

# OHIO ETHICS COMMISSION

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## **INFORMATION SHEET: ADVISORY OPINION NO. 2003-01** **COMMUNITY SCHOOLS**

### **What is the question addressed in the opinion?**

Are members of the governing board of a community school subject to the Ohio Ethics Law and related statutes?

### **What is the answer in the opinion?**

Yes. All governing boards of community schools are required to sign contracts with the school districts that sponsor them, in which the community schools agree to be bound by the revolving door, confidentially, conflict of interest, and representation provisions of the Ethics Law. Further, members of the governing board of a community school are “agents” of the state and, therefore, subject to the public contract law and the supplemental compensation law.

While the Ethics Law does apply to members of a community school governing board, the General Assembly provided a specific exception from the law that allows a member of the board of a community school to become an employee of the school and to sell goods or some services to the school. The exception does not allow members of community school governing boards to participate in board decisions to award contracts, including employment contracts, for themselves, their family members, or their business associates.

### **What prompted the question?**

The Commission considered this question in response to a number of questions that followed recent changes to the laws that govern the operation of community schools.

### **When will the conclusions of the opinion become effective?**

The opinion became effective upon acceptance by the Commission.

### **For More Information, Please Contact:**

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IT IS NOT AN ETHICS COMMISSION ADVISORY OPINION.  
ADVISORY OPINION NO. 2003-01 IS ATTACHED.**

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Advisory Opinion  
Number 2003-01  
October 17, 2003

Syllabus by the Commission:

- (1) All members of the governing board of a community school are subject to the provisions of the Ohio Ethics Law and related statutes, as set forth in R.C. Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code, except as set forth in Division (A)(11)(e) of Section 3314.03 of the Revised Code;
- (2) This conclusion also applies to all officers and employees of a community school, excluding teachers and other educators who have no authority to perform supervisory or administrative functions;
- (3) Teachers and other educators employed by a community school, whose job duties do not include the authority to perform supervisory or administrative functions, are subject to the restrictions set forth in Sections 102.04, 2921.42, and 2921.43 of the Revised Code, but are not subject to the restrictions set forth in Section 102.03 of the Revised Code.

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You have asked whether the members of the governing board of a community school are subject to the Ohio Ethics Law and related statutes.

## **Brief Answer**

As explained more fully below, members of the governing board of a community school are bound by the provisions of R.C. Chapter 102. pursuant to the terms of the contract between the community school and the sponsor district. Further, members of the governing board of a community school are “agents” of the state and, therefore, “public officials” subject to the provisions of R.C. 2921.42 (the public contract law) and R.C. 2921.43 (the supplemental compensation law).

Because of the specific exception enacted by the General Assembly in R.C. 3314.03(A)(11)(e), however, a member of the board of a community school may become an employee of the school and may sell goods or some services to the community school. However, R.C. 102.03(D) and 2921.42(A)(1) prohibit a member of the board of a community school from participating, in any manner as a board member, in board actions to approve, or alter the terms and conditions of, any kind of contract in which he, a family member, or a business associate, has an interest, including an employment contract.

### **Community Schools**

Community schools are established pursuant to Ohio Revised Code 3314.01:

- (A)(1) A board of education may permit all or part of any of the schools under its control, upon request of a proposing person or group and provided the person or group meets the requirements of this chapter, to become a community school.
- (2) Any person or group of individuals may propose the creation of a community school pursuant to the provisions of this chapter. . . .
- (B) A community school created under this chapter is a public school, independent of any school district, and is part of the state's program of education. A community school may sue and be sued, acquire facilities as needed, contract for any services necessary for the operation of the school, and enter into contracts with a sponsor pursuant to this chapter. The governing authority of a community school may carry out any act and ensure the performance of any function that is in compliance with the Ohio Constitution, this chapter, other statutes applicable to community schools, and the contract entered into under this chapter establishing the school.

A community school is organized as a nonprofit corporation, under the Ohio Nonprofit Corporation Act.

In order to operate a community school, the governing authority of the community school must enter into a contract with the school district that will sponsor the district. R.C. 3314.03. R.C. 3314.01(B) provides that the governing board of a community school must ensure the performance of any function that is in compliance with “the contract entered into under this chapter establishing the school.”

R.C. 3313.04 sets forth the terms of the contract. R.C. 3313.04(A)(11) provides that the contract shall specify that the school will comply with a number of requirements, including the requirement set forth in Division (A)(11)(e):

The school shall comply with Chapter 102. of the Revised Code except that nothing in that chapter shall prohibit a member of the school's governing board from also being an employee of the school and nothing in that chapter or section 2921.42 of the Revised Code shall prohibit a member of the school's governing board from having an interest in a contract into which the governing board enters that is not a contract with a for-profit firm for the operation or management of a school under the auspices of the governing authority. (Emphasis added.)

