



OHIO ETHICS COMMISSION

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Advisory Opinion No.78-002

February 16, 1978

Syllabus by the Commission:

- 1) As used in Division (A) of Section 102.03 of the Revised Code, the phrase "represent. . or act in a representative capacity" comprehends any formal or informal appearance or written or oral communication.
- 2) Division (A) of Section 102.03 of the Revised Code prohibits a school district transportation director from representing or acting in a representative capacity for a transportation company in which he is a partner, before the school district by which he is employed, on any matter in which he is directly concerned and personally participates by a substantial and material exercise of administrative discretion in his capacity with the school district.
- 3) Division (D) of Section 102.03 of the Revised Code prohibits a school district transportation director from using or attempting to use his official position to secure anything of value for himself that would not ordinarily accrue to him in the performance of his official duties, which thing is of such character as to manifest a substantial and improper influence upon him with respect to his duties.
- 4) Division (C) of Section 102.04 of the Revised Code prohibits a school district transportation director from receiving or agreeing to receive compensation, directly or indirectly, other than from the school district, for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before the school district.
- 5) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a school district transportation director from knowingly having an interest in the profits or benefits of a contract entered into by or for the use of the school district.

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In your request for an Ohio Ethics Commission Advisory Opinion, you asked whether the Ohio Ethics Law prohibits the president and vice president of a private company which provides transportation, under contract, for the students of the Fairfield City School District, from serving as transportation director or "Transportation Head" for the school district.

You state, by way of history, that the Fairfield Civil Service Commission has prepared a list of persons eligible for the position of school district Transportation Head. Two of the persons on the list are the president and vice president of the private firm which has the pupil

transportation contract with the Fairfield City School District. The duties of the Transportation Head include supervising the implementation of the transportation contract, insuring that the contract is fulfilled by the private company, and "recommending qualified applicants to the board of education for employment."

The prohibitions of the Ohio Ethics Law apply generally to any "public official or employee" or "any person elected or appointed to an office of or employed by. . . the state. . . (or) . . . a county, township, municipal corporation, or any other governmental entity, excluding the courts." A school district is a "governmental entity," and a person employed as the transportation director of a school district is a "public official or employee," and a "person . . . employed by. . . a . . . governmental entity" for purposes of the Ohio Ethics Law. (See: Ohio Ethics Commission Advisory Opinion No. 75-020)

The Ohio Ethics Law prohibits certain conduct by public officials and employees. It would not, per se, prohibit the appointment of the president or vice president of a transportation company to a position as transportation director of the school district, since neither person would be a public employee for purposes of the Ethics Law until he assumed the position.

Division (A) of Section 102.03 of the Revised Code provides, in pertinent part:

"No public . . . employee shall represent a client or act in a representative capacity for any person before the public agency by which he is. . employed . . -on any matter with which the person is directly concerned and in which he personally participated during his employment . . . by a substantial and material exercise of administrative discretion."

The pertinent elements of Division (A) of Section 102.03 of the Revised Code are: 1) a public employee; 2) is prohibited from representing a client or acting in a representative capacity for any person (defined in Section 1.59 of the Revised Code to include any individual, corporation, partnership, association, or other similar entity); 3) before the public agency by which he is or within the last twelve months was employed; 4) on any matter with which he is or was directly concerned and in which he personally participated by a substantial and material exercise of administrative discretion. This prohibition remains in effect for twelve months after the public employee leaves office. In the instant case, Division (A) of Section 102.03 of the Revised Code would prohibit an employee of the school district (the transportation director) from representing or acting in a representative capacity for any person, including his transportation company, before the agency by which he is employed (the school district), on any matter with which he has been directly concerned and in which he personally participated by a substantial and material exercise of administrative discretion (supervision of the contract for the transportation of pupils).

As used in Division (A) of Section 102.03 of the Revised Code, the phrase "represent a client or act in a representative capacity" would comprehend any formal or informal appearance or written or oral communication., by the public official or employee on behalf of any "person," with the public agency by which he is employed. Thus.- any appearance before or communication with the school district by the transportation director on behalf of his private company regarding the transportation of pupils would constitute "representation" in violation of

this provision. We conclude that Division (A) of Section 102.03 of the Revised Code prohibits a school district transportation director from representing or acting in a representative capacity for a transportation company in which he is a partner, before the school district by which he is employed, on any matter with which he is directly concerned and in which he personally participated by a substantial and material exercise of administrative discretion in his capacity with the school district.

