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Phoenix, Arizona 85007

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January 8, 1982

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ARIZONA ATTORNEY GENERAL

Mr. John R. MacDonald
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240 North Stone Avenue
Tucson, AZ 85701

Re: 182-004 (R81-160)

Dear Mr. MacDonald:

We have reviewed your opinion dated October 29, 1981, to the Superintendent of the Maricopa Public Schools concerning whether employment of a school superintendent's spouse restricts the decisions and actions of the superintendent. Your opinion concluded that a superintendent may not participate in decisions he makes as a superintendent concerning the employment or supervision of his or her spouse as a teacher. Your opinion also concluded that A.R.S. § 38-503 should be construed as applicable only to those authorized to make a decision and not to those who give advice or make recommendations to the decision maker or who otherwise participate in the decision-making process. The following is a partial revision of your opinion.

When a superintendent's spouse is employed as a teacher in the superintendent's district, the superintendent must make known any substantial interest¹/he or she or his or her spouse has in any decision of the school district. The disclosure must be reflected in the official records of the school district. The superintendent, moreover, must refrain from participating in any manner as a district superintendent

1. A.R.S. § 38-502.11 defines "substantial interest" as "any pecuniary or proprietary interest, either direct or indirect, other than a remote interest."

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in the decision according to A.R.S. § 38-503.B.^{2/} Decisions which a superintendent otherwise would make then must be made by the governing board of the school district or by someone else, not subject to any control or supervision by the superintendent, selected by the board to act in the superintendent's stead.

Decisions in which a superintendent's spouse may have a substantial interest are not confined to those made only by the superintendent. Section 38-503 expressly makes its requirements applicable to any decision of a school district. To construe narrowly the prohibition against participation as applicable only to those decisions which a superintendent is empowered to make is inconsistent with the statutory language that the requirements of A.R.S. § 38-503 apply to any decision of the public agency involved. Moreover, to so construe the prohibition against participation in any manner is contrary to the plain meaning of the phrase, including the definitions of participation to which your opinion refers.

Whether a superintendent's spouse has a substantial interest in a decision of the superintendent or school district generally will depend on the facts of each particular situation.^{3/} We do note that where the interest of a member of a class of persons is no greater than the interest of other

2. A.R.S. § 38-503.B reads:

Any public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.

The same requirements are imposed on a public officer or employee who has or whose relative has a substantial interest in any contract, sale, purchase or service to the public agency. See A.R.S. § 38-503.A.

3. See, generally, Atty. Gen. Op. Nos. 179-290, 175-10.

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members of that or similar classes of persons, the individual is deemed to have a remote interest, not a substantial interest. See A.R.S. § 38-502.10.J. A superintendent's spouse who is a member of the class consisting of all teachers and who has an interest no greater than the other teachers has only a remote interest which is not subject to the disclosure and abstention dictates of A.R.S. § 38-503.

Sincerely,

Bob Corbin

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Attorney General

BC/CWL/lm

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October 29, 1981

EDUCATION OPINION
ISSUE NO LATER THAN
12-31-81

11-3-81/pc
LOWE
R81- 160

Mr. Paul Kasparian
Superintendent
Maricopa Public Schools
P. O. Box 310
Maricopa, Arizona 85239

Re: Effect of Employment of School Superintendent's
Wife on Superintendent's Decisions

Dear Mr. Kasparian:

Maricopa School District has requested an opinion concerning actions necessary to comply with A.R.S. §38-501, et seq., where the Superintendent's wife is employed as a teacher in the District. A.R.S. §38-503 reads as follows:

A. Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any contract, sale, purchase or service to such public agency shall make known that interest in the official records of such public agency and shall refrain from voting upon or otherwise participating in any manner as an officer or employee in such contract, sale or purchase.

B. Any public officer or employee who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.

It is clear that under A.R.S. §38-503A and B that the Superintendent, as a public employee, must make known in the official records of the agency the fact that he or she has a substantial interest in the employment of his spouse or any other relative if that relative is to be employed.

Arizona Attorney General Opinion No. 75-10 ruled that a school board member whose relative was employed as a teacher by the district could not vote on or participate in decisions affecting teachers' salaries, teachers' fringe benefits, working conditions which have an indirect affect on the budget such as class loads, salaries and fringe benefits of other employees groups, or on the total maintenance and operation budget.

Obviously in the day-to-day operations of the schools, the superintendent has considerable decision-making power. It would be futile to attempt to make a complete list of such powers, but good examples would be evaluation of teachers, transfer of teachers, assignment of teachers, etc. In these areas, the superintendent must comply with A.R.S. §503B and not make or participate in decisions concerning his or her spouse. He must also, pursuant to A.R.S. §38-508A, notify the school board of this conflicting interest. The board must therefore assign to someone else these duties concerning the superintendent's spouse, or administer them itself.

