

December 2, 2002

**FOR PUBLIC RELEASE**

RE: Advisory Opinion A13-02

The School Ethics Commission is in receipt of your request for an advisory opinion on behalf of the Board of Education (“Board”) that you represent. First, you have asked whether six Board members whose candidacy was endorsed by the local education association, three in 2001 and three in 2002, would violate the Act if they were to participate in negotiations and vote on the collective bargaining agreement with the association. Second, you have asked whether two other Board members, who are running for re-election to the Board in 2003, will violate the Act if they continue to participate in the collective bargaining process with the association should the association endorse their candidacy for election to the Board, during the course of negotiations. Third, you have asked whether the Board may invoke the Doctrine of Necessity after negotiations have already commenced, if the Commission determines that all of the above-referenced members have conflicts of interest.

The Commission adopted this advisory opinion on November 26, 2002, advising that the three Board members who were endorsed by the association in 2001 would not violate the School Ethics Act if they were to participate in negotiations involving the local education association or vote on the collective bargaining agreement. However, the three Board members who were endorsed by the association in 2002 would violate the Act if they were to negotiate and vote. The Commission determined that, while it was premature to determine whether the other two board members had a conflict of interest since they had not been endorsed by the association, in order to avoid having to change the committee midway through negotiations, these members would violate the Act if they were to continue participating in negotiations and vote on the contract if they were

endorsed by the association in April 2003. The Commission notes that the opinion herein is based solely upon the specific information that you provided.

You have set forth that in April 2001, the board president, the board vice-president and another member were elected to the Board and in April 2002, three other members were elected to the Board. You indicated that, prior to their respective elections, the local education association invited each of the Board members to be interviewed by a committee of the association and subsequently endorsed their candidacies. The board members did not in any way solicit the endorsements. The association's endorsement of the six board members involved the provision of services on behalf of the board members. These included distributing newsletters that encouraged its members to vote for the board members, hosting a Hot Dog Rally where the board members were permitted to address the public, conducting a phone bank to promote their campaigns and printing and distributing palm cards that indicated the ballot numbers of the board members.

You also set forth that two other board members intend to run for re-election to the Board in April 2003 and it is expected that the association will invite them to be interviewed, which may result in the association's endorsement of their candidacy. You have provided that negotiations with the association are expected to begin in November of 2002 and continue into the winter and possibly spring of 2003.

Last, you indicate that one of the board members who was endorsed by the association in 2001 has a conflict of interest in any event because her daughter is a substitute teacher in the District and certain substitutes are covered by the collective bargaining agreement. Further, the ninth member of the Board has a conflict of interest because his wife and daughter are members of the local education association.

Your first and second inquiries raise questions under N.J.S.A. 18A:12-24(c) and (e) of the School Ethics Act and N.J.S.A. 18A:12-24.1(f) of the Code of Ethics. The following opinion will discuss each provision in turn.

N.J.S.A. 18A:12-24(c) provides:

No school official shall act in his official capacity in any matter in which he, a member of his immediate family, or a business organization in which he holds an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family.

Based on the information that you have provided, the six board members do not appear to have a monetary connection with the association and therefore, would not achieve any financial gain, directly or indirectly, from the collective bargaining agreement to be reached in 2003. One may question whether the association can be

considered a business organization in which the board members hold an interest due to the endorsement, but the Legislature set forth in N.J.S.A. 18A:12-23 that while the term “business organization” may refer to a union, the term “interest” means ownership or control and cannot apply to assets in a labor union. Therefore, the board members in question do not have a financial involvement, direct or indirect, with the association’s collective bargaining agreement.

