



MEMORANDUM

TO: Members, New Haven Board of Education
Dr. Iline Tracey
Attorney Patricia King
Attorney Elias Alexiades

FROM: Thomas B. Mooney

RE: Authority to Investigate the Conduct of Members of the Board of Education

DATE: January 10, 2021

I. INTRODUCTION:

At the meeting of the New Haven Board of Education on December 14, 2020, the Board voted to request our legal opinion on the following question: “whether the investigation of elected board member Darnell Goldson’s conduct at board meetings followed by-laws, Robert’s Rules of Order, guidelines and procedures.” By email dated December 22, 2020, Assistant Corporation Counsel Elias Alexiades conveyed that request to me. In the following, I will provide the reasoning for my legal opinion that (1) Dr. Tracey, as Superintendent and chief executive officer of the Board of Education, had the authority to initiate the investigation in question through outside counsel, and (2) the scope of the formal investigation by Dr. Tracey through outside legal counsel was broader than appropriate. Dr. Tracey has the right and responsibility to investigate (through outside counsel or otherwise) whether conduct, by a Board member is violating or has violated the legal rights of a district employee. However, further investigation of whether a Board member’s conduct at Board meetings violates “any provision of the City Charter, Ordinance, section of the City’s Code of Ethics, or BOE by-laws” is not the responsibility of the Superintendent, but rather of the Board itself.

II. BACKGROUND:

On March 23, 2020, Phillip Penn, Chief Financial Officer of the Board of Education, wrote an email to Dr. Tracey setting forth a complaint against Mr. Goldson, as follows:

During tonight’s Board of Education meeting, Board member Darnell Goldson accused Attorney Michael Pinto and me of making decisions regarding the use of outside counsel on the basis of race.

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As a result of that outrageous accusation in a public meeting, my personal and professional reputation has been damaged by Mr. Goldson. Thus, I have no choice but to raise this formal harassment complaint against him.

When Attorney Alexiades advised us of this complaint, we responded that it would not be advisable to have Shipman & Goodwin investigate this complaint because we represent the Board of Education as a whole. Our investigation of a complaint against an individual member of the Board of Education would have been awkward at best and would possibly be a conflict of interest, given our duty to represent all members of the Board. We understand that the Office of the Corporation Counsel reached the same conclusion as to its undertaking this investigation. We later learned that by letter dated June 29, 2020, then-Chief Operating Officer Michael Pinto, acting on behalf of the Superintendent, retained the firm of Tinley, Renehan & Dost LLP for the purpose of investigating Mr. Penn's complaint of harassment against Mr. Goldson.

The engagement letter dated June 29, 2020 described the engagement as providing "general employment law advice, including investigation of allegations of misconduct, such as harassment, relating to employees." The letter stated further that "Upon finalizing the engagement agreement, we will confer on the special initial tasks to be undertaken." Attorney Amita Rossetti of Tinley, Renehan & Dost LLP acknowledged receipt of the engagement letter by letter dated July 1, 2020, stating in that letter that she and Attorney Tinley would be working on this matter.

By email to Attorney Rossetti dated July 28, 2020, after consultation with Board President Rivera, Assistant Corporation Counsel Alexiades described the scope of the engagement as follows:

The specific charge for the Penn matter is for legal advice with regard to:

1. A factual investigation of the circumstances underlying the complaint by BOE CFO Phillip Penn of harassment by BOE member Darnell Goldson;
2. An opinion as to whether the conduct found to have been committed constitutes harassment or violates any federal or state statutory or common law obligation of the City, or any provision of the City Charter, Ordinance, section of the City's Code of Ethics, or BOE by-laws;
3. An assessment as to the City's obligation to protect its employee from the conduct and if the City is so obligated, what steps the City should take to fulfill its obligation.

In that email, Attorney Alexiades invited comments, but I am not aware of any further discussion regarding the scope of the engagement. In a Progress Report to Dr. Tracey dated October 10, 2020, Attorney Rossetti restated her understanding of the engagement as follows:

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The issues under consideration, include but are not limited to the following:

- whether the conduct of Mr. Goldson constitutes harassment;
- whether there are any possible defenses to the conduct in question;
- whether the conduct is violative of any state or federal statutes and/or the City Charter, local ordinances and/or Board of Education Bylaws or Code of Ethics.

