

OHIO ETHICS COMMISSION

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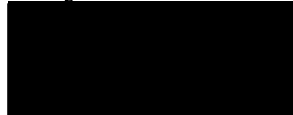
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January 21, 2000

Informal Opinion 2000-INF-0121-1

Keith A. Wilkowski
Cooper, Walinski & Cramer



Dear Mr. Wilkowski:

In your letter to the Ethics Commission, you seek guidance regarding the restrictions imposed, by the Ohio Ethics Law and related statutes, upon the members of the governing board of a community school. You ask your question in light of the fact that R.C. 3314.03(A)(11)(e) requires a community school to comply with Ohio's Ethics Law, R.C. Chapter 102., while permitting board members to be employed by the school and have an interest in the contracts with the board.

At the outset, the Commission commends you for seeking the Commission's guidance and making this request for an advisory opinion. In addition, the Commission fully acknowledges and appreciates the intent and purpose of the General Assembly in enacting the community school law to create new models for the education of Ohio's children.

In direct response to your questions, and as explained below, members of the governing board of a community school are subject to protections to the public against conflicts of interest embodied within the provisions of Chapter 102. by the express provisions of R.C. 3314.03(A)(11)(e). Members of the governing board of a community school are agents of the state, and, therefore, "public officials," also subject to the provisions of R.C. 2921.42 (the public contract law) and R.C. 2921.43 (supplemental compensation).

Because of the specific exemption 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 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.

Facts

You state that you are counsel for the Lucas County Educational Service Center (Center), a political subdivision of the state. You state that the Center is authorized to sponsor community schools in Lucas County as part of a pilot project under Section 50.52, Subsection 2, of H.B. 215. The community schools are organized as nonprofit corporations under R.C. Chapter 1702., the Ohio Nonprofit Corporation Act. Section 50.52, Subsection 5(A), of H.B. 215. The pilot project was designed to "permit the operation of community schools in a limited area of the state in order to provide for the evaluation and measurement of the effects of these schools." You state that the pilot project is similar to general community schools as organized under R.C. Chapter 3314.

The statutes that authorize the establishment of community schools contain a reference to the Ohio Ethics Law in R.C. 3313.04(A)(11)(e), which reads:

(A) Each contract entered into under section 3314.02 of the Revised Code between a sponsor and the governing authority of a community school shall specify the following:

...

(11) That the school will comply with the following requirements:

...

(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.

You seek guidance regarding how R.C. 3314.03(A)(11)(e) applies to the members of the governing board of a community school.

The Ohio Ethics Law and Related Statutes

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.

The status of a community school in relation to R.C. Chapter 102. will be addressed first.

The Ethics Law—R.C. Chapter 102.

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 under the Ohio Nonprofit Corporation Act. As a nonprofit corporation, a community school is not a department, division, institution, board, commission, authority, bureau or other instrumentality of a county educational service center or any other governmental entity. The Ethics Commission has previously applied provisions within Chapter 102. of the Revised Code and concluded that these prohibitions do not apply to persons serving on the board of a nonprofit corporation, even where the functions of the nonprofit may be of a public nature. Ohio Ethics Commission Advisory Opinions No. 75-013 and 75-019.

In the instant situation, because a community school is a nonprofit corporation, it is not a “public agency” as that term is defined in R.C. 102.01(C). As such, 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 that the function a community school performs on behalf of the public, mandated, in R.C. 3314.03(A)(11)(e), that community schools “shall comply with Chapter 102. of the Revised Code.”

Thus, but for the exception that permits a member of the school’s governing board to be an employee of the school, a member of the governing board of a community school is subject to all the restrictions imposed upon “public officials and employees” by R.C. 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 General Assembly, by this action, has also indicated the importance of the protections to the public contained in these provisions and its conviction that the people of the state of Ohio will benefit if the officers and employees of community schools are governed by general protections against conflicts of interest.

The exception that permits a member of the school’s governing board to be an employee of the school will be addressed after the discussion regarding the prohibitions imposed by R.C. 2921.42.

The Public Contract Law—R.C. 2921.42

The Ethics Commission is empowered to administer, interpret, and enforce Sections 2921.42 and 2921.43 of the Revised Code, as well as R.C. Chapter 102. R.C. 102.06 and 102.08. 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. These statutory definitions differ from the definitions in Chapter 102. See Adv. Op. No. 93-017 (because of different definitions in Chapter 102. and R.C. 2921.01(A) and (B), an individual may be subject to some, but not all, of the prohibitions imposed by the statutes under the Ethics Commission's jurisdiction).

