

MEMORANDUM

To: Superintendent Carl Carlson

From: Walter J. Zukowski

Date: November 22, 2017

ATTORNEY-CLIENT PRIVILEGED
VIA EMAIL

Re: Board Vacancy Matter
Our File No. 0263

I do not believe that the recent seating of the Board Member at issue was an illegal or void act.

Factual Background

Based upon information provided by the District, it is my understanding that Putnam County Schools constitute a Community Unit School District organized before January 1, 1975. Further, the District covers land in certain Congressional Townships which have fewer than 100 residents. The District does not have at least 75% of the District population living within one Congressional Township. The District is approximately 143 square miles in area. Currently, three (3) Board Members reside within one (1) of the District's Congressional Townships.

A then sitting Board Member, Ms. Kristina Popurella submitted a resignation. She does not reside in the Congressional Township from which three (3) other Board Members reside. The Board notified residents of the entire geographic area covered by the District, including residents of the Township from which Ms. Popurella resided, of the vacancy and requested that interested individuals submit an application. Five (5) individuals so applied. None of those individuals reside in the same Township as Ms. Popurella.

The Board considered all applications and adopted a Motion to appoint Mr. Jason Judd to fill the vacancy.

Analysis - Statutes

In this particular situation criteria and restrictions appear to be primarily found in state statutes and Board Policy.

The Illinois School Code contains several relevant provisions:

Whenever a vacancy occurs, the remaining members shall notify the regional superintendent of that vacancy within 5 days after its occurrence and shall proceed to fill the vacancy until the next regular school election...Should they fail so to act, within 45 days after the vacancy occurs, the regional superintendent of schools under whose supervision and control the district is operating...shall within 30 days after the remaining members have failed to fill the vacancy, fill the

vacancy as provided herein. Upon the regional superintendent's failure to fill the vacancy, the vacancy shall be filled at the next regularly scheduled election. Whether elected or appointed by the remaining members or regional superintendent, the successor shall be an inhabitant of the particular area from which his or her predecessor was elected if the residential requirements contained in Section 10-10.5 or 12-2 of this Act apply.

105 ILCS 5/10-10

It is my understanding that the Board notified the Regional Superintendent consistent with the requirements of the statute set forth above. Additionally, it is my understanding that the Board took action to fill the vacancy within the 45 day period contemplated by the statute.

- (1) if the territory of the district is greater than 2 congressional townships or 72 square miles, then not more than 3 board members may be selected from any one congressional township, except that congressional townships of less than 100 inhabitants shall not be considered for the purpose of this mandatory board representation;
- (2) if in the community unit school district or combined school district at least 75% but not more than 90% of the population is in one congressional township, then 4 board members shall be selected from the congressional township...

105 ILCS 5/10-10.5

It is my understanding that the District comprises more than 72 square miles and, consistent with subsection (1) set forth above, that no more than three (3) Board Members residing in the same Congressional Township would be seated as a result of the Board action to fill the vacancy. Subsection (2) which provides that there "shall" be four (4) Board Members from one Congressional Township if 75% of the population resides in one Congressional Township is inapplicable to the current situation. Thus, since the appointment would not cause the District to have more than three (3) Board Members from one Congressional Township and the requirement of four (4) Board Members is inapplicable, it is believed the "residential" requirements of Section 10-10 as clarified by Section 10-10.5 are satisfied.

...The successor shall have the same type of residential qualifications as his or her predecessor and, if the residential requirements contained in Section 10-10.5, 11E-35, or 12-2 of this Code apply, the successor, whether elected or appointed by the remaining members or regional superintendent, shall be an inhabitant of the particular area from which his or her predecessor was elected.

105 ILCS 1/10-11

The residential qualifications described in Section 10-11 are set forth in Section 10-10:

...Each member, on the date of his or her election, shall be a citizen of the United States of the age of 18 or over, shall be a resident of the State and the territory of

the district for at least one year immediately preceding his or her election, shall be a registered voter as provided in the general election law, shall not be a school trustee, and shall not be a child sex offender...

The District believes Mr. Judd satisfies the requirements set forth above. The provision of 10-11 making reference to the Board Member also being a resident of the "particular area" from which his or her predecessor was elected "if" the residential requirements of Section 10-10.5 are applicable, are "not" believed to be applicable for the reasons described previously. Thus, it is believed that Mr. Judd has satisfied all of the "statutory" criteria to be seated as a Board Member.

Analysis – Policy

I also understand that a question has arisen about the Board action because of certain language within District Policy 2:70, specifically the sentence that reads "The successor shall reside in the Congressional Township from which his/her predecessor was elected." This District initiated self-imposed language, which does not appear within the otherwise-similar model PRESS Policy promulgated and recommended by the Illinois Association of School Boards, would, to the extent it is enforced, create a more restrictive residency requirement than the standard found within the Illinois School Code.

While courts have established that it is permissible "in principal" for a school board to implement rules that are generally more restrictive than those set forth within State legislation (see, e.g. Wheaton v. Loerop, 926 N.E.2d 1004 (2nd District, 2010) Illinois school districts do not have the legal authority to enforce restrictions upon the ability of District residents to serve on the Board that would be otherwise illegal in terms of how they are applied. Such restrictions can raise issues of both arbitrariness and equal protection under the law. The restriction contained in District Policy could, when applied, create a risk of legal challenges going forward to the extent a district resident asserts that his or her access to Board membership has been unreasonably restricted by the provision.

While the policy in question states that the appointed Board Member "shall" be from the same Congressional Township as the previous Board Member, it is my understanding that the Board endeavored to satisfy this provision, but determined that doing so was not possible because no resident applied from the Congressional Township at issue. Under such a circumstance it is necessary to consider whether or not the word "shall" is, in this context, a mandatory or merely directory term. If the term in this context is merely directory (as opposed to mandatory) then the Board's decision to disregard this provision would not call into question the validity of its seating of Mr. Judd.

The Third District Appellate Court, which has jurisdiction over the District, discussed the distinction between the different ways in which the word "shall" is used. The Court, in Frankfort Public Library District v. Mokena, 511 N.E.2d 997 (3rd District, 1987) shed light on when the word "shall" is intended to carry a mandatory meaning and when it is used with an advisory/directory connotation. The Frankfort Court held that "A statute [using the term "shall"]

is merely directory only if no advantage is lost, no right is destroyed, and no public or individual benefit is sacrificed."

In the present case, it appears that the provision at issue is intended to be directory. Since the Board attempted to fill a vacancy with a resident of the same Congressional Township as that of the predecessor Board Member, no "...advantage is lost, no right is destroyed, and no public or individual benefit is sacrificed". Only after it was determined that no applicants were residents of the Township in question did the Board consider other candidates to fill a position.

This policy interpretation is reinforced by the fact that the provision in question is only applicable to the Board – no such restriction would apply with regard to any Board Member appointed by the Regional Superintendent. Further, it could be argued that the Board filling of the vacancy would provide a public benefit as opposed to allowing the position to be filled by someone from outside of the District (ROE) or by allowing the position to remain vacant.

Conclusion

We believe that the District complied with the statutorily mandated requirements of the School Code. It attempted to comply with the self-imposed language of its policy. Given the preference of the statutes to fill the position, unless it can be shown that private individuals or the public at large is actually harmed, it appears that the Board of Education legally seated Mr. Judd.

I hope that this review is of assistance to the District. If you have any further questions regarding this matter or my review of this matter, please do not hesitate to contact me.