

Where do you stand on



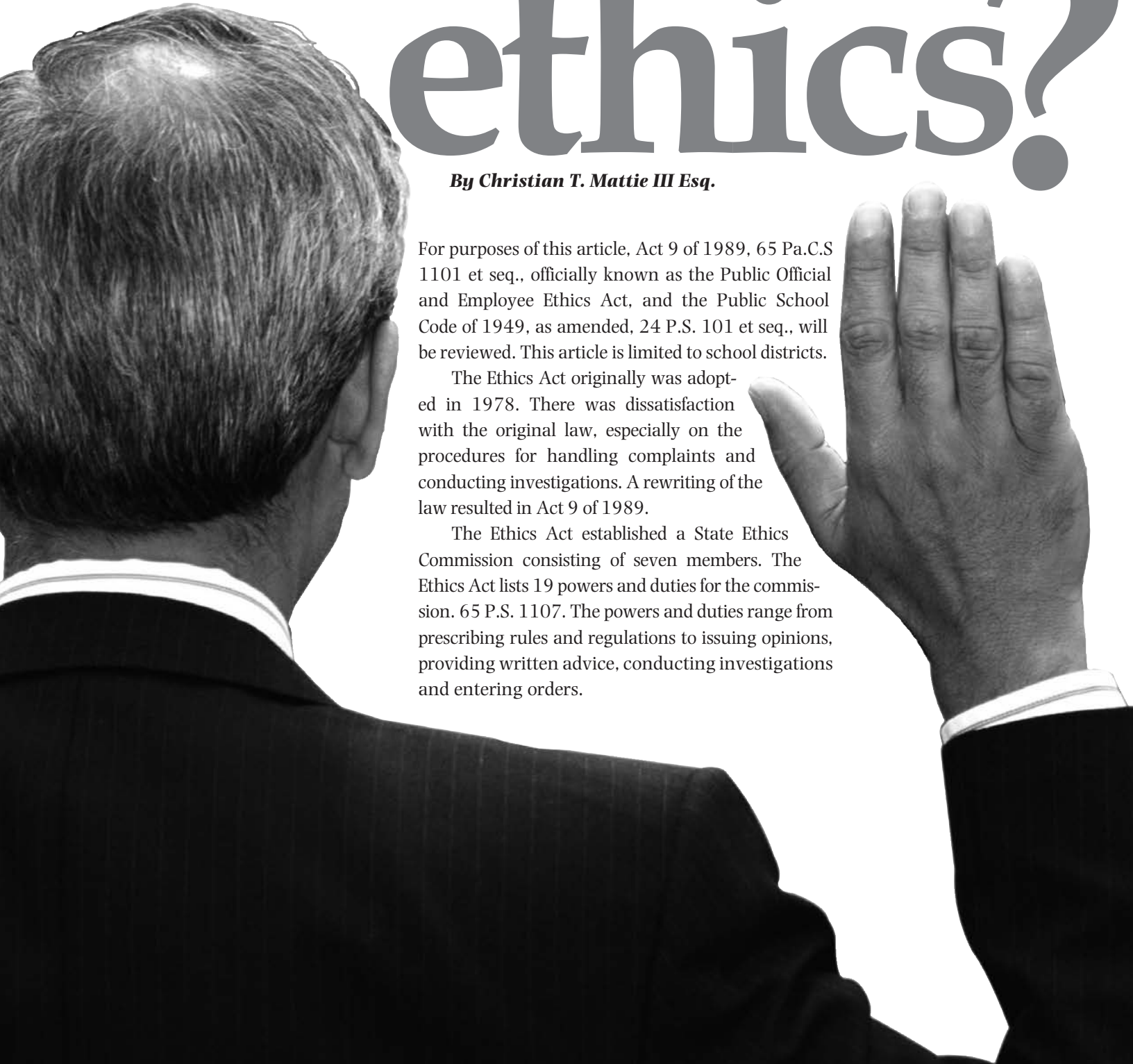
ethics?

By Christian T. Mattie III Esq.

