

OHIO ETHICS COMMISSION

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January 26, 2001

Informal Opinion 2001-INF-0126-1

Joseph W. Testa
Franklin County Auditor



Dear Mr. Testa:

In a letter received by the Ohio Ethics Commission on January 12, 2000, you ask whether the Ethics Law and related statutes prohibit you from serving as both an advisor to the board of a community school and Franklin County Auditor.

Opinion Summary

As explained more fully below, the Ethics Law and related statutes do not prohibit you from serving in an advisory capacity to the board of a community school, even though the community school acquires property or services from the county that you serve, provided that, as an advisor to the board, you do not perform any of the same duties as the board members or community school officers, or have the authority to make binding decisions on behalf of the board. In addition, if you were to become employed by, or were provided compensation as an advisor to, the board, or if you were to be entrusted with any of the same powers as those held by the board members, the Ethics Law and related statutes may prohibit you from performing your required duties in one, or both, of these positions, and, therefore you should contact our office again for information and guidance.

Facts

In your letter to the Commission dated November 18, 1999, you explain that you have submitted a preliminary application to the State Board of Education through the Department of Education for the sponsorship of a charter school. You further explain that the school would be established under the Ohio Community Schools Provisions and operate as a public school.

You state that a community school operates with state funds based on the per pupil allocation of the local school district in which it is sited. You also state that community schools have no statutory authority to levy a tax and are not eligible for local tax dollars such as real estate tax levies. Finally, you state that you are not aware of any funding disbursed by the state for the charter school that would pass through the County Auditor's Fiscal Division.

Subsequent to your earlier letter, in correspondence dated January 11, 2000, you ask whether there is any potential conflict of interest between your position as Franklin County Auditor and your position as advisor to the non-profit board of the school. Before addressing your question in further detail, this opinion will briefly examine the applicable statutory provisions pertaining to community schools.

Community Schools—R.C. Chapter 3314.

A community school created under R.C. Chapter 3314. is a public school, independent of any school district, and is part of the state's program of education. See R.C. 3314.01(B). A community school must be established under R.C. Chapter 1702 as a nonprofit corporation. R.C. 3314.03(A)(1). The governing authority of a community school is empowered to carry out any act and ensure the performance of any function that is in compliance with the Ohio Constitution, R.C. Chapter 3314., other statutes applicable to community schools, and the contract entered into under R.C. Chapter 3314. establishing the school. R.C. 3314.01(B). A community school must comply with R.C. Chapter 102. with the exception that a member of the school's governing board is not prohibited from also being an employee of the school and nothing in R.C. Chapter 102. or section 2921.42 of the Revised Code prohibits a member of the school's governing board from having an interest in a contract into which the governing board enters. See R.C. 3314.03(A)(1)(e).

A community school receives a portion of the state funding allocated to the school districts that its pupils would otherwise attend if they were not enrolled in the community school. See R.C. 3314.08. A community school does not have the authority to levy taxes or issue bonds secured by tax revenues. R.C. 3314.08(H). A board of education sponsoring a community school may, however, utilize local funds to make enhancement grants to the school. R.C. 3314.08(G).

Having an Interest in a Community School Contract—R.C. 2921.42(A)(4)

Your question implicates R.C. 2921.42(A)(4), which provides that no public official shall knowingly:

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 term "public official" includes any person who is elected to or employed by any political subdivision. R.C. 2921.01(A). County auditors are "public official(s)" for purposes of R.C. 2921.42(A)(4), and are subject to the restrictions in the law. Ohio Ethics Commission Advisory Opinions No. 81-004 and 95-006. Therefore, R.C. 2921.42(A)(4) prohibits you from having an interest in any public contract entered into by, or for the use of, the county. The term "public contract" includes any purchase or acquisition of property or services by or for the use of any political subdivision, including the county. R.C. 2921.42(G)(1). In a telephone conversation with staff, you explained that the county may enter into contracts with the board of the

community school. If the county would enter into any contracts with the board, you should be aware of the prohibition of R.C. 2921.42(A)(4).