Division (D) of Section 102.03 of the Revised Code provides, in pertinent part:

"No public . . . employee shall use or attempt to use his official position to secure anything of value for himself that would not ordinarily accrue to him in the performance of his official duties, which thing is of such character as to manifest a substantial and improper influence upon him with respect to his duties."

The pertinent elements of Division (D) of Section 102.03 of the Revised Code are: 1) a public employee; 2) is prohibited from using or attempting to use his official position; 3) to secure anything of value for himself; 4) the thing of value must be something that would not ordinarily accrue to him in the performance of his official duties; and 5) the thing of value must be of such character as to manifest a substantial and improper influence upon him with respect to his duties. Violations of Section 102.03 (D) depend upon the specific facts and circumstances of a particular case, and it is difficult to identify potential violations without access to all the facts of the situation. However, a city school district transportation director would be in a position to use or attempt to use his official position to secure something of value for- himself, such as the benefits of a transportation contract with the school district. Such benefits would not ordinarily accrue to the transportation director in the performance of his official duties, and could manifest a substantial and improper influence upon him with respect to his duties. The mere acceptance of the position as transportation director would not, per se, constitute a violation of Division (D) of Section 102.03 of the Revised Code ' : however, it would create the appearance of impropriety, and subsequent actions while serving concurrently in two positions may result in an actual violation. We conclude that Division (D) of Section 102.03 of the Revised Code prohibits a school district transportation director from using or attempting to use his official position to secure anything of value for himself that would not ordinarily accrue to him in the performance of his official duties, which thing is of such character as to manifest a substantial and improper influence upon him with respect to his duties.

Division (C) of Section 102.04 of the Revised Code provides:

"Except as provided in division (D) of this section, no person who is elected or appointed to an office of or employed by a county, township, municipal corporation, or any other governmental entity, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which he is an officer or employee. - . ." (emphasis added)

The pertinent elements of Division (C) of Section 102.04 of the Revised Code are: 1) a person employed by a governmental entity, such as a school district; 2) is prohibited from receiving or agreeing to receive compensation, directly or indirectly, except from the governmental entity by which he is employed; 3) for a service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before any agency of the entity by which he is employed. This provision would prohibit a person employed by a school district from receiving or agreeing to receive compensation, directly or indirectly, other than from the school district, for any service rendered or to be rendered by him personally in any matter which is before the school district.

As noted in your request for an opinion, the application of this provision turns on an interpretation of the phrase "or other matter which is before any agency . . . -of the entity of which he is an . . . employee." In Ohio Ethics Commission Advisory Opinion No. 75-006, the Commission concluded that matters which are being considered by, judged by, decided by, in the presence of, or under the official purview of, are "matters which are before a governmental entity" for purposes of this Section. Thus., in the instant case, the transportation director would be prohibited from receiving or agreeing to receive compensation from the transportation company, directly or indirectly, on any matter involving the transportation of pupils that requires a determination or decision by the board of education of the school district, including approval or renewal of the transportation contract itself. It should also be noted that the exemption of Division (D) of Section 102.04 of the Revised Code would not apply in the instant case, since the person would be employed by and providing services in a matter before the same entity, the school district. We conclude that Division (C) of Section 102.04 of the Revised Code prohibits a school district transportation director from receiving or agreeing to receive compensation, directly or indirectly, other than from the school district, for any service rendered or to be rendered by him personally in any case., proceeding, application, or other matter which is before the school district.

Section 102.08 of the Revised Code authorizes the Ohio Ethics Commission to render advisory opinions interpreting Section 2921.42 as well as Chapter 102. of the Revised Code. Section 2921.42 of the Revised Code, provides. in pertinent part:

"(A) No public official shall knowingly do any of the following:

(1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest;

....

(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."

Section 2921.42 of the Revised Code applies to any "public official," defined in Section 2921.01 (A) of the Revised Code to include "any elected or appointed official., or employee, or

agent of the state or any political subdivision thereof. . . ." (emphasis added), which would include a school district employee such as the transportation director. The term "public contract" is defined in Division (E)(1) of Section 2921.42 as "the purchase or acquisition., or a contract for the purchase or acquisition of property or services by or for the use of the state or any of its political subdivisions, or any agency or instrumentality of either." This definition would comprehend a contract for the transportation of pupils between a school district, which is considered a political subdivision, and a private contractor.

