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October 31, 2017

FOR PUBLIC RELEASE

SUBJECT: Advisory Opinion—A28-17

The School Ethics Commission (Commission) is in receipt of your request for an advisory opinion on behalf of the Board of Education (Board). You verified that you copied the Board members who are the subject of the request, in addition to the Superintendent and the Business Administrator, thus complying with N.J.A.C. 6A:28-5.2(b). The Commission notes that the Superintendent submitted comments based on advice provided by Board counsel. Therefore, the Commission will provide its advice based on the information included in your request, as well as the comments submitted by the Superintendent on behalf of the Board. The Commission's authority to issue advisory opinions is expressly limited to determining whether any prospective conduct or activity would constitute a violation of the School Ethics Act (Act). N.J.S.A. 18A:12-31. Pursuant to N.J.S.A. 18A:12-28(b), the Commission discussed this matter at its meeting on September 26, 2017.

You inform the Commission that the Board, when fully seated, has eight (8) members. Of these eight (8) Board members, six (6) Board members have conflicts of interest which prohibit them from negotiating the Superintendent's contract. More specifically, you note that five (5) Board members have relatives employed in the School District (District), and another Board member is supervised (in his employment) by the Superintendent's brother. As a result, there are only two (2) Board members who are not conflicted. You state that, although, historically, the Board has negotiated contracts with only one (1) or two (2) members serving as the committee, there has been a recent attempt to "change past practice" and to invoke the Doctrine of Necessity (Doctrine) to allow the entire Board to negotiate the Superintendent's contract. You also inform the Commission that the Superintendent and "most Board members" with conflicts want to invoke the Doctrine so as to allow the entire Board to negotiate the Superintendent's contract.

In response, the Superintendent submitted the advice of Board counsel which stated, in relevant part, that the Doctrine "must be invoked since the committee as presently constituted only consists of [two (2)] non-conflicted [B]oard members." Counsel also cited three advisory opinions, Advisory Opinion A55-95 (A55-95), Advisory Opinion A03-98 (A03-98) and Advisory Opinion A14-02 (A14-02), for the proposition that "if there are not at least [three (3)] Board

[m]embers without conflicts on a committee, the [Doctrine] must be invoked for negotiating and voting purposes.”

Your inquiry seeks to determine whether, based on the above, the two (2) non-conflicted Board members may negotiate the Superintendent’s contract on behalf of the entire Board, or whether the Doctrine must be invoked.

Before more fully responding to your inquiry, the Commission wishes to review the advisory opinions cited by counsel in support of the position that at least three (3) Board members without conflicts are necessary to form a committee. In A55-95, the requestor, after detailing the conflicts of each Board member, asked which members “may be a part of the three [3] member negotiating committee.” In other words, before submitting its request, the Board determined that it wanted to use a three (3) member negotiations committee; importantly, the Commission did not find that the Board “had” to use a three (3) member committee, but instead advised which Board members could serve on that committee.

In A03-98, the Board sought advice on which members could serve on the negotiations team (with the local education association) and vote on the resulting contract. Based on the conflicts as set forth therein, it was determined that only one (1) Board member was able to serve on the Board’s negotiations committee, but “one [1] [B]oard member does not constitute a committee.” As a result, the Commission advised that the Doctrine would have to be invoked to allow other members of the Board to participate in negotiations.

Finally, in A14-02, one of the inquiries was whether the Board could invoke the Doctrine to permit the entire Board to negotiate if only two (2) or three (3) members without conflicts were permitted to negotiate. Because the Commission found that there were three (3) Board members without conflicts who were able to negotiate, it did not advise whether two (2) members could serve as the negotiations committee.

In summary, based on the Commission’s advice as set forth in A55-95, A03-98, and A14-02, the Commission disagrees with counsel that it has previously advised that a Board “must” invoke the Doctrine when there are “not at least” three (3) non-conflicted board members who may serve as the negotiating committee. Instead, the advisory opinions cited by counsel confirm that one (1) Board member is not sufficient to constitute a negotiations committee, and that three (3) Board members are sufficient for a committee. However, the cited advisory opinions do not indicate that two (2) non-conflicted Board members cannot serve as a Board’s negotiations committee.

With the above in mind, Advisory Opinion A19-17 (A19-17), which was issued on June 27, 2017, and made public on September 26, 2017, is particularly relevant here. <http://www.state.nj.us/education/legal/ethics/advisory/>. In that matter, a Board, when fully seated, was comprised of seven (7) members. Of those seven (7) members, four (4) Board members had a conflict of interest under the Act and, as a result, the remaining three (3) Board members served as the negotiations committee. However, the negotiations committee was subsequently reduced to two (2) Board members following a resignation, and one (1) of those Board members had difficulty with regular attendance. As a result, the Board asked two questions, including whether

it could invoke the Doctrine to permit additional conflicted Board members to join the negotiations committee. Based on the information presented, the Commission advised that the two (2) remaining non-conflicted Board members could serve as the negotiations committee, and that, in lieu of invoking the Doctrine, they could obtain assistance from other individuals as part of negotiations, e.g., hiring an outside consultant or using a technical resource, such as the Superintendent or Business Administrator.

As in A19-17, and consistent with the District's past practice, the Commission again advises that the two (2) non-conflicted Board members can serve in this case as the negotiations committee for the Superintendent's contract negotiations. To the extent the non-conflicted Board members may require assistance, the committee can consult with Board counsel and/or seek the assistance from a technical resource, such as the Business Administrator or other administrator as appropriate.

Notwithstanding the above, the Commission agrees that the Board will need to invoke the Doctrine in order to vote on the contract that is negotiated by the two (2) member negotiations committee.

Sincerely,

Robert W. Bender, Chairperson
School Ethics Commission