

# Answers to FAQs Regarding Conflict of Interest and Incompatible Offices

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ICSA publishes this guidance as part of its continuing effort to provide assistance to school leaders. The responses to the FAQs represent the combined thinking of committee members. Potential conflict questions may arise that are not addressed in this guidance. **This guidance is published for informational purposes only, and is not a substitute for legal advice. For legal advice or a legal opinion on a specific question, you should consult a lawyer.**

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## 1. Board member interest in school contracts

Section 10-9 of the *School Code* (105 ILCS 5/10-9) states that a board member shall not be interested, either directly or indirectly, in his or her own name, or in the name of another person, in any contract, work, or business of the school district, or in any sales or purchases of the school district. Similar provisions are found in the Public Officer Prohibited Activities Act. 50 ILCS 105/3.

### A. Are there any exceptions to this rule?

Yes. Certain contracts may be given to a board member or his or her business if the contract is \$1000 or less, or in certain limited situations provided disclosure procedures are followed and the board member owns less than 7.5% of the business. Also, if the materials, labor, or merchandise are not available from any other source, the contract may be let to a board member provided the total amount in any one fiscal year does not exceed \$5000.

**B. What does it mean to be “interested, either directly or indirectly?”**

In *Panozzo v. City of Rockford*, 306 Ill.App. 443, 28 N.E.2d 748 (2d Dist. 1940), the court held that the interest must be “certain, definable, pecuniary or proprietary.” The court held that the interest must be financial, and must be of a personal or private nature as opposed to a general benefit to all persons or property. In considering the financial interest, or prohibited interest, the courts have basically held that it is irrelevant whether there would be any actual harm or injury, or even whether the contract may be beneficial to the governmental entity. Motive does not play a part in whether a conflict of interest exists and whether the contract is then void. The purpose of the prohibition was explained by the Illinois Supreme Court in *People v. Adduci*, 412 Ill. 621, 108 N.E.2d 1 (1952), as follows:

The interest against which the prohibition is leveled is such an interest as prevents or tends to prevent the public official from giving to the public that impartial and faithful service which he is in duty bound to render and which the public has every right to demand and receive....whether or not the interest in any given case comes within the prohibition of the statute may well become a question of construction for the court in view of all the facts and circumstances shown in the particular case.

The court’s interpretation of what constitutes a “contract” under 105 ILCS 5/10-9 and 50 ILCS 5/3 is sweeping. In *People ex rel. Madigan v. Bertrand, Jr.*, 2012 IL App (1st) 111419, the Appellate Court held that a board member could not settle a lawsuit he filed against the public board because the settlement agreement included the payment of his attorney fees, thus making it a contract in which he was financially interested.

**C. May a board member be employed by a company that does business with the district he or she serves?**

Yes, as long as a board member has no financial interest in the business other than as an employee. The *School Code* states that “[a] school board member [is not] deemed interested if the board member is an employee of a business that is involved in the transaction of business with the school district, provided that the board member has no financial interests other than as an employee.” 105 ILCS 5/10-9.

In a 2014 “unofficial” opinion, the Ill. Attorney General determined that a board member’s employment must be at a *for-profit* business that operates as a traditional commercial enterprise. In that case, a school board member was determined to be in violation of 105 ILCS 5/10-9 because she was employed at a special education cooperative to which her board’s school district was a member.

**D. May a board member who is appropriately licensed work as a substitute teacher for the district where he or she is a board member?**

Yes, but only in limited situations. Working as a substitute is a contract for services. As such, it is analyzed under the statutory exception requiring: (1) a contract to be approved by majority vote of the board; (2) the amount of the contract to not exceed \$1000 and, in the aggregate, to not exceed \$2000 per fiscal year, except when the service is not available from any other source, the aggregate amount in the same fiscal year to not exceed \$5000; (3) the board member to publicly disclose the nature and extent of his or her interest before or during deliberations; and (4) the interested member to abstain from voting on the contract. The potential of a common law conflict may exist, however, if the board member is called upon to vote on the rate of compensation to be paid to substitute teachers. See also the discussion at 2. B. below.

**E. Can the spouse of a board member who owns his or her own business be awarded a contract with the school district?**

This probably would not be a conflict so long as the board member had no ownership or financial interest in the business. See Sections 3 and 9 below.

