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Board Members May Serve on JVSD Board in Official Capacity

Ohio Ethics Commission Informal Opinion (June 29, 2010).

The Ohio Ethics Commission (OEC) released an informal opinion stating that a school district board member may also serve on the board of a Joint Vocational School District (JVSD) if he/she does so in his/her official capacity. The member may not, however, vote to appoint his self/herself.

Bath Local School District (Bath) helps govern Apollo Joint Vocational School District. Apollo was created pursuant to R.C. 3311.19 which specifies that a JVSD board is composed of board members of the governing districts. On the other hand, R.C. 2921.42(A)(4) states a public official or employee may not have an interest in a public contract that a public agency he/she is affiliated with entered into.

In its opinion the OEC first acknowledged that if a board member also serves the JVSD board, he/she has an interest in the contract between the boards. The fact that Bath governed Apollo created a public contract. Generally, this situation would violate 2921.42. It then determined that officials may have such an interest if they serve in their official capacity.

To show that a person serves in his/her official capacity, the following requirements must be met: 1) the ESCs or boards that are members of a joint vocational district participate in, or approve of, the creation of the district; 2) the JVSD board member is appointed pursuant to statute to his/her position on the JVSD board; 3) the JVSD board member is instructed as part of the appointment to serve and represent the interests of the ESC or board; and 4) the board member has no other conflicts of interest.

However, R.C. 102.03 (D) prohibits public officials or employees from using their office to influence or secure anything of value. Thus, even if these requirements are met, the board member may not vote to appoint his self/herself to the JVSD board if it is a paid position. This conclusion is supported by common law which prohibits public officials from appointing themselves to another public position.

The OEC then examined the statute governing appointment to JVSD boards. Since R.C. 3311.19, which calls that a JVSD board is made of governing board members, does not authorize a board member to vote for himself/herself it does not violate the other statutes or common law. Thus the a board member may be appointed to the JVSD board in his/her official capacity, but cannot participate in voting.

How this Affects Your District:

The above opinion is an informational opinion, however, ERF believes a formal opinion would glean the same result.

This opinion is important for ESCs or districts to consider before they vote to appoint any board members to a JVSD board. Districts should first make sure the board member they wish to appoint meets the four criteria for serving in official capacity. Second, that member must be excluded from the vote if the JVSD board position is compensated. If these steps are not complied with, the district and the board member could be in violation of state law.

Court Denies Discrimination Claims Despite Inadequate Education

***Mumid v. Abraham Lincoln High School*, No. 08-3041 (8th Cir. August 25, 2010)**

The United States Court of Appeals for the Eighth Circuit recently held that a school for internationally born students did not discriminate against students by failing to provide them with an adequate education, denying injunctive and monetary relief.

Abraham Lincoln High School in Minneapolis was an alternative high school for immigrant children. The school, though formerly part of Minneapolis Public Schools, is now a charter school and is not affiliated with MPS. Thirteen former students, all refugees from Somalia or Ethiopia, sued MPS alleging discrimination under the Civil Rights Act of 1934, the Minnesota Human Rights Act (MHRA), and the Equal Educational Opportunities Act (EEOA).

Plaintiffs all arrived in the United States from Kenyan refugee camps between the ages of 14 and 20 with minimal or no education. Plaintiffs all had limited English proficiency. Five of the thirteen plaintiffs graduated by completing or being excused from graduation requirements. The others were unable to pass the Minnesota Basic Skills Tests (MBSTs) and thus could not graduate from high school.

After complaints from numerous students that ALHS was not meeting educational needs, the Minnesota Department of Education investigated the school. It found that the school did not use successful methods to recognize children's disabilities, misunderstood the law regarding special education testing, and violated Minnesota law by failing to help students who had failed the MBSTs at least two years before they were scheduled to graduate.

In its opinion, the Eighth Circuit first discussed claims that the students had been discriminated against per the Civil Rights Act and the MHRA. The students alleged that they were discriminated against because of their national origin since they received substandard curriculum and programming, and they did not receive timely special education testing and services. The students at ALHS were not offered the same educational and extracurricular activities as students at other schools. In addition, students were not tested for special education needs until they had been in the school system for three years.

However, the court noted that the students failed to show that either they were affected by the inadequate special education testing policy, or that they could overcome the school's alternative reasons for the policy. The school had defended the policy by stating that it did not test earlier because it could not accurately test students who spoke too little English.

