

July 27, 2009 Utilization of Hearing Officers by Local School Boards for Termination and Discharge Hearings Held Pursuant to the School Personnel Act

The Honorable Ernest H. Chavez
New Mexico State Representative
1531 Severo Road SW
Albuquerque, NM 87105

Re: Opinion Request – Utilization of Hearing Officers by Local School Boards for Termination and Discharge Hearings Held Pursuant to the School Personnel Act

Dear Representative Chavez:

You have requested our advice regarding whether an attorney who represents a school district may serve as hearing officer at a termination hearing requested by a tenured school district employee under the School Personnel Act, NMSA 1978, Sections 22-10A-24 to -27. We understand that school districts usually contract with an outside attorney for representation. According to your letter, the attorney's duties, in many districts, include advising the superintendent in disciplinary matters leading up to a termination, assisting the superintendent in investigating and drafting the employee's notice of termination and, if the employee appeals the decision, helping the school board conduct a hearing and prepare written documents sustaining or overturning the superintendent's decision. You specifically ask whether the attorney's actions comply with the School Personnel Act, due process under the state and federal constitutions, and with an attorney's ethical obligations. We conclude, based on the applicable statutes, case law and other legal authorities, that the attorney's actions create conflict of interest issues under the School Personnel Act and the attorney's code of ethics and may violate constitutional due process principles.

The School Personnel Act (the "School Act") provides that a local school board or governing authority^[1] may terminate an employee with three or more consecutive years of service for just cause by giving the employee a notice of termination. See Section 22-10A-24. The school district superintendent is charged with providing written grounds for the action. See id. The employee may request the opportunity to make a statement to the local school board. Id. At an informal hearing, the superintendent presents his case that just cause exists to terminate the employee and the employee presents his or her case. According to the School Act, the "school board may consider only such evidence as is presented at the hearing...." Id. § 22-10A-24(F). Within five working days from the conclusion of the hearing, the local school board is required to notify the "employee and the local superintendent" of its decision in writing. Id.

In the scenario you presented in your opinion request, the same attorney who advised the superintendent with regard to the termination notice also represents the board at this informal hearing by acting as hearing officer and drafting the board's final decision. Further, since the attorney/hearing officer is legal counsel to the board, the attorney provides the board with legal counsel following the hearing and during the deliberations

and prepares a written decision to implement the board's final determination. The attorney's role does not end after the issuance of the board's written decision because an employee can ask for a de novo appeal to an independent arbitrator. Id. § 22-10A-25. The School Act provides that the school board and the employee have "the right to be represented by counsel" at this second hearing. Id. § 22-10A-25(F).

Rules of Professional Responsibility

NMRA 16-112(A) prohibits an attorney from representing "anyone in connection with a matter in which the lawyer participated personally as a judge or other adjudicative officer" absent consent by all the parties after disclosure. NMRA 16-107(B) prohibits an attorney, absent client consent, from representing one client if the representation materially limits his responsibilities to another client. These rules may be implicated when the attorney acts on behalf of the superintendent, then acts as hearing officer at the informal hearing and then appears on behalf of the board before the independent arbitrator. There are differing opinions on whether these actions are absolutely prohibited, but they do raise issues of an appearance of impropriety. See State Bar Opinion 1985-7 (Committee, looking to standards of judicial conduct for guidance, held Administrative Hearing Officer should be precluded from appearing before his own forum to avoid an appearance of impropriety). Cf. State Bar Advisory Opinion 1987-10 (an attorney who acted as hearing officer during a rule hearing and made two procedural rulings did not implicate Rule 16-112(A) when he considered the offer to act as appellate counsel as the rule was appealed.)

The facts presented in your letter create a tension between the attorney's responsibilities to the superintendent and the board. Therefore, we conclude that to avoid the appearance of impropriety and the possibility that the school board's decision may be overturned by an appellate court, the attorney should, at least, refrain from acting as hearing officer at the informal proceeding and the above-mentioned roles should be split among two different lawyers. To ensure that a tenured school district employee receives a fair termination hearing, it is important that the school board be insulated from the disciplinary action initiated by the superintendent. In essence, the board and superintendent can be viewed as separate clients for purposes of the Rules of Professional Responsibility.

Constitutional Due Process

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Matthews v. Eldridge, 424 U.S. 319, 333 (1976). Procedural due process protections apply to administrative proceedings. New Mexico Bd. of Veterinary Medicine v. Riegger, 2007-NMSC-044, ¶14, 142 N.M. 248, 257. These due process protections require "a fair and impartial hearing before a trier of fact who is disinterested and free from any form of bias or predisposition regarding the outcome of the case." U.S. Const. amend. XIV, § 1; N.M. Const. art. II, § 18; Riegger, at ¶12, 142 N.M. at 257. See also Reid v. N.M. Bd. of Optometry, 92 N.M. 414, 589 P.2d 198 (1979) (State may not deprive an individual of property rights absent a trial before a

fair and impartial tribunal). The school board's attorney acting as hearing officer in an adjudicatory proceeding (albeit an informal one) after advising the superintendent on the underlying disciplinary matter undermines the "fundamental principles of justice and procedural due process." Bd. of Educ. of Melrose Mun. Schools v. N.M. State Bd. of Educ., 106 N.M. 129, 131, 740 P.2d 123, 126 (Ct. App. 1987) (internal citations omitted) (an adjudicatory hearing must conform to fundamental principles of justice and procedural due process including the requirement that the trier of fact be free from bias or interest). At the very least, there is an appearance of an improper conflict of interest when the same attorney is involved in prosecuting the terminated employee as well as advising the public body doling out the discipline. See Gonzales v. McEuen, 435 F.Supp. 460, 465 (C.D.Ca. 1977) (dual role of attorney compels conclusion that due process is violated and bias is presumed to exist). We conclude that the scenario you presented raises legitimate concerns about whether an employee who is terminated under the procedures you describe is afforded due process under the federal and state constitutions.

Your requested a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

MONA VALICENTI
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] As used in the School Act and for purposes of this letter, the terms "local school board" and "governing authority" are interchangeable.