

ETHICS OPINIONS RESTRICT BOARD MEMBER ROLE IN PERSONNEL MATTERS ALONG THE CHAIN OF SUPERVISION

Rulings Affect Board Members with Relatives Employed in-District

The School Ethics Commission (SEC) has issued a string of public Advisory Opinions that are instructive to every school board member who have relatives employed by the district. Beginning with [A30-05](#) (March 10, 2006) which involved board members with “immediate family members” (spouse or dependent child residing in the same household) employed in the district, these advisory opinions signal a significant erosion of the role of those board members with regard to employment decisions respecting their Superintendents. In the subsequent opinions, [A07-06](#); [A14-06](#); and [A23-06](#), the SEC was called upon to address a number of factual situations and provided advice to further refine the parameters of the restrictions imposed upon board members whose relatives, as well as immediate family members, work in the same district in which they serve.

Overview of Advisory Opinions: Board members may not evaluate CSA, other Supervisors

A-30-05

In A30-05, the SEC advised that two board members who had spouses employed in the 11-building district, would violate N.J.S.A. 18A:12-24(c) if they were to participate in the evaluations, personnel actions and decisions regarding compensation not only for the principals who supervise their spouses, and in one case for the Director who supervised the principal, but also for the Superintendents.

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

No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has 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.

In A30-05, the SEC concluded that each of the board members’ interests in his/her respective spouse’s employment constituted an indirect financial involvement that might reasonably be expected to impair his objectivity of judgment in violation of N.J.S.A. 18A:12-24(c). The SEC advised the board members to recuse themselves and not to participate in any discussions or votes regarding these administrators.

Rationale In A30-05, Board member A’s spouse was an instructional associate who was not a member of the union, and whose immediate supervisor was the principal of that school. The principal, in turn, was supervised by the Director of Elementary Education (Director)-- a central office administrator who reported directly to the Superintendent. The SEC noted that since the principal directly supervised the board member’s spouse, it

would be difficult for the board member to be completely objective in acting on any employment issues regarding the principal; the public could reasonably expect that the board member's involvement in employment issues could positively or negatively impact the employment of the board member's spouse. The SEC also noted that the Director supervised the principal and was accountable to the Superintendent, who ultimately made recommendations regarding the employment terms of the board member's spouse to the board. The SEC believed that the public could reasonably perceive that the board member's objectivity and independence of judgment could be impaired as it relates to employment issues regarding the Director. The SEC also advised that the board member would violate N.J.S.A. 18A:12-24(c) if he were to participate in any employment issues regarding the Superintendent, reasoning that the board member would have difficulty being completely objective in acting on employment issues since the Superintendent must provide a recommendation to the board regarding all terms, conditions and benefits of employment of the board member's spouse. (This follows from the fact that the spouse was not part of the union, such that terms and conditions of employment were not established through the collective bargaining agreement.) The SEC concluded that the public could reasonably expect that the board member's objectivity and independence of judgment may be impaired in such a situation.

Board member B's spouse was a member of the district's secretaries' union, working in the nurse's office at the high school and directly supervised by the high school principal. The principal, in turn, was directly supervised by the Superintendent. As with board member A, the SEC found that it would be difficult for board member B to be completely objective in acting on any employment issues regarding the immediate supervisor of the board member's spouse, and therefore the board member could not participate on employment issues relating to the principal. The SEC advised that it would also be a violation for the board member to participate in employment issues with respect to the Superintendent, since as direct supervisor of the principal, there would be an opportunity for the spouse's employment to be affected by the board member's involvement in employment issues related to the Superintendent in terms of the way the administrators treat and evaluate the spouse, even if such impact did not affect the contractually determined salary. The SEC did not mention whether its determination was also influenced by the fact that under N.J.S.A. 18A:27-4.1, any transfer, appointment or removal or renewal of an employee can only be made upon the Superintendent's recommendation.

Prior rulings This decision did not mark the first time that the SEC had required that a board member with a spouse working in the district recuse himself from employment matters concerning the Superintendent. In rendering its advice in A30-05, the SEC cited to two earlier authorities: SEC v. Gunning, C15-93 (September 22, 1994) and Advisory Opinion A10-00 (June 27, 2000). However, these occurred in specific limited factual contexts, and A30-05 is more far-reaching.

In Gunning, the SEC determined that a board member was wrong to participate in employment matters involving the Superintendent where the Superintendent was the

direct supervisor of the board member's spouse, who served as the Superintendent's confidential secretary.