For purposes of this article, Act 9 of 1989, 65 Pa.C.S. 1101 et seq., officially known as the Public Official and Employee Ethics Act, and the Public School Code of 1949, as amended, 24 P.S. 101 et seq., will be reviewed. This article is limited to school districts.

The Ethics Act originally was adopted in 1978. There was dissatisfaction with the original law, especially on the procedures for handling complaints and conducting investigations. A rewriting of the law resulted in Act 9 of 1989.

The Ethics Act established a State Ethics Commission consisting of seven members. The Ethics Act lists 19 powers and duties for the commission. 65 P.S. 1107. The powers and duties range from prescribing rules and regulations to issuing opinions, providing written advice, conducting investigations and entering orders.



The Ethics Act contains numerous definitions. It applies to “public officials” and “public employees.” In addition, it applies to candidates for public office and nominees for public office.

With the exception of members of certain advisory boards that have no authority to spend public money or have no power to exercise the power of the school board, a public official is any person elected by the public, or elected or appointed by a governmental body. This would include elected and appointed members of a school board. An example of an advisory board would be a board whose sole charge would be to recommend curriculum matters.

A public employee is an individual employed by a political subdivision (such as a school district) who is responsible for taking or recommending official action of a nonministerial nature with respect to:

- 1) Contracting or procurement.
- 2) Administering or monitoring grants or subsidies.
- 3) Planning or zoning.
- 4) Inspection, licensing, regulating or auditing any person.
- 5) Any other activity where the official action has an economic impact of greater than *de minimis* nature on the interest of any person.

By definition, a teacher employed in a teaching capacity, as opposed to an administrative capacity, is not a public employee for purposes of the Ethics Act. An assistant high school principal was found to have violated the Ethics Act when he used his position to obtain grant funds to implement a program that was conducted by a company in which he was a paid employee or had a reasonable expectation of receiving compensation. *Waleski*, Order No. 1331, issued June 16, 2004.

A journey through the Ethics Act and related laws has a beginning, a middle and an end.

An individual who wants to be a school board director must meet the eligibility requirements of the School Code. He or she must be a citizen of the commonwealth, 18 years of age or older, and have been a resident of the district for at least one year. The School Code also requires that school board director candidates be of good moral character. 24 P.S. §3-322. An individual removed from an office of trust in a governmental body for malfeasance is ineligible to serve as a school board director. 24 P.S. §3-323.

The next issue an individual faces is whether he holds an incompatible position. The School Code lists numerous positions that are incompatible with the office of school director. 24 P.S. §3-322. Some of the more common positions that would make an individual ineligible to be a school board director include a mayor, a member of council in a municipality, a township supervisor, a county commissioner, a district attorney and an employee of the school district. A candidate for the position of school board director should review 24 P.S. §3-322, if the person holds a position with another governmental body.

Candidates for the position of school board director also must be aware that the Hatch Act restricts federal employees, and some state and local employees who work in connection with federally funded programs, from engaging in partisan politics.

Candidates or nominees for public office must file a Statement of Financial Interest with the secretary of the governing authority on a form prescribed by the commission.

A candidate for the school board must file the statement for the preceding calendar year with the school district by the last day for filing a petition to appear on the ballot. A copy of the statement must be attached to the petition to appear on the ballot that is filed with the county election board. Local election officials cannot accept a petition to appear on the ballot unless a copy of the statement is attached.

Christian T. Mattie III Esq. is a partner in the law firm of Mattie & Alfieri in Eldred. The following article is based on a presentation he made on ethics during Summer Law & Governance Workshop 2005.



Failure to comply with this requirement is a fatal defect. Filing the statement with the wrong person also is a fatal defect. Giving the statement to a member of city council was not a filing with the governing authority. In *re Olshefski*, 692 A.2d 1168 (Pa. Cmwlth. 1997). Therefore, the candidate will not appear on the ballot. No public official is allowed to take an oath of office or to enter or continue upon duties of the office (nor receive compensation), unless the statement has been filed. Furthermore, a nominee for public office must file the statement with the governing body at least 10 days before the official or body will approve or reject the nomination.