### **The Ethics Law—R.C. Chapter 102.**

Chapter 102. of the Revised Code establishes the Ethics Commission and defines its authority and duties. The Commission has investigative and advisory jurisdiction over Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. R.C. 102.06 and 102.08. Generally, the Ohio Ethics Law and related statutes prohibit public officials and employees from using their official positions for their own personal benefit, for the benefit of their family members or business associates, or where there is otherwise a conflict of interest.

R.C. 102.01(B) defines the term “public official or employee” for purposes of Chapter 102. of the Revised Code as “any person who is elected or appointed to an office or is an employee of any public agency.” R.C. 102.01(C) defines the term “public agency” as:

[T]he general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, township, and the five state retirement systems, or any other governmental entity. “Public agency” does not include a department, division, institution, board, commission, authority, or other instrumentality of the state or a county, municipal corporation, township, or other governmental entity that functions exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes; does not expend more than ten thousand dollars per calendar year, excluding salaries and wages of employees; and whose members are uncompensated.

As stated above, a community school is organized as a nonprofit corporation. The prohibitions in Chapter 102. generally do not apply to persons serving on the board of a corporation. See Ohio Ethics Commission Advisory Opinions No. 75-013 and 75-019.<sup>1</sup>

In this instance, a community school is not a “public agency” as that term is defined in R.C. 102.01(C) and the members of the governing board of a community school would not normally be subject to the Ohio Ethics Law. However, the General Assembly, presumably contemplating the function a community school performs on behalf of the public, mandated that community schools agree to “comply with Chapter 102. of the Revised Code” when they enter into a contract with a sponsor school. See R.C. 3314.03(A)(11)(e) (set forth above).

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<sup>1</sup> There may be some instances where the officers and employees of a corporation are subject to the Ethics Law and related statutes because of the nature and authority of the corporation on behalf of a public agency. See Adv. Op. No. 78-004 (a corporation designated to serve as the “engineer” for a city is subject to R.C. Chapter 102. and 2921.42).

Thus, a member of the governing board of a community school is subject to the restrictions imposed upon “public officials and employees” by R.C. Chapter 102. By requiring that the “school” shall comply with Chapter 102., the General Assembly has expressed, in unambiguous terms, its intent to require officers and employees of community schools to comply with the requirements of the Ethics Law.

### **The Public Contract Law—R.C. 2921.42**

R.C. 2921.01(A) and (B) include definitions that determine whether an individual is subject to the prohibitions imposed by Sections 2921.42 and 2921.43 of the Revised Code. R.C. 2921.01(A) defines the term “public official” for purposes of R.C. Chapter 2921. as:

[A]ny elected or appointed officer, or employee, or agent of the state or any political subdivision thereof, whether in a temporary or permanent capacity, and including without limitation legislators, judges and law enforcement officers. (Emphasis added.)

A nonprofit corporation is not a political subdivision of the state. Accordingly, a member of the governing board of a community school is neither an officer nor an employee of a political subdivision or the state.

### **Agents of the State**

R.C. 2921.01 includes “agents of the state,” as well as officers and employees, within the definition of “public official” for purposes of R.C. 2921.42. Because the word “agent” is not statutorily defined for purposes of R.C. 2921.42, the Ethics Commission has applied the definition of the word “agent” that has been used in judicial decisions:

A person is an “agent of the state,” and thus, a “public official” as defined in Division (A) of Section 2921.01 of the Revised Code, when: (a) the person has the power to act on behalf of and bind the state by his actions; (b) the state has the right to control the actions of the person; and (c) the actions of the person are directed toward the attainment of an objective sought by the state.

Adv. Op. No. 92-001.

The statutes governing the establishment of community schools are set forth in R.C. Chapter 3314. A community school is considered “ a public school . . . and is part of the state’s program of education.” R.C. 3314.01(B). The governing authority of a community school is statutorily authorized to “carry out any act and ensure the performance of any function that is in compliance with the Ohio Constitution, [Chapter 3314.], other statutes applicable to community schools, and the contract entered into under this chapter establishing the school.” *Id.* A community school is created by a contractual agreement between the governing authority and a sponsoring public agency. R.C. 3314.03. The governing board of a community school must submit an annual report

of its activities and progress, and its financial status, to the public agency that sponsors it and the legislative office of education oversight. R.C. 3314.03(A)(11)(g).

A community school receives funds for the performance of its duties from the state department of education through a statutorily devised formula. R.C. 3314.08(D). For purposes of receiving grants from any state or federal agency, a community school is considered a school district and its governing board is considered a board of education. R.C. 3314.08(E). A community school must maintain its financial records in the same manner as a public school districts. R.C. 3314.03(A)(8). In addition, the Auditor of State is required to audit community schools. Id.

