

March 27, 1998

Donna M. Cameron
Miller, Nash, Wiener, Hager & Carlsen LLP
Attorneys at Law
3500 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204-3699

Dear Ms. Cameron:

This letter is in response to your correspondence dated March 23, 1998, concerning the Parkrose School District entering into mediated settlement discussions to settle all or several pending and threatened lawsuits against it and board members.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF OPINION
98S-010**

STATED FACTS: The Parkrose School District may enter into mediated settlement discussions to settle some or all pending and threatened lawsuits against the district and members of its governing board.

The following persons are expected to participate in the proposed settlement discussions:

Dianne Harr, board chair since July 1, 1997, board member prior to July 1, 1997;
Mark Gardner, board member before and after July 1, 1997;
Cheryl Jones, board member since July 1, 1997;
Karen Rutledge, board member since July 1, 1997;
Sallie LaValley, board member since July 1, 1997;
Jacki Cottingim, superintendent currently on leave from the district and soon to begin another job in California;
Linda Marshall, attorney for Dr. Cottingim, Ms. Harr, and Mr. Gardner;
Paula Barran, attorney for Dr. Cottingim;
Brian Chenoweth, attorney for Ms. Rutledge and Ms. LaValley;
Davis Morrison, attorney for Ms. Rutledge;
Jeff Austin, attorney for the school district; and
Donna Cameron, attorney for the school district.

Donna M. Cameron
March 27, 1998
Page two

The following is a summary of seven current and threatened lawsuits and issues that may arise in the settlement discussions:

1. Rutledge and LaValley v. Parkrose School District, et al. In April 1997, the school board adopted an addendum to Dr. Cottingim's contract to allow for a unilateral termination without cause in which event a severance package would be paid. Ms. Rutledge and Ms. LaValley believe that the adoption of the addendum was not in compliance with the Oregon Public Meeting law and have filed a lawsuit against the school district, the five pre-July 1997 board members, and Dr. Cottingim, all in their official capacities, seeking to void the contract addendum and to recover attorney fees.
2. Cottingim v. Rutledge and LaValley. Dr. Cottingim has sued Ms. Rutledge and Ms. LaValley in their individual capacity for defamation. The complaint alleges they were not acting in the course and scope of any official duty or role on behalf of the school district or school board. The claim arises out of public statements that Dr. Cottingim took more salary and compensation than she was entitled to receive.
3. Nolf v. Batman, et al. Gaynelle Nolf, a former principal employed at Parkrose high school, sued the school district, Dr. Cottingim, and the five members of the pre-July 1997, school board, alleging breach of contract and violation of plaintiff's constitutional rights when she was removed from the position of high school principal and reassigned.
4. Due Process Claim. Dr. Cottingim has sent a demand letter to the school district alleging that her constitutional rights under the due process clause of the United States Constitution were violated and that her employment contract was breached. The alleged violation is that accusations against Dr. Cottingim by Ms. Rutledge and Ms. LaValley were made in public without first following due process requirements or the contractually required complaint process. Additional allegations are that when the board met for a name clearing process, Ms. Rutledge and Ms. LaValley refused to state the accusations for the superintendent, refused to attend the portion of the meeting at which she presented her response and evidence, but still voted against a resolution to exonerate the superintendent.

5. Public Records. Ms. Rutledge sought to obtain copies of W-2 forms for Dr. Cottingim and Mr. Fenstermaker, the business manager of the school district. The school district believed that the total compensation paid to Dr. Cottingim and Mr. Fenstermaker was public information but that the W-2 forms themselves were not.
6. Public Meetings. Statements have been made by Ms. Rutledge and Ms. LaValley that actions taken before July 1, 1997, by the past school board (in addition to the adoption of the contract addendum involved in the lawsuit described in item #1 above) may be subject to a public meetings lawsuit by Ms. Rutledge and Ms. LaValley with possible financial demands directed against past and current board members or Dr. Cottingim.
7. Recall Petitions. Recall petitions have been circulated as to four of the five current board members. Ms. Rutledge and Ms. LaValley presented a peace plan that included a request for mediation of disputes and a commitment that their followers had withdrawn recall petitions against Ms. Harr and Mr. Gardner.

RELEVANT STATUTES: The following Oregon Revised Statutes are applicable to the issues addressed herein:

ORS 244.020(1): Actual conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (8)(a) to (c) of this section.

ORS 244.020(7): Potential conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of the following:

ORS 244.020(15): Public official means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political

subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services.

ORS 244.040: Code of ethics; prohibited actions; honoraria. The following actions are prohibited regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120.

(1)(a) No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this subsection, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated.

ORS 244.120: Methods of handling conflicts; generally; application to elected officials or members of boards. (1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:

(c) If the public official is any other appointed official subject to this chapter, notify in writing the person who appointed the public official to office of the nature of the conflict, and request that the appointing authority dispose of the matter giving rise to the conflict. Upon receipt of the request, the appointing authority shall designate within a reasonable time an alternate to dispose of the matter, or shall direct the official to dispose of the matter in a manner specified by the appointing authority.

