



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

Counsel and Deputy Commissioner for Legal Affairs
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March 31, 2009

Michael J. Looby
General Counsel
Buffalo City School District
717 City Hall
Buffalo, NY 14202

Labor Relations

APR 06 2009

Received

Dear Mr. Looby:

On November 20, 2008, you wrote to me asking whether the State Education Department ("SED") is investigating alleged ethics violations by members of the Buffalo City School District Board of Education (the "Board") in connection with the alleged disclosure of confidential information from an executive session of the Board. You specifically referenced an April 25, 2008 letter to Commissioner Richard Mills (the "Commissioner") from Board President Kapsiak ("Kapsiak"), which you stated enclosed a copy of the opinion, findings and conclusions of the Buffalo Committee on Ethics (the "Committee"). In my response to you dated December 29, 2008, I indicated that Kapsiak's correspondence to the Commissioner did not include these documents, and asked that you forward them to me so that I could respond to your inquiry.

On February 10, 2009, I received a response from Kapsiak, apologizing for the inadvertent omission of documents from her April 25 letter, and enclosing: a February 22, 2008 Notice to Board Members and Hearing Materials; a February 26, 2008 Hearing Transcript; Ethics Committee Hearing Minutes dated April 15, 2008; Conclusions of the Committee on Ethics dated April 15, 2008; Minutes of the Buffalo Board of Education dated April 23, 2008; and a letter from Kapsiak to the Commissioner dated April 25, 2008. I have reviewed all of these documents and determined that, while actions of some board members and/or Superintendent Williams ("Williams") may raise questions about compliance with the law, these questions are unlikely to be answered as a result of further action by SED. Accordingly, in response to your question, no further investigation by SED is contemplated at this time. As discussed below, however, this determination reflects only the practical difficulties inherent in conclusively proving the alleged violations of law, and not vindication of the handling of this matter by either the Board or Williams.

As you know, after a hearing at which testimony was given by witnesses under oath, the Commission concluded that the Board did, indeed, enter into Executive Session on the evening of January 29, 2008, and that all present understood the matters discussed therein to be confidential. The Commission also concluded that four board members—Pamela Cahill, Ralph Hernandez, Catherine Nugent Panepinto and Louis Petrucci—admitted communicating with Mark Sommer

("Sommer"), a reporter for the Buffalo News, sometime after the meeting but before the publication on February 1, 2008 of an article Sommer authored. That article revealed information discussed in the confidential executive session and attributed the information to unidentified Board Members. All four members who spoke with Sommer, however, denied discussing confidential executive session matters with him. The Commission thus concluded that one or more of these board members had been untruthful in their sworn testimony and had, in fact, revealed to Sommer confidential, executive session material. The Commission acknowledged, however, that it could not establish with certainty which member or members did so. Because of First Amendment protections accorded to the press, the Commission did not subpoena Sommer to testify as to the identity of his source(s).

As you are aware, disclosure by a board member of confidential information discussed in a properly convened executive session violates the school board member's oath of office, fiduciary duty and General Municipal Law section 805-a(1)(b), and is grounds for removal from the board. Appeal of Nett, 45 Ed Dep Rep 259 (2005). It is clear on the instant record that the information discussed in the January 29, 2008 executive session was of a very personal nature and understood by all present to be confidential. It is also clear that the matter discussed at executive session was a proper subject of an executive, and not a public, session.

The remedy available to the Commissioner for violation by a board member of these principles is removal from office under Education Law section 306. The Commissioner may remove a board member if, after a hearing, it is proven to his satisfaction that the board member in question has engaged in a willful violation or neglect of duty under Education Law or has willfully disobeyed a decision, order, rule or regulation of the Board of Regents or the Commissioner. To be considered willful, the board member's actions must be shown to have been intentional and with a wrongful purpose.

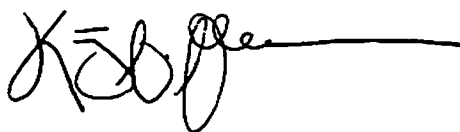
While the Commission concluded, after sworn testimony, that one or more members violated the above provisions and revealed confidential information to Sommer, the Commission was unable to identify which board members acted wrongfully. As noted above, the four members who communicated with Sommer testified under oath that they did not disclose confidential information to Sommer. None of the remaining board members contradicted their testimony. Sommer himself did not testify. Only unsworn statements in a news article attributed the confidential information to Board Members, and, even then, those Board Members were not identified. Given this record, convening a hearing before the Commissioner to determine whether board member(s) improperly disclosed confidential information to Sommer would be futile. The same witnesses would be called to testify, and they can be expected to give the same denials they gave before the Commission. Absent conclusive proof, the Commissioner would be without authority to remove board members from office.

Like the Commission, however, I am nevertheless troubled by the facts on this record. It is possible that one or more witnesses who appeared before the Commission may have testified untruthfully under oath. Almost equally disturbing is the impact of disclosure of confidential information from executive session, which ultimately undermines the effective operation of a board.

I am also concerned about the treatment by the Superintendent and the Board of the personal information discussed at the executive session. The statement(s) made by the Superintendent about a certain individual appear to have been gratuitous, and, in any event, irrelevant to that individual's professional performance, even if true. Moreover, if the Superintendent and/or Board had real concerns about the safety of children under that individual's charge, they were required to report it to the appropriate authorities. The fact that no report was made demonstrates either a serious omission on their part or likely confirms that the statement(s) were baseless speculation.

I trust you will share this information with the Board and Superintendent. If you have any further questions, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kathy A. Ahearn', followed by a long horizontal line extending to the right.

Kathy A. Ahearn