And in Advisory Opinion A10-00, the SEC advised that a board member could not participate in employment matters with regard to the Superintendent, principal and vice principal, when the board member's spouse was employed as a teacher in the one-building K-8 school district with 900 students, the Superintendent, principal and vice-principal were all considered supervisors of the spouse, and the SEC noted that the board member's vote could affect the way the administrators treat and evaluate the spouse. The SEC further advised that a board member could participate in the search for the administrators and vote on the appointments, reasoning that it would not be reasonable for the public to expect that a board member, with a spouse who teaches in the district, would select administrators who are most likely to be financially favorable to teaching staff, especially since teachers are employed pursuant to a collective bargaining agreement. However, the SEC noted that this could change if the selection is for someone who already knows the board member's spouse.

In yet a third ruling, Orban v. Roosevear, C12-00, 12/19/2000, which was not mentioned in A30-05, the SEC found no probable cause to believe that a board member, whose spouse served as a district elementary school principal directly under the Superintendent in a multi-building district, violated the School Ethics Act by participating in the search for a new Superintendent. Significantly, the SEC noted that any ethics concerns should be assuaged by the fact that such board member would not be allowed to participate in any subsequent decisions regarding the Superintendent's employment.

A7-06

In A7-06 (July 31, 2006), the SEC advised that a board member with a spouse who was a teacher's assistant in the district would violate N.J.S.A. 18A:12-24(c) if he were to participate in the hiring and any employment issues regarding the Superintendent, where the assistant superintendent supervised the board member's spouse's supervisor and was a candidate for Superintendent.

The board member requesting the advisory opinion had asked for a clarification of *A10-00* and *A30-05* based on his particular facts. (He had apparently also asked a second question that the SEC declined to answer for lack of service upon the individual whose conduct was involved). The requestor's situation included that: the board member served in a nine-school pre k-12 district with approximately 6,800 students; his wife was a teacher's assistant at the high school where she was directly supervised by the building principal and indirectly supervised by four assistant principals; the building principal was supervised by the assistant Superintendent who, in turn, was supervised by the Superintendent; while the Superintendent and the assistant superintendent operated out of a building different from the high school, they regularly went from building to building; and the current assistant superintendent had had several interviews to become Superintendent.

In tackling the board member's request, the SEC first reviewed several principles that had been addressed in the earlier Advisory Opinions. The SEC initially noted that in A30-05, since it had not been presented with the question of hiring the principal, director of elementary education and the Superintendent, that issue had not been addressed. The SEC also noted that in A30-05, it had applied the principle in A10-00 (that a board member could not participate in employment issues regarding supervisors of that board member's spouse) to multiple building districts. Thus, board members with spouses working in the same district, either large or small, would violate N.J.S.A. 18A:12-24(c) if they voted on employment issues of the administrators supervising their spouse including the supervisors of those administrators.

Establishing first that based on the definition of "member of immediate family" in N.J.S.A. 18A:12-23, the board member's spouse was an immediate family member, the SEC noted that with regard to the board member's participation in employment issues involving the Superintendent, the board member's situation was similar to that in A10-00 and A30-06 with regard to the chain of supervision. Citing language from A30-06 ("the board member would have difficulty being completely objective in acting on employment issues regarding the Superintendent since the Superintendent must provide a recommendation regarding the employment terms of the board member's spouse to the board.") and relying on A10-00 wherein the SEC found that there was an opportunity for the board member's spouse's employment to be affected by the board member's vote on employment issues in terms of the way the administrators treat and evaluate the spouse, the SEC found likewise that the board member in A7-06 would violate N.J.S.A. 18A:12-24(c) were he to participate in any employment issues regarding the Superintendent. The SEC advised that as the board member's spouse was supervised by the principal who was supervised by the assistant superintendent who was supervised by the Superintendent, the public could reasonably expect that his objectivity and independence of judgment could be impaired.

The SEC then found that A10-00 addressed the board member's inquiry about voting on the hiring of the Superintendent. It noted that A10-00 carves out an exception to the general rule that a board member in these circumstances may participate in the search for the administrators and vote on the appointments; namely, the SEC made an exception for administrators who have some familiarity with a board member's spouse. The board member seeking advice in A7-06 had indicated that a candidate for the Superintendent position is the current assistant superintendent who is familiar with the board member's wife insofar as he currently supervises the principal who supervises the board member's wife. Given this familiarity, and the public's reasonable expectation that the board member's objectivity and independence of judgment could be impaired if he were to participate in discussions regarding, or vote on, the hiring of the Superintendent, the SEC advised the board member that he would violate N.J.S.A. 18A:12-24(c) if he were to participate in discussions regarding, or vote on, the hiring of the Superintendent.

