



OHIO ETHICS COMMISSION

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Advisory Opinion Number 93-008
May 21, 1993

Syllabus by the Commission:

(1) Division (A) (1) of Section 2921.42 of the Revised Code prohibits a member of a board of education from authorizing, voting upon, discussing, deliberating, recommending, or otherwise using the authority or influence of his position, formally or informally, to secure the employment of his minor child by the board of education;

(2) The prohibition which Division (A) (4) of Section 2921.42 of the Revised Code imposes upon a member of a board of education precludes his minor child from being employed for compensation by the board even if the board member does not exercise his statutory right to the child's earnings, unless the exception of Division (C) of Section 2921.42 of the Revised Code can be established;

(3) The prohibition which Division (A) (3) of Section 2921.42 of the Revised Code imposes upon a member of a board of education precludes his minor child from being employed for compensation by the board, unless the board member does not exercise his statutory right to the child's earnings.

* * * * *

You have asked whether the prohibitions which the Ohio Ethics Laws and related statutes impose upon the members of a local school district board of education preclude the minor children of board members from being employed as lifeguards at a swimming pool operated by the board.

You state that the board employs approximately 10-12 lifeguards who serve on a rotating basis to provide protection during hours when the pool is open. The board solicits applicants for the lifeguard positions from the student body through "school district channels" and does not seek applicants from outside the student body. Periodically the board faces an understaffing problem when there are more open positions than applicants. You contend that the understaffing problem would be remedied if the board hired the minor children of board members.

You also state that in the past, the board has hired minor children of board members as lifeguards, but both parent and child were required to show that the child's earnings would not be used to substitute for the parent's support obligations, or otherwise inure to the benefit of the parent board member. The board will not hire a minor child of a board member if the child's employment would displace another applicant. For purposes of this opinion, it is assumed that the minor children are unemancipated.

A member of a board of education is subject to Divisions (A)(1) and (A) (4) of Section 2921.42 of the Revised Code which read as follows:

(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.

The general prohibitions imposed by Divisions (A)(1) and (A)(4) must be explained in order to address your specific questions.

R.C. 2921.42 (A)(1) prohibits a public official from authorizing, or using the authority or influence of his office to secure authorization of, the employment of a member of his family by the political subdivision with which he serves. See In re Removal of Steed, No. 1909 (Lawrence County July 27, 1989) ; Walsh v. Bollas, Case No. 91-L-149 (Lake County September 21, 1992); Ohio Ethics Commission Advisory Op. No. 90-010. For purposes of R.C. 2921.42, a family member includes children whether dependent or not. Advisory Ops. No. 80-001 and 90-010. In the instant situation, Division (A) (1) prohibits a board member from authorizing, voting upon, discussing, deliberating, recommending, or otherwise using the authority or influence of his position, formally or informally, to secure the employment of his child by the board as a lifeguard at a swimming pool operated by the board, even where his child would be employed only in a temporary or part-time capacity with the board. See Advisory Op. No. 90-010. See also R.C. 102.03 (D).

Division (A)(4) of Section 2921.42 prohibits a public official from having an interest in a public contract entered into by or for the use of his own political subdivision. An "interest" which is prohibited under R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. See Advisory Op. No. 81-008. In the instant situation, Division (A)(4) prohibits a board member from having a definite and direct pecuniary interest in the employment of his child by the board as a lifeguard. The issue is whether a board member would have a prohibited interest in a public contract under R.C. 2921.42 (A)(4) if his minor child were employed by the board.

In previous advisory opinions, the Commission has held that, generally, R.C. 2921.42 (A) (1) and (A) (4) do not prohibit a public officials family member from being employed by the same political subdivision which the official serves, so long as the official refrains from taking any action, formally or informally, to secure employment for his family member, and the official does not have a definite and direct pecuniary interest in the employment of his family member. See Advisory Ops. No. 90-010 and 92-017.

For example, the Ethics Commission has explained that, since the contractual interests of spouses are independent, a public official is not deemed to have a definite and direct interest in a contract with his own political subdivision for purposes of R.C. 2921.42 (A) (4) merely because his spouse has an interest in such contract, absent additional facts which would indicate otherwise. See Advisory Ops. No. 82-003 and 92-017. The Commission explained that while a public official may have an indirect interest in a public contract from which his spouse profits or benefits, an official is not generally considered to have a definite and direct interest in a contract with his political subdivision for purposes of R.C. 2921.42 (A) (4) merely because his spouse has an interest in such contract. See Advisory Ops. No. 88-007, 89-005, and 92-017. See also Board of Education v. Boal, 104 Ohio St. 482 (1922) and Ohio Op. Att'y Gen. No. 89-030. Generally, this would be the case with the employment of most other family members.

