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# RESPONDING TO ALLEGATIONS OF BOARD MEMBER MISCONDUCT

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## I. Introduction

Given the preference for local control and the low bar set by the Legislature when it comes to the qualifications required of school board candidates, rare is the school board attorney who is not charged with counseling the board on responding to the impropriety of at least a school board member or two. This paper and the accompanying presentation aim to identify the various forms of school board member impropriety and misconduct and the legal tools available to the board attorney in addressing the situation, with a primary focus on recent developments in the law.

## II. Statutory Source of School Board Member Authority

The Illinois Legislature has established a low bar for school board member qualifications. Anyone who has been a resident of the district (or a sub-district therein for some districts) for at least one year, is at least 18 years old, is registered to vote and is not a child sex offender or convicted felon, is eligible for the school board. 105 ILCS 5/10-3; 10-11. In other words, in some cases a school board member might be less qualified for the position than some of the teenagers they are charged with educating. It may come as no surprise then that a few bad apples – those who operate without the professionalism, civility, ethics or even the most basic understanding of a school board member's role and authority expected of our elected officials – can be found amongst the bushels of school board members in Illinois.

Prior to receiving the mandatory board training now required of all newly appointed or elected school board members (*see School Code*,105 ILCS 5/10-16a), many of those members might be surprised to learn that the individual power of the school board member is actually quite limited to little more than the right to engage in board meetings and vote on action items. By and large, Article 10 and other provisions of the *School Code* that grant authority to the school board speak to the "board" as a corporate body. For instance, §10-20 provides a general grant of authority to the "school board," but lacks any reference to individual board member authority:

> The school board has the powers enumerated [herein]. This enumeration of powers is not exclusive, but the board may exercise all other powers not inconsistent with this Act that may be requisite or proper for the maintenance, operation, and development of any school or schools under the jurisdiction of the board.

105 ILCS 5/10-20.

Notwithstanding the broad grant of authority given to the board as a corporate body in §10-20 and dozens of other provisions in Article 10, the Legislature limited the authority of board members to act individually when it added the board member oath to the School Code. That provision requires all school board members to take the following oath upon being seated to the board:

> I, (name of member or successful candidate), do solemnly swear (or affirm) that I will faithfully discharge the duties of the office of member of the Board of Education (or Board of School Directors, as the case may be) of (name of school district), in accordance with the Constitution of the United States, the Constitution of the State of Illinois, and the laws of the State of Illinois, to the best of my ability.
> I further swear (or affirm) that: I shall respect taxpayer interests by serving as a faithful protector of the school district's assets; I shall encourage and respect the free expression of opinion by my fellow board members and others who seek a hearing before the board, while respecting the privacy of students and employees; **I shall recognize that a board member has no legal authority as an individual and that decisions can be made only by a majority vote at a public board meeting; and shall abide by majority decisions of the board**, while retaining the right to seek changes in such decisions through ethical and constructive channels.

105 ILCS 5/16.5 (2010).[1]

But is the oath anything more than aspirational? According to one court, §16.5 is not actionable to recover damages against the board member or board, due to its lack of an express or implied private right of action. *Collins v. Board of Education of North Chicago CUSD 187*, 792 F.Supp.2d 992, 1000 (N.D. Ill. 2011). In *Collins*, the plaintiff sought money damages related to the Board's failure to hire him. The case, however, did not address whether a school board member could be compelled to follow the oath through a writ of mandamus action. As discussed below, the Illinois Appellate Court appears willing to interpret §16.5 as a limitation upon individual board member authority when the scope of the member's authority is at issue.

[1] The IASB Code of Conduct to which most school districts subscribe mirrors much of the oath as well.

## A. Board Member Demands for Unauthorized Access

For some, recognizing a grant of power to a school board to act without recognizing the same authority to its individual members is a legal fiction. The "board" after all, is a collection of individual members and can act only via those members. The board member interested in testing the limits of her individual authority might assert, for example, a right to unfettered access of the district's books and records by virtue of her role as director of the corporate body. It is well established in the common law that corporate directors have a nearly absolute right to full access to, and fiduciary duty for the review of, the corporate books and records.