A14-06

In A14-06 (October 19, 2006), the SEC determined that, applying the principles of A30-05, a board member would not violate N.J.S.A. 18A:12-24(c) by participating in discussions and

votes on the employment and compensation of the Superintendent and building principals in the district where his or her spouse served as an on-call substitute teacher.

The board member's spouse, about whom the advisory opinion was sought, was not in any bargaining unit and was subject to annual recommendations by the Superintendent to the board, for all terms, conditions and benefits of employment, and was on a substitute teacher list submitted annually to the board for approval. The procedures for becoming a substitute teacher were as follows: the candidate would fill out various forms, be interviewed by one of the district principals, be recommended for hire and then placed by the Superintendent on the board agenda for approval. The substitutes were picked and called for service by the school secretaries. Teachers or building principals were allowed to state a preference for a particular substitute, and the substitutes were evaluated each time they entered a school/classroom and reported for service by the principal as well as the absentee teacher.

The SEC found the fact that the nature of the substitute teacher's employment on an on-call, as-needed basis, distinguished it from the situation in *A30-05*. Here, not being a permanent employee, the spouse was not subject to increments or pay increases based on collective bargaining. The spouse was evaluated by the absentee teacher and the building principal each time he or she reports for service. There was no direct line of supervision over the substitute teachers. In this situation, the board member's involvement in employment issues would not positively or negatively impact the employment of his or her spouse. The SEC Commission also found that since the board member's spouse was an at-will part-time employee, it would not be reasonable to expect that the board member's objectivity or independence of judgment would be impaired by participating in discussions and votes on the employment and compensation of the Superintendent and building principals.

A23-06

A23-06 is especially significant because it addresses whether restrictions apply to board members whose family members other than "immediate" family members are employed in the district, such as a mother or brother. In light of A23-06, board members may be precluded from participating in employment issues regarding the Superintendent where the board members have a "relative" (as defined by N.J.S.A. 18A:12-23) working in the district. A23-06 also provides the reassurance to board members having "in-laws" employed by the district, that recusal is not necessary since "in-laws" are not included in the definition of "relative." A23-06 is also significant because it reiterates the advice expressed in earlier advisory opinions, that even where the board member may not participate in contract negotiations or the evaluation of the current Superintendent due to the district employment of the board member's relatives, such a board member may fully participate in the hiring process for that Superintendent, provided that the relative had not been directly or indirectly supervised by a candidate working in the district.

In A23-06 (November 15, 2006), the SEC advised four board members (identified as A,B,C, and D) who had various family members and/or relatives working in the district whether or not they would violate N.J.S.A. 18A:12-24(c). The board members sought to participate in the search for a new Superintendent, the interview process for the potential

candidates, contract negotiations, the hiring of the new Superintendent and employment issues related to the new Superintendent. The school district was a K-12 district with nine elementary schools, one middle school and one high school.

Some board members could participate The SEC determined neither Board member A nor Board member D would violate the law by their participation in the search for the new Superintendent, the interview process for the potential candidates, contract negotiations, or the hiring of the new Superintendent or employment issues related to the new Superintendent.

Board member A's husband was a substitute custodian who reported to the supervisor of custodians, and was supervised by the business administrator, who in turn reported to the Superintendent. The SEC relied on *A10-00* and reiterated that because board member A's spouse was not a full-time or permanent employee, but only a substitute who serves on an as-needed basis, board member A's involvement in employment issues related to the new Superintendent posed no conflict as they would not positively or negatively impact the employment of board member A's spouse. (However, the SEC cautioned board member about voting on the annual hiring of substitute custodians.)

Board member D's daughter-in-law, who did not reside with the board member, was a teacher at one of the elementary schools. She reported directly to her respective principal, who in turn reported to the director of curriculum, who reported to the Superintendent. Because D's daughter-in-law was not a "relative" as defined by N.J.S.A. 18A:12-23 (which defines "relative" as "the spouse, natural or adopted child, parent, or sibling of a school official") the SEC did not believe it would be reasonable to perceive that the board member's relationship with the daughter-in-law would be predominant over the best interests of the district.