Finally, in her Investigation Report dated October 26, 2020 (hereinafter “the Report”), Attorney described her task as follows:

To determine whether the complaint is substantiated and what, if any, action should be taken in response. Necessary components of the work entailed the following;

A factual investigation of the circumstances underlying the complaint by BOE CFO Phillip Penn of harassment by BOE member Darnell Goldson;

An opinion as to whether the conduct found to have been committed constitutes harassment or violates any federal or state statutory or common law obligation of the City, or any provision of the City Charter, Ordinance, section of the City’s Code of Ethics, or BOE by-laws;

An assessment as to the City’s obligation to protect its employee from the conduct and if the City is so obligated, what steps the City should take to fulfill its obligation.

This description of the specific elements of the engagement conform to the proposed charge set forth in Attorney Alexiades’ email dated July 28, 2020, referenced above.

III. ANALYSIS

The question posed by the Board, “whether the investigation of elected board member Darnell Goldson’s conduct at board meetings followed by-laws, Robert’s Rules of Order, guidelines and procedures,” must be answered in the context of the complaint that was being investigated. In his complaint, Mr. Penn alleged that Mr. Goldson’s statements about outside counsel contracts on March 23, 2020 constituted illegal harassment: “Board member Darnell Goldson accused Attorney Michael Pinto and me of making decisions regarding the use of outside counsel on the basis of race.” Mr. Penn then stated that he had “no choice but to raise this formal harassment complaint against [Mr. Goldson].

In the following, I offer my opinion that it was appropriate for the Superintendent to investigate whether Mr. Goldson’s statements on March 23, 2020, were illegal harassment of Mr. Penn. However, the further investigation of whether Mr. Goldson’s statements that evening violated “any provision of the City Charter, Ordinance, section of the City’s Code of

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Ethics, or BOE by-laws” was not consistent with the Board Bylaws.¹ Investigation of whether a Board member’s conduct violates or has violated Board Bylaws is properly the responsibility of the Board of Education itself, not the Superintendent.

A. Investigation of Potential Illegal Harassment.

Harassment is illegal under state and federal law when unwelcome conduct against another person is based on a protected characteristic (such as race or gender), and “(1) enduring the unwelcome conduct becomes a condition of continued employment, or (2) the conduct is severe and pervasive enough to create a work environment that a reasonable person would find intimidating, hostile or abusive.” Report, at page 41, *quoting* EEOC Guidance.

The employees of the New Haven Public Schools, as all other employees, are protected by law from being the victims of harassment as defined above. In some circumstances, an employer may be liable for discrimination against employees by third parties, typically because they did not protect the employee from such discrimination. *See, e.g.*, cases cited in footnote 57 of the Report,² *Summa v. Hofstra University*, 708 F.3d 115 (2013).

Dr. Tracey therefore acted appropriately in investigating the charge of harassment, which Mr. Penn claimed was related to his race. To be sure, we did not find any cases imputing to a board of education discrimination against a school board employee based on comments or actions of a board member. However, responsibility for discrimination by third parties has been imputed to the employer in analogous situations. In any event, it appears that all agree that investigation of the allegation of illegal harassment was justified. *See* “Goldson Preliminary Response to the Tinley Report 12/14/20,” at 3 (“It was understandable that if the Superintendent received a valid complaint of harassment, it should be investigated. It was investigated and it was dismissed. That should have been the end.”).

Specifically, the investigation of Mr. Penn’s complaint required consideration of whether the statements made by Mr. Goldson at the Board meeting on March 23, 2020 constituted illegal harassment as defined above. The Report addresses that question on page 42. Based on her conclusion that Mr. Goldson’s comments cannot be imputed to the Board, Attorney Rossetti declined to offer an opinion on whether Mr. Goldson’s statements about the contracts for outside counsel on March 23, 2020 constituted illegal harassment of Mr. Penn:

¹ The Board Bylaws incorporate Robert’s Rules of Order, and otherwise serve as the guidelines and procedures that govern Board operation, and to answer the question posed by the Board, we may simply ask whether the investigation of Mr. Goldson’s conduct at Board meetings was consistent with Board Bylaws.