However, the instant situation involves the employment of a board member's minor child. As explained above, a spouse has the statutory right to contract independently of his or her spouse and retain his or her own income, see R.C. 3103.04 and 3103.05; however, this is not true with regard to minor children and their parents. A parent has a statutory right to the services and earnings of his or her unemancipated minor children. See R.C. 2111.08. See also Fulton v. Fulton, 52 Ohio St. 229, 238 (1895) and In re Cline's Estate, 30 Ohio Op. 2d 221, 225 (P. Ct. Cuyahoga County 1964). Since a parent has a right to the earnings of his or her minor child, the parent has a pecuniary interest in the earnings of his or her minor child. See 1931 Ohio Op. Att'y Gen. No. 3200, vol. I, p 624 at 625 ("there does not exist a pecuniary interest between a father and son except where the son is a minor and the father is charged with the duty of support") (emphasis added).. See also 1923 Ohio Op. Att'y Gen. No. 302, p 236, 1927 Ohio Op. Att'y Gen. No. 1169, p 2059, and Ohio Op. Att'y Gen. No. 90-040.

Therefore, a board member would have a statutory right to the earnings which his minor child received from employment with the board as a lifeguard, and thus would have a prohibited interest in a public contract under R.C. 2921.42 (A) (4) if his child were employed by the board. Accordingly, the prohibition which R.C. 2921.42 (A)(4) imposes upon the members of a board of education precludes the minor children of board members from being employed for compensation by the board as lifeguards at a swimming pool operated by the board.

As explained above, you have stated that in the past when the board of education hired the minor children of board members as lifeguards, both parent and child were required to show that the child's earnings would not be used to substitute for the parent's support obligations, or otherwise inure to the benefit of the parent board member. In order to determine whether a board member would still have an "interest" in his minor child's earnings under such circumstances, it is necessary to closely examine the definition of the word "interest." The Ethics Commission has consistently adhered to a primary rule of statutory construction that words used in a statute which are not statutorily defined must be construed according to rules of grammar and common usage. See R.C. 1.42.

The word "interest" is defined in The New Lexicon Webster's Dictionary of the English Language as "a legal or financial stake, right or title to a thing, 11 503 (1988 Edition) , and in Black Is Law Dictionary as "a right to have the advantage accruing from anything," 729 (5th ed. 1979). See also Webster's New World Dictionary of the American Language 734 (2d College ed.

1970) (a right or claim to something) . Thus, since "interest" refers to a right or claim, as opposed to the actual exercise of that right or claim, a board member would still have an "interest" in his minor child's earnings even where he does not exercise his statutory right to his child's compensation.

The instant situation is factually akin to the case, In re Removal of Leach, 19 Ohio Op. 263 (C.P. Jackson County 1940), in which the court affirmed the removal of a member of a board of education for malfeasance for having a pecuniary interest in a contract with his board of education. one issue involved the board's employment of the board member's minor son as a janitor despite the fact that the board member neither participated in the board's vote to hire his son nor exercised his right to receive his son's earnings. The board member's minor son resided at home with his father and did not pay board, the father furnished his son with food and lodging, and the son used his compensation from his employment with the board as he saw fit.

The court determined that the board member had a pecuniary interest in his minor son's employment with the board in contravention of sections of the General Code which prohibited a member of a board of education from having a pecuniary interest in a contract with his board of education. The court held that the fact that the board member did not receive his son's earnings was irrelevant in determining whether the board member had a pecuniary interest in the board's employment of his son. The court held at page 268:

It was contended by counsel for the defendant that there was no pecuniary interest in this employment because the son did not in fact give any of his money to the father. However. . . . when a minor son has not been emancipated the father is entitled to his earnings until he reaches the age of majority. The father may not only demand the earnings from the minor son and be entitled thereto, but has a right of action for the same. In the instant case [the defendant] could demand these earnings at any time and have the absolute right to obtain them. The court feels that this is an interest in said employment or that it is a right of property which [the defendant] has in the minor son's earnings. The court, therefore, feels that the evidence clearly discloses a pecuniary interest to (the defendant] in the employment of his minor son as janitor by the board of education. (Emphasis added.)

The court's holding in Leach supports the conclusion that the prohibition which R.C. 2921.42 (A)(4) imposes upon the members of a board of education precludes the minor child of a board member from being employed for compensation by the board even if the board member does not receive the child's earnings.

However, Division (C) of Section 2921.42 provides an exemption to the prohibition of Division (A)(4). R.C. 2921.42 (C) establishes four requirements, and a school board member must demonstrate compliance with all of those requirements before his minor child may be hired by the board of education. Division (C)(2) is of particular note ' and requires that the services which a minor child of a board member is offering to the board be "unobtainable elsewhere for the same or lower cost." The issue becomes whether it can be objectively determined that the services of a board member's minor child as a lifeguard at a swimming pool operated by the board are "unobtainable elsewhere for the same or lower cost."

