

State of Nebraska

Accountability and Disclosure Commission

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ADVISORY OPINION #203

SUBJECT: Conflicts of Interest/School Boards/Use of public funds to pay expenses/ Meaning and consequences of business association

Requested by: James B. Gessford, Attorney with Perry, Guthery, Haase & Gessford, P.C., L.L.O., representing Lincoln Public Schools

Questions Presented: "1. Can a school board member vote on approving a check which reimburses the school board member for expenses incurred related to board service, or must the school board member abstain from voting on such checks? Is there any other action (or inaction) that the school board member must take in order to comply with the Act in this situation?"

"2. Can a school board member who is also an "officer" or member of the "board of directors" of the Nebraska Association of School Boards ("NASB") vote on approving a check which pays the NASB for dues or other programs or services it provides to the school district or which reimburses the NASB for various types of expenses incurred by the school district or its personnel related to NASB programs or services, or must the school board member/NASB officer or director abstain from voting on such checks? Is there any other action (or inaction) that the school board member must take in order to comply with the Act in this situation?"

Conclusion: 1. A school board member may not vote on matters of direct financial gain or detriment to himself/herself, including expenses; a Potential Conflict of Interest Statement should be submitted at the commencement of a school board member's service noting that conflicts of interest may arise with regard to expense issues.

2. School board members who are also officers or directors of the NASB may not vote to provide financial gain or detriment to the NASB since this is a business with which they are associated; a Potential Conflict of Interest Statement should be submitted to reflect this situation.

Scope of this Opinion: This opinion is limited in its scope to the precise questions presented by the requester, as stated above.

Analysis Concerning Question 1, . Question 1 asks whether a board member may vote or must abstain from voting on the question of whether to reimburse his/her own submitted expenses. The question further asks whether, once the question of abstention is resolved, the law requires anything further of said board member.

In answering this question, the applicable Section of the Nebraska Political Accountability and Disclosure Act ("NPADA") is Section 49-1499.03(2)(a) R.R.S. 2010, which includes the following language:

"...any person holding an elective office of a school district who would be required to take any action or make any decision in the discharge of his or her official duties that may cause financial benefit or detriment to him or her,...or a business with which he or she is associated...shall take the following actions as soon as he or she is aware of such potential conflict or should reasonably be aware of such potential conflict...:(i) Prepare a written statement describing the matter requiring action or decision and the nature of the potential conflict; (ii) Deliver a copy of the statement to the person in charge of keeping records for the ... school district, who shall enter the statement onto the public records of the city, village, or school district; and (iii) Abstain from participating or voting on the matter in which the person holding elective office has a conflict of interests."

In approaching this question, we first note that Nebraska is not one of those States in which expenses are fixed on a per diem basis, such that voting on them might be regarded as perfunctory and without an exercise of discretion.

On the contrary, Nebraska Revised Statute, Section 79-546, R.R.S. 2014, provides that members of a school board or board of education shall not receive a per diem. Rather, that Statute goes on to state that each board may reimburse members for their, "actual and necessary expenses incurred while carrying out their duties ..." Ibid.

The same Statute further refers to Nebraska Revised Statute, Section 81-1176 (in computing mileage) and to Sections 81-1174, 81-1175, and 81-1177, R.R.S. 2014, which Statutes are described as "guidelines for such [school] boards when determining allowable expenses and reimbursement for such expenses." The Chapter 81 Statutes so referenced and incorporated into Section 79-546, R.R.S. 2014, are Statutes which set financial policies for the State of Nebraska as implemented by the Nebraska Department of Administrative Services.

These Statutes provide detailed criteria and guidelines to be followed by public officials and employees in reimbursement of expenses. Section 81-1174 makes

clear that virtually all statements of expenses submitted by school board members will need to meet the applicable guidelines, including being, "duly verified and supported by receipts.."

Section 79-546 R.R.S. 2014, is consistent with, but more comprehensive than, Sections 13-2201 through 13-2204 R.R.S. 2007, which permit reimbursement for "Local Government Expenditures", including school boards. These Statutes permit, "... reimbursement for actual and necessary expenses.." (Section 13-2203(1)(a)) R.R.S. 2007.

The Department of Administrative Services Statutes governing reimbursement for expenses are similar to provisions found in the Nebraska State Accounting Manual and followed by the Nebraska Auditor of Public Accounts ("APA") That office on occasion audits particular school districts, and its method of assessing how expenses should be substantiated is generally consistent with the Statutes in Chapter 81, as cited above.

From the foregoing Statutes, it is clear that a school board member who is submitting expenses for reimbursement must provide sufficient information so that the board itself may make a determination of whether the expenses so submitted are to be reimbursed under statutory guidelines.