1. *Hughes v. Ricker*, 2013 IL App (1st) 113419-U.

In *Hughes v. Ricker*, a board member's quest to gain unfettered access to school district records was particularly derailed when the Circuit Court dismissed the case as moot since the board member filed her lawsuit after she had lost her re-election bid and four days prior to the end of her term. But the Appellate Court, albeit in a Rule 23 unpublished opinion, nonetheless provided guidance on the extent of a board member's individual authority.

In her complaint, school board member Janet Hughes alleged that she had been denied access to certain district records, including executive session audio-recordings and un-redacted legal invoices and sought an injunction to compel disclosure. Her requests were denied by the board president and superintendent because Hughes failed to assert a purpose or duty as a board member that justified access as a board member that a member of the public would not have pursuant to FOIA. Hughes protested having to justify her request, arguing that as a board member she is charged with fiduciary duties that permit access to all district records without specific justification. Hughes cited the general grant of authority given to boards in §10-20 of the *School C*ode, as well as the board's duty to oversee the superintendent's administration of the district in §10-16.7 as supporting her position that she deserved access to the specific records demanded, as well as unfettered access to all district records. In addition to relying on the *School Code* in asserting the inherent authority of an individual school board member, Hughes also likened school board members to corporate directors and argued in favor of unlimited access to the district's records.

Considering the complaint in the context of an injunction, the Appellate Court affirmed the Circuit Court's determination that Hughes lacked a "clear and ascertainable right" as a board member that was in need of protection. In denying the claim, the Court first reasoned that §10-20 does not give a school board specific authority to access all district documents, thus making the board member's contention overbroad. And while recognizing the board's responsibility to oversee the superintendent's performance, board member Hughes failed to allege why access to the specific records she sought were necessary. *Id.*, at ¶27.

Next, the Appellate Court recognized the limiting effect the board member oath placed on individual board member authority, stating:

> Moreover, insofar as the School Code gives the board all powers needed to perform its functions, and requires the superintendent and president to perform duties delegated by the board, those powers do not pertain to individual board members, but to the board as an entity. In fact, as defendants point out, the School Code requires board members to swear that they recognize that a "'board member has no legal authority as an individual and that decisions shall be made only by a majority vote [of the board]."

*Id*., at 29.

Finally, the Appellate Court rejected Hughes' claims that school board members are likened to corporate directors who have an "absolute" right to inspect the company's records. The Appellate Court noted that "school board members' right to district records are subject various statutory limitations which do not apply to a company's directors (including provisions of ISSRA and FERPA that limit access to student records to those demonstrating a legitimate educational or administrative interest in the student)." *Id*., at ¶ 31.

2. Using *Hughes* and §16.5 to Respond to the Overbearing Board Member

Beyond its value as a tool to respond to the unjustified demands of a board member for document access, the *Hughes* decision may have value in combatting other questionable conduct of board members. For example, some board members exhibit little restraint when it comes to using their position for access to school buildings and staff not otherwise enjoyed by members of the public. Thus, while the *School Code* may generally authorize the board with maintenance of buildings and the oversight of the Administration and staff, the *Hughes* decision may serve as grounds for limiting the board member who is a regular fixture in the central office, who sees himself as a direct supervisor of teachers and support staff, or who fashions himself a building inspector.

## III. Options Available to the Board Seeking to Police its Members

Despite its significant limitation upon the individual authority of school board members, the *School Code* (and other applicable laws) is rather limited in empowering school boards to discipline its members for misconduct or impropriety. This largely leaves the policing of abusive board members to the electorate. As discussed below, only in unique or the most severe situations may a school board member be removed from office. As a result, school boards and their legal advisers are left to creative means to combat individual members who refuse to carry out the duties of the office or abuse the authority that comes with being seated to the board. The option(s)

practically available to the school board attorney, however, depend greatly on the misconduct at issue, and perhaps even more importantly, the interest demonstrated by the board majority in addressing the situation.

### A. Ouster as a Basis to Declare a Board Vacancy

Once elected to office, school board members are relatively secure in their positions as Illinois law does not provide for the recall of school board members by the electorate. In limited situations, however, a position on the school board may be declared vacant by the board, thus entitling the board to appoint a new member.