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.)

As described above, a community school is a nonprofit corporation. 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. The question, then, is whether a member of the governing board of a community school is an "agent of the state," and, therefore, subject to the provisions of R.C. 2921.42.

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. In Advisory Opinion No. 92-001, the Ethics Commission held:

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.

See also Adv. Ops. No. 85-005, 92-001, and 92-007. An agreement creating the agency relationship may be express or implied. Ross v. Burgan, 163 Ohio St. 211 (1955).

In the instant situation, 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.” 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 scheme. 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 financial records in the same manner as financial records of public school districts. R.C. 3314.03(A)(8). In addition, the Auditor of State is required to audit a community school’s funds and fiscal records. Id.

Therefore, by enacting R.C. Chapter 3314., the state 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.

Accordingly, a member of the governing board of a community school is an “agent of the state” for purposes of R.C. 2921.01. Thus, a member of the governing board of a community school is subject to the restrictions imposed upon “public officials” by many of the provisions in Revised Code Chapter 2921., including 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. That section prohibits a public official from accepting compensation for the performance of his public duties from anyone other than the public agency he serves. Your question does not specifically involve the supplemental compensation law, and it will not be addressed here, but your clients should know that they are subject to its provisions.

The Commission notes that the fact that community schools are “agents” for purposes of R.C. 2921.42 does not change the status of community schools as private, nonprofit organizations. A community school is not transformed into a public entity because it performs public functions. However, the governing board of a community school, and its members, do act as agents of the state when they perform the duties imposed upon them by R.C. Chapter 3314.

Finally, the fact that R.C. 3314.03(A)(11)(e) provides a specific and narrow exemption to R.C. 2921.42 supports the holding that members of the governing board are subject to the restrictions imposed by the remaining sections of the Ohio Ethics Law and related statutes. If members of the governing board were not subject to the restrictions of the Ethics Law, there would be no reason to exempt the board members from certain provisions of the law. In fact, the General Assembly could have removed them from all conflict of interest protection by not directing their inclusion in those subject to these laws.

Exemptions Provided by R.C. 3314.03(A)(11)(e)

As stated above, R.C. 3314.03(A)(11)(e) provides exemptions 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.

In Advisory Opinion No. 75-014, the Ethics Commission addressed the issue of exceptions to Ethics Law prohibitions, holding:

The general rule of construction is that an exception in a statute is an affirmation of the application of its provisions to all cases not excepted, and excludes all other exceptions. This well established theory of construction was restated in Hill v. Harris et al, 39 Ohio Op. 267 (1948), at page 271:

“Where an exception is grafted upon the general terms of a statute, that exception should be strictly construed and must be governed by the familiar rule that the exclusion clearly made in the exception only emphasizes the inclusion of all other things relative to the statute which are not so excluded.” (Emphasis in original.)

In past opinions, the Ethics Commission held that R.C. 102.03(D) and (E) prohibit a public official, serving as a member of a governing board, from accepting or holding employment with the public agency while serving as a member of the governing board. Adv. Ops. No. 87-008 (a member of a board of education is prohibited from soliciting or accepting employment with the school district) and 91-002 (a city council member may not be a compensated employee of his city). R.C. 3314.03(A)(11)(e) provides that “nothing in [R.C. Chapter 102.] shall prohibit a member of the school's governing board from also being an employee of the school.” Thus, the Ethics Commission's application of R.C. 102.03(D) and (E) in Advisory Opinion No. 87-008 to prohibit simultaneous service as a board member and an employee of the board does not apply to a member of a community school's governing board. Accordingly, 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), which reads:

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.

The Ethics Commission has held that R.C. 102.03(D) prohibits a public official from participating in deliberations, voting, or otherwise using his public position with regard to matters affecting his own personal financial interests. 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). Therefore, 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. R.C. 102.03(D) also prohibits that board member from participating, as a board member, in matters, after he becomes an employee, that result in a definite and direct benefit for him, such as renewal or approval of his own 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. 3314.03(A)(11)(e) also provides an exemption 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 read:

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

...

- (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 having an interest in a public contract entered into by the community school for the use of the sponsoring public agency. Because R.C. 3314.03(A)(11)(e) provides an exemption 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, including a contract for employment.

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.

However, in R.C. 3314.03(A)(11)(e), the General Assembly has specifically stated that "nothing in [Chapter 102.] 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." By this language, the General Assembly has demonstrated its clear intention that this language should not prohibit members of the governing board of a community school from holding employment 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 without exception, or in contract, and provided a narrowly crafted exemption to permit employment and other contracts. Subsequent to its careful consideration, the General Assembly chose to provide this narrow exemption.