If a person who has submitted expenses proceeds to vote upon the amount of his or her own reimbursement, the vote incorporates a subjective judgment on the part of said voter that the expenses in question are: (a) reasonable and necessary; (b) consistent with a governmental purpose; and (c) sufficient to meet applicable statutory guidelines, including receipt verification. In making these judgments, it is clear that the person submitting such expenses has a direct financial stake in their approval. In short, he or she has a conflict of interest under the Statute cited above with respect to approving his or her own expenses.

In reaching this conclusion, we are well aware that the submission of expenses in many instances will be a matter of routine and may involve little exercise of discretion. Nonetheless, in fashioning an answer to the question presented, we must provide an answer which will take into account all submissions, whether they be simple or complex. The answer must also be consistent with the plain language and requirements of the NPADA.

When a person has submitted his/her expenses to a board and is aware that a vote will then be taken with respect to their approval, a written statement should be prepared identifying the nature of the potential conflict and noting that the board member in question will abstain from voting on that particular matter.

Because submission of expenses may expect to be a recurrent matter of potential conflict, an initial statement of potential conflict would suffice.

Conclusion with respect to Question 1. A board member submitting expenses may not vote to approve them because doing so would constitute the board member voting on a matter of direct financial gain or detriment. A Potential Conflict of Interest Statement should be submitted to the person who keeps records for the board concerning this conflict.

Analysis of Question 2. The second question asks whether school board members who are also officers or directors of the NASB may vote or must abstain from voting on payments of various types from their own school boards to the NASB. Once the question of abstention is resolved, the question then asks whether the said board members need to do anything further under the terms of the NPADA.

There are three sections of the NPADA which govern the answer to this question. The first section, 49-1499.03(2)(a) R.R.S. 2010, has been quoted above. The question with respect to this Statute is whether the language—"a business with which he or she is associated"—is applicable to school board members who have the relationship with the NASB of being officers or directors of that body. The answer to that question depends upon the NPADA's definition of "business".

The NPADA defines the term "business" in broad terms which would apparently include non-profit corporations such as NASB. Section 49-1407, R.R.S. 2010 defines "business" to mean:

"...any corporation, partnership, limited liability company, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint-stock company, receivership, trust, activity, or entity."

The NPADA further defines the term "business with which the individual is associated" in Section 49-1408, R.R.S. 2010, as follows:

"Business with which the individual is associated or business association shall mean a business: (1) in which the individual is a partner, limited liability company member, director, or officer; .."

From the foregoing Statutes, as applied to the second question, we conclude the following: (1) NASB is a "business" as currently defined in Section 49-1407, R.R.S. 2010; (2) a school board member who is also an officer or board member

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of NASB, would, under the definitions in Sections 49-1407 and 49-1408, R.R.S. 2010, be considered as having a business association with NASB; and (3) a school board member who is required to vote on a question which would constitute a financial gain or detriment to NASB, would have a potential conflict of interest since it is a business with which he or she is associated. Consequently, that school board member should file a potential conflict of interest statement, ensure that it is filed with the record keeper for the school board, and abstain from voting on that issue.

It should be noted that the provisions of the NPADA cited above do not require that there be financial gain or detriment to an individual board member for conflict of interest to occur. Rather, where the board member is associated with a business, then the conflict provision of Section 49-1499.03(2)(a) R.R.S. 2010, may also be triggered.

Conclusion with respect to Question 2: Where a board member is associated with NASB through being a NASB board member or officer, and where the board member is required to act upon a matter which could constitute a financial gain or detriment to NASB, there exists a potential conflict of interest. The board member should file a potential conflict of interest statement with the board's record-keeper, and abstain from voting on the said issue.

Summary: A school board member who submits expenses for reimbursement may not vote on his/her own reimbursement because of a direct financial interest in that vote. A school board member who is also a board member or officer of the Nebraska Association of School Boards ("NASB"), has a business association with NASB and may not vote on questions of financial gain or detriment to NASB.

ADOPTED as an Advisory Opinion pursuant to Section 49-14,123(10) R.R.S. 2010 and Title 4, Chapter 1, Rules of Practice and Procedure. As provided in Section 49-14,123(10), this Advisory Opinion shall be binding upon the Commission unless amended or revoked, concerning the person or public body who requested the opinion and acted in reliance thereon in good faith unless material facts were omitted or misstated by the person in the request for the opinion.

DATED this 8th day of September, 2017

NEBRASKA ACCOUNTABILITY AND DISCLOSURE COMMISSION



Matthew Enenbach, Acting Chairman