ORS 244.120(2): An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:

(a) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or

(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:

Donna M. Cameron
March 27, 1998
Page five

(A) Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.

(B) If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.

QUESTION #1: Do Government Standards and Practices laws permit the current board members to participate in global settlement discussions covering all of the above disputes in one mediation together? Do any of these issues need to be entirely excluded from such discussions?

OPINION: There is nothing contained within the provisions of ORS Chapter 244 which restricts board members from participating in the global settlement discussions nor which restricts the issues which may be included in settlement discussions. The provisions of ORS Chapter 244 would become relevant after the mediation is concluded and the board members convene to take action in their official capacity as public officials to formally approve any dispositions of lawsuits which may arise from settlement talks.

QUESTION #2: Under what circumstances must a board member declare a conflict of interest before voting on a proposed settlement?

OPINION: Oregon Government Standards and Practices laws define actual conflict of interest in ORS 244.020(1) and potential conflict of interest in ORS 244.020(7). The difference between an actual and a potential conflict of interest is determined by the words would and could.

An actual conflict of interest occurs when the action is reasonably certain to result in a financial benefit or detriment. It will occur when an action taken by a public official would directly and specifically affect the financial interest of the official, the official's relative or a business with which the official or a relative is associated.

A potential conflict of interest exists when an official takes action that could possibly have a financial impact on the official, a relative of the official or a business with which the official or a relative is associated. Such possible financial impact is not certain.

Donna M. Cameron
March 27, 1998
Page six

If a board member were confronted with a situation where the board was entertaining a motion which, if passed, would be an action which could result in a financial impact to a board member, but it is not certain, the board member would have a potential conflict of interest. The board member would then be required to announce publicly the nature of the potential conflict of interest and would then be permitted to continue with discussion, debate and vote on the issue.

If a board member were confronted with a situation where the board was entertaining a motion which, if passed, would authorize the school district to pay for the board member's legal fees, the board member would have an actual conflict of interest. The board member would then be required to announce publicly the nature of the actual conflict and refrain from discussion, debate and voting. If the board member's vote was necessary in order to obtain the minimum number of votes necessary for the board to take action the board member would then be allowed to vote on the issue.

QUESTION #3: If the discussions in mediation include possibilities for settling Dr. Cottingim's claims against individual board members in their personal capacities, can the district pay the entire cost of the mediator or must the board members against whom these claims are directed pay a portion of that cost?

OPINION: ORS Chapter 244 does not restrict the school board, as the governing body of the public body, from paying for the cost of mediation. However, individual board members who could benefit or who would benefit from the district's decision to pay such costs must comply with the conflict of interest disclosure requirements of ORS 244.120.

QUESTION #4: What limitations apply to settlement proposals that can be advanced by (a) an individual board member acting in the board member's own behalf when a claim has been directed against that board member personally or (b) by the district? For example, can a board member propose a global settlement that includes resolution of a lawsuit directed against the board members. Can the school district make such a proposal?

OPINION: Settlement proposals are not restricted by the provisions of ORS Chapter 244. The school board members would not be acting as public officials during the mediation. The board members would be participating in settlement discussions as parties to the subject litigation. ORS Chapter 244 applies when the school board members take action in their official capacity as board members on the resulting decisions coming out of mediation. Again, if the actions taken by individual school board members would have an

Donna M. Cameron
March 27, 1998
Page seven

impact on them financially, they must comply with the conflict of interest disclosure requirements set forth in ORS 244.120.

QUESTION #5: Under what circumstances must a board member refrain from voting on a proposed settlement?

OPINION: If a potential conflict of interest arises, the official may participate in the action, once a public disclosure has been made. In the case of an actual conflict of interest, the official must publicly declare the actual conflict and refrain from taking any official action on the issue. If the official's vote is necessary for the public body to take action on the matter, the official may vote but, may not discuss, debate or otherwise participate in the matter.

An example of this would be a situation where the school board is entertaining a motion for the district to pay an individual board member's legal fees. The individual board member impacted by this action would be required to comply with the conflict of interest disclosure requirements of ORS 244.120.

QUESTION #6: Is it permissible for a settlement package to include a district payment to a plaintiff in return for claims being dropped against individual board members (e.g. for the district to pay a settlement to Dr. Cottingim in the defamation lawsuit against Ms. Rutledge and Ms. LaValley) if Dr. Cottingim drops that suit?

OPINION: The governing body of the public body can adopt whatever settlement package it desires. As stated previously, when individual board members would be financially impacted by an action, the individual board members must comply with the conflict of interest disclosure requirements in ORS 244.120.

QUESTION #7: Is it permissible for the district to pay the attorney fees incurred by the individuals (both plaintiffs and defendants) for participating in the mediation?

OPINION: See opinion to question #6.

Donna M. Cameron
March 27, 1998
Page 8

QUESTION #8: Is it permissible for settlement discussions to include demands, offers, or proposals for board members to take a position about recall petitions as to other board members?

OPINION: See opinion to question #6.

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS CHAPTER 244 TO THE FACTS STATED HEREIN. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. IT IS MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION.

Sincerely,

L. Patrick Hearn
Executive Director

0867JP