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 exemption 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 exempted members of the 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, it is the Commission's conclusion that the exemption in R.C. 3314.03(A)(11)(e) extends to the restrictions in R.C. 2921.42(A)(3) and (A)(4), and that 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.

It should be noted, however, that R.C. 3314.03(A)(11)(e) does not provide an exemption 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. R.C. 3314.03(A)(11)(e) does not say that the members of the governing board will not be considered to have an interest in contracts, if they are employed by or have other contracts with the community school. Rather, R.C. 3314.03(A)(11)(e) states that R.C. Chapter 102. and 2921.42 do not prohibit such interests. However, the exemption does not explicitly allow, or even 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 exemption, 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.

In a letter dated August 6, 1999, you provided additional information about your questions. In that letter, you state:

[I]t is highly unlikely that a member of a governing board of a community school ever could 'have an interest' in a contract with the board, without having participated in the discussions leading up to that contract. In fact, Ohio corporation law requires the interested member to disclose all facts to the board. (See, R.C. 1702.30.1 . . .). Therefore, the board member would be at risk of being found to have used "the authority or influence" of the person's office to secure authorization of that contract.

The implication of your statement is that, by disclosing his potential interest in a pending contract, a board member will be considered to have used the authority or influence of his office to secure authorization of that contract. This implication is incorrect.

R.C. 2921.42(A)(1) prohibits a public official from authorizing a contract, or using his position to secure authorization of a contract. Disclosing one's potential interest in a contract, in order that other board members will be fully informed before making a contractual decision, is not the misuse of authority to improperly secure a public contract, so long as the board member does not then lobby the board or participate in discussions to attempt to secure the contract. Disclosure has been, and continues to be, one of several methods to protect against conflicts of interest. Once disclosure has been made, the board member would then be prohibited from taking any official action, or using his position in any way, to secure authorization of the contract. A member of the governing board of a community school can comply with the requirement of R.C. 1702.301, and disclose the fact of his interest in a contract, without violating R.C. 2921.42.

General Exemption

In your August 6, 1999 letter, you also quote R.C. 3313.04:

Except as otherwise specified in this chapter or in the contract between a community school and a Sponsor, such school is exempt from all State laws and rules pertaining to schools, school districts, and boards of education, except those laws which grant certain rights to parents [emphasis added].

The implication of your letter is that R.C. 3313.04 has the effect of exempting the community schools from the Ethics Law and related statutes. However, while you have emphasized the phrase "exempt from all State laws," that phrase does not stand alone. R.C. 3313.04 states that a community school is "exempt from all State laws . . . pertaining to schools, school districts, and boards of education." The Ohio Ethics Law and related statutes do not pertain exclusively to schools, school districts, and boards of education, and are not related to the delivery of education. These laws are general criminal laws. Most of the laws apply to all public officials and employees, and some apply to agents for public entities and to public servants. It does not appear, from R.C. 3313.04, that it was the General Assembly's intent to excuse members of the governing board of a community school from the general criminal laws of the state.

Further, as stated above, there is a general rule of statutory construction that an exception to a statute is an affirmation of the application of its provisions to all cases not excepted. R.C. 3314.03(A)(11)(e) provides "nothing in . . . 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." By enacting this exemption, the General Assembly has clearly indicated its intention that members of the governing boards of community schools are bound by the other provisions of R.C. 2921.42. If, as you imply, R.C. 3313.04 exempts members of governing boards of community schools from the prohibitions in R.C. 2921.42, the quoted language in R.C. 3313.03(A)(11)(e) would be unnecessary.

Conclusion

As explained above, members of the governing board of a community school are subject to protections to the public against conflicts of interest contained within the provisions of Chapter 102. by the express provisions of R.C. 3314.03(A)(11)(e). Members of the governing board of a community school are agents of the state, and, therefore, "public officials," also subject to the provisions of R.C. 2921.42 (the public contract law) and R.C. 2921.43 (supplemental compensation).

Because of the specific exemption 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 from being an employee of the school and may sell goods or 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 way, in board actions to

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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.

In addition, although your question only 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. Advisory Opinion No. 93-017, which discusses a specific exception to provisions of the Ethics Law and related statutes for teachers, has been enclosed for your reference.

The Ohio Ethics Commission approved this advisory opinion at its meeting on January 21, 2000. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. I apologize for the delay in providing this opinion. If you have any further questions, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

Enclosure
Advisory Opinion No. 93-017