Some board members' participation would be limited The SEC found that the participation of Board members B and C would be limited by the employment of certain of their family members.

Board member B had two family members employed by the district-- his mother and his brother. His mother was a full-time aide at one of the elementary schools and his brother held the position of Media Services Coordinator. Board member B's mother reported to the school principal, who reported to the director of curriculum, who reported to the Superintendent. B's brother reported to the Superintendent. Neither relative resided within B's household.

Although neither the mother nor the brother were "immediate family members" the SEC advised that Board member B had a "personal," as opposed to a "financial" involvement, due to the B's relationship with his or her mother and brother, which may be perceived as being predominant to the best interests of the district. The SEC described a number of Commissioner decisions and advisory opinions where conflicts of interest were found with respect to matters beyond a board member's immediate family member:

The Commission first notes, based on the definition of "member of immediate family" in N.J.S.A. 18A:12-23, that board member B's mother and brother are not

immediate family members. However, board member B's mother and brother are relatives as defined in N.J.S.A. 18A:12-23. As the Commission noted in *Advisory Opinion A23-94*, (January 23, 1996), the Commission is not constrained to recognize conflicts of interest only when a matter affects a board member's immediate family member. The Commission has found conflicts of interest under N.J.S.A. 18A:12-24(c) where a board member negotiates a sibling's contract when the sibling is in the local bargaining unit. See *I/M/O James Russo and Thomas Scarano*, C12-97 (January 27, 1998). The Commission also found a conflict of interest under N.J.S.A. 18A:12-24(c) where a board member was present during and participated in two executive session discussions related to the hiring of his brother. See *I/M/O Dino Pettinelli*, C01-04 (July 27, 2004). Furthermore in *Advisory Opinion A16-00*, (December 1, 2000), the Commission advised a board member that he would violate N.J.S.A. 18A:12-24(c) if he were to participate in negotiations or vote on a contract with the local education association when his brother held a position in the maintenance department and is a member of the local education association. In *A16-00*, the Commission found that the benefit set forth in N.J.S.A. 18A:12-24(c) need not be financial; otherwise the "personal involvement" provision would be redundant. The Commission also noted that "it considers an involvement to be personal whenever a school official has a relationship that the public may perceive as being predominant to the best interest of the district. Therefore, a benefit can be something of intrinsic value, but no monetary worth." *Id.* Page 2. In *Pettinelli*, the Commission found that there was a benefit of intrinsic value in the personal satisfaction that a board member receives in ensuring that a sibling obtains employment.

Therefore, Board member B was advised not to participate in any employment issues such as contract negotiations or performance reviews related to the new Superintendent once that Superintendent is appointed, because that participation could have an impact on the mother's or brother's employment in the district. However, B could participate in the search for the new Superintendent, the interview process for the potential candidates and the hiring of the new Superintendent---provided that neither B's mother nor brother had familiarity with a potential candidate because such candidate directly or indirectly supervised them in the district.

Board member C's wife was a teacher's aide at one of the elementary schools. His mother-in-law was a four-hour aide within the district. (Note that early on in the advisory opinion the SEC once refers to the mother-in-law as the board member's "stepmother" but the reader can reasonably infer that this was stated in error). All aides reported to their respective principals, who reported to the director of curriculum, who reported to the Superintendent.

The SEC noted that because a mother-in-law is not a "relative" pursuant to N.J.S.A. 18A:12-23, it would not be reasonable to perceive board member C's relationship with his mother-in-law as being predominant to the best interests of the district. Therefore, board member C would not violate N.J.S.A. 18A:12-24(c) in relation to his mother-in-law.

However, because C's wife worked in the district as well as his mother-in-law, the SEC advised that his participation would be limited in employment issues such as performance reviews or contract negotiations of the newly-hired Superintendent. However, board member

C could participate in the Superintendent search itself, as well as in the interview process for the potential candidates and the hiring of the new Superintendent—that is, unless the board member’s spouse had some familiarity with a potential candidate because such candidate directly or indirectly supervised her in the district.

Conclusion: implications for board members Although these advisory opinions do not carry the weight of actual rulings, they provide a clear window into the way the SEC would decide similar cases if complaints against a board members were brought for the SEC’s consideration. In fact, the SEC specifically made these advisory opinions public to inform other board members. A board member’s failure to follow the direction set forth in an advisory opinions may affect the severity of the penalty should the board member later be found to have violated the School Ethics Act.

