

March 4, 2015

**OFFICIAL OPINION 2015-2**

Mr. Patrick W. Mapes, Chairman  
Indiana Education Employment Relations Board  
143 W. Market St., Suite 100  
Indianapolis, IN 46204

**RE: IEERB's ability to invoke the Rule of Necessity**

Dear Chairman Mapes:

You asked whether the Indiana Education Employment Relations Board (“IEERB” or “Board”) may invoke the rule of necessity to act on a matter when a Board member would otherwise be disqualified from acting due to a conflict of interest.

**BRIEF ANSWER**

The rule of necessity allows a Board member to vote on a matter in spite of a conflict of interest, if the Board could not take action without the member’s participation. A decision made under such circumstances would be valid, but would be subject to heightened scrutiny if challenged on judicial review. Even though the decision would be valid, the affected Board member should seek the advice of the Ethics Commission. It is not clear how the Ethics Commission would rule on the issue, but the Commission could take the rule of necessity into account in making a determination.

**ANALYSIS**

The Board is a three-member body established by Ind. Code Chpt. 20-29-3 to oversee collective bargaining for public schools. The Board members are appointed by the Governor under Ind. Code § 20-29-3-2. Two members constitute a quorum. Ind. Code § 20-29-3-10. The Board would be unable to act if two members were unable to participate in a decision due to conflicts of interest, or if one member has a conflict and the remaining two members are deadlocked.

The rule of necessity is a common law doctrine that allows a judge or other body to decide an issue, in spite of a conflict of interest, if no other judge has jurisdiction over the issue. “So that the law is not powerless to act, an otherwise disqualified judge may nevertheless preside over a case if there is no sufficient replacement.” *Adkins v. City of Tell City*, 625 N.E.2d 1298, 1304 (Ind. Ct. App.1993). The doctrine is often invoked when a judge or panel of judges must hear a case involving judicial compensation or benefits. *See, e.g. United States v. Will*, 449 U.S. 200, 211–16 (1980); *Bd. of Trs. of Pub. Employees' Ret. Fund v. Hill*, 472 N.E.2d 204, 206 (Ind. 1985) (judicial pension). Because any judge with jurisdiction to hear such a case would have a financial interest in the outcome, it is impossible to assign the case to a judge who does not have a conflict of interest. Under the rule of necessity, a judge must address the question in spite of the judge’s personal interest in the outcome. *D & M Healthcare, Inc. v. Kernan*, 800 N.E.2d 898, 899-900 (Ind. 2003).

Although the rule of necessity is most often applied when a judge has a conflict, *Adkins* makes it clear that the rule also applies to administrative bodies acting in a judicial capacity when there is no other body to rule on a matter. *Id* at 1304; citing *Metsker v. Whitesell*, 103 N.E. 1078, 1082 (1914). In *Adkins*, the entire Tell City Board of Safety was subject to disqualification due to its previous involvement in proceedings involving a police officer's discharge. Because there was no other entity with the power to discharge the officer, the rule of necessity allowed (and required) the Board of Safety to decide the matter. The judicial review process provides a check on decisions made by an administrative body under the rule of necessity. Such decisions are subject to heightened scrutiny on judicial review. *Adkins* at 1304.

Because the IEERB is the only body with jurisdiction to decide teacher collective bargaining matters, it is not possible to appoint another decision maker to carry out the Board's duties. IND. CODE § 4-21.5-3-9 provides a process for appointment of a new administrative law judge if the original judge is disqualified. However, that statute does not provide an alternative when the ultimate agency authority is responsible for taking action. Although the IEERB could appoint an administrative law judge to hear evidence and issue a recommended order, the Board must issue the final order. Because there is no other body to decide the IEERB's cases, the Board has a duty to decide matters in spite of a conflict of interest.