The more difficult question is whether the board members have a personal involvement with the association and its collective bargaining agreement that constitutes a benefit to them. The Commission addressed a similar question in C23-96, *In the Matter of James Famularo*, OAL Docket No. EEC 2723-97 (January 27, 1998), aff’d SEC Docket No. C23-96 (February 24, 1998), where the Commission concluded that a board member violated N.J.S.A. 18A:12-24(c) of the Act when he voted to appoint as a principal in his District, a political association for whom he had served as campaign treasurer. The Commission adopted the standard set by the Administrative Law Judge (ALJ) in *Famularo*, for dealing with political associations and contributions. In that decision, the ALJ set forth three factors to be considered in determining whether the acceptance of a campaign contribution precludes certain subsequent actions by school officials. Although the decision pertained to a vote for an individual, the Commission finds the analysis to be applicable to negotiations with the association as well. The first factor is the prominence of the person or persons’ support in the campaign. The second is the amount of time that has lapsed between the time of active campaigning and the time of consideration by the public body of the issue of interest to the supporter. The third is the extent to which the causes on which the candidate campaigned and the supporters endorsed remain matters of public debate and controversy.

With regard to the first factor, the prominence of the persons’ support in the campaign, the six board members in question received volunteer assistance from the local teachers’ association. The association distributed newsletters that encouraged its members to vote for the board members, hosted a Hot Dog Rally where the board members were permitted to address the public, conducted a phone bank to promote their campaigns and printed and distributed palm cards that indicated the ballot numbers of the board members. This caused the association’s endorsement of the board member to be well known in the community. From the facts you have provided, the Commission believes that the benefits that the board members gained from the association rise to the level of more than just casual support. Thus, it appears that the association did have a position of prominence in the campaigns of the six board members and, indeed, accounted for their increased visibility in the community.

Regarding the second factor, the amount of time that has lapsed, you have indicated that three board members were endorsed by the association in April 2001 and three were endorsed in April 2002. The contract is scheduled to expire in June 2003 thus negotiations are expected to begin in November 2002 and possibly proceed to the spring of 2003. The timing of the association’s support may be viewed as strategically placed to impact teacher negotiations with regard to the members endorsed in 2002, but this is less of a concern with the members endorsed in 2001. Thus, at least with respect to the

members endorsed in April 2002, with negotiations beginning just months after the endorsement, the Commission finds this factor to be of concern since not much time elapsed between the endorsement and negotiations.

The third factor is the extent to which the issues of the campaign are still a source of controversy. The Commission finds that, as a general matter, collective bargaining agreements are always a subject of great concern and often, controversy, during a school board election and continuing thereafter. This is especially true in the year when negotiations are scheduled to begin. Thus, the Commission finds that the issues that were of concern to the association remain a subject of public debate and controversy.

Based on the foregoing, the circumstances that you have set forth show that the three board members endorsed in 2002 meet all of the factors that the ALJ found relevant to determining whether a board member has a conflict of interest and should recuse himself from a matter. These factors indicate that a personal involvement was created by the endorsement by the association and that a benefit was created by the services attached to that endorsement. Therefore, the Commission advises that the three board members endorsed in 2002 have a personal involvement with the association that constitutes a benefit to them and thus, the board members' participation in negotiations and voting on this year's teachers' contract would violate N.J.S.A. 18A:12-24(c).

The board members endorsed in 2001 did not meet each of the three foregoing factors. While the Commission found that the association did play a prominent role in the campaign of the board members and that the contract was and will continue to be a controversial subject, it did not find that so little time had lapsed between the campaign and negotiations, that the board members could not separate themselves from the association. The Commission finds that board members who receive endorsements from the local education association will not continue to have a conflict of interest that will prohibit them from participating in discussions and votes on the teachers' contract forever. Rather, the Commission advises that the three board members endorsed in 2002 should abstain from participation in negotiations and voting on the association's contract that is currently being negotiated until the new contract has been ratified, in accordance with *Famularo, supra*. For the board members who were endorsed in 2001, the conflict has dissipated because negotiations were more than a year away from the endorsement and they will not be up for re-election again until 2004, well after a collective bargaining agreement has been reached.

