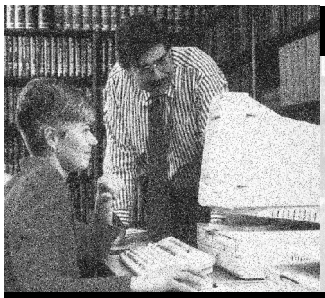

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

School Law Matters

Latest legal developments and practical guidance for school officials & administrators **December 2005**

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Board Members Can Be Removed For Revealing Confidential Information From Executive Sessions

In a recent decision of the Commissioner of Education (*Appeal of Nett and Raby*, Decision No. 15,315, October 24, 2005), the Commissioner held that school board members who reveal information discussed during executive sessions may be subject to removal by the Commissioner under Education Law Section 306. While the Commissioner declined to remove the particular school board member (who secretly recorded executive sessions) based on the facts of this case, the decision is very significant because the Commissioner has now put school board members across the state on notice that removal is possible in such cases.

Facts

In this case, a member of the Patchogue-Medford School Board in Suffolk County secretly taped several executive sessions at which the board discussed the possible termination of an employee who had been found guilty of multiple counts of misconduct. The school board ultimately voted to dismiss the employee and the employee challenged this dismissal in federal court. During the course of the litigation, the district learned that the former employee had in his possession one to two hours worth of recordings covering discussions relating to his termination that occurred during various executive sessions. The board member admitted that she recorded the executive sessions without the knowledge of her fellow board members and gave the recordings to the employee, but denied that she "willfully violated the law or neglected her duties". She likened herself to a "whistle blower" who acted in good faith to protect the rights of the employee she believed was unfairly investigated and terminated. Several district residents then brought an Appeal to the Commissioner seeking the board member's removal for divulging the confidential information acquired in the course of the board member's duties for the purpose of assisting the employee in litigation against the district.

The bottom line is ...

The Commissioner has "delivered a message" to board members across the state that they are not free to divulge information to others when that information is obtained in executive sessions, and that a deliberate breach of the confidentiality of executive session may form the basis for a board member's removal.

Legal and Ethical Violations Found

In his decision, the Commissioner found that the board member's unilateral taping and disclosure of executive session material was a violation of her fiduciary duty as a board member, her oath of office and the school district's code of ethics for board members and employees under Section 805-a of the General Municipal Law. (That section provides that no municipal officer or employee shall "disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interest.") The Commissioner, citing previous decisions, stated that it is well-settled law that a board member's disclosure of confidential information obtained at an executive

Continued on next page

Board Members Can Be Removed For Revealing Confidential Information From Executive Sessions (continued)

session of a board meeting violates General Municipal Section 805-a.

The Commissioner pointed out that in the course of their duties, "board members are required to discuss and debate difficult and sensitive issues, including matters"... involving employee discipline, collective bargaining tactics and litigation strategies. The Open Meetings Law specifically recognizes the sensitivity of these matters by permitting them to be discussed in executive session. The purpose of this exception to the Open Meetings Law, in the Commissioner's view, is to enable board members "to deliberate freely and speak frankly in ways they might not if those discussions were held in full public view."

Strong Message Sent By Commissioner

The Commissioner then went on to make a strong statement about the impropriety of disclosing confidential information during an executive session:

> *In this case,.... Weeks personally chose to divulge information that the board... as a collective body... properly decided to discuss in confidence. By doing so, she effectively thwarted the will of the majority and invalidated its action as a body corporate. Such conduct is contrary to the basic principles of school board governance. A single board member cannot be allowed to undermine the effective functioning of the school board by unilaterally disclosing information properly discussed in executive session.*

Disagreement with Opinions of Committee on Open Government

The Commissioner's decision is also significant because he specifically disagreed with Robert Freeman, the Executive Director of the Committee on Open Government, who had previously issued several advisory opinions concerning the disclosure of information discussed in executive session. In these opinions, Mr. Freeman took the view that the term "confidential" should be interpreted narrowly and that board members were free to discuss any information gained in executive session unless there was a specific State statute or federal law prohibiting the disclosure. The Commissioner disagreed with this view, stating, in effect, that a broader interpretation was necessary to insure that by electing to discuss such items as specific employment matters in executive session, the board discussion could be frank and remain in confidence.

Board Member Not Removed, But No Such Leniency in the Future

As noted above, however, the Commissioner declined to remove the board member in this case because the record showed that her personal attorney had advised her that Mr. Freeman's opinions could be followed and that her conduct in disclosing the information from executive sessions would not be unlawful. However, it is unlikely that this type of leniency from the Commissioner will be applied in similar cases in the future.

It is clear, therefore, that the Commissioner has "delivered a message" to board members across the state that they are not free to divulge information to others when that information is obtained in executive session, and that a deliberate breach of the confidentiality of executive session may form the basis for a board member's removal. It must be kept in mind that the Commissioner's decisions have the force and effect of law, and that the Commissioner, as well as the board of education, has the authority to remove board members for violations of State law, including a school district's code of ethics. Mr Freeman's opinions, on the other hand, are only opinions of interpretation of the OML and FOIL

Cautionary Notes

At the same time, it should be noted that the Commissioner cautioned that while board members generally cannot disclose information properly discussed in an executive session, there are instances in which information learned during the executive session may warrant referrals to the "District Attorney, the Attorney General, or other appropriate law enforcement authority for investigation and possible action."