The more important question is whether or not the second clause of each of those provisions (A.R.S. §38-503A and B) is applicable. Under Arizona law, a school superintendent, or any other District employee, has decision making power only to the extent that it is delegated to him or her by the Governing Board. The governing boards of school districts themselves in Arizona are creatures of the Legislature and have only the powers expressly or impliedly granted by the Legislature. School Districts, unlike cities, are not provided for as such in the Arizona Constitution. As stated in the case of Monahan v. School District No. 1, Clackamas County, 315 P.2d 797 (1957):

A school district, as a legislatively created entity, enjoys closer proximation to the state than to the community it serves. It is a civil division of the state and has been referred to as a corporation having the most limited powers known to the law. It is a quasi-municipal corporation separate and distinct from pure municipal corporations such as cities and towns.

56 Am.Jur.2d, Municipal Corporations, etc., §196, at page 251, states:

Unless a statute specifically provides otherwise, legislative and discretionary powers vested in the governing board of a municipality cannot be delegated by such body to the administrative officials of the municipality.

Thus, where the Legislature specifically delegates a power to the Governing Board which involves the exercise of discretion, that power cannot be delegated to the Superintendent or any other employee. As stated in 68 Am.Jur.2d, Schools, paragraph 129, page 459:

Where a statute confers upon school boards the power and duty to employ teachers, such boards cannot delegate such responsibility to the superintendent of schools, since the power to employ teachers and fix their wages is not a mere ministerial or administrative matter, in which little or no judgment or discretion is involved, but on the contrary, is a legislative or judicial power involving the exercise of considerable discretion, and hence cannot be delegated.

A.R.S. §15-443 gives the Governing Board the power to employ and fix the salaries of teachers, principals, janitors, etc. A.R.S. §15-1202 gives the Governing Board all duties concerning the budget. Arizona statutes do not as such give any power to a school superintendent except in very limited situations. Thus, school superintendents have only limited decision making power as provided by statute and properly delegated to them by the school board.

Does the language "shall refrain from participating in any manner as an officer or employee in such decision" contained in A.R.S. §38-503B disqualify the superintendent from salary negotiations or consideration of the M & O budget, as it did the board member in Attorney General Opinion 75-10. It is this office's opinion that the Superintendent does not "participate" in those decisions, and thus is not disqualified from advising the Governing Board with respect thereto. The word "participate" is defined in Black's Law Dictionary, 4th Edition, as "to receive or have a part or share of; to partake of; experience in common with others; to have or enjoy a part or share in common with others; partake; as to 'participate' in a discussion, to take a part in; as to participate in joys or sorrows." If there is any doubt about the meaning of "participate" in context, it must be resolved in favor of the Superintendent.

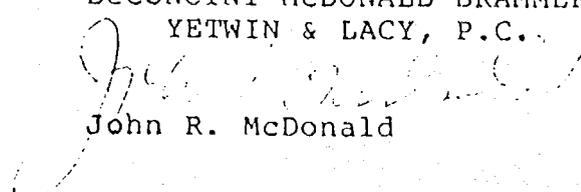
For purposes of A.R.S. §38-503, a superintendent and his spouse or other relative, as defined in §38-502, would be in exactly the same position. If the logic of Opinion 75-10 were applied to superintendents, an absurd situation would result. The superintendent's pay itself is affected by the salaries and other benefits paid to teachers and by all other budget expenditures. Accordingly, the amount of money spent for teacher salaries and maintenance and operating expenses such as utilities, transportation, etc., would disqualify the superintendent from "participating" in decisions concerning the maintenance and operating budget. It is a well settled principle of statutory construction that ambiguous provisions should be given a reasonable, rational, sensible and intelligent construction. 73 Am. Jur. Statutes para. 265, page 434. Therefore, the only reasonable interpretation is that only the members of the governing board "participate" in salary and maintenance and operations budget decision.

In summary, since the superintendent has no decision-making power with respect to salary negotiations and the maintenance and operations budget, the context of A.R.S. §38-503B indicates that it is the decision of the public agency which is being referred to, and not any personal decision or recommendation on the part of the superintendent or anyone else. Therefore, under the statutory scheme in Arizona, the Superintendent acts only in an advisory capacity in these areas and does not, within the meaning of A.R.S. §38-503, participate in the decision itself.

This opinion is being submitted to the Attorney General for review.

Yours truly,

DeCONCINI McDONALD BRAMMER
YETWIN & LACY, P.C.


John R. McDonald

JRM:rms

cc: Hon. Robert K. Corbin
Members of the Board of Education