You have stated that periodically the board faces an understaffing problem whenever there are more vacant lifeguard positions than qualified applicants and you contend that the hiring of the minor children of board members could aid in remedying this problem. It is apparent that there will be no displacement of children who are unrelated to board members if there are more vacant lifeguard positions than applicants and the minor children of board members are hired only to fill those positions which remain vacant after all other interested and qualified children have been employed. However, the board's practice of not seeking applicants from outside the student body must be examined in order to determine whether the exception of Division (C)(2) can be met.

While the board has discretion to determine from what sources it will recruit lifeguards, it is undisputed that limiting its pool of applicants to the student body restricts the number of individuals who are qualified to apply for the lifeguard positions. In order to show that the services of minor children of school board members as qualified lifeguards are unobtainable elsewhere for the same or lower cost, the board must be able to justify objectively the validity of its decision to restrict applications to the student body since such a restriction increases opportunities and favors the chances of the board member's minor children who are qualified to be employed as lifeguards. See Advisory Op. No. 88-001.

You have explained that seeking applicants from outside the student body could limit scheduling flexibility achieved by using local students and deprive some students of needed employment and work experience. However, even if the practice of restricting employment to members of the student body can be shown to be a valid consideration, the board must conduct all aspects of the hiring process on an open and fair basis and make all reasonable efforts to inform the entire student body of available positions in order to provide a broad opportunity for the employment of qualified and interested students who are not minor children of board members. If such actions are taken, the board may employ a board member's minor child only after all qualified and interested applicants who are not related to the board members have been hired and vacancies still remain. See generally Advisory Op. No. 91-011. Also, if the board should decide to reduce the number of lifeguards employed by the school board, preference for continued employment must be given to students who are not the minor children of board members.

In addition, a board member must comply with the other provisions of R.C. 2921.42 (C) . For example, R.C. 2921.42 (C) (4) requires that the transaction be conducted at arm's length, with full knowledge of the governmental agency of the public servant's interest, and the public servant take no part in the deliberations and decision of the governmental agency with respect to the employment. See also R.C. 2921.42 (A)(1) (discussed above).

If a board member is able to comply with the requirements of Division (C) , then Division (A) (4) would not preclude the employment of a board member's minor child. Division (C) does not, however, provide an exception to the prohibition imposed by R.C. 2921.42 (A)(3). See Advisory Op. No. 92-002. R.C. 2921.42 (A)(3) provides that no public official shall knowingly:

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, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid.

Division (A) (3) does not speak in terms of a public officials "interest" in a public contract, but rather prohibits a public official, during his term of office and for one year thereafter, from occupying any position of profit in the prosecution of a public contract," which was authorized by his board, unless the contract was competitively bid and the contract from which he would profit was the lowest and best bid. The Commission has held that a public official will be deemed to "occupy [a] position of profit" in a public contract whenever the official receives a fee or compensation which would be paid from, or is dependent upon, the contract, or the official would receive some other profit or benefit from the contract. See Advisory Ops. No. 88-008 and 92-008. A "position of profit" which is prohibited under Division (A)(3) must be definite and direct in nature. Id. A public official who is a member of a board is subject to the prohibition of R.C. 2921.42 (A) (3) even if he does not deliberate, participate in the discussions, vote upon, or otherwise approve the public contract. See Advisory Op. No. 90-005. See also R.C. 2921.42 (A)(1) (described above).

You have stated that the board authorizes the employment of all school district employees, including students who are employed as lifeguards. You have stated that the board will approve a list of students who will work as lifeguards and the administrator in charge of the swimming pool will choose students from the list to work as lifeguards on an as-needed basis. Thus, the student's employment is "authorized" by the board of education. See Advisory Ops. No. 87-004 and 92-017. Since lifeguards are not hired pursuant to competitive bidding, it is necessary to determine whether, for purposes of Division (A) (3) , a board member will "occupy [a] position of profit" in the employment of his minor child by the board.

The Ethics Commission has held that the term "profit" as used in R.C. 2921.42 (A) (3) connotes a pecuniary gain or benefit. See Advisory Ops. No. 92-013 and 92-017. Thus, if a school board member exercises his statutory right to the compensation which his minor child earns from employment with the school board, then the board member would receive a pecuniary gain or benefit from the minor child's employment and be considered to "occupy [a] position of profit" in the school board's employment of his minor child for purposes of R.C. 2921.42 (A)(3).

However, as discussed above, you have stated that in the past, when the board of education hired the minor children of board members as lifeguards, both parent and child were required to show that the child's earnings would not be used to substitute for the parent's support obligations, or otherwise inure to the benefit of the parent board member. The issue thus remains whether a board member will "occupy [a] position of profit" in the employment of his minor child by the board if he does not exercise his statutory right to his minor child's compensation.