The Legislature defined eight scenarios that, the happening of any of which, permits the school board to declare a seat vacant, including:

1. The death of the incumbent.
2. His or her resignation in writing filed with the Secretary or Clerk of the Board.
3. His or her becoming a person under legal disability.
4. His or her ceasing to be an inhabitant of the district for which he or she was elected.
5. His or her conviction of an infamous crime, of any offense involving a violation of official oath, or of a violent crime against a child.
6. His or her removal from office.
7. The decision of a competent tribunal declaring his or her election void.
8. His ceasing to be an inhabitant of a particular area from which he was elected, if the residential requirements contained in Section 10-10.5, 11E-35, or 12-2 of this *Code* are violated.

105 ILCS 5/10-11. If the facts giving rise to the vacancy are disputed, the school board may conduct a fact-finding inquiry and determine whether the vacancy exists. 10 ILCS 5/25-3(a). *Brown v. Johnson*, 362 Ill.App.3d 413 (1st Dist. 2005).

#### 1. Removal From Office

Although removal from office is grounds for the declaration of a vacancy, the board itself is not authorized to remove one of its own from office. That authority is vested in the regional superintendent, who may "remove any member of a school board from office for willful failure to perform his official duties." 105 ILCS 5/3-15.5. Although this law has been on the books for over 50 years, there is a dearth of reported decisions, thus suggesting that the regional superintendents exercise this duty sparingly. Nevertheless, where a board member's attendance at meetings is deplorable, the board's option to declare the seat vacant first requires removal of the member by the regional superintendent. Alternatively, where a board member is derelict in her duties to

comply with other duties charged of board members, e.g., mandatory board training, compliance with the *Open Meetings Act* (particularly a member's duty to refrain from discussing non-exempt subject matters in closed session), or the Freedom of Information Act, referral to the regional superintendent may be appropriate.

Besides the regional superintendent's authority to remove a board member, removal from office is a penalty for certain statutory violations. *See*., e.g., 105 ILCS 5/20-6 (willful violation of the working cash fund rules); 720 ILCS 5/33-3 (official misconduct).

### 2. *Quo Warranto* Action to Oust the Member from Office

Where a board member was ineligible for office in the first place, but was elected and seated nonetheless anyway, or where a board member commits an act while in office that renders him ineligible to continue finish his term, a judicial challenge to the member's eligibility may be appropriate. A *quo warranto* action is a procedural mechanism permitted by the *Code of Civil Procedure*, having the purpose to "question whether a person lawfully holds title to office." *McCready v. Ill. Sec'y of State*, 382 Ill.App.3d 789 (2008); 735 ILCS 5/18-101. The proceeding must be initiated by the Attorney General or State's Attorney of the proper county. 735 ILCS 5/18-102. Where either office fails to initiate the action and an individual makes a demand on those offices to do so, if that demand is unanswered, the individual citizen may bring the action. *Id*.

Three separate statutes prevent school board members convicted of serious crimes from holding office. The *Election Code*, 10 ILCS 25-2(5), and *School Code*, 105 ILCS 5/10-11 both provide that upon a school board member's conviction of an "infamous crime", the elective office becomes vacant. The Election Code prohibits anyone convicted of an infamous crime from holding any public office, unless pardoned.10 ILCS 5/29-14. Similarly, the *Officials Convicted of Infamous Crimes Act*, 5 ILCS 280/1 provides that a school board member who is convicted of "a felony, bribery, perjury, or other infamous crime, as understood in Section 1 of Article XIII of the Constitution of 1970, shall be, upon conviction, ineligible to continue in such office." 5 ILCS 280/1.

In other circumstances, an individual's devotion to other public offices may prohibit the member from dual public service, if those offices are incompatible as provided by statute or the common law doctrine of incompatibility.