Although the Commission finds it a bit premature to advise whether board members scheduled for re-election in 2003, who have not yet received the endorsement of the association, have conflicts of interest, it realizes that these members may be in a position of starting negotiations because they have no conflict of interest and being found to have a conflict when they are in the middle of negotiations. Therefore, in order to avoid this situation, the Commission advises, for the same reasons as noted above, that the two Board members who are running for re-election to the Board in 2003 meet all of the ALJ's factors for when a board member should recuse himself from a matter due to political association or contribution. Indeed, receiving the endorsement in the middle of

negotiations would create an even greater concern about the timing of the endorsement and the endorsement would occur when negotiations are a subject of even greater public debate and controversy. Therefore, the members who are scheduled for re-election in 2003 would be in violation of N.J.S.A. 18A:12-24(c) if they were to continue participation in the collective bargaining process with the association should it endorse their campaigns for election to the Board during the course of negotiations in the same way as it endorsed the board members in 2001 and 2002.

Your first and second inquiries also raise questions under N.J.S.A. 18A:12-24(e) of the School Ethics Act, which provides:

No school official, or member of his immediate family, or business organization in which he has an interest, shall solicit or accept any gift, favor, loan, political contribution, service, promise of future employment, or other thing of value based upon an understanding that the gift, favor, loan, contribution, service, promise, or other thing of value was given or offered for the purpose of influencing him, directly or indirectly, in the discharge of his official duties. This provision shall not apply to the solicitation or acceptance of contributions to the campaign of an announced candidate for elective public office, if the school official has no knowledge or reason to believe that the campaign contribution, if accepted, was given with the intent to influence the school official in the discharge of his official duties.

You set forth that the association endorsed the candidacies of six Board members and may endorse the candidacies of two other Board members who will run for re-election April 2003. A violation of N.J.S.A. 18A:12-24(e), under these circumstances, requires a showing that the Board members had knowledge or reason to believe that the association intended to influence their decisions as board members by endorsing them. While the Commission recognizes that some members of the public may wish to infer intent to influence by the endorsement, the Commission cannot assume intent without information to support such a finding. Therefore, the Commission advises that the Board members do not have a conflict pursuant to N.J.S.A. 18A:12-24(e), which precludes their participation in negotiations.

In July 2001, the Code of Ethics for School Board Members was added to the School Ethics Act. N.J.S.A. 18A:12-24.1(f) of the Code of Ethics is relevant to your first and second inquiries as well. N.J.S.A. 18A:12-24.1(f) provides:

I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

As set forth above, the board members who have been endorsed by the association did not solicit the support of the association. The association voluntarily gave their support to the candidates after an interview indicated that they were supportive of

teachers and their issues. The board members cannot be assumed to have surrendered their independent judgment to the association because they accepted the endorsement. There would need to be some additional information to suggest that the board member is not being objective when dealing with the union. This opinion cannot shield the board members from being subject to a complaint making such allegations in the future. However, based on the information you have provided, the Commission advises that the Board members would not violate N.J.S.A. 18A:12-24.1(f) if they were to negotiate with the union.

Your third question is whether the Board may invoke the Doctrine of Necessity in the spring of 2002 after negotiations have already commenced, if the Commission determines that all of the aforementioned board members have conflicts of interest. Since the Commission has advised that the three board members endorsed in 2002 would violate N.J.S.A. 18A:12-24(c) of the School Ethics Act by negotiating with the association and voting on a collective bargaining agreement, but the board members endorsed in 2001 would not have a conflict of interest in negotiating and voting, the three Board members endorsed in 2001 would be permitted to negotiate and vote on the contract. Therefore, the Board does not have to invoke the Doctrine of Necessity for negotiations. Since three Board members cannot ratify a contract, however, the Board may have to invoke the Doctrine of Necessity to vote on the contract, but this is assuming that the two Board members who are up for re-election in 2003 accept an endorsement by the association and endorsement means the same thing as it did for the Board members endorsed in 2002 and 2001. If the Board invokes the Doctrine of Necessity, those Board members who have a conflict of interest should publicly state the nature of the conflict.

Again, the Commission stresses that this opinion is based solely on the information that you have set forth in your request for an advisory opinion.

We hope this answers your inquiry. Because the Commission believes that the issues addressed in this advisory opinion may be of interest to other school officials, the Commission is making this opinion public.

Sincerely,

Paul C. Garbarini,  
Chairperson