As a school board member, there are two main areas of concern. First, board mem-

bers are required to file with the governing body on or before May 1 of each year the statement on the form prescribed by the commission. Next, there are, in effect, nine restricted activities, eight of which could apply to school board members and school district public employees.

The eight areas are as follows:

- 1) Gifts
- 2) Bribes
- 3) Conflict of interest
- 4) Honoraria vs. fees (income)
- 5) Severance payments
- 6) Contract conflicts
- 7) Use of information copied from the statement
- 8) Representing others after leaving the office or position



When it comes to improving your school, Thorp Reed & Armstrong, LLP can lend a hand. Collectively, our bond attorneys have more than 80 years of experience and, in the last six years alone, we have guided municipal governments through more than 500 capital financings – totaling more than \$6 billion. Thorp Reed & Armstrong, LLP can untangle the Internal Revenue Code for your community's bond financing. Call Chris Brewer or Lisa Chiesa at 412.394.7711 for more information.

| PITTSBURGH | PHILADELPHIA | WHEELING | PRINCETON | 412.394.7711 | WWW.THORPREED.COM |



THORP REED
— & —
ARMSTRONG

The Lawyers Lawyers go toSM

Gifts and bribes

The Ethics Act proscribes both the offering and giving (as well as the soliciting or receiving) of anything of monetary value, including a gift, loan, political contribution, reward or promise of future employment based on an understanding of that person covered by the Ethics Act that the vote, official action or judgment of that person would be influenced thereby. The commission has determined that travel provided by a vendor would be prohibited by the Ethics Act, where such was unreasonable in nature.

Certain criteria were set forth by the commission when reviewing such situations. Although the commission determined that

The following criteria should be considered in relation to whether the travel is reasonable:

- a. Is the trip necessary to review equipment, material or facilities that the governmental body is considering purchasing, and that cannot be transported to the location of the governmental body?
- b. Is it necessary for the entire governmental body to travel to review such facilities, equipment or materials, or is it more reasonable for one or two members of the governmental body to review such items and report back to the governmental body?

The Hatch Act restricts federal employees, and some state and local employees who work in connection with federally funded programs, from engaging in partisan politics.

the Ethics Act presented no *per se* prohibition upon a public official's travel at the expense of a vendor to perform the official responsibilities of the official's governmental body, any such travel must conform to the requirements and standards enumerated through the Ethics Act and by prior commission opinions. The factors considered and the criteria to be employed in reviewing such situations include the following:

1) The traveling official may not directly bill or receive reimbursement from the vendor or contractor.

2) Such reimbursement should be arranged by the vendor with the governmental body.

3) The nature of the expenses incurred and the amounts paid by the vendor should be outlined specifically and enumerated to the governmental body. Such information also should be available to the public.

4) The nature and extent of the travel must be reasonable in nature.

c. Is the location and extent of the trip, including the length of time during which the individual travels, reasonable in nature to the duties that are to be performed by the official while traveling?

d. Has the vendor supplied additional items during the trip including gifts, entertainment and other gratuities that are unreasonable in nature and in relation to the official duties that are being performed?

e. Would the travel by the official accord the vendor advantages over other vendors?

5) Public officials may not accept travel expenses and accommodations for their spouses.

6) The travel must be in accordance with the official duties and responsibilities of the individuals involved. The travel must not be related to tangential items not related to the official duties and responsibilities of the public official.



Section 326 of the School Code prohibits receiving a bribe. If convicted, a director is removed from office, and is ineligible to hold an office under the School Code. This section also provides for a fine and/or imprisonment.

Conflict of interest

A conflict of interest is the use by a public official or a public employee of the authority of office or confidential information for private pecuniary benefit for himself, his immediate family, or a business in which he or a member of the immediate family is associated.

A conflict of interest does not apply if there is a “*de minimis* economic impact” or an insignificant effect. For example, the court held a net profit of \$561.77 made by an auto repair business that employed a township supervisor was *de minimis* in *Bixler v. State Ethics Commission*, 847 A.2d 785 (Pa. Cmwlth. 2004).

A conflict of interest also does not apply where an action affects in the same way a class or subclass that includes the public official, a public employee, members of the immediate family, or a business with which he or a member of the immediate family is associated. Members of the immediate family are parents, spouse, children and siblings.