Therefore, by enacting R.C. Chapter 3314., the General Assembly has empowered a community school to act on behalf of and bind the state with regard to education. It is apparent that the state exercises control over a community school's operations in a number of ways such as fiscal oversight and the requirement for annual reports. The community school is directed towards the attainment of a state objective—providing educational opportunities and choices for Ohio school children and parents.

A member of the governing board of a community school is an “agent of the state” for purposes of R.C. 2921.01, and is subject to the public contract restrictions in R.C. 2921.42. Because they are “public officials,” members of the governing board of a community school are also subject to the restrictions imposed by R.C. 2921.43, which prohibits a public official from accepting compensation for the performance of his public duties from anyone other than the public agency he serves.

#### **Exceptions Provided by R.C. 3314.03(A)(11)(e)**

R.C. 3314.03(A)(11)(e) provides exceptions to the Ethics Law and related statutes to permit a member of the school's governing board to be an employee of the school and to have an interest in a contract with the governing board. Because of this exception, a member of the school's governing board may also be employed by the school without violating R.C. 102.03(D) and (E) by serving in both capacities.

However, because the language of the exception in R.C. 3314.03(A)(11)(e) is specific and limited, a member of a community school's governing board is subject to all other prohibitions imposed by R.C. Chapter 102., including other prohibitions imposed by R.C. 102.03(D) and (E), which read:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

R.C. 102.03(D) prohibits a board member from using the authority or influence of his position to secure his own employment with the community school. Adv. Ops. No. 87-008 and 88-004. See R.C. 1.03(H) (a promise of future employment is a thing of value for purposes of R.C. 102.03). R.C. 102.03(D) also prohibits a board member who is also employed by the community school from participating, as a board member, in matters that result in a definite and direct benefit for him, such as renewal of his contract, approval of his performance evaluations, and pay increases. See also Att'y Gen. Op. No. 79-086 (addressing the well-established principle of common law that an appointing authority may not appoint himself to an appointive position). R.C. 102.03(E) prohibits a board member from impropriety soliciting any definite and direct benefit for himself.

R.C. 3314.03(A)(11)(e) also provides an exception from some of the public contract prohibitions in R.C. 2921.42. Two of the prohibitions are found in Divisions (A)(3) and (A)(4) of R.C. 2921.42, which provide that no public official shall knowingly:

- (3) During his term of office, or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder;
- (4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

R.C. 2921.42(A)(4) prohibits public officials from having an interest in the profits or benefits of a public contract entered into by or for the use of the governmental agency with which they are connected. Adv. Op. No. 89-008. An interest that is prohibited under R.C. 2921.42(A)(4) must be definite and direct and may be either pecuniary or fiduciary. Adv. Ops. No. 78-005 and 81-003. R.C. 2921.42(G)(1)(a) defines the term "public contract" as the purchase or acquisition, or a contract for the purchase or acquisition of property or services, including a contract for public employment, by or for the use of a political subdivision or any of its agencies or instrumentalities.

Generally, then, R.C. 2921.42(A)(4) would prohibit a member of the governing board of a community school from being employed by, or selling goods or services to, the community school for the use of the sponsoring public agency. Because R.C. 3314.03(A)(11)(e) provides an exception to the prohibition contained in R.C. 2921.42(A)(4), however, a member of a community school's governing board is not prohibited from having a definite and direct interest in the sale of goods or services to the school, excluding a contract with a for-profit firm for the management or operation of the school.

With respect to R.C. 2921.42(A)(3), the prohibition is not against a public official having an “interest” in a public contract. Rather, R.C. 2921.42(A)(3) prohibits a public official from occupying a position of profit in a public contract. In Advisory Opinion No. 92-013, the Ethics Commission held that the General Assembly’s use of the words “occupy any position of profit” in Division (A)(3) characterizes a different type of activity on the part of a public official than having “an interest in the profits or benefits of a public contract,” for purposes of Divisions (A)(1) and (4). Adv. Op. No. 92-013. During his service on the board, or within one year thereafter, a member of a community school’s governing board is prohibited from occupying a “position of profit” in the prosecution of a public contract authorized by him, or by the governing board, unless the contract was let by competitive bidding to the lowest and best bidder.

### **Application of Exception**

However, in R.C. 3314.03(A)(11)(e), the General Assembly specifically stated:

[N]othing in [Chapter 102.] or section 2921.42 of the Revised Code shall prohibit a member of the school's governing board from having an interest in a contract into which the governing board enters that is not a contract with a for-profit firm for the operation or management of a school under the auspices of the governing authority.

By this language, the General Assembly has demonstrated its clear intention that, with the exception of contracts with a for-profit firm for the operation or management of a school, there should be no prohibition against members of the governing board of a community school being employed or entering into contracts with the community school. It is apparent that the General Assembly has weighed the relative merits of imposing the Ethics Law and related statutes in their entirety, and decided, instead, to craft a narrow statute to permit employment and contracts.