Continuing, the Court concluded that the discrimination claim also had no merit. District and school policy did not discriminate against a protected class. The testing policy applied to all English language learners, not just students born outside of the United States, thus it was not discrimination on the basis of national origin. Finally, without a better-treated comparison school, the substandard educational programs could did not rise to discrimination.

The Court next addressed the EEOA claim. The EEOA states in part that no "State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by...failure by an education agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

The Eighth Circuit struck down the EEOA claim. It affirmed the District Court's opinion holding that injunctive relief cannot address the students' injuries since none of them will attend the school again.

One of six ways a State may fail to provide an equal education under the EEOA is by a failure to act to overcome language barriers. Regarding this, the plaintiffs also requested an injunction that would close ALHS, or alternatively, forbid the school to engage in any unlawful practices.

Since all plaintiffs graduated or are no longer in public school systems, the Court decided their standing to bring this claim was compromised. The relief requested would not affect them and additionally, the school is now an independent charter school unaffiliated with MPS, the entity actually sued.

Finally, the Court held that although plaintiffs requested monetary damages, the EEOA does not allow for such compensation. Generally, where Congress has not indicated what relief is available, anything appropriate can be granted. However, Courts are limited to types of relief Congress does mention in laws. The EEOA allows only equitable, corrective relief. Monetary relief is not mentioned and thus not allowed.

(Continued on page 3)

How this Affects your District:

Though it is not controlling in Ohio, this case provides one more example to districts indicating what does and does not constitute a valid claim. Not all discrepancies in education constitute discrimination. It is also useful for administrators to understand that some claims will not amount to monetary damages. Sometimes, however, there is a fine line separating acceptable policies from liability. Districts should review their policies to determine if adjustments should be made in order to avoid law suits.

Districts should always be aware of and up to date on educational requirements. Districts must ensure that their schools are correctly applying state and federal regulations. MPS could easily have avoided this lawsuit, and significant legal costs, by consulting an attorney versed in special education law and by checking to make sure schools in their district complied with curricular requirements. This case seems to have been preventable and the district was fortunate the claims were dismissed for technicalities.

Additionally, even though MPS was not legally liable, they very well may have faced sanctions imposed by the Minnesota Department of Education as a result of the investigation.

OAG Limits Superintendents/Treasurers Ability to Serve Community Schools

Opinion to Superintendent Delisle, OAG 2010-020 (August 10, 2010).

In a recent decision requested by Ohio Department of Education Superintendent Deborah Delisle, the Ohio Attorney General (OAG) made several conclusions regarding district employees' ability to concurrently serve administratively for a conversion community school.

First, the OAG addressed whether a person may serve concurrently on both school boards. The OAG used a common law compatibility test to determine that a person may not serve on both school boards.

The test asks: 1) Is either position a classified employment per R.C. 124.57; 2) does a constitutional provision or law prohibit holding both positions concurrently; 3) is one position subordinate to the other; 4) can one person physically carry out both positions; 5) is there a prohibited conflict of interest between the positions; 6) are there local charter provisions, resolutions, or laws that control this issue; 7) do any federal, state, or local department regulations apply? Since a school board governs a conversion community school board, the issue failed the subordination question. Thus, a board member may not serve concurrently on both boards.

The OAG next addressed whether superintendents and treasurers may also serve in their respective positions for a conversion community school. The OAG again applied the compatibility test and decided that the situation was not barred, however, conflicts of interest could exist. The OAG stated that a superintendent or treasurer may not: "1) oversee, monitor or evaluate the administration, management, organization, or operation of the community school; 2) review or evaluate the finances of the community school; or 3) oversee the provision of technical services to the community school." Realistically, it will be virtually impossible to resolve these conflicts.

The last question was whether a superintendent or treasurer may be employed by the regular school district, but do work in their official capacity for the community school without being simultaneously employed with both school boards. The OAG decided this question much like the last. The school board may agree to provide a person to perform superintendent or treasurer duties for the community school and that person could be the superintendent or the treasurer. However these same very limited requirements mentioned above apply and again, they will be extremely difficult to overcome.

How this Affects Your District:

Since this decision was provided by the Ohio Attorney General, it is instructive to all schools in Ohio who may find themselves in similar situations. All districts who govern convening community schools can learn from this and avoid problems in the future.

Districts helping to govern community schools should first remove from the community school board any members who also serve on the governing school board. It is also prudent to prohibit superintendents and treasurers from concurrently serving a conversion community school. Although the OAG mentioned that the situation may not be completely barred, it is extremely unlikely that conflicts can be removed. School districts' best option is to simply provide a conversion community school with its own board members, superintendent, and treasurer.

