

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>August 11, 2003</p>	<p>No. I03-005 (R03-023)</p> <p>Re: Conflicts of Interest</p>
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TO: Linda Harant Good
Office of the Pinal County Attorney

Questions Presented

1. Must a member of a school district governing board, who has a conflict of interest relating to decisions regarding services provided to the district by the natural gas utility company that employs him, refrain from participating in any discussions regarding the choice of power to schools in areas that are not served by the member's employer?

2. Must the board member refrain from participating in general study sessions concerning the choice of power to be provided to district schools at a time when a decision relating to provision of utility services for a particular school is not pending before the board?

Summary Answer

A school district governing board member who has a conflict of interest relating to decisions regarding services provided to the district by the natural gas company that employs him must refrain

from participating in discussions relating to the choice of power in areas of the district that are not served by the member's employer. The board member must also refrain from participating in general study sessions concerning the choice of power for future schools. This prohibition on participating in discussions applies unless it is reasonably foreseeable that the issue of purchasing gas as opposed to electricity will not come to the governing board for action while the board member's employer is a potential provider to the district.

Background

Pursuant to Arizona Revised Statutes ("A.R.S") § 15-253, you submitted for this Office's review an opinion to the superintendent of the Coolidge Unified School District ("district") addressing whether a member of a district governing board ("board"), who is an employee of a public utility that supplies natural gas to areas in the district, has a conflict of interest relating to decisions and discussions concerning the choice of power to be provided to district schools.

According to opinion submitted for review, the district has several new schools under construction or planned for construction in the next few years. The board member in question is employed by a utility that is the sole provider of natural gas in most, but not all, areas within district boundaries. Before this board member was elected, the board took action to require two new schools to be designed as all-electric schools. The board member has now requested a board study session concerning the choice of electricity or natural gas as sources of power to be used in future school construction.

Your opinion concluded that the board member has a conflict of interest in decisions pending before the board regarding on the choice of power to serve schools in the district that are located in an area the board member's employer serves and advised that the board member must recuse himself

from these decisions. The opinion submitted for review also concluded that the board member could participate in discussions concerning the choice of power for schools that are not in an area served by the board member's employer and in general study sessions regarding the choice of power when there is no decision pending before the board.

Analysis

Pursuant to A.R.S. § 15-253, this Office declines to review your conclusion that, based on the facts presented to you, a member of the school district governing board has a conflict of interest in matters pending before the board relating to the choice of gas or electric power for schools in an area served by the board member's employer. This Office, however, revises the analysis and conclusions in the opinion submitted for review concerning the ability of that board member to participate in (1) discussions concerning the choice of power for schools that are not in an area served by the board member's employer and (2) general study sessions regarding the choice of utilities when there is no decision pending before the board. The analysis in this Opinion assumes that the board member has the conflict of interest you have identified relating to pending board matters.

Pursuant to A.R.S. §§ 38-502 and -503, a conflict-of-interest analysis must be applied to the questions relating to discussions about schools in areas where the member's employer does not provide service and general study sessions relating to utility services. The board member has a conflict of interest on any matter in which he has a "substantial interest." A.R.S. § 38-502(11). A determination of whether there is a substantial interest must be made on a "case-by-case" basis, which requires a determination of the board member's proprietary or pecuniary interest in the action. A.R.S. § 38-503; *see also* Ariz. Att'y Gen. Ops. I85-052 and I80-139. If the board member will benefit directly or indirectly from the fact that his employer may obtain business from the district for

its new schools, the board member has a substantial interest. A.R.S. § 38-502(11).¹ If the board member has a conflict of interest, it is not enough that he refrain from voting on a matter; he is also required to “refrain from participating *in any manner*” in a decision. A.R.S. § 38-503 (emphasis added).

The statutes addressing conflicts of interest of a public officer do not, by their express terms, prohibit discussion only on “pending” matters. A.R.S. §§ 38-502 through -511. The prohibition against participating in a decision or a contract, sale, or purchase in which a board member has a substantial interest applies with equal force to participating in any way in the process leading up to a decision. *See* Ariz. Att’y Gen. Op. I83-111 (an employee with a conflict of interest “must not make recommendations, give advice, or otherwise communicate in any manner with anyone involved in the decision-making process”); *see also* Ariz. Att’y Gen. Op. I82-004.²

Determining whether the board member may participate in a general study session concerning the merits of natural gas requires an analysis of the purpose of the discussion and the likelihood that the board will be making a decision in the future on the topic discussed. The connection between the discussion and possible board action should not be so narrowly construed to permit a board member to participate in a general discussion of the merits of natural gas merely because a decision is not pending, if such a decision may come before the governing board later. It is reasonable to anticipate that even though a decision about a particular school served by the member’s employer is not pending

¹A "substantial interest" is "any pecuniary or proprietary interest, either direct or indirect, other than a remote interest." A.R.S. § 38-501(11). A "remote interest" is one of ten interests enumerated by statute. A.R.S. § 38-502(10).

²In addition to the recusal, the board member must "make known . . . [the substantial] interest in the official records" of the school district. A.R.S. § 38-503(A), (B). The district must "maintain for public inspection in a special file all documents necessary to memorialize all disclosures of substantial interest made known." A.R.S. § 38-509.

before the board, any general discussion would revolve around the relative merits of using gas power versus electric power, or a combination of both, versus relying exclusively on electric power. These discussions could potentially influence other board members when making future decisions that directly affect the board member's utility company. The communications would then constitute improper recommendations, advice or other communications made to the decision makers on future matters. Thus, if the board member has a conflict when there is a pending decision about schools that his utility company could potentially serve, he is also prohibited from participating in a general study session with fellow board members concerning choice of power when a matter is not pending, unless it is reasonably foreseeable that the issue will not come before the board for action while the board member's employer is a potential provider to the district.³

The same principles apply to the analysis of whether the board member may participate in discussions relating to the choice of power in areas of the district that are not served by the member's employer. These discussions are likely to involve the relative merits of one type of power over another. Although the immediate decision before the board may not directly benefit the board member's employer, these discussions, like the study group discussions, provide the opportunity to influence board members concerning future matters that would directly affect the board member's employer. Section 38-503, A.R.S., broadly prohibit participating "in any manner" in decisions in which the board member has a substantial interest. Thus, the board member must recuse himself

³Although it could be argued that the board member's expertise in this area may be of significant value, any benefit is outweighed by the essential requirement that public officers be unbiased in the performance of their duties. *See Maucher v. City of Eloy*, 145 Ariz. 335, 338, 701 P.2d 593, 596 (App. 1985) (Public officials should avoid situations where their professional or financial concerns might conflict with the unbiased performance of their duties.)

from discussions concerning the choice of power if it is reasonably foreseeable that the board will make similar decisions concerning the board member's employer.

Conclusion

A school district governing board member whose employer is a public utility that supplies natural gas to areas in the district must refrain from participating in any discussions or decisions concerning the choice of power to district schools when the board member's employer is a potential supplier. This rule applies to discussions relating to schools outside the employer's service area and to general study sessions on choice of power, regardless of whether there is a decision pending before the board, unless it is reasonably foreseeable that the issue of choice of purchasing gas as opposed to electricity will not come to the governing board for action while the board member's employer is a potential provider of services to the district.

Terry Goddard
Attorney General