
2005 Wis Eth Bd 05
IMPROPER USE OF OFFICE

The Ethics Board advises that a board member of an institution of higher education whose spouse is employed as a teacher by the institution:

- (1) not participate in negotiations, discussions, or votes on the teachers' contract;
- (2) may vote on the institution's budget if the board has already entered into a contract that establishes teachers' salaries and benefits for the period covered by the budget but may not vote on the budget if the budget will substantially affect teacher salaries or benefits;
- (3) not participate in negotiations, discussions, or votes on the terms of another union's contract if it will affect the terms of the teachers' contract in other than an inconsequential manner;
- (4) may participate in a disciplinary or similar matter affecting another teacher if the action does not result in a board member's spouse obtaining a substantial benefit or anything of substantial value from such decision;
- (5) may participate in decisions affecting teaching load, teaching hours, and other general policy decisions if the effect on the board member's spouse does not differ materially from the effect on other teachers; and
- (6) if the board member is covered by the institution's health benefits plan, not participate in consideration of the terms of that plan or the award of the institution's health benefits contract.

The Ethics Board further advises that abstention does not avoid a conflict, it simply mitigates it. If the above restrictions materially impede the board member's ability to fulfill his or her responsibilities as a public official, or conflicts are frequent and continuing, the member should consider withdrawing from the position so that another appointee may participate fully in the activities of the board.

Facts

- ¶1 This opinion is based upon these understandings:
- a. You write on behalf of the board of an institution of higher education.
 - b. A member of the board is married to a teacher employed by the institution who is also a member of the faculty union.

Questions

¶2 You have asked generally about potential issues that may arise from the board member's spousal relationship to a member of the institution's faculty. The Ethics Board believes the most likely questions to arise are:

1. Consistent with statutes administered by the Ethics Board, may the board member whose spouse is a teacher employed by the institution participate, in an official capacity, in discussions, negotiations, or votes on the institution's contract with the faculty?
2. Consistent with statutes administered by the Ethics Board, may the board member whose spouse is a teacher employed by the institution participate, in an official capacity, in discussions and votes on the institution's annual budget?
3. Consistent with statutes administered by the Ethics Board, may the board member whose spouse is a teacher employed by the institution participate, in an official capacity, in discussions, negotiations, or votes on the institution's contracts with employees other than teachers?
4. Consistent with statutes administered by the Ethics Board, may the board member whose spouse is a teacher employed by the institution participate, in an official capacity, in disciplinary matters or matters affecting the employment status, benefits, or working conditions of teachers or other employees?
5. Consistent with statutes administered by the Ethics Board, may the board member whose spouse is a teacher employed by the institution participate, in an official capacity, in matters involving general policy that affects teachers' working conditions?
6. Consistent with statutes administered by the Ethics Board, may the board member, if covered by the institution's health benefits plan participate, in an official capacity, in discussions, negotiations, and votes on labor contracts that include health benefits or participate in selecting the benefit provider or benefit plan design?¹

¹ See 1997 Wis Eth Bd 06 which addressed these issues under §19.59, *Wisconsin Statutes*, the Code of Ethics for Local Public Officials in the context of a local school board member.

Discussion

¶3 Wisconsin's Code of Ethics for State Public Officials and Employees provides that any individual, on behalf of a governmental body, may request the Ethics Board to issue an opinion regarding the propriety of any matter to which the body may become a party. §19.46 (2), *Wisconsin Statutes*.

¶4 Sections 19.45 (2) and 19.46 (1) (a) and (b), *Wisconsin Statutes*, apply to your questions. Reduced to their elements, §§19.45 (2) and 19.46 (1) (b), *Wisconsin Statutes*, provide:

No state public official
May use his or her office or position
To obtain anything of substantial value
For the official's private benefit or that of his or her immediate family
Or to produce a substantial benefit for the official or his or her
immediate family.²

¶5 Reduced to its elements, §19.46 (1) (a), *Wisconsin Statutes*, provides:

No state public official
May take any official action
Substantially affecting a matter
In which the official or the official's immediate family
Has a substantial financial interest.³

² Section 19.45 (2), *Wisconsin Statutes*, provides:

19.45 (2) No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. This subsection does not prohibit a state public official from using the title or prestige of his or her office to obtain contributions permitted and reported as required by ch. 11.

Section 19.46 (1)(b), *Wisconsin Statutes*, provides:

19.46 (1) Except in accordance with the board's advice under sub. (2) and except as otherwise provided in sub. (3), no state public official may:

(b) Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

³ Section 19.46 (1) (a), *Wisconsin Statutes*, provides:

19.46(1) Except in accordance with the board's advice under sub. (2) and except as otherwise provided in sub. (3), no state public official may:

(a) Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.