**F. May the school district purchase property from the spouse of a board member?**

The answer to this question could be very fact-specific. Such a purchase could probably be made so long as the board member does not have any ownership or proprietary interest in the property being purchased, but a violation could occur depending on how title to the property in question was held.

**G. Can a board member who owns a local business provide free services to the district? Example: A board member owns a printing business and offers to print athletic programs at no cost to the district.**

A gift would not be deemed a contract. Thus, so long as there is nothing of value coming to the board member, and the service is in fact free, then it does not appear that there is a conflict.

**H. If a conflict exists, can a board member merely abstain from voting? Does it make any difference if the contract is awarded pursuant to a public bid?**

Merely abstaining from voting does not alone cure a statutory conflict of interest. If a conflict exists, it does not make any difference if the contract is fair or even favorable to the district, or if it was awarded pursuant to a public bid.

**I. What are the penalties or consequences if any of these provisions are violated?**

A board member convicted of violating provisions of the applicable statutes would be guilty of a Class 4 felony and would be removed from office. The contract is also voidable by the court. 50 ILCS 105/3.

**2. Employment while a board member**

**A. May an individual run for election as a school board member for the district where he or she is employed?**

Yes. If elected, the individual may need to resign from district employment to comply with the laws defining prohibited interests as described below.

**B. May an individual be employed by a school district for which he or she serves as a school board member?**

A school board member may not be employed by the district he or she serves unless the pay is less than the statutory contract limit and other requirements are met.

Two laws address this question: the *School Code* and the Public Officer Prohibited Activities Act. The *School Code* prohibits a school board member from having an interest in a contract with the district he or she serves. Employment is a contractual relationship even if the individual does not have an individual employment agreement. An exception to this rule exists when the contract amount does not exceed \$1000 or the award of the contract does not cause the aggregate amount of such contracts to the same individual to exceed \$2000 in the same fiscal year, or \$5,000 in the same fiscal year if the labor or materials to be provided are not otherwise available in the district. 105 ILCS 5/10-9(c).

The Public Officer Prohibited Activities Act prohibits a governing body member from being "in any manner financially interested directly in his own name or indirectly in the name of any other person, association, trust, or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote." 50 ILCS 105/3. Exceptions to this prohibition are similar to the exceptions in the *School Code*. Read together, the *School Code* and the Public Officer Prohibited Activities Act allow a board member to be employed by the district he or she serves if all of the following conditions are met:

- (1) The award of the contract is approved by a majority vote and the board member abstains from voting;
- (2) The contract (employment is a contractual relationship) amount does not exceed \$1,000;
- (3) The award of the contract would not cause the aggregate amount of all such contracts so awarded to the same board member to exceed \$2,000 in the same fiscal year, or \$5,000 in the same fiscal year if the labor or materials to be provided are not otherwise available in the district;<sup>2</sup>
- (4) The board member publicly discloses the nature and extent of his or her interest before or during the deliberations concerning the contract; and

- (5) The board member abstains from voting on the award of the contract (note that he or she is considered present to establish a quorum).

The question occasionally arises whether an employee of a special education cooperative may serve on the school board for a district that is a member of the cooperative. If the individual is deemed to be a district employee, he or she violates the conflict of interest laws. See the answer to question 1C above for more information. An attorney will analyze the entire factual context before providing an answer.

A violation of the prohibited interests section of the *School Code* or the Public Officer Prohibited Activities Act is a Class 4 felony.

### 3. Nepotism

#### A. May an individual be a board member at a school district that employs his or her spouse?

Yes. An individual's interest in a contract is not attributed to his or her spouse, provided the contract is not a mere subterfuge. Following this rule, an Illinois Appellate Court found no violation of the Corrupt Practices Act (predecessor of the Public Officer Prohibited Activities Act) when a school district employs a board member's spouse. *Hollister v. North*, 50 Ill.App.3d 56, 365 N.E.2d 258 (4th Dist., 1977).

This rule also applies in the context of the *School Code's* section on prohibited interests. It allows a board member to participate in a group health insurance program provided to a district employee if the board member is that employee's spouse or child. 105 ILCS 5/10-22.3a. This provision clearly indicates an intent to permit spousal employment.

