



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

June 25, 1990

Informal Opinion 1990-INF-0625

William M. Corzine, Esq.
Director of Law

Dear Mr. Corzine:

In your letter dated February 12, 1990, you asked if the Ohio Ethics Law and related statutes prohibit a member of a city board of education from serving as a paid scorekeeper at the school district's high school basketball games.

By way of history, you have explained that the individual in question is an elected member of the city board of education. He has served as a scorekeeper with the high school for more than twenty years before his election to the position of school board member. The high school contracts with individuals on a yearly basis to serve as scorekeepers for basketball games. The athletic director makes the hiring decisions, and payment is made on a per game basis. The funds which are used to pay the scorekeepers are the high school's athletic department funds which are generated from ticket and concession sales.

Division (A)(4) of R.C. 2921.42 of the Revised Code provides as follows:

(A) No public official shall knowingly:

. . .

(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.

A "public official" is defined, for purposes of R.C. 2921.42, in R.C. 2921.01, to include any elected or appointed officer of any political subdivision of the state. A member of a board of education is a public official as set forth in this definition. See Ohio Ethics Commission Advisory Opinions No. 85-009 and 90-003. A member of a board of education is prohibited by R.C. 2921.42(A)(4) from having an interest in a public contract entered into by or for the use of the school district or school board which he serves.

A "public contract" is defined in Division (E) of R.C. 2921.42 to include "[t]he 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." Public employment as either an employee or independent contractor of a governmental entity or political subdivision is included within this definition of public contract. See Advisory Opinions No. 84-002, 85-003, 85-010, and 85-015. A contract entered into by a school district for the employment of a high school sports scorekeeper is a "public contract" for purposes of R.C. 2921.42(A)(4). It is immaterial that the scorekeepers are paid from funds generated by ticket and concession sales since such contracts are still made by and for the use of the school district. See Advisory Opinion No. 90-005. Accordingly, R.C. 2921.42(A)(4) would prohibit a board of education member from being employed as a scorekeeper by the school district where he serves on the board.

Division (C) of R.C. 2921.42, does, however, provide an exception to the prohibition set forth in Division (A)(4) of R.C. 2921.42. This Division reads as follows:

- (C) This section does not apply to a public contract in which a public servant, member of his family or one of his business associates has an interest, when all of the following apply:
 - (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
 - (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public servant's becoming associated with the political subdivision or governmental agency or instrumentality involved;
 - (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;
 - (4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public servant, member of his family, or business associate, and the public servant takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

Each of the provisions of Division (C) is a question of fact which, when applied to the circumstances of each individual case, will determine whether a particular transaction fits within the exception. See Advisory Opinions No. 80-003, 88-008, and 90-003. The criteria of Division (C) are strictly construed against the public official, who must show compliance with the exemption. See Advisory Opinions No. 83-004, 84-011, and 90-003.

Division (C)(2) is of particular importance. This Division requires that the services be unobtainable elsewhere for the same or lower cost. The school board member must show by some objective standard that his services are unobtainable elsewhere for the same or lower cost. See Advisory Opinions No. 84-006 and 90-003. An open and fair competitive process, whereby the official submits the lowest or only bid, is one indication that this requirement has been met, but is not determinative. See Advisory Opinions No. 86-002 and 90-003. Other factors must be considered, such as the availability and adequacy of notice to potential bidders, the openness and fairness of the bidding process, the objectivity and validity of the bid specifications, and the conditions of the market. See Advisory Opinions No. 83-004, 88-001, and 90-003. In Advisory Opinion No. 88-001, the Ohio Department of Mental Retardation and Developmental Disabilities asked if the Ohio Ethics Law and related statutes prohibited it from awarding personal service contracts to physicians who were also employees of the Department. In analyzing the requirement in R.C. 2921.42(C)(2), the Ethics Commission stated:

[T]he Department . . . must ensure that reasonable efforts are used to secure competitive bids, and that a broad opportunity to bid be given. While the Department has discretion, where there are no limiting statutes or regulations, in determining what services are to be provided pursuant to contract, in formulating bid specifications, and in advertising the bids, it is clear that in order to meet the requirements of Division (C)(2), bids must be solicited on an open and fair basis, and not limited to solicitations from employees of the Department. The Department must make every reasonable effort to open the bidding process to all interested and qualified individuals outside of the Department and to award the work to the person or persons who will provide the necessary services at the lowest cost.

Advisory Opinion No. 88-001.

The school board member may alternatively show compliance with R.C. 2921.42(C)(2) by demonstrating that the services are provided to the school district as part of a continuing course of dealing. A contract for the provision of scorekeeping services, which is in existence at the time the board of education member takes office, would show a continuing course of dealing for purposes of that contract. See Advisory Opinions No. 82-007, 84-006, 88-008, and 90-003. If he entered into a yearly contract and was, during that year, subsequently elected to the school board, the board of education member could complete the contract which was in existence at the time he was elected. However, if any material changes are made in the agreement between the parties, or if the contract is renegotiated or renewed, the contract would cease to fall within the exemption because such changes alter the original understanding between the parties. See Advisory Opinions No. 82-007 and 90-003. In this instance, the contracts are renewed yearly. Each yearly contract is considered to be a separate contract. See Advisory Opinion No. 82-007. Any contract entered into after the school board member takes office would not fall within the continuing course of dealing exception, even though the school board member may have entered into contracts with the school board prior to his election to the board. See Advisory Opinion No. 88-008.