The rule of necessity allows IEERB members to act even though they would otherwise be disqualified. However, if the reason for disqualification is a financial conflict of interest, the members must still comply with the applicable state ethics standards. IEERB members are special state appointees as defined in Ind. Code § 4-2-6-1, and are subject to the ethics requirements of Ind. Code Chpt. 4-2-6. Ind. Code § 4-2-6-9(a) provides:

- (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:
  - (1) The state officer, employee, or special state appointee.
  - (2) A member of the immediate family of the state officer, employee, or special state appointee.
  - (3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a trustee, a partner, or an employee.
  - (4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

Ind. Code Chpt. 4-2-6 does not address the rule of necessity, and the Indiana cases invoking the rule of necessity do not address the decision maker's ethical obligations under Ind. Code § 4-2-6-9. The Court in *Adkins* had no need to address the ethics code, since the Safety Board was disqualified due to previous involvement in a case, and not a personal financial conflict of interest. In the case of the IEERB, if the reason for potential disqualification is not a financial one, Ind. Code § 4-2-6-9 is not implicated.

The Indiana cases dealing with judicial pay are not helpful in analyzing the ethical requirements that apply to special state appointees, because Ind. Code Chpt. 4-2-6 does not apply to the judicial branch. Judges are governed by the Indiana Code of Judicial Conduct, which explicitly recognizes the rule of necessity. The Comments to Rule 2.11 of the Code state: “The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order.”

The Code of Judicial Conduct does not apply to administrative law judges, but certain agencies have adopted parts of it as the code of conduct for their administrative law judges. The code of conduct for environmental law judges (315 IAC 1-1-2) incorporates Rule 2.11, as does the code of conduct for natural resource commission administrative law judges (312 IAC 3-1-2.5). Therefore, the comments to Rule 2.11, which acknowledge the rule of necessity, apply to those administrative law judges, but not to the Board.

There is currently no statewide code of judicial conduct for administrative law judges, so there is no clear guidance on the rule of necessity for most administrative law judges. Ind. Code § 4-2-7-9 requires the Inspector General to adopt rules to establish a statewide code of judicial conduct for administrative law judges, and provides that the Inspector General may base the code of conduct on 312 IAC 3-1-2.5 and 315 IAC 1-1-2. However, the Inspector General has not yet proposed rules implementing this statute, so it is not yet known whether the rules will include a rule of necessity exception to Ind. Code § 4-2-6-9.

Because there is no ethics code specifically addressing administrative law judges and other quasi-judicial bodies, the general ethical requirements of Ind. Code Chpt. 4-2-6 apply. Those requirements are enforced by the Indiana Ethics Commission, which has sole jurisdiction over ethics matters for state employees. *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1258 (Ind. 2000). Ind. Code § 4-2-6-9(b) sets out the process to be followed if a person subject to the statute identifies a potential conflict. The person “shall notify the person’s appointing authority<sup>1</sup> and seek an advisory opinion from the [ethics] commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter.” When presented with the potential conflict, the Ethics Commission has two options. The Commission may assign the matter to another person and screen the original decision maker from involvement (if the appointing authority approves), or “make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services” provided by the person. Assigning the matter to another person is not feasible in the case of the Board, since there is no other body with statutory authority to decide the matters over which IEERB has jurisdiction. The Commission could consider the rule of necessity in determining whether the Board member’s interest is likely to affect the integrity of the decision. The Commission could take into account the member’s statutory duty to rule on the matter.

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<sup>1</sup> IND. CODE § 4-2-6-1(a)(3) defines “appointing authority” as “the chief administrative officer of an agency.” For the IEERB, the appointing authority would be the chairperson.

## CONCLUSION

Because the Inspector General and the Ethics Commission have not expressly adopted a “rule of necessity” exception to the conflict of interest requirements at Ind. Code § 4-2-6-9, a Board member who must rule in spite of a financial conflict should follow the process set out in Ind. Code § 4-2-6-9(b) -- the member should notify the person’s appointing authority and seek an advisory opinion from the Ethics Commission. In exercising its jurisdiction over the matter, the Ethics Commission could follow the majority of courts that recognize that there are times when a decision maker has a duty to act in spite of a conflict of interest. In those situations, transparent disclosure and a heightened level of scrutiny on judicial review can decrease the likelihood that the Board member’s interests will influence his or her decision.

Sincerely,

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Attorney General

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Deputy Attorney General