Division (A)(1) of Section 2921.42 of the Revised Code would prohibit the transportation director from knowingly authorizing or using the authority or influence of his office to secure authorization of a pupil transportation contract between the school district and a firm in which he has an interest. Division (A) (4) of that Section would prohibit a school district transportation director from knowingly having an interest in the profits or benefits of a contract between the school district and the transportation firm with which he is associated. Division (A)(4) appears to be more applicable to the facts as presented. It prohibits a person with an ownership interest in the transportation firm from serving as transportation director, since his acceptance of the position would make him a public official with an interest in a public contract, the transportation contract.

Division (B) of Section 2921.42 of the Revised Code provides that, in the absence of bribery or fraud, a public servant, a member of his family, or any of his business associates shall not be considered to have an interest in a public contract when: 1) the public servant's interest in such a contract is limited to owning shares of a corporation, 2) the shares he owns do not exceed five per cent of the outstanding shares of the corporation, and 3) he files with the governmental entity an affidavit establishing his status with the corporation or organization. This exception would probably not apply in the instant case; the transportation director appears to have more than a mere ownership interest, since he participates in the operation of the transportation firm.

Division (C) of Section 2921.42 of the Revised Code provides that the prohibitions of Division (A) of that Section do not apply to a public contract in which the public servant has an interest, when all of the following apply: 1) the subject of the contract is necessary supplies or services; 2) the services are unobtainable elsewhere for the same or lower cost or are furnished as part of a continuing course of dealing established prior to the public servant's association with the governmental entity; 3) the treatment accorded the governmental entity is either preferential or the same as that accorded other customers or clients in similar transactions; and 4) the entire transaction is conducted at arm's length, with full knowledge by the governmental entity of the interest of the public servant, and the public servant takes no part in the deliberations or decision with respect to the contract. These are factual determinations, and whether a particular transaction meets the criteria of Division (C) of Section 2921.42 of the Revised Code depends on the facts and circumstances of the individual case.

In the instant case: 1) the contract for pupil transportation services may not be necessary, since the school district could provide its own transportation service; 2) although it is not clear whether the services are unobtainable elsewhere for the same or lower cost, it appears that the services are furnished as part of a continuing course of dealing established prior to the public servant's association with the school district (at present, the parties are associated with the school

district only as independent contractors); 3) it appears that the treatment accorded to the school district would be the same as that accorded to other customers of the transportation company in similar transactions; however, 4) it is not clear whether the entire transaction has been conducted at arm's length with full knowledge of the board of education of the interests or potential interests of the parties in the transportation company. Thus, it appears that at least two of the criteria, numbers (1) and (4), may not be met under the facts as presented.

Therefore, we conclude that, unless the criteria for exemption are met, Division (A)(4) of Section 2921.42 of the Revised Code prohibits a school district transportation director from knowingly having an interest in the profits or benefits of a public contract entered into by or for the use of the school district.

Thus, if either the president or vice president of a private transportation company which provides pupil transportation for the school district under contract becomes transportation director of the school district, it would create the appearance of impropriety, and may constitute a violation of Divisions (A) or (D) of Section 102.03, Division (C) of Section 102.04, or Division (A)(4) of Section 2921.42 of the Revised Code.

The conclusions of this advisory opinion are based upon an examination of the facts and circumstances of the instant case as you have presented them. The Ohio Ethics Commission cautions that its advisory opinions may be relied upon only with respect to questions arising under Chapter 102. or Section 2921.42 of the Revised Code, and do not address possible violations of other laws or rules.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised that: 1) as used in Division (A) of Section 102.03 of the Revised Code, the phrase "represent. . or act in a representative capacity" comprehends any formal or informal appearance or written or oral communication; 2) Division (A) of Section 102.03 of the Revised Code prohibits a school district transportation director from representing or acting in a representative capacity for a transportation company in which he is a partner, before the school district by which he is employed, on any matter with which he is directly concerned and in which he personally participates by a substantial and material exercise of administrative discretion in his capacity with the school district; 3) Division (D) of Section 102.03 of the Revised Code prohibits a school district transportation director from using or attempting to use his official position to secure anything of value for himself that would not ordinarily accrue to him in the performance of his official duties, which thing is of such character as to manifest a substantial and improper influence upon him with respect to his duties; 4) Division (C) of Section 102.04 of the Revised Code prohibits a school district transportation director from receiving or agreeing to receive compensation, directly or indirectly, other than from the school district, for any service rendered or to be rendered by him personally in any case, proceeding, or application, or other matter which is before the school district; 5) Division (A)(4) of Section 2921.42 of the Ohio Revised Code prohibits a school district transportation director from knowingly-having an interest in the profits or benefits of a contract entered into by or for the use of the school district.