#### a. *People ex rel. Lyons v. Parker*, 2012 IL App (3d) 110140-U

General John Parker filed nominating petitions in December 2010 to place his name on the April 2011 ballot for Peoria School District 150 and submitted a statement of candidacy wherein he swore that he was "legally qualified" for the office. This caught the attention of the Peoria County State's Attorney, who in February filed a *quo warranto* action to have Parker's name kept off the

ballot based upon Parker's record of two felony theft convictions, albeit 27 years prior. The Circuit Court ruled for the State and ousted Parker from office, and the Appellate Court affirmed.

b. *People of the State of Illinois v. Kenneth J. Williams*, No. 13CH1379 (Circuit Court of Cook County, Oct. 23, 2013)

Kenneth Williams was elected to the Thornton Township High School District 205 board in April 2009, despite having been convicted of a Class C felony for forgery in Indiana in 1985. In January 2013, Cook County State's Attorney Alvarez filed a *quo warranto* action to oust Williams based upon his felony convictions, and this brought the incredibly sensible result of Williams being re-elected to the board at the April 2013 election, and then promptly seated as board president. The State, however, continued prosecuting the *quo warranto* action.

One of Williams' main defenses was that the timing of his conviction (nearly 30 years prior), barred the application of the vacancy provisions of the *School Code* and the *Election Code* because those provisions allegedly applied only to convictions occurring while the member was in office. The Cook County Circuit Court (Hon. Rita Novak), rejected this argument, reasoning that the several statutory provisions prohibiting convicted felons from serving offices of honor, trust or profit were intended to be applied regardless of *when* the conviction occurred. The Court went on to reject Williams' other defenses, including constitutionality (vagueness) arguments, and entered an order of ouster.

c. *People ex rel. Ballard v. Niekamp*, 2011 IL APP (4th) 100796; Statutory Incompatability

The *Public Officers Prohibited Activities Act* ("*POPAA")* prohibits county board members from simultaneously serving as school board members, thus making those offices statutorily incompatible. Bud Niekamp had a long history of contemporaneously serving in those positions, until taxpayers and members of his school board took action to end the practice. 2011 IL App (4th) 100796, ¶¶ 5-8. In April 2009, Niekamp was re-elected to the school board, after having been re-elected to his county board position the year prior. In July 2009, a group of taxpayer- challengers to Neikamp's office filed a *quo warranto* action to oust him from the school board. That same month, he resigned from his county board position. But his challengers continued their *quo warranto* action to oust him from the school board. By May 2010, three of Neikamp's fellow school board members intervened in the action. In September 2010, the Circuit Court entered summary judgment for the plaintiffs and ousted Neikamp from his school board office. *Id*., at ¶ 9.

Neikamp appealed and during the appeal he was elected to a separate position on the school board. During the briefing of the appeal, Neikamp moved to dismiss the case, arguing that his election to a new seat on the school board operated as a *de facto* resignation of his prior seat on the school board (from which the defendants sought his ouster), thus making the case moot. But relying on *People ex rel Courtney v. Botts*, 376 Ill. 476 (1941), the Appellate Court denied this

argument and held that the quasi-criminal nature of *quo warrant*o proceedings permits punitive measures, thus leaving a justiciable issue to be decided. *Id*, at ¶ 19.

Niekamp also challenged the standing of his fellow board members to bring the *quo warranto* action against him. *Id*., at ¶ 24. The Appellate Court first noted that while a citizen's personal interest in the dispute need not be unique to him, to have standing to bring a *quo warranto* action, he must "demonstrate that he has a personal interest which had been invaded which is sufficiently distinct from the interest of the general public even though other members of the general public may be affected in the same manner as plaintiff." 2011 IL App (4th) 100796, ¶ 25. Borrowing guidance from a West Virginia Supreme Court decision, the Appellate Court then held that the interests of the plaintiff school board members were sufficiently distinct from the interests of the general public, since Neikamp's votes could affect the validity of board actions. *Id*., at ¶¶26 – 28. It was the board member's duties to protect the interests of the district, in fact, that gave rise to their standing. Quoting from *State Ex rel. Morrison v. Freeland*, 139 W.Va 327 (1954), the Appellate Court reasoned:

> …can it be said, by any process of reasoning, that each member of the council is not interested, as an individual and as an officer, in having only properly elected officers participate in the transaction of the business of that body? Is not such interest of such dignity as to make it the duty of each member, either as an individual or as a member of that body, to prevent illegal or unauthorized participating in the voting on the important issues which must be settled by that body? Is not the interest of each member, because of the duties imposed, and the privileges granted, different and far more substantial than the interest of a mere citizen and taxpayer? We think it must be held that each member of the council is possessed of such an 'interest' as entitled him to prosecute such an action.