¶6 A member of the board of the institution of higher education on whose behalf you write is a state public official.

¶7 Participating, in an official capacity, in discussions, contract negotiations, and votes on issues before the board is taking official action. 1996 Wis Eth Bd 13 ¶4; 1995 Wis Eth Bd 6 ¶4; 1992 Wis Eth Bd 22 ¶10. A spouse is a member of an official's immediate family.⁴ A financial interest is substantial if it is of more than token or inconsequential value. 1995 Wis Eth Bd 5 ¶6; 1993 Wis Eth Bd 8 ¶6; 7 Op. Eth. Bd. 1 (1983); 5 Op. Eth. Bd. 97 (1982).

¶8 The ultimate question, then, is which, if any, of the various official actions by a board member would substantially affect a matter in which the member or the member's spouse has a substantial financial interest. In each case this is a question of fact. Worthy of consideration is whether the member or the member's spouse has a measurable, demonstrable, not speculative, financial interest in the matter and the member's action affects that interest in more than an insignificant way. We will address each of the questions in turn.

1. *Consistent with statutes administered by the Ethics Board, may the board member whose spouse is a teacher employed by the institution participate, in an official capacity, in discussions, negotiations, or votes on the institution's contract with the teachers?*

¶9 Patently, an individual's salary and benefits are things of substantial value and of personal benefit. Therefore, a board member, consistent with §§19.45 and 19.46, should not participate in decisions concerning the contract that will establish the salary and benefits of the member's spouse.⁵ Although the Ethics Board does not administer §946.13, *Wisconsin Statutes*, we note that this statute also appears to prohibit such action.⁶ See 76 Op. Att'y Gen. 15 (1987).

⁴ Section 19.42(7)(a), *Wisconsin Statutes*, provides:

19.42 (7) "Immediate family" means:

(a) An individual's spouse.

⁵ We note that §19.46 (3) provides that paragraph (1) does not prohibit a state public official from taking any action concerning the lawful payment of salaries or employee benefits. This provision applies only to the payment, and not the establishment, of salary and benefits; and (b) only to §19.46 not to §19.45. For these reasons, this provision is not applicable to the questions we are addressing. 1996 Wis Eth Bd 10, n. 5.

⁶ Section 946.13, *Wisconsin Statutes*, in relevant part, provides:

946.13 Private interest in public contract prohibited (1) Any public officer or public employee who does any of the following is guilty of a Class E felony:

* * *

(b) In the officer's or employee's capacity as such officer or employee, participates in the making of a contract in which the officer or employee has a private pecuniary interest, direct

2. *Consistent with statutes administered by the Ethics Board, may the board member whose spouse is a teacher employed by the institution participate, in an official capacity, in discussions and votes on the institution's annual budget?*

¶10 Whether a board's vote on the institution's budget will substantially affect teacher salaries and benefits is a question of fact. If, prior to acting on a budget, the board has already entered into a contract that establishes teachers' salaries and benefits for the period covered by the budget, then acting on a budget that merely appropriates moneys for costs already approved is unlikely to affect substantially the board member's financial interests. As a representative of the people, an individual holding a public office has an obligation to consider and vote on issues before the official. 1996 Wis Eth Bd 10 ¶9. Accounting for that obligation and the incidental effect on the member, we believe the board member may, consistent with §§19.45 and 19.46, *Wisconsin Statutes*, vote on the budget as a whole if the member does not participate in discussions or votes or any amendment to the budget specifically affecting the salary, benefits, or employment status of the member's spouse.

¶11 On the other hand, if the board has not entered into a contract that establishes teachers' salaries and benefits for the period covered by the budget, then acting on a budget that sets parameters for collective bargaining is likely to substantially affect the board member's financial interests. In this instance, we advise that the board member not participate in discussions or vote on the budget. If other portions of the institution's budget can be separated from portions affecting teacher salaries and benefits, the member may participate in discussions and votes on those aspects of the budget.

3. *Consistent with statutes administered by the Ethics Board, may the board member whose spouse is a teacher employed by the institution participate, in an official capacity, in discussions, negotiations, or votes on the institution's contracts with employees other than teachers?*

¶12 Salaries and benefits that are negotiated in contracts for non-teachers may serve as a precedent for the teachers' contract. If the terms of another union's contract will serve as precedent for the terms of the teachers' contract, then we advise that the board member not participate in negotiations, discussions, or votes on any of those contracts. See 1994 Wis Eth Bd 6 ¶7; 1994 Wis Eth Bd 4 ¶5. Experience is one factor that might indicate whether another union's contract will have a precedential effect on the teachers' contract. On the other hand, if the effect of another contract's terms on the teachers' contract is merely conjectural, or if the other contract will have only an inconsequential influence, we believe the member may participate in decisions concerning that contract. See *LeBow v. Optometry Examining Board*, 52 Wis.2d 569, 574 (1971); 1996 Wis Eth Bd 3 ¶5; 1995 Wis Eth Bd 4 ¶7; 1993 Wis Eth Bd 11 ¶5.

or indirect, or performs in regard to that contract some function requiring the exercise of discretion on the officer's or employee's part.