At one time, the commission tried to include a son-in-law as a member of the immediate family. However, in *Pulice v. State Ethics Commission*, 713 A.2d 161 (Pa. Cmwlth. 1998) appeal denied, 527 Pa. 642, 732 A.2d 1211 (1998) the court ruled a son-in-law was not a member of the immediate family. The president of a school board had participated in personnel committee meetings that created a new administrative position, and had voted to appoint his son-in-law to the position. The court held the president of the board did not violate the Ethics Act, because the definition of “immediate family” did not include son-in-law.

The issue of voting for the employment of a son-in-law as a teacher under the School Code has not been decided in any reported

case. The School Code, 24 P.S. 11-1111, provides that certain relatives of a school board member are not to be employed unless they receive an affirmative majority of all members of the board other than the member related to the applicant.

The School Code is more extensive than the Ethics Act concerning family members. In addition to the family members listed in the Ethics Act, the School Code includes stepchildren, grandchildren, nephews, nieces, first cousins, sisters and brothers-in-law, aunts and uncles. It does not include sons-in-law.

Whenever a public official has a conflict of interest, the public official must, before the vote is taken, publicly announce and disclose the nature of the interest in a written memorandum filed with the person responsible for recording the minutes of the meeting at which the vote is taken.

When a member of the immediate family becomes an employee of the district, a director likely will be faced with the prospect of negotiations for a new collective bargaining agreement. What can a director do? Almost nothing!

It is important to note that the commission has taken the position that the use of authority of office is more than voting, and it encompasses all the tasks needed to perform the functions of the office, including, but not limited to, discussing, conferring with others and jobbing for a particular result. *Juliante*, Order No. 809.

In a series of Opinions and Advice of Counsel, the commission has addressed the issue. One of the first Opinions was *Krier*, Opinion No. 84-002. The issue in *Krier* was whether a school board director, whose spouse was employed by the district, could vote on the CBA between the district and a union. The spouse was a member of the union. The commission previously had ruled that, where a question presented to a public official directly and individually affects a spouse, the public official must abstain.

In *Krier*, the spouse was one of approximately 100 members of the union. The commission held that because the CBA affected the spouse in the same manner and degree as other members of the bargaining unit, it was permissible to vote on the ratification of the agreement.

However, the commission noted that the director should refrain from participating in the negotiating process, and from discussions and meetings regarding the CBA being negotiated. This would assure the public that the public official's financial interests were separated from the public official's responsibilities to the public, would eliminate any influence on the district's decisions as to the direction and outcome of the process, and would minimize, if not eliminate, the problem of the director acquiring confidential information.

The Opinion was consistent with the Public Employee Relations Act, 43 P.S. 1101.101 et seq. 1101.1801, which prohibits a person who is in the same local, state, national or international organization as the employee organization, or who has an interest in the outcome that is in conflict with the interest of the public employer, from participating in the collective bargaining process. The individual is allowed to vote. The principle announced in *Krier* was reinforced in *Van Rensler*, Opinion No. 90-017.

In *Mattie*, Advice No. 91-508, the Advice concluded that a school director with such a conflict could receive general financial information for the proposed budget, which information did not have an impact upon the negotiation process with the bargaining unit. However, such a school director could not receive financial information related to the budget that would affect the negotiation process with the bargaining unit, including, but not limited to, line-by-line items such as salaries, or specific information from which one could deduce such line-by-line items. The school director could not receive information

regarding the background of negotiations or the analysis of negotiations at any time. However, the school director could have access to information when it became public. An Advice of Counsel, *Henry* No. 97-629 (1997), stated that a superintendent was precluded from participating as a negotiator where a spouse was a member of the bargaining unit.

