

OHIO ETHICS COMMISSION

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INFORMATION SHEET: ADVISORY OPINION NO. 2005-02 **SCHOOL DISTRICT FINANCIAL PLANNING AND SUPERVISION COMMISSION**

What is the question addressed in the opinion?

Are the members of a financial planning and supervision commission, with authority to adopt and implement a financial recovery plan for a school district in fiscal emergency, subject to the Ohio Ethics Law and related statutes?

What is the answer in the opinion?

Yes. A financial planning and supervision commission is an agency and instrumentality of the state created to adopt and implement a financial recovery plan for a school district in fiscal emergency. A financial planning and supervision commission has the authority to sue and be sued, enter into contracts, and make reductions in the school district's workforce to bring the district's budget into balance.

Because a financial planning and supervision commission is an instrumentality of the state with substantial administrative authority, the members of the commission are subject to the post-employment, confidentiality, and conflicts of interest prohibitions set forth in R.C. 102.03, the representation and contracting prohibitions set forth in R.C. 102.04, the public contract prohibitions in R.C. 2921.42, and the supplemental compensation prohibitions in R.C. 2921.43. However, because of a specific exception to the law, a member of a financial planning and supervision commission is not required to file a financial disclosure statement.

To whom does this opinion apply?

This opinion applies to any person who is a member of a financial planning and supervision commission created for a school district that is in fiscal emergency.

How and when did 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. 2005-02 IS ATTACHED.**

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Advisory Opinion
Number 2005-02
August 11, 2005

Syllabus by the Commission:

- (1) A “financial planning and supervision commission” is an agency and instrumentality of the state created pursuant to Section 3316.05 of the Ohio Revised Code to adopt and implement a financial recovery plan for a school district in fiscal emergency, with authority set forth in Section 3316.07 to sue and be sued, enter into contracts, and make reductions in the district’s work force to bring the district’s budget into balance;
- (2) A member of a school district financial planning and supervision commission is a “public official or employee,” as that term is defined in Division (B) of Section 102.01 of the Revised Code, subject to the post-employment, confidentiality, and conflicts of interest prohibitions set forth in Section 102.03 and is an officer of an instrumentality of the state subject to the representation and contracting prohibitions set forth in Section 102.04;
- (3) A member of a school district financial planning and supervision commission is a “public official,” as that term is defined in Division (A) of Section 2921.01 of the Revised Code, subject to the public contract prohibitions set forth in Section 2921.42 and the supplemental compensation prohibitions set forth in Section 2921.43; and
- (4) Because Division (J) of Section 3316.05 of the Revised Code requires members of a school district financial planning and supervision commission to file a statement described in that section, and exempts them from the financial disclosure filing requirement in the Ethics Law, the members of financial planning and supervision commissions are not required to file the disclosure statement described in Section 102.02 of the Revised Code.

* * *

The Ohio Ethics Commission has been asked whether the members of a school district financial planning and supervision commission are subject to the prohibitions of Ohio’s Ethics Law and related statutes.

Brief Answer

As explained more fully below, a member of a school district financial planning and supervision commission is subject to the post-employment, confidentiality, and conflict of interest prohibitions in R.C. 102.03, the representation and sale of goods prohibitions in R.C. 102.04, and the public contract and supplemental compensation prohibitions contained in R.C. 2921.42 and 2921.43. Because of the statutory exception set forth in R.C. 3316.05(J), an appointed member of a financial planning and supervision commission is not subject to the financial disclosure requirements of R.C. 102.02, but must file the financial statement described R.C. 3316.05(J).

School District Financial Planning and Supervision Commission

A “financial planning and supervision commission” is created pursuant to authority established in Ohio Revised Code Chapter 3316. The state policy to require school district fiscal integrity is stated in R.C. 3316.02. Under that policy, the General Assembly enacted procedures, provided powers, and imposed restrictions, set forth in Chapter 3316., to assure fiscal integrity for school districts.

R.C. 3316.03 empowers the State Auditor, in the presence of certain specified conditions, to declare that a school district is in a state of “fiscal emergency.” After the Auditor declares a fiscal emergency in any school district, R.C. 3316.05 provides that a financial planning and supervision commission is established for the school district. The financial planning and supervision commission is a body corporate and politic “constituting an agency and instrumentality of the state and performing essential governmental functions of the state.” R.C. 3316.05(A).

A financial planning and supervision commission is composed of five voting members. R.C. 3316.05(B). There are two ex officio members: the Director of the Office of Budget and Management and the Superintendent of Public Instruction, or their respective designees. R.C. 3316.05(B)(1). Of the other three voting members, one is appointed by the Governor, one is appointed by the Superintendent of Public Instruction, and one is appointed by the mayor of the municipal corporation with the largest number of residents living in the school district or by the county auditor of the county with the largest number of residents living in the school district. R.C. 3316.05(B)(2).