All board members with relatives employed by the district should be mindful of A30-05. Apparently, the prohibition against participating in employment matters concerning the spouse’s chain of supervisors, as well as the Superintendent, can apply to board members regardless of the level at which the spouse is employed, and regardless of whether the spouse is a member of the union. The opinion reaches further than the SEC’s earlier rulings, which came from narrow factual contexts. That is, in Gunning and Orban the board members’ spouses were directly supervised by the Superintendent. And in A10-00, the board member’s spouse was housed along with the spouse’s supervisors in a one-building district. Neither of these conditions was present in A30-05. In fact, subsequently in A7-06, the SEC described the effect of its opinion in A30-05 to be that “board members with spouses working in the same district, *either large or small* would violate N.J.S.A. 18A:12-24(c) if they voted on the administrators supervising their spouse including the supervisors of those administrators.” (emphasis added)

Prior to A23-06 it was difficult to predict *any* set of facts under which a board member with a spouse employed by the district would be permitted to participate in employment matters concerning the Superintendent. However, A23-06 sets aside an exception for the board member whose spouse is a substitute teacher, serving on an as-needed basis. That type of employment apparently does not pose the same potential for conflict in the SEC’s eyes, and the board member may fully participate in the absence of any other conflict.

Prior to A23-06, the guidance provided through SEC advisory opinions involved only board members with “immediate family members” (as defined in N.J.S.A. 18A:12-23) working in the district. This would include the board member’s spouse, as well as a dependent child living with the board member (although the SEC has not been presented with the dependent child fact scenario). That limited guidance left board members and their counsel to speculate on whether a parent, sibling or other “relative” working in the district would evoke a similar prohibition. Now that the SEC has specifically advised in A23-06 that similar ethical conflicts arise when the employee is a mother or a brother, board members with any relative in a similar position, should construe these advisory opinions as applicable to their situations as well. Presumably, every “relative” (defined in N.J.S.A. 18A:12-23 as spouse, natural or adopted child, parent, or sibling) working in the district will present the same type of “personal involvement” that creates a benefit to

the board member, *i.e.*, the same prospect for the board member's "intrinsic satisfaction" in seeing a positive employment decision for that relative.

What about a friend, a paramour, a cousin, an in-law? How far does the "intrinsic satisfaction" justification take us? In A23-06, the SEC appears to draw the line at "relatives" as statutorily defined. The SEC advised two board members who had respectively, a mother-in-law and a daughter-in-law employed in the district, that since the in-laws were not "relatives" within the statutory definition, it would not be reasonable to perceive board that the board members' relationships with these individuals would be "predominant to the best interests of the district." While this may only restate the obvious with regard to the mother-in-law (how those mother-in-law jokes abound!), it seems to make a stronger statement with regard to the daughter-in-law and it is reasonable to infer that neither friends nor cousins, aunts or uncles, or other non-statutory relatives would pose the same potential for conflict.

These opinions also clarify that a board member who may not participate in decisions regarding the current Superintendent's employment, may still participate in the discussions and decision with regard to the actual hiring of a new Superintendent-- provided that the board member's relative had not been directly or indirectly supervised by a candidate working in the district. Once the hiring is accomplished, however, the board member's ethical conflict precludes participation in negotiations over the Superintendent's salary and other aspects of the contract, in evaluation, and in any subsequent employment decisions.

Affected board members must remove themselves from discussions and voting on evaluations, raises, contractual issues including compensation, and personnel actions. Not only that, but they must also refrain from lobbying or otherwise encouraging other board members to vote a certain way on these employment issues. Board members affected by these advisory opinions should leave the room during closed session discussions pertaining to the employment of the Superintendent as well as to those in the line of direct supervision of their spouses. These board members should also avoid casual discussions of these topics with their fellow board members, so as not to influence those board members' votes.

The same board members who under ethics law are not permitted to play a role in establishing the district's collective bargaining agreement because they have immediate family members working in the district, now will also be unable to participate in another important board member function—evaluating the Superintendent. Presumably a school board can invoke the doctrine of necessity where the majority of the board has disqualifying interests; however, where use of the doctrine is not authorized, many board members will be excluded from the process. We are left bracing ourselves for the possibility that the opinion will affect both the number of potential board candidates, and the public's determination to vote for candidates who bring with them significant limitations on their ability to contribute to the public office.