A violation may occur if the board member actively promotes the financial interests of his or her spouse. This is a fact-sensitive inquiry; a board member should seek legal counsel before voting on anything directly related to his or her spouse, such as, a motion to hire, promote, or transfer as well as anything of a disciplinary nature.

#### B. May a board member participate in his or her spouse's insurance?

Yes. As discussed above, the *School Code* expressly permits a school board member to be the beneficiary of dependent health insurance coverage. It states:

Nothing contained in this Code may preclude an elected school board member from participating in a group health insurance program provided to an employee of the school district that the board member serves if the board member is a dependent of that employee.

105 ILCS 5/10-22.3a. There are no appellate decisions concerning whether the Illinois Public Officer Prohibited Activities Act permits this interest. However, the *School Code* provision should control because it was the latest legislative action on the topic and the most specific.

#### C. May a board adopt an anti-nepotism policy? More specifically, may a school board prohibit the hiring of a spouse and family members of sitting board members?

Yes, a board may adopt an anti-nepotism policy that prohibits hiring a spouse and family members of sitting board members. This policy may be broadened to prohibit the hiring of the spouse and family members of the superintendent and other identified employees.

State and federal law permits no-spousal hire or anti-nepotism policies. The Illinois Human Rights Act prohibits discrimination on the basis of *marital status*. As defined, *marital status* concerns an individual's *legal status* as married, single, separated, divorced, or widowed. Thus, the statutory definition of *marital status* discrimination does not encompass the *identity* of one's spouse. *Boaden v. Dept. of Law Enforcement*, 171 Ill.2d 230, 664 N.E.2d 61 (1996).

Before adopting an anti-nepotism or no-spouse policy, a board should carefully analyze benefit versus harm. Among the potential *harms* are that such a policy could reduce the applicant pool, be difficult to apply, prevent hiring of the most capable applicant if he or she is in a prohibited relationship, and burden future boards with a policy that is difficult to delete or dilute. Potential *benefits* include protecting the district against favoritism, preventing fellow board members from feeling pressured, and adding credibility to the hiring process.

Selecting job candidates based on merit is itself a powerful deterrent to nepotism. Adhering to the principle that the most qualified candidate will be selected also avoids the pitfalls of an anti-nepotism policy.

#### 4. Incompatibility of offices

##### A. Can a board member hold two elected offices at the same time?

Yes, provided the offices are not incompatible. In *Rogers v. Village of Tinley Park*, 116 Ill.App.3d 437, 441 (1st Dist. 1983), the court described incompatibility as follows:

Incompatibility is present when the written law of a state specifically prohibits the occupant of either one of the offices in question from holding the other **and, also, where the duties of either office are such that the holder of the office cannot in every instance, properly and fully, faithfully perform all the duties of the other office.** This incompatibility may arise from multiplicity of business in one office or the other, considerations of public policies, or otherwise. (Emphasis added) *People v. Haas*, 145 Ill.App. 283, 286-87 (1st Dist. 1908).

[Incompatibility] is found to be in the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties and functions which attach to them. **Incompatibility of offices exists where there is a conflict in the duties of the offices, so that the performance of the duties of the one interferes with the performance of the other.** They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper to retain both. [Emphasis added] (Internal quotations omitted).

In another appellate decision, the court held that the offices of alderman, school board member, and park district commissioner were incompatible. Said the court: "Instead of examining whether there has been an actual conflict in the offices in which a person is serving, Illinois courts look to whether there will eventually be a conflict." *People ex. rel. Alvarez v. Price*, 948 N.E.2d 174 (Ill. App. 1 Dist. 2011).

The Illinois Attorney General's office has compiled a comprehensive list of incompatible offices. Some offices found by Attorney General opinions to be incompatible with the office of school board member are: Board of Review member, City Council member, City Manager, Community College District Trustee, County Board Member, County Engineer, County Zoning Administrator, County Zoning Board of Appeals Member, Educational Labor Relations Board Member, Fire Protection District Trustee, Park District Board Member, Township Assessor, and Township School Trustee. The Attorney General's index of opinions can be found at: [www.illinoisattorneygeneral.gov/opinions](http://www.illinoisattorneygeneral.gov/opinions).