² “57. *See Bolick v. Alea Grp. Holdings Ltd.*, No. 3:03CV165 (PCD), 2005 WL 8166988, at *8 (D. Conn. Mar. 30, 2005) citing *Malik v. Carrier Corp.*, 202 F.3d 97, 105 (2d Cir. 2000) for the proposition that “[a]n employer’s investigation of a harassment complaint is not a gratuitous or optional undertaking....” *See also Flanagan v. Ashcroft*, 316 F.3d 728,730 (7th Cir.) (2003) (affirming dismissal of a discrimination claim arising from the employer’s decision to investigate employee for harassment because employer was obligated to do so); *Lipscomb v. Winter*, 577 F. Supp. 2d 258, 277 (D.D.C. 2008), *aff’d in part, remanded in part*, No. 08-5452, 2009 WL 1153442 (D.C. Cir. Apr. 3, 2009).”

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Therefore, even pursuant to federal law, harassment has not been defined in a civil context outside of the context of conduct by and/or otherwise attributable to an employer. Given that we find the conduct at issue is conduct of a single member, i.e. not properly attributable to the employer, it would be inappropriate to opine whether the conduct constitutes “harassment” as defined in the employment law context.

To the extent that the Report addresses whether the alleged harassment violated Mr. Penn’s legal rights, the investigation was appropriate. In her responsibility for the supervision of the school district, the Superintendent has the right and responsibility to determine whether the legal rights of a Board employee have been violated, by a Board member or otherwise.

B. The Board Itself is Responsible for Investigating Whether the Conduct of its Members Violate the Board Bylaws.

The question of whether conduct by a Board member violates “any provision of the City Charter, Ordinance, section of the City’s Code of Ethics, or BOE by-laws” is very different from the question of whether conduct of a Board member has violated the legal rights of a Board employee. The Report does not cite any provisions of the City Charter or Ordinances that were relevant to the investigation. Report, at pages 32-33. Moreover, the Report states that the City’s Code of Ethics was incorporated into the Board Bylaws. Report, at page 39. Accordingly, the question posed by the Board on December 14, 2020, boils down to asking whether it is appropriate for the Superintendent, acting through outside counsel, to investigate whether Mr. Goldson’s statements on March 23, 2020 violated Board Bylaws.³ I conclude that such further investigation was not appropriate. Investigating whether a Board member has violated the Board Bylaws is properly the responsibility of the Board of Education itself, not the Superintendent.

In the following, I will explain that conclusion by excerpting and commenting on the applicable Board Bylaws and policies.

- Board Policy 2131:

The Board of Education shall elect and fix the term of office and salary of a Superintendent of Schools, who serves as the chief executive officer of the Board and has authority and responsibility for the supervision of the school system.

NOTE: Responsibility for the supervision of the school system includes taking appropriate action to protect Board employees from illegal conduct. However, the Superintendent’s responsibility for supervision of the school system does not otherwise include oversight of Board member conduct. Rather, the actions of the Board members are subject to review by the Board of Education and its members, not the Superintendent. *See* Bylaw 9271(j)(f), Bylaw 9325.1, discussed below.

³ See note 1.

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- Board Policy 4104:

Any employee . . . who feels that he/she has been the victim of illegal discrimination may file such a complaint with his/her immediate supervisor The Superintendent of Schools and the Chairperson of the Board shall be notified immediately of all complaints, and the Superintendent of Schools shall notify the Board of Education that such allegations have been lodged at its next regular meeting.

NOTE: The Board members were notified of the complaint in the course of the investigation, but notification of Mr. Penn's complaint was not provided to the Board at the next Board meeting following Mr. Penn's complaint. This Policy does not contemplate a complaint against a Board member, and the Board may wish to consider whether it interprets this policy to apply to the instant situation.

- Bylaw 9271(j)(f) Code of Ethics:

(f) The leadership of the Board of Education – the President, Vice President and Secretary - shall determine and recommend to the Board of Education, the appropriate action concerning any member of the Board of Education, to be imposed consistent with these Bylaws, applicable federal and state laws, court decisions, policies, and the rules of the Board of Education.

NOTE: The Code of Ethics is set forth in this Bylaw, and it provides that the Board leadership “shall determine and recommend” action to the Board of Education with regard to one of its members. Its application may be limited to violations of the Code of Ethics, though perhaps it can be read to apply to Board member misconduct more broadly, as the Bylaw sets forth standards of conduct. In any event, this Bylaw is relevant to show that policing the actions of Board members is a responsibility that the Board has reserved for itself through its Bylaws.

- Board Bylaw 9325.1:

The rules contained in Robert's Rules of Order, Newly Revised shall govern the proceedings of the Board of Education in all instances in which they are consistent with the bylaws of the Board, state and local law.