Firefighter's Termination Reversed because of Vague Policy

Bowman v. Butler Township Board of Trustees, 185 Ohio App.3d 180 (2009).

Ralph Bowman was a part-time firefighter and emergency medical technician for Butler Township. In 2007, the department found out that some firefighters had been downloading violent and pornographic videos from the internet from work computers while on duty. Several videos had been accessed on Bowman's account, such as *Lions Eat Man, Hamas Militant Shot Killed, Felony Fights, Helicopter Crewman Execution,* and *Terrorists Guerilla Killed*. Most of the movies were very violent, and one had sexually explicit language. None were pornographic.

Bowman denied watching all the videos except Felony Fights. He stated that he had seen another firefighter watching one of them, however, that firefighter was not working the night the video was viewed. Bowman also claimed he had given his password away and suggested he could have forgotten to log out of the computers. The Board of Trustees found that Bowman's testimony was not credible. It held a disciplinary hearing in executive session and concluded Bowman had viewed the videos.

While Bowman's case was pending another court trying one of the other firefighters held that the hearings should have been held in open session and thus violated Open Records Law. The trial court deciding Bowman's case remanded it to the Board of Trustees for another hearing. Thus, the hearing was official in November 2008, rather than January 2008.

The Appellate Court first adopted the facts the Board of Trustees had adopted. It affirmed that Bowman had viewed extremely violent videos and one with sexually explicit language.

The Court then addressed Bowman's second argument that the fire department did not have a policy that allowed him to decipher what computer activity would be permitted and what would not. The Board of Trustees said that common sense dictates the videos are inappropriate and in violation of department policy. The Board relied on a code of ethics and Fire Department Special Order where employees were reminded that inappropriate behavior on or off-duty could result in discipline.

The Court noted, however, that neither the Special Order nor the code of ethics mention computers or define what constitutes the "highest level of morality" the code of ethics demands. The Constitution requires that people are notified of prohibited activity. Since this policy so vague, it failed to put Bowman and other employees on notice of what was and was not permissible computer activity. There was no "guidance as to where the township drew the line between appropriate and inappropriate content along the spectrum of behaviors that can be accessed by television or computer." As a result, the Court held that the trial court decided this issue incorrectly; it should not have held that Bowman had engaged in malfeasance that warranted termination of employment.

The second issue the Court addressed was whether the trial court denied Bowman due process since it instructed the township to hold a second disciplinary hearing ten months after the initial hearing was concluded in executive session. The appellate court referenced another case, *Nihizer v. Butler Township Board Of Trustees*, while deciding this issue. That case had persuaded the trial court that Bowman's disciplinary hearing had to be conducted by the Board of Trustees in an open session, not in an executive session. The Appellate Court noted however that the Board of Trustees acted appropriately in the open session ten months after the initial hearing. The Court viewed the re-hearing simply as a procedural correction that did not affect Bowman's due process rights.

How This Affects Your District:

While this case addresses city policy, its lessons are certainly applicable to school districts as well.

School Districts must be sure that their policies on what is considered appropriate behavior in school are clear. This applies to both teachers and students. Although policies certainly must be broad enough to address a multitude of potential situations, they must notify those they apply to as to the sort of behavior that is and is not acceptable. Relying on "common sense" is too vague as it could potentially vary greatly from person to person.

If there are specific situations administrators wish to address with their policy those should be listed. Districts should attempt to make policies as objective as possible. This will alleviate confusion and potential law suits when a district seeks to discipline a student or employee for an act it believes was in violation of school or district policy.

Certainly policy writing must strike a delicate balance. If districts are unsure whether their policies meet these standards or seek to write new ones, they should contact an attorney for further guidance.

Education Law Speeches/Seminars

Ennis, Roberts & Fischer regularly conducts seminars concerning education law topics of interest to school administrators and staff.
Popular topics covered include:

Cyber law
School sports law
IDEA and Special Education Issues
HB 190 and Professional Misconduct

To schedule a speech or seminar for your district, contact us today!

Upcoming Speeches

Bill Deters and Jeremy Neff
at Canal Winchester on October 15, 2010
Special Education Update

Erin Wessendorf-Wortman
at Brown County ESC on October 25, 2010
Civil Rights, Title IX, Sexual Harassment and Employment

Administrator's Academy Dates at Great Oaks Instructional Resource Center

January 20th, 2011– *Gear Up for Negotiations*

April 7th, 2011 – *Media and Public Relations*

June 21st, 2011 – *Student Education and Discipline*

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