A board member may also be a city councilman, a city alderman or a village trustee if the village, city or unincorporated town has 2500 or fewer inhabitants. 50 ILCS 105/1.3.

##### B. Can a board member be employed by another public body (e.g., a park district) that may have dealings with the school district?

If the employment position is one of authority or policy making, the analysis contained in the above answer would seem to indicate that a conflict exists.

#### 5. Fiduciary duty and oath of office

##### A. Does a board of education member owe a fiduciary obligation to the school district? If so, what is that obligation?

As elected public officials, school board members hold a fiduciary position and owe duties of loyalty and good faith to their school districts. The fiduciary duty requires the board member to put the best interests of the district ahead of his or her other personal or financial interests. As the Illinois Supreme Court has noted, "The faithful performance of

official duties is best secured if a governmental officer, like any other person holding a fiduciary position, is not called upon to make decisions that may advance or injure his individual interest.” *City of Chicago v. Keane*, 64 Ill.2d 559 (1976). Moreover, in the mandated oath of office, each board member swears or affirms to faithfully discharge the duties of the office in accordance with the state and federal constitutions and laws, and to “respect taxpayer interests by serving as a faithful protector of the school district’s assets.” 105 ILCS 5/10-16.5. Training on fiduciary responsibilities is included in the list of topics on which each board member must complete training within the first year of his or her term. 105 ILCS 5/24-16a.

**B. What is the board of education member’s obligation when his or her personal or financial interests conflict with the best interests of the school district?**

The board member is expected to act in the best interest of the school district and not in his or her own personal or financial interest. When a conflict arises between the district’s interests and the school board member’s personal and financial interest, the board member should carefully review and consider his or her role in the decision. Sometimes conflict can be resolved by the board member’s abstaining from discussion and action on the matter. However, there may be occasions when the board member’s conflict of interest cannot be removed through non-participation in the decision-making process. This is addressed in Section 1.

Similarly, the board member should not use his or her position as a board member to influence the outcome of day-to-day decisions left in the administration’s hands. Use of such influence could be considered a breach of the board member’s fiduciary obligations to the school district.

**C. What are the considerations for a board member who simultaneously serves as a board member in both a high school and elementary school district?**

Lawyers disagree whether this constitutes incompatible office holding; an individual considering being on both boards should obtain a legal opinion. See Section 4. In addition to this consideration, the board member should be mindful that he or she has a fiduciary duty to both the high school district and the elementary district. If a conflict arises between the two districts, the board member should obtain guidance from legal counsel on how to best address the potential conflict.

**D. What are the consequences if a board member breaches the fiduciary duty?**

In some instances, the board member may forfeit his or her seat on the school board as a consequence of the breach. Depending upon the nature of the breach, the board member could also face legal action by the school district, a taxpayer, or a member of the public for an accounting and possible restitution. The board member could further face criminal penalties imposed by statutes, including penalties under the Gift Ban Act or the Public Officer Prohibited Activities Act.

**E. Can a board member be prohibited from participating in a closed meeting if he or she has a personal interest adverse to the district as regards the matter being discussed?**

Illinois statutes do not specifically address whether a board of education member can be excluded from a closed meeting because of a perceived conflict of interest. The Illinois Attorney General’s office has opined that a board member cannot be sanctioned in the absence of a statute authorizing such action by the board. See *Op. Att’y Gen. No. 91-001 (1991)*. Furthermore, the Appellate Court has held that school board members hold a property right in their election to the board, thus requiring due process before removal. *East St. Louis Federation of Teachers, AFT, AFL-CIO v. East. St. Louis School District No. 189 Financial Oversight Panel*, 178 Ill.2d 399, 417-18 (1997).

If because of his or her own personal or financial interests the board member cannot act in the best interest of the school district, the board member should voluntarily refrain from participation and discussion of the topic.

**F. What is the significance of the school board member oath of office?**

Board members are required to take the oath of office, administered as determined by the board, in substantially the

form set out in 105 ILCS 5/10-16.5.<sup>3</sup> In addition to fiduciary and other duties imposed by statute, the oath of office could be a basis for legal action against the school board member. Courts have found government officials liable for breach of contract for violating the oath of office. The violation of the oath of office may also be grounds for removal from office. A violation of the oath in most cases, however, is not subject to a private right of action for damages. *Collins v. Bd. of Educ. of N. Chicago Cmty. Unit Sch. Dist. 187*, 792 F. Supp. 2d 992, 999 (N.D. Ill. 2011).