4. *Consistent with statutes administered by the Ethics Board, may the board member whose spouse is a teacher employed by the institution participate, in an official capacity, in disciplinary matters or matters affecting the employment status, benefits, or working conditions of teachers or other employees?*

¶13 Matters affecting a particular teacher are quasi-judicial in nature. Sections 19.45 and 19.46 prohibit an official only to act in a matter in which the official or the official's spouse has a substantial financial interest or to use the official's position to gain a substantial benefit or anything of substantial value for personal benefit or for the benefit of the official's spouse. Although the facts may vary, it seems unlikely that participation in a disciplinary or similar matter affecting another teacher would result in a board member's spouse obtaining a substantial benefit or anything of substantial value from such decision. Although such decisions may affect future decisions involving other teachers or future interpretations of the teachers' contract, absent other facts, any effect on the member's spouse appears too remote and speculative for us to say that the member's participation in the decision is barred by the statute. It may be appropriate to address this question in light of specific circumstances.

5. *Consistent with statutes administered by the Ethics Board, may the board member whose spouse is a teacher employed by the institution participate, in an official capacity, in matters involving general policy affecting teachers' working conditions?*

¶14 A decision affecting teaching load, teaching hours, and the like could result in a substantial benefit for the spouse of the board member. However, as we understand it, these issues usually arise as general policy decisions that are quasi-legislative in nature. The Ethics Board has consistently said that an official may participate in quasi-legislative matters, even if a decision may affect the official, if (1) the decision affects a broad class of individuals; (2) the official represents a small portion of the entire class; and (3) the official's interest is not affected to any greater or lesser extent than others' interests. See, e.g., 1994 Wis Eth Bd 6 Supp. ¶7; 8 Op. Eth. Bd. 21 (1984); 5 Op. Eth. Bd. 65 (1981); 5 Op. Eth. Bd. 59 (1981). Thus, as long as a policy decision pertains to all or the substantial majority of teachers in the institution and does not affect the member's spouse in a way that differs materially from the effect on other teachers, §19.59 does not bar the member's participation in such policy issues. If a decision affects the board member's spouse in way that does differ materially from the effect on most other teachers, then the member ought not to participate in the decision.

6. *Consistent with statutes administered by the Ethics Board, may the board member who is covered by the institution's health benefits plan participate, in an official capacity, in discussions, negotiations, and votes on labor contracts that include health benefits or participate in selecting the benefit provider or benefit plan design?*

¶15 The answer to this question is "no." We have previously opined that the terms of a health insurance contract can be something of substantial value and a

substantial benefit to the insured. 1996 Wis Eth Bd 10 ¶7. The private interest of a board member who is covered by the institution's insurance may directly conflict with the interest of the public whom the official serves. The statute requires that the board member who is covered by the institution's health benefits plan not participate in consideration of the terms or award of that contract.

Advice

¶16 The Ethics Board advises that a board member of an institution of higher education whose spouse is employed as a teacher by the institution:

- (1) not participate in negotiations, discussions, or votes on the teachers' contract;
- (2) may vote on the institution's budget if the board has already entered into a contract that establishes teachers' salaries and benefits for the period covered by the budget but may not vote on the budget if the budget will substantially affect teacher salaries or benefits;
- (3) not participate in negotiations, discussions, or votes on the terms of another union's contract if it will affect the terms of the teachers' contract in other than an inconsequential manner;
- (4) may participate in a disciplinary or similar matter affecting another teacher if the action does not result in a board member's spouse obtaining a substantial benefit or anything of substantial value from such decision;
- (5) may participate in decisions affecting teaching load, teaching hours, and other general policy decisions if the effect on the board member's spouse does not differ materially from the effect on other teachers; and
- (6) if the board member is covered by the institution's health benefits plan, not participate in consideration of the terms of that plan or the award of the institution's health benefits contract.

¶17 The Ethics Board further advises that abstention does not avoid a conflict, it simply mitigates it. If the above restrictions materially impede the board member's ability to fulfill his or her responsibilities as a public official, or conflicts are frequent and continuing, the member should consider withdrawing from the position so that another appointee may participate fully in the activities of the board.