Division (A)(3) of R.C. 2921.42 may also apply in this situation:

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

A school board member is prohibited from profiting from a contract for scorekeeping services with the school district that is not competitively bid and is not the lowest and best bid, even if he does not participate in the decision to award the contract. See Advisory Opinions No. 88-008, 90-003, and 90-005 (syllabus paragraph 3) ("A board of education will be deemed to 'authorize' all school district purchases for purposes of Divisions (A)(1) and (A)(3) of Section 2921.42 of the Revised Code, unless the board has passed a general resolution dispensing with the adoption of resolutions authorizing

purchases and approving payments, in accordance with the requirements of R.C. 3313.19". See also R.C. 2921.42(A)(1) (discussed below). However, this provision would not apply to a contract approved by the board of education before the school board member took office. See Advisory Opinion No. 88-008.

Assuming that all the criteria of Division (C) of Section 2921.42 can be established and that the requirements of R.C. 2921.42 (A)(3) are met, so that the school board member may properly serve as a high school scorekeeper, the prohibitions of R.C. 2921.42(A)(1) must be met. Division (A)(1) of R.C. 2921.42 provides that no public official shall knowingly:

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.

Accordingly, the school board member is prohibited from discussing, deliberating, voting, or otherwise authorizing or using the authority or influence of his position as a school board member, either formally or informally, to secure for himself a contract to serve as a scorekeeper in the high school. See Advisory Opinions No. 85-009, 89-006, and 90-005 (syllabus paragraph 3) ("A board of education will be deemed to 'authorize' all school district purchases for purposes of Divisions (A)(1) and (A)(3) of Section 2921.42 of the Revised Code, unless the board has passed a general resolution dispensing with the adoption of resolutions authorizing purchases and approving payments, in accordance with the requirements of R.C. 3313.18"). See also R.C. 2921.42(C)(4) (set forth above). Revised Code 2921.42(A)(1) also prohibits the school board member from using his authority or influence over school district employees to secure authorization of a contract to provide scorekeeping services to the school district. See Advisory Opinion No. 90-003.

Divisions (D) and (E) of R.C. 102.03 are also relevant in this circumstance:

- (D) No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his duties.
- (E) No public official or employee shall solicit or accept anything of value that is such a character as to manifest a substantial and improper influence upon him with respect to his duties.

A "public official or employee" is defined, for purposes of Chapter 102., to include any person who is elected or appointed to an office of any governmental entity. See R.C. 102.01(B) and (C). A member of a board of education is a "public official or employee" for purposes of R.C. Chapter 102. See Advisory Opinion No. 80-003.

The term "anything of value" is defined in R.C. 1.03, for purposes of R.C. 102.03(D) and (E), to include money, any promise of future employment, and every other thing of value. See R.C. 102.01(G) and R.C. 1.03. Compensation for employment is a thing of value as set forth in this definition. See Advisory Opinions No. 81-007, 84-009, and 85-013. Divisions (D) and (E) of R.C. 102.03 prohibit a public official from accepting, soliciting, or using his official authority or influence to secure anything of value for himself if the thing of value is of such character as to manifest a substantial

and improper influence upon him with respect to his official duties. See Advisory Opinions No. 80-003, 88-004, and 90-003. The school board member is prohibited from using his official position in order to provide an economic advantage for himself. See Advisory Opinion No. 90-003.

In this situation, the high school scorekeepers are hired by the high school athletic director. In Advisory Opinion No. 90-003, the Ethics Commission addressed the issue of high school band directors making decisions involving the financial interests of a school board member, stating:

A member of a board of education holds a position of power and authority over the employees, business affairs, and budget of the school district. See R.C. 3313.17, 3313.201, 3313.47, and 3319.07. For example, you may be required, as part of your official duties and responsibilities, to make contract and salary decisions regarding the band directors who administer the music program in the elementary schools. A board of education member has the responsibility to provide services which fulfill the statutorily mandated and defined duties of his office in an objective and impartial manner. See Advisory Opinion No. 89-010. You are prohibited from using your authority or influence as a board member with respect to the band directors in order to secure business for your store, and from acting upon the interests of the band directors based upon their decisions regarding the purchase or rental of instruments or the continuation of lessons.

In the situation you have presented, the school board member will be in a position to participate in contract and salary matters involving the high school athletic director who hires the scorekeepers. Therefore, the school board member must abstain from using the authority or influence of his office with regard to the athletic director in order to secure the position as scorekeeper, and from participating in any matters affecting the athletic director's interests based upon the athletic director's decision regarding the hiring of the scorekeepers. See Advisory Opinion No. 90-003. See also R.C. 2921.42(A)(1) (set forth above).

Division (B) of R.C. 102.03 reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

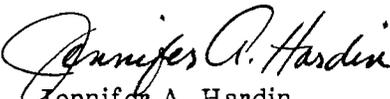
Pursuant to this section, the school board member is prohibited from disclosing confidential information which he acquired in his position with the board of education to any other person, and from using such information, without appropriate authorization. See Advisory Opinion No. 89-006. This prohibition has no time limit, and is applicable during the school board member's public service, and after. Id.

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There are also provisions outside the Ohio Ethics Law which condition the school board member's conduct. Of particular relevance is R.C. 3313.33 which reads, in pertinent part: "No member [of the board of education] shall have, directly or indirectly, a pecuniary interest in any contract of the board." The Ethics Commission has no jurisdiction over the application or interpretation of R.C. 3313.33. Interpretation of this section is left to the legal advisor for the school board.

This informal advisory opinion represents the views of the undersigned, based on the facts presented, and is limited to questions arising under Chapter 102, and Sections 2921.42 and 2921.43 of the Revised Code. I have included, for your information, copies of Ethics Commission Advisory Opinions No. 90-003 and 90-005, both of which concern issues related to school board members. If you have any additional questions, or wish to request a formal opinion from the Commission, please contact me.

Sincerely,


Jennifer A. Hardin
Staff Attorney

Enclosures: Advisory Opinions No.
 90-003
 90-005

JAH/mw