The Commissioner also noted that an individual board member might be compelled to disclose information from an executive session in the context of a judicial proceeding such as a situation where a board member is subpoenaed to testify in a lawsuit. In that instance, the board member may be required to answer questions about what was said in executive session, and that board member would not violate any State law by doing so.

If you have any questions about this case or its implications, please contact our office at 315-437-7600.

Letter Notifying Employees of Tenure Denial Recommendation Must Be Carefully Drafted

A new decision from a mid-level appellate court demonstrates the need for a carefully-worded letter from the superintendent advising a tenure-eligible teacher/administrator that the superintendent will not be recommending him/her for tenure. (*Brunecz v. City of Dunkirk Bd of Educ.*, ___ A.D.3d ___, 2005 WL 3021885 [4th Dept., November 10, 2005].)

Facts

In this case, the superintendent verbally informed the teacher that he would not be recommending to the board of education that the teacher be granted tenure. On July 2, 2003, the superintendent wrote to the teacher advising him that at a meeting of the board scheduled for August 12, 2003, he would recommend to the board that "[y]our probationary period be terminated."

However, on July 29, 2003, the superintendent sent a second letter correcting one portion of his initial letter of July 2, stating that his previous letter mistakenly stated that his recommendation would be to terminate the teacher's probationary period and that he would be recommending to the board at its August 12 meeting that the teacher not be granted tenure. The teacher then received a letter from the superintendent dated August 8 stating that he had presented to the board his recommendation that the teacher not be granted tenure at a meeting held on August 7, and that the teacher would not receive tenure and had no further duties or responsibilities as a teacher with the district as of that date.

Notice Held "Confusing"

In the subsequent lawsuit, a state court held that the notices given to the teacher were not sufficient to satisfy the requirements of the Education Law. The court held that the various notices that the teacher received from the superintendent were confusing at best and untimely. It granted the teacher's request that he receive tenure with back pay and benefits, as well as the costs incurred in challenging the district's actions.

The bottom line is ...

Superintendents should take care to include in any letter notifying a teacher or administrator in these circumstances that a recommendation will be made to the board that the employee will not be granted tenure and that the employee's services will be terminated at the expiration of the probationary period.

Appeals Court Denies Tenure But Grants Back Pay

On appeal, the Appellate Division, Fourth Department, agreed with the District that the lower court erred in awarding the teacher tenure. However, it concurred with the lower court that the letter sent to the teacher on July 2, 2003 did not properly notify him that the superintendent would recommend that he would not be granted tenure or that he would be terminated. In the court's view, the letter merely stated that the superintendent would recommend that the teacher's probationary period be terminated. Because a probationary period may be terminated either by an award or denial of tenure, the court viewed the letter as ambiguous and stated that it failed to give the teacher the proper notice required under the Education Law. Since the proper notice the teacher received was 51 days late, the court ruled that the teacher was entitled to 51 days' pay. The court rejected the district's argument that the teacher was not entitled to any pay because he was not receiving pay during the summer.

Lesson to be Learned

Superintendents should take care, therefore, to include in any letter notifying a teacher or administrator in these circumstances that a recommendation will be made to the board that the employee will not be granted tenure and that the employee's services will be terminated at the expiration of the probationary period.

If you need assistance in drafting such a letter, please contact our office at 315-437-7600.

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Parents Challenging IEPs Must Prove Plans Are Invalid, Supreme Court Rules

The U. S. Supreme Court recently held that in an administrative hearing challenging a disabled child's individualized education program (IEP), the challenging party bears the "burden of proof". *Schaffer v. Weast,* 546 U.S. ____ (2005). In other words, contrary to recent cases in our jurisdiction, when a parent challenges a student's IEP, the hearing officer must presume that the IEP is valid until the parents demonstrate otherwise. It should be noted, however, that the Supreme Court did not prohibit states from enacting their own laws placing the burden of proof on school districts in this situation. Accordingly, it is possible that some time in the future New York school districts will once again bear this burden.

This case involved the educational services that were claimed due, under Individuals with Disabilities Education Act (IDEA), to Brian Schaffer, a 7th grader in Montgomery County, Maryland. Brian suffered from learning disabilities and speech-language impairments. From pre-kindergarten through seventh grade he attended a private school and struggled academically. In 1997, school officials informed Brian's mother that he needed a school that could better accommodate his needs. Brian's parents contacted the Montgomery County Public Schools System (MCPS) seeking a placement for him for the following school year. MCPS evaluated Brian and convened an IEP team. The committee generated an initial IEP offering Brian a place in either of two MCPS middle schools. Brian's parents were not satisfied with the arrangement, believing that Brian needed smaller classes and more intensive services. The Schaffers thus enrolled Brian in another private school, and initiated a due process hearing challenging the IEP and seeking compensation for the cost of Brian's subsequent private education. The administrative law judge held that the parents bore the burden of proving their claims and ruled in favor of MCPS. The parents appealed and ultimately the Supreme Court agreed to hear the case.

The Supreme Court agreed with the Administrative Law Judge. Specifically, the Court rejected the parents' argument "that every IEP should be assumed to be invalid until the School District demonstrates that it is not." The Court wrote that the core of the IDEA "... is the cooperative process that it establishes between parents and schools" and that "Congress has repeatedly amended the Act to reduce its administrative and litigation-related costs." After a lengthy discussion of the origins of the concept of "burden of proof" the Court ruled that like most other laws, the IDEA places that burden on the party seeking relief.

If you have any questions regarding this case or need further assistance, please contact our office at (315) 437-7600.

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