*Id*, at 28.

The Appellate Court then affirmed the Circuit Court's ouster based upon Neikamp's dual-office at the time he was seated to the School Board. *Id.* at 43.

This straightforward case that affirmed a rather unambiguous and exacting provision of the *POPAA* is significant for a couple reasons. One, it serves as a serious blow to the fast-and-loose approach taken by some public servants when it comes to incompatible offices. In many situations, the office holder serves in both positions, only to resign from one office when challenged. After *Neikamp*, such politicking appears to be riskier, with punitive measures in the form of ousting from the chosen office clearly available as part of the *quo warranto* challenge.

Additionally, the case creates precedent affirming the standing of individual board members to challenge the offending member. Arguably, the Court's rationale for honoring the standing of individual board members to challenge the dual office-holder opens the door for a majority of a school board to take action on behalf of the district, even if only authorizing action through its individual members. The court's reasoning on the standing of school board members to bring a *quo warranto* action, raises at least a question concerning whether a board member must now be concerned with facing ouster actions from the deep pockets of the very board he serves.

### 3. Personal Interests in Contracts

Two anti-corruption statutes are aimed at prohibiting school board members from personally benefiting financially from their membership on the board. Both the *Public Officers Prohibited Political Activities Act* (a.k.a. *Corrupt Practices Act*), 50 ILCS 105/3 and Section 10-9 of the *School Code* prohibit school board members from having an interest, directly or indirectly, in a contract, work or business of the district where district funds serve as consideration. These laws prohibit board members from personally conducting substantial business with the board, including but not limited to:

- Contractor/vendor services (e.g., construction work; banking; consulting; etc.)
- Engaging in property transactions with the Board;
- Direct and indirect employment relationships; and
- Monetary settlements and consent decrees.

The statutes apply not only to board members who direct-deal with the board as a sole proprietor, but to those board members holding an ownership interest in larger business entities. Violation of these statutes is punishable as a Class 4 felony (thus subjecting the board member to removal from office) and voids the contract.

Exceptions in both statutes allow board members with limited ownership interests (e.g., less than 7.5% ownership) to avoid the reach of the prohibition, and allow the business relationship where the contract value is relatively small, provided certain transparency measures are taken. A 2010 amendment to §10-9 provided an exception to the general contract prohibition where a school board member is employed by a company that "transacts business" with the school board, so long as the board member has no financial interest in the company other than as an employee. 105 ILCS 5/10-9(a). For example, a school board member who is an accountant for a firm that is hired to perform the district's annual independent financial audit, would not be in violation of the statute so long as the member lacks an ownership interest in the firm.

*a. Attorney General (Informal) Opinion: Op. Att'y Gen. (Ill.) No. I-14-001 (2014)*

A recent informal opinion issued by the Attorney General seems to turn the apparent policy behind the 2010 amendment on its head. At issue in the dispute was the employment of a school board member by a regional special education cooperative to which the board member's district was a member. Because the cooperative exists by virtue of a contract amongst several member districts, the cooperative's contract with the school board member's district was at issue. Since the board member's employment at the cooperative was dependent, however remotely or fractionally, on her board's continued financial support and relationship with the cooperative, she was personally "financially interested" in the contract between the two entities.

In considering whether the 2010 amendment to §10-9(a) applied to except the board member's interest from the statute's general prohibition, the Attorney General focused on whether the cooperative "transacts business" with the school district. Relying on common definitions of "business," the Attorney General determined that "business" means a "commercial enterprise carried on for profit." Because the cooperative is a non-profit and quasi-governmental organization, the Attorney General determined that no business is transacted between the two entities. Thus, the exception was not applicable and the school board member was in violation of §10-9.

Faced with having to choose between her livelihood and her seat on the school board or the threat of felony prosecution, the member resigned from the board. If the Circuit Court were to endorse the Attorney General's reasoning, then school board members who are employed by non-profit organizations and governmental bodies who contract with school districts for the delivery of services are potentially subject to the law's enforcement provisions.