In order to address this issue it is necessary to more closely examine the definition of the word "profit." In Advisory Op. No. 92-013, the Commission held:

The word "profit" is defined in The New Lexicon Webster's Dictionary of the English Language as "to obtain financial gain or other benefit" The New Lexicon Webster's Dictionary of the English Language 798 (1988 Edition). (Emphasis added.)

While the word "obtain" is not used in Division (A) (3), it is necessary to examine its definition in order to thoroughly construe the word "profit" as used in Division (A)(3). The word "obtain" is defined in The New Lexicon Webster's Dictionary of the English Language as "to become the possessor of, secure for oneself or another." The New Lexicon Webster's Dictionary of the English Language 693 (1988 Edition).

As explained above, a parent has a statutory right to the earnings of his minor child and thus, has a pecuniary "interest" in the child's employment for purposes of R.C. 2921.42 (A)(4), regardless of whether the parent exercises the statutory right to the earnings of his minor child. However, in order to "occupy a position of profit" it is necessary for a public official to actually obtain or realize a financial gain or benefit. If a board member whose minor child is hired by the board does not exercise his right to his minor child's earnings, then he will not obtain a financial gain or other benefit as a result of his minor child's employment and would not be considered to "occupy a position of profit" in the board's employment of his minor child for purposes of Division (A) (3), despite the fact that he will have an "interest" in the child's employment for purposes of Division (A) (4). So long as the board member does not receive any pecuniary gain or benefit from his minor child's employment with the board, the prohibition which R.C. 2921.42 (A) (3) imposes upon a board member does not preclude his minor child from being employed as a lifeguard at a swimming pool operated by the board.

The court's decision in *Leach* that a school board member has an "interest" in his minor child's employment with the school board does not apply to the prohibition of R.C. 2921.42 (A)(3) since it relied upon General Code statutes which prohibited members of a board of education from having "directly or indirectly any pecuniary interest in a contract of the board," and from being "interested in a contract" with his own board of education. The General Code statutes did not contain a provision comparable to R.C. 2921.42 (A) (3), which prohibits a public official from occupying any position of profit" in a public contract authorized by the official or his board.

Therefore, the court's holding in *Leach* that a board member has a "pecuniary interest" in his minor child's employment with the board even if the minor child does not give his earnings to the board member does not establish that the board member occupies a "position of profit" in a minor child's employment where the parent does not exercise his or her statutory right to his or her minor child's compensation. See Advisory Op. No. 76-008 (the Ethics Commission has adhered to the rule of statutory construction that if a statute uses two terms, then each term is presumed to have a different meaning) .

Your questions also raise the issue of the application of other statutes which are outside the Ethics Commission's advisory jurisdiction. See R.C. 102.06 and 102.08 (the Commission's statutory jurisdiction is limited to Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code) . Your attention is directed to R.C. 3313.33, which reads in pertinent part, 11[n]o member of the board shall have, directly or indirectly, any pecuniary interest in any contract of the board .

. . (Emphasis added.) Also, R.C. 3319.21 reads in pertinent part, [w]henver a local director or member of a board of education . . . acts in any matter in which he is pecuniary interested, such contract, or such act in such matter, is t the employment of a minor son of a school board member is illegal under General Code Section 4757, which is the predecessor to R.C. 3313.33, and would violate General Code Section 12932, which is the predecessor to R.C. 3319.21, since the board member would have a pecuniary interest in the contract. See also Ohio Op. Att’y Gen. No. 89-030. It must be noted that the exception which Division (C) provides to the prohibition imposed by Division (A) (4) does not apply to R.C. 3313.33. See generally Advisory Op. No. 84-006 and Ohio Op. Att’y Gen. No. 82-008. It is for the school board's legal counsel, rather than the Ethics Commission, to interpret R.C. 3313.33 and R.C. 3319.21 in conjunction with the court's holding in Leach and the Attorney Generals decisions set forth above.

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) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a member of a board of education from authorizing, voting upon, discussing, deliberating, recommending, or otherwise using the authority or influence of his position, formally or informally, to secure the employment of his minor child by the board of education; (2) The prohibition which Division (A) (4) of Section 2921.42 of the Revised Code imposes upon a member of a board of education precludes his minor child from being employed for compensation by the board even if the board member does not exercise his statutory right to the child's earnings, unless the exception of Division (C) of Section 2921.42 of the Revised Code can be established; and (3) The prohibition which Division (A) (3) of Section 2921.42 of the Revised Code imposes upon a member of a board of education precludes his minor child from being employed for compensation by the board, unless the board member does not exercise his statutory right to the child's earnings.


Jack Paul DeSario, Chair
Ohio Ethics Commission