The Superintendent of Public Instruction is the Chairperson of any financial planning and supervision commission that is established. R.C. 3316.05(D). The Auditor of State is the financial supervisor for the school district under the control of a financial planning and supervision commission. R.C. 3316.05(G). The Attorney General shall serve as legal counsel for the financial planning and supervision commission. Id.

A financial planning and supervision commission is empowered to adopt a financial recovery plan for the school district for which it was created. R.C. 3316.06(A). The plan will be submitted to the Superintendent of Public Instruction for approval. R.C. 3316.06(C). The financial recovery plan must include actions to be taken to eliminate all fiscal emergency conditions, satisfy judgments and past-due accounts payable, eliminate the deficits in all deficit funds, balance the budget and avoid fiscal emergency conditions in the future. R.C. 3316.06(A). The financial recovery plan will also include the management structure that will enable the district to take the actions enumerated, target dates for commencement and completion of the actions, and the amount and purpose of any issue of debt obligations that will be issued to support the actions enumerated. R.C. 3316.06(A)(2).

In order to fulfill its authority set forth in R.C. Chapter 3316., a financial planning and supervision commission for a school district exercises the powers and performs the duties and functions set forth in R.C. 3316.07(A). Among other things, a financial planning and supervision commission is empowered to: review or assume responsibility for the development of all tax budgets, tax levies and bond and note resolutions; bring civil actions; enter into contracts; consult with officials of the school district and make recommendations or assume the responsibility for implementing cost reductions and revenue increases to achieve balanced budgets; and make reductions in force to bring the school district's budget into balance, within limitations set forth in the statute. See R.C. 3316.07(A)(1), (4), (5), (9), (10), and (11), respectively.

R.C. 3316.16 provides that a financial planning and supervision commission shall continue in existence until a determination is made that conditions exist indicating that the commission's statutory goals have been met. Once the determination has been made, the financial planning and supervision commission and its functions under Chapter 3316. will terminate. R.C. 3316.16(B).

Application of the Ethics Law and Related Statutes

Section 102.03 of the Revised Code imposes prohibitions regarding post-employment conduct, confidentiality, and conflicts of interest upon any "public official or employee." The representation and sale of goods restrictions, set forth in R.C. 102.04(A) and (B), apply to any person "elected or appointed to an office of . . . any . . . instrumentality . . . of the state." The public contract restrictions, set forth in R.C. 2921.42, apply to any person who is a "public official." Finally, the supplemental compensation restrictions, set forth in R.C. 2921.43, apply to any person who is a "public servant."

"Public Official or Employee"—R.C. 102.03

The term "public official or employee," as used in R.C. 102.03, is defined to include any person who is appointed to an office of an instrumentality of the state, a county, or "any other governmental entity." See R.C. 102.01(B) and (C). A school district financial planning and

supervision commission is a body political and corporate, constituting an “agency and instrumentality of the state.” See R.C. 3316.05(A). Therefore, a member of a financial planning and supervision commission for a school district is a public official, for purposes of the application of R.C. 102.03, if he or she is “appointed to an office.”

Under Ohio law, a person who holds an “office” is an “officer.” Muskingum Co. Democratic Exec. Comm. v. Burrier, 31 Ohio Op. 570, 572 (C.P. Muskingum County 1945). See also Ohio Ethics Commission Advisory Opinion No. 85-005. The Ethics Commission has established five elements that, in combination, will determine whether a person is “appointed to an office.” The Commission determines whether the person: (1) is appointed; (2) has a title; (3) exercises a function of government concerning the public; (4) is not subject to a contract of employment; and (5) exercises the “sovereign power” of government. See Adv. Ops. No. 74-007, 75-004, and 77-004. In Advisory Opinion No. 77-004, the Commission held that sovereign power “includes the exercise of a duty entrusted to one by virtue of statute or some other public authority, a duty that is not merely clerical, but that involves discretionary, decision-making qualities.” See Adv. Op. No. 75-004. See also State ex rel. Landis v. Butler, 95 Ohio St. 157 (1917).

The statutes governing the authority of a financial planning and supervision commission for a school district clearly indicate that a commission member exercises “sovereign power” and is therefore appointed to an office of an agency or instrumentality of the state. R.C. 3316.05(A) states that a financial planning and supervision commission performs essential governmental functions. R.C. 3316.07(A) describes these essential functions. As noted above, these functions include, but are not limited to: developing all tax budgets, tax levies and bond and note resolutions; bringing civil actions; entering into contracts; and making reductions in force to bring the school district’s budget into balance, within limitations set forth in the statute. See R.C. 3316.07(A).

Based on the statutory provisions governing the authority of a financial planning and supervision commission, as set forth in R.C. 3316.07(A), a member of a financial planning and supervision commission exercises “sovereign authority” and is subject to the prohibitions of Section 102.03 of the Revised Code.