## B. Other Option to Combat the Abusive Board Member

While the cases above represent some of the most far-reaching examples of board member misconduct, most misconduct is pettier and does not give rise to an ouster action or is not met with a lawsuit by the member challenging her right to access district property. For these situations, a variety of other options may be available to the board attorney.

### 1. No Trespass Notice

In some circumstances, board member demands on administrative staff may be sufficiently significant to cause a real disruption to the ability of the administrative staff to perform their normal duties. A board member who is denied access or ignored by the superintendent may resort to ordering an office assistant to provide access or to copy records. The office clerk, who is not interested in upsetting one of her "bosses" and perhaps is oblivious to the dispute between the

board member and the majority of the board, may misconstrue or misperceive the authority of the board member to give workplace directives.

For the board member who refuses to abide by the direction of the majority of the board to cease making unauthorized visits to district buildings, who meddles in the supervision of office staff or teachers, or who otherwise uses her position for illegitimate access, consider issuing the board member a no-trespass notice. Where the board member acts beyond the authority vested in her as a member of the board and refuses to yield to the warnings or demands from the rest the board, it may be appropriate and necessary to issue the member a written trespass warning that is copied to local law enforcement. While that notice cannot prohibit the member's attendance and participation at school board meetings (since the board lacks the authority to remove a member from office absent a qualifying vacancy), the board can prohibit the member from taking actions not expressly authorized or inherent to the office.

**2. Self-Reporting of the Violation**

Not all instances of board member misconduct are intentional or met with vitriol from other members of the board. In some situations, unintended violations occur with an interest from the board member (and rest of the board) to immediately cease the violation and cure.

Consider the scenario where a local businessman (Mark) has an ownership interest in a company that for many years has provided sporadic services to the school district, the contracting of which are exempt from public bidding. A vacancy occurs on the board, and as a respected business-person, Mark is approached by the board to fill the vacancy and accepts the nomination. Six months later, when the company's $9,000 invoice comes up for payment approval by the board, Mark abstains from voting on the bill because he recognizes a conflict of interest. As the board attorney, you happen to be at the meeting to address the board on other matters, and notice Mark's abstention. After the meeting, you casually talk to Mark to inquire about his abstention, learn of his ownership interest and warn him that he and the board are violating §10-9 of the *School Code* and §3 of *POPAA*. Mark assumed that his abstention eliminated the conflict of interest and is surprised to hear from you that he might be facing felony charges if he continues with the relationship. He and the board are now concerned that his abstention is going to draw attention to the matter, and want to comply with the law and move on.

Where the violation is limited in scope, amount and circumstance, such as the above scenario, a suitable course of action may be to self-report the violation the appropriate oversight agency (e.g., State's Attorney's Office) with assurance that the practice has immediately ceased. Coupling the *mea culpa* with a commitment from the board to receive training from its attorneys on conflicts of interest and the fiduciary responsibilities of the board may be sufficient to stave off any interest from the State's Attorney. And while this practice has some inherent risk, such risk may be significantly less than trying to keep the matter private and hoping the prosecutor's office either does not catch wind of the practice or is uninterested in bringing charges.

### 3. Warning from Board Attorney

In some situations, the board attorney may be tasked by the majority of the board to address allegations of misconduct or impropriety directly with the offending board member – especially when the board member is not responsive to the demands of the rest of the board. While the board attorney's lecture to the defiant board member may fall on deaf ears, the member's attention might be piqued when personal liability is at issue.

Just as the board's employees are not entitled to indemnification from the board for actions taken outside the scope of their employment, unauthorized actions by a board member may similarly eliminate the member's right to indemnification granted by the *School Code*, 105 ILCS 5/10-20.20 and the *Local Government and Governmental Employees Tort Immunity Act*, 745 ILCS 10/2-302. Where a board member is taking action that exposes the board to liability (such as feeding confidential information to members of the public, e.g.), a warning that the board member would not be indemnified and may be personally liable for any actions filed against her, may curb the practice.

### 4. IASB Board Evaluation

Where constructive criticism and self-evaluation is a reasonable option, the services of the IASB's field services directors at a self-evaluation conference may be fruitful.