Board members should carefully read the required oath of office to better understand the obligations it imposes on school board members.

#### **G. When does a seat on the board of education become vacant?**

According to the *School Code*, a school board seat is vacant if one of the following occurs during the board member's term of office: (1) death of the incumbent; (2) resignation provided to the Secretary or Clerk of the board; (3) lacking legal capacity to serve in the position; (4) no longer residing in the district; (5) conviction of certain crimes involving a violation of official oath, or conviction of a violent crime against a child; (6) removal from office; (7) a finding by a court or other competent tribunal that the election of the board member is void; and (8) no longer residing in the particular area that the school board member was elected to represent.

Other actions may lead to a vacancy under other state or federal law. For example, a vacancy occurs if a board member is convicted of having a prohibited interest in a district contract, official misconduct, or engaging in bid rigging activities. A board member may also forfeit his or her office by failing to file a statement of economic interest, accepting an incompatible office, or violating the working cash fund provisions. See *Vacancies on the Board of Education*, published on the IASB website at [www.iasb.com/law/vacancies.cfm](http://www.iasb.com/law/vacancies.cfm).

### **6. Gift ban and prohibited political practices**

#### **What does the Ethics Act prohibit?**

The State Officials and Employees Ethics Act, 5 ILCS 430/70-0.01 *et seq.* (Ethics Act), prohibits the acceptance of certain gifts by public officials and identifies prohibited political activities. The Ethics Act is a lengthy and complex law most of which does not apply to school board members. A school board should consult with its attorney for legal advice or a legal opinion concerning specific fact situations.

The Ethics Act is designed for state employees and officials but requires local governments to adopt an ordinance or resolution no less restrictive than the Act's provisions. Thus, school officials are left to figure out how to make a piece of legislation that was not designed for them, fit their situation. The enforcement provisions are particularly problematic because school boards do not have the power to adopt penal ordinances and penalties. Regardless of enforcement uncertainties, school officials should pay attention to the Act's prohibitions because violation charges are tried in the court of public opinion.

Determining what political activities are prohibited by the Ethics Act depends on three factors: the actor (board member or employee), the context (location and time), and the activity. No employee may intentionally perform any political activity during compensated time. No board member or employee may intentionally use any district property or resources in connection with any political activity (similar to the prohibition in the Election Interference Prohibition Act, 10 ILCS 5/9-25.1, that bars spending public money to advance a candidate or proposition), intentionally require any other board member or employee to perform any political activity, or award board members or employees compensation or benefits for participating in any political activity.

The Ethics Act's gift ban prohibits school officials (board members and employees) from accepting a gift from a *prohibited source* unless the gift falls within one or more of 12 exceptions to the ban. A person or entity becomes a *prohibited source* by seeking official action from, or doing or seeking to do business with, school officials, among other types of conduct described in the statute.

The 12 exceptions include receipt of educational materials, a gift from a relative or personal friend, goods or refreshments not exceeding \$75 per person in value on a single calendar day, and any item(s) from one prohibited source during any calendar year having a cumulative total value of less than \$100. The ban applies to spouses and immediate family members living with the school official.

## 7. Illinois Governmental Ethics Act

### A. What is required by the Governmental Ethics Act?

The Governmental Ethics Act requires each school board member and certain employees to annually file a verified Statement of Economic Interests. 5 ILCS 420/4A-101. A school board candidate must also file a *Statement of Economic Interests*. 105 ILCS 5/9-10; 5 ILCS 420/4A-105.