NOTE: Robert's Rules of Order set forth procedures for members of a body to enforce appropriate standards of conduct. In the first instance, Board members may help each other assure appropriate conduct and decorum by raising a point of order. Robert's Rules of Order Newly Revised, 11th Edition (2011) (“Robert's Rules”), Section 23. For example, if a Board member believes that another

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Board member is violating Bylaw 9271, Standards of Conduct, Paragraph (c),⁴ in referring to other Board members or to Board employees, he or she may raise a point of order as to that alleged violation. In accordance with Robert's Rules, the Board President rules on the point of order as a matter of parliamentary procedure. Any two members of the Board who disagree with that ruling may seek review of that ruling by the appeal by one and a second by the other. In such case, the point of order is submitted to the Board as a whole for debate and decision.

Robert's Rules provides further means for the Board to police the conduct of its members if the Point of Order process does not result in compliance with the Board's rules. Section 61, Discipline of Members and Guests, sets forth procedures for maintaining order and assuring compliance with Board rules.

While a comprehensive review of the disciplinary procedures set forth in Robert's Rules is beyond the scope of this memorandum, it may be helpful to offer the following comments on procedures in Robert's Rules related to discipline of Board members:

- Such measures are uncommon and should be used only when less severe actions, such as calling the member to order or reviewing Board member conduct through a point of order has not corrected the problem. As stated in Robert's Rules: "Formal disciplinary procedures should generally be regarded as a drastic step reserved for serious situations or those potentially so. When it appears that such measures may become necessary, proper and tactful handling of the case is of prime importance. It is usually of the best interests of the organization first to make every effort to obtain a satisfactory solution of the matter quietly and informally."
- Robert's Rules distinguishes between conduct at a meeting and conduct outside of a meeting. When conduct that allegedly violates Board rules occurs at a meeting, there is no need for a trial. Rather, Robert's Rules describes the procedures as follows:

"Naming" an Offender. In cases of obstinate or grave breach of order by a member, the chair can, after repeated warnings, "name" the offender, which amounts to preferring charges and should be resorted to only in extreme circumstances. Before taking such action, when it begins to appear that it may become

⁴ Standards of conduct, Section (c), found at Bylaw 9271(k) provides: "(c) New Haven Board of Education members and New Haven Public Schools employees shall refrain from abusive conduct, personal charges, or affronts upon the character, motives, or intents of other New Haven Board of Education members or New Haven Public Schools employees, or of members of the public."

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necessary, the chair should direct the secretary to take down objectionable or disorderly words used by the member. This direction by the chair, and the words taken down pursuant to it, are entered in the minutes only if the chair finds it necessary to name the offender.

Although the chair has no authority to impose a penalty or to order the offending member removed from the hall, the assembly has that power. It should be noted in this connection that in any case of an offense against the assembly occurring in a meeting, there is no need for a formal trial provided that any penalty is imposed promptly after the breach (cf. pp. 250-51), since the witnesses are all present and make up the body that is to determine the penalty.” Robert’s Rules, at 646.

The rules are different when the conduct that may result in discipline occurs outside of a Board meeting. Since the Board members who will consider whether a penalty should be imposed on a Board member did not witness the conduct in question, Robert’s Rules, Section 61, contemplates that an investigation and trial should be held to determine the facts so that the Board can deliberate and impose a penalty a majority deems appropriate. Robert’s Rules, Section 63 sets forth those procedures.

- One further comment about these procedures may be helpful.
 - Robert’s Rules includes expulsion from the body among the penalties that may be imposed (only in extreme cases, of course). However, Board Bylaw 9325.1 specifies that Robert’s Rules apply “in all instances in which they are consistent with the bylaws of the Board, state and local law.” There is no authority under state law for the members of a board of education to take action to remove one of its members.

Given these Bylaw provisions, I conclude that only the Board itself should police the conduct of its members, through the progressive steps set out in Robert’s Rules. In so doing, the Board members should not view raising points of order as an antagonistic act. Rather, that preliminary step is a legitimate exercise of Board member responsibility to assure that the Board operates in accordance with its rules. By raising points of order when potential violations of Board Bylaws occur, the Board members may help their colleagues avoid the more serious actions described above.

I hope that this information is helpful to the Board and Dr. Tracey. Please let me know whether and how we may be of further assistance.