It would be contrary to the General Assembly's explicitly stated intention for the Ethics Commission to conclude that R.C. 2921.42(A)(3) effectively prohibits employment contracts, because those contracts are not competitively bid, where the exception in R.C. 3314.03(A)(11)(e) appears intended to specifically allow such employment. Further, with respect to other contracts, it would be a logical inconsistency to assume that the General Assembly excepted the members of governing boards of community schools from the provisions of R.C. 2921.42(A)(4), but not R.C. 2921.42(A)(3), when the restrictions, in this situation, would preclude essentially the same activity.

Therefore, the Commission concludes that the exception in R.C. 3314.03(A)(11)(e) extends to the restrictions in both R.C. 2921.42(A)(3) and (A)(4). As a result, except as provided in R.C. 3314.03(A)(11)(e), the members of the governing boards of community schools are not prohibited from being employed by, or having other contracts with, the community schools they serve.

However, R.C. 3314.03(A)(11)(e) does not provide an exception to all of the prohibitions imposed by other sections of R.C. 2921.42.



### **Authorizing a Public Contract—R.C. 2921.42(A)(1)**

Division (A)(1) of R.C. 2921.42 prohibits a public official from authorizing, or using the authority or influence of his office, to secure a public contract in which he, a family member, or a business associate has an interest. A person who is employed by, or sells goods or services to, a community school, has an interest in a public contract for the use of the public agency that sponsors the community school. The exception in R.C. 3314.03(A)(11)(e) does not suggest that the General Assembly intended to allow, members of the governing boards of community schools to award employment or other contracts to themselves, their family members, or their business associates.

Therefore, R.C. 2921.42(A)(1) prohibits a member of a community school's governing board from authorizing a contract for himself, and from participating as a board member in matters that affect a contract in which he has an interest. See also R.C. 102.03(D) (discussed above). Further, notwithstanding the stated statutory exception, R.C. 2921.42(A)(1) and R.C. 102.03(D) also prohibit a member of a community school's governing board from authorizing, or using the authority or influence of his position on the governing board to secure, either the authorization of a public contract or anything of value for a family member or business associate.

### **Other Officers and Employees of Community Schools**

Although your question pertains to members of a community school's governing board, the mandate in R.C. 3314.03(A)(11)(e) that "[t]he school shall comply with Chapter 102. of the Revised Code" would impose the restrictions of the Ohio Ethics Law and related statutes upon all school officers and employees. Therefore, the community school superintendent, treasurer, and other officers and employees are subject to the restrictions in R.C. Chapter 102. and Sections 2921.42 and 2921.43. This would include all employees, regardless of their job duties, except teachers and other educators.

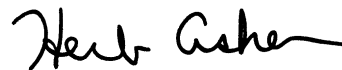
Teachers and other educators employed by community schools, whose job duties do not include the authority to perform supervisory or administrative functions, are specifically excepted from the restrictions in R.C. 102.03, which include the revolving door, conflict of interest, and confidentiality laws. However, teachers and other educators are subject to the restrictions set forth in R.C. 102.04 (which prohibits representation of clients before the agency served), R.C. 2921.42 (discussed above), and 2921.43 (which prohibits supplemental compensation). See Adv. Op. No. 93-017.

### **Summary**

As explained above, members of the governing board of a community school are bound by the provisions of R.C. Chapter 102. pursuant to the terms of the contract between the community school and the sponsor district. Further, members of the governing board of a community school are "agents" of the state and, therefore, "public officials" subject to the provisions of R.C. 2921.42 (the public contract law) and R.C. 2921.43 (the supplemental compensation law).

Because of the specific exception enacted by the General Assembly in R.C. 3314.03(A)(11)(e), however, the Commission concludes that a member of the board of a community school may become an employee of the school and may sell goods or some services to the community school. However, R.C. 102.03(D) and 2921.42(A)(1) prohibit a member of the board of a community school from participating, in any manner as a board member, in board actions to approve, or alter the terms and conditions of, any kind of contract in which he, a family member, or a business associate, has an interest, including an employment contract.

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. Therefore, it is opinion of the Ohio Ethics Commission, and you are so advised, that: (1) All members of the governing board of a community school are subject to the provisions of the Ohio Ethics Law and related statutes, as set forth in R.C. Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code, except as set forth in Division (A)(11)(e) of Section 3314.03 of the Revised Code; (2) This conclusion also applies to all officers and employees of a community school, excluding teachers and other educators who have no authority to perform supervisory or administrative functions; and (3) Teachers and other educators employed by a community school, whose job duties do not include the authority to perform supervisory or administrative functions, are subject to the restrictions set forth in Sections 102.04, 2921.42, and 2921.43 of the Revised Code, but are not subject to the restrictions set forth in Section 102.03 of the Revised Code.



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