Campaign contributions are not included in the *Statement of Economic Interests*, but must be disclosed pursuant to the Election Code. 10 ILCS 5/9-1 *et seq.*

The Governmental Ethics Act provides instructions and deadlines for filing a *Statement of Economic Interests*. The required form is also posted on the Illinois Secretary of State's website [www.cyberdriveillinois.com/publications/index/home.html](http://www.cyberdriveillinois.com/publications/index/home.html). An individual must file the *Statement* upon initial appointment or employment and by May 1 of each year unless he or she has already filed that calendar year. A candidate for the school board must file a *Statement* with the county clerk and give the receipt to the county clerk or the county board of election commissioners at the time he or she files nominating papers. 105 ILCS 5/9-10. Failing to comply with the deadline or filing an intentionally false or incomplete *Statement* may subject an individual to a fine, criminal charge, and/or forfeiture of office or employment.

### B. Are items that are required to be listed in a board member's Statement of Economic Interests also prohibited conflicts of interest?

Not necessarily. The interests that must be disclosed in the *Statement of Economic Interests* are independent from the prohibited interests contained in other laws. These laws do not correlate to each other. Thus, an interest disclosed in the *Statement of Economic Interests* does not necessarily give rise to a prohibited conflict of interest.

## 8. Removal of a board member

### May a school board member be removed from office? If so, what are the procedures?

The regional superintendent of schools is authorized to remove a school board member during his or her term of office. The regional superintendent may do so if the school board member has willfully failed to perform his or her duties as a member.

If a board member fails to perform a mandatory duty, a proceeding known as *quo warranto* may be brought against the board member. If a court determines that the board member did not perform a mandatory duty, the court can impose a \$25,000 fine or oust the board member from office. 735 ILCS 5/18-108.

If, after three years following a district's placement on academic watch status, the district remains on academic watch status, the State Board of Education may authorize the State Superintendent to direct the regional superintendent to remove school board members. 105 ILCS 5/2-3.25f and 3-14.28.

## 9. Appearance of impropriety

### What does appearance of impropriety mean? Is this a legal standard?

*Appearance of impropriety* is not a legal standard; it refers to conduct that appears questionable although it may be legal. Community members might assume, based on their knowledge of the facts, that a board member has violated some rule or law because his or her conduct appears suspicious, self-serving, or improper. To avoid accusations of misconduct and the resultant loss of credibility, board members generally seek to avoid the *appearance of impropriety*. For example, to avoid the *appearance of impropriety*, a board member may want to refrain from voting on any matter that will financially affect him or her and his or her spouse or family member.



<sup>1</sup> The following attorneys are members of the 2014 committee: Heather Brickman, Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP; John Izzo, Sraga Hauser, LLC; Chris Miller, Miller, Tracy, Braun, Funk & Miller, Ltd.; Merry Rhoades, Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C.; James Petrungaro, Scariano, Himes & Petrarca, Chtd.; Melinda Selbee, Illinois Association of School Boards; and Peter Wilson, Jr., Mickey, Wilson, Weiler, Renzi & Andersson, P.C. The 2014 ICOSA Executive Committee provided peer review.

<sup>2</sup> The *prohibited interests* sections of the *School Code* and Public Officer Prohibited Activities Act have different limits. Here we used the limits in the *School Code* because they are specifically applicable to school board members. The Public Officer Prohibited Activities Act permits a contract to be awarded to a governing body member if it “would not cause the aggregate amount of all such contracts so awarded to the same person, firm, association, partnership, corporation, or cooperative association in the same fiscal year to exceed \$4,000.” The similar provision in the *School Code* is up to \$2,000, but it permits contracts up to the aggregate amount of \$5000 in the same fiscal year if the labor is not otherwise available in the district.

<sup>3</sup> The following is the text of the oath of office to be administered to board members:

I, (name of member or successful candidate), do solemnly swear (or affirm) that I will faithfully discharge the duties of the office of member of the Board of Education (or Board of School Directors, as the case may be) of (name of school district), in accordance with the Constitution of the United States, the Constitution of the State of Illinois, and the laws of the State of Illinois, to the best of my ability.

I further swear (or affirm) that:

I shall respect taxpayer interests by serving as a faithful protector of the school district's assets;

I shall encourage and respect the free expression of opinion by my fellow board members and others who seek a hearing before the board, while respecting the privacy of students and employees;

I shall recognize that a board member has no legal authority as an individual and that decisions can be made only by a majority vote at a public board meeting; and

I shall abide by majority decisions of the board, while retaining the right to seek changes in such decisions through ethical and constructive channels.

105 ILCS 5/10-16.5.