In addition to being potential violations of other provisions of the Ethics Act, a violation of the conflict of interest provision has been found by the commission in the following circumstances:

1. Accepting a gift in an official capacity from someone you are supervising.
2. Directing an employee to contact a business in which a director was an owner for quotes.
3. Engaging in discussions, actions and/or voting to be appointed to a paid position, e.g. the paid position of secretary of the board or treasurer.
4. Storing personal property in school district facilities.
5. Using district property for personal purposes.
6. Using district personnel for personal business.
7. Using the authority of an office to make purchases from a business where a member of the immediate family is a sales representative.
8. Approving payment to a business with which you are associated.
9. Selling your personal property to the district.
10. Receiving payment other than authorized.
11. Participating in actions to award contracts to a business with which you are associated.
12. Seconding a motion to appoint a member of the immediate family.

In addition to Ethics Act issues, a director is subject to Section 324 of the School Code.



Until June 22, 2001, Section 324 contained a strict prohibition against a director being employed or doing business during the terms for which the director was appointed or elected. Section 324 was amended in 2001 to provide that it would not be a violation for a director to contract for the purchase of goods or services from a business with which the director is associated to the extent permitted and in compliance with the Ethics Act.

Even with the provision that was added in 2001, it would appear that Section 324 of the School Code would prevent, with three exceptions, a school board director from resigning from the board and then being employed by the district. Section 324 provides, in part: "No school director shall, during the term for which he was elected or appointed, as a pri-

term for which he was elected or appointed, the individual must resign and must receive at least a two-thirds vote of all other members of the board.

Honorarium

The Ethics Act prohibits a public official or a public employee from receiving an honorarium. This is a payment in recognition of published works, appearances, speeches and presentations, and which is not intended as consideration for the value of services. Token things of a *de minimis* value are not included. Depending on the amount, the income might have to be reported on the statement.

Severance payment

The Ethics Act prohibits a person from solic-

No public official is allowed to take an oath of office or to enter or continue upon duties of the office (nor receive compensation), unless the Statement of Financial Interest has been filed.

vate person . . . be employed in any capacity in the district in which he is elected or appointed, or receive from such school district any pay for services rendered . . ."

The three exceptions are an appointment as solicitor, secretary to the board of a school district of the second class and teacher. To be appointed as solicitor during the term for which he was elected or appointed, the individual must have served as a director for two consecutive terms of six years, must resign and must receive the unanimous vote of all other members of the board.

To be appointed as secretary to the board of a school district of the second class during the term for which he was elected or appointed, the individual must resign and must receive the unanimous vote of all other members of the board.

To be appointed as a teacher during the

iting or accepting a severance payment or anything of monetary value contingent upon the assumption or acceptance of public office or public employment. The Ethics Act would not prohibit payments under a preexisting employment contract or sales agreement.

Contract conflicts

The Ethics Act prohibits a public official, a public employee, a spouse, or a business in which the person or his spouse or child is associated from entering into a contract with the public body in excess of \$500, unless the contract is awarded through an open and public process.

Many of the same acts of employing members of the immediate family or entering into contracts with a business in which the person or members of the immediate family are associated also are violations of the conflicts of interest provision.

A contract made in violation of this provision is voidable, if suit is filed within 90 days of the making of the contract.

Even if the contract is awarded through an “open and public process,” a public official or a public employee cannot have supervisory or overall responsibility for the implementation or administration of the contract.

Misuse of the statement

The Ethics Act prohibits all people, not just a public official or a public employee, from using, for commercial purposes, information copied from the statement. The Ethics Act also prohibits all people, not just a public

are made primarily for purposes other than reporting a violation of the Ethics Act.

Leaving a position as a public official or a public employee does not immediately end involvement with the Ethics Act. A public official or a public employee must file the statement by May 1 of the year after leaving office.

A public official or public employee is prohibited from representing a person, for compensation, for one year after he or she leaves the governmental body. A public official or a public employee represents a person when he acts on behalf of another person in any activity, including, but not limited to, personal appearances, negotiations, lobbying, and submitting bid or contractual proposals that are signed or that

There are three exceptions under which a school director may resign from a position on the board and then be employed by the district.

official or a public employee, from breaching the confidentiality provisions, and from filing complaints with the commission that are frivolous or without probable cause and that

contain the name of the former public official or public employee. After one year, the provisions of the Ethics Act that apply to a public official or a public employee end. **3**