Person Appointed to an Office of an Instrumentality—R.C. 102.04

R.C. 102.04(A) prohibits a public official from accepting compensation from any source, other than from the governmental entity that he serves, for performing services on matters pending before that governmental entity. R.C. 102.04(B) prohibits a public official from selling goods or services to his own governmental entity. This prohibition applies to any person who is appointed to an office of an instrumentality of the state. See R.C. 102.04(A) and (B). As explained above, a member of a financial planning and supervision commission is appointed to an office of an instrumentality of the state. Therefore, a member of a financial planning and supervision commission is subject to the prohibitions of Section 102.04.

“Public Official” and “Public Servant”—R.C. 2921.42 and 2921.43

The other provisions of ethics-related statutes that need to be analyzed are Sections 2921.42 and 2921.43 of the Revised Code. R.C. 2921.42, which provides general prohibitions against having an interest in a public contract, states that its prohibitions apply to any “public official,” which is defined in R.C. 2921.01(A). R.C. 2921.43, which limits supplemental compensation, states that its prohibitions apply to any “public servant,” which is defined in R.C. 2921.01(B) and includes any “public official.”

Therefore, a member of a financial planning and supervision commission will be subject to the prohibitions of R.C. 2921.42 and 2921.43 if the commission member is a “public official.” The term “public official” is defined for purposes of R.C. 2921.42 and 2921.43 to include any elected or appointed officer or agent of the state or any political subdivision thereof. See R.C. 2921.01(A). In Advisory Opinion No. 92-001, the Ethics Commission explained that an individual who is “appointed to an office” is an “appointed officer” for purposes of R.C. 2921.01(A). As stated above, a member of a financial planning and supervision commission is appointed to an office of an instrumentality of the state. Therefore, a member of a financial planning and supervision commission is a “public official,” as that term is defined in R.C. 2921.01(A). A member of a financial planning and supervision commission for a school district is subject to the prohibitions set forth in both R.C. 2921.42 and 2921.43.

Financial Disclosure Requirements—R.C. 102.02


R.C. 102.02(A) requires that some public officials and employees file annual financial disclosure statements with the Ethics Commission. Members of boards of education, and educational service center governing boards, of school districts and educational service centers with more than 12,000 total student count, are required to file financial disclosure statements. R.C. 102.02(A). R.C. 102.02(B) empowers the Ethics Commission to require other classes of public officials and employees under its authority, whose positions involve a substantial and material exercise of administrative discretion in the formulation of public policy, expenditure of public funds, enforcement of laws and rules of the state or a county or city, or the execution of other public trusts, to file annual financial disclosure statements. It is possible that the Commission could consider whether members of financial planning and supervision commissions serving school districts in fiscal emergency exercise the kind of authority described in R.C. 102.02(B) such that the Commission could require the commission members to file financial disclosure statements.

However, the legislation that created financial planning and supervision commissions specifically exempts appointed members of such commissions from the requirement to file a financial disclosure statement with the Ethics Commission as described in Section 102.02 of the Revised Code. R.C. 3316.05(J). The Director of Budget and Management and the Superintendent of Public Instruction, who are statutorily required to serve on all financial

planning and supervision commissions, are required to file financial disclosure statements by R.C. 102.02(A). R.C. 3316.05(J) does not exempt these individuals from the filing requirement.

While appointed members of the financial planning and supervision commission cannot be required to file annual financial disclosure statements, R.C. 3316.05(J) does provide that each appointed member of a financial planning and supervision commission must file a signed statement with the financial planning and supervision commission. In the statement, the member must set forth the general nature of any sales of goods, property, or services, or of loans, to the school district served by the commission, if the appointed member, any member of the member's immediate family, or any corporation, partnership, or enterprise of which the appointed member or an immediate family member owns more than a five percent interest, has a pecuniary interest in the sales or loans. R.C. 3316.05(J). The member is required to supplement the statement "from time to time" to reflect changes in the nature of any sales or loans.

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 the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) A "financial planning and supervision commission" is an agency and instrumentality of the state created pursuant to Section 3316.05 of the Ohio Revised Code to adopt and implement a financial recovery plan for a school district in fiscal emergency, with authority set forth in Section 3316.07 to sue and be sued, enter into contracts, and make reductions in the school district's work force to bring the district's budget into balance; (2) A member of a school district financial planning and supervision commission is a "public official or employee," as that term is defined in Division (B) of Section 102.01 of the Revised Code, subject to the post-employment, confidentiality, and conflicts of interest prohibitions set forth in Section 102.03 and is an officer of an instrumentality of the state subject to the representation and contracting prohibitions set forth in Section 102.04; (3) A member of a school district financial planning and supervision commission is a "public official," as that term is defined in Division (A) of Section 2921.01 of the Revised Code, subject to the public contract prohibitions set forth in Section 2921.42 and the supplemental compensation prohibitions set forth in Section 2921.43; and (4) Because Division (J) of Section 3316.05 of the Revised Code requires members of a school district financial planning and supervision commission to file a statement described in that section, and exempts them from the financial disclosure filing requirement in the Ethics Law, the members of financial planning and supervision commissions are not required to file the disclosure statement described in Section 102.02 of the Revised Code.



Merom Brachman, Chair
Ohio Ethics Commission