The Ethics Commission has held that an "interest" under R.C. 2921.42 must be definite and direct, and may be pecuniary or fiduciary in nature. See Adv. Ops. No. 78-005 and 81-008. If the county were to enter into contracts with the community school, you would be prohibited from having a pecuniary or fiduciary interest in those contracts. The question is whether you would have a fiduciary interest in the contracts of the board of the community school by virtue of your position as advisor to the board.

In Advisory Opinion No. 81-008, the Ethics Commission concluded that a city council member who also serves as a member of the board of trustees of a nonprofit corporation that contracts with the city has an interest in the contract between the corporation and the city, and thus may not serve on the board of the nonprofit corporation. The Commission, in citing the legislative committee that enacted Section 2921.42, stated: "this dual interest creates a situation 'in which there is a risk that private considerations may detract from serving the public interests'." Similarly, the Commission concluded in Advisory Opinion No. 81-005 that a city official is prohibited by R.C. 2921.42(A)(4) from serving as an officer or a board member of an undesignated community improvement corporation, one type of nonprofit corporation, which is established by the city and receives funds distributed through the city. Advisory Opinions No. 81-005 and 81-008 are consistent with those opinions of the Commission which have concluded that members of the board of directors and officers of for-profit corporations have a fiduciary interest, and in some instances, a pecuniary interest, in the contracts of the corporation. See, e.g., Adv. Ops. No. 85-007, 85-009, 86-002, and 86-005.

In your letter to the Commission, you indicated that the community school would be organized as a non-profit corporation. Therefore, the members of the governing board of the community school would have an interest in the contracts of the board. The critical question is whether this conclusion would also apply to you as the advisor to the board.

Advisor to a Non-Profit Board

In Advisory Opinion No. 99-004, the Commission noted that, for purposes of the Uniform Fiduciary Act, a person is a "fiduciary" if he is an officer of a public or private corporation, a public officer, or any person acting in a fiduciary capacity for any person, trust, or estate. See R.C. 1339.03(B). The Commission further noted, in that same advisory opinion, that Random House Webster's Unabridged Dictionary defines "fiduciary" as "a person to whom property or power is entrusted for the benefit of another," and "of, based on, or in the nature of trust and confidence, as in public affairs." Random House Webster's Unabridged Dictionary 714 (1997). Therefore, in order to determine whether you, as an advisor to the board, have a fiduciary interest in the contracts of the board, it is necessary to examine your powers and duties as advisor to the board.

If you have been entrusted with the power to make binding decisions on behalf of the board, then you would act in a fiduciary capacity on behalf of the board and would have a

fiduciary interest in the board's contracts. In addition, if you have been entrusted with any of the same powers as those held by the board members, or community school officers, you would have a fiduciary interest in the board's contracts. However, as a mere advisor to the board, you would not have these kinds of powers and authority and, therefore, would not have an interest in the contracts of the board. See 2000 Op. Att'y Gen. No. 00-015 (the prohibition against having a fiduciary interest prevents an individual from holding "positions of authority" with two entities that contract with one another). See also Adv. Op. No. 88-002 (no provision of the Ethics Law would prohibit a deputy director of the Office of Budget and Management, who serves as President of the Controlling Board, from acting as an instructor at a public college or university if he receives no compensation or other benefits except expenses).

If, however, you do exercise these kinds of authority such that you would have a fiduciary interest in the contracts of the board by virtue of your position as advisor to the board, you would have a prohibited interest in any contract between the county and the board. If that is the case, please contact this office for further guidance as to the application of any relevant exceptions to the law.

Securing Something of Value for Community School—R.C. 102.03(D)

Your question also implicates R.C. 102.03(D), which provides the following:

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.

A "public official or employee" is defined, for purposes of R.C. 102.03, to include any person who is elected or appointed to an office of, or employed by, any department, division, institution, board, commission, authority, bureau or other instrumentality of a county. R.C. 102.01(B) and (C). You are, therefore, a "public official" subject to the prohibitions of R.C. 102.03(D). See Adv. Op. No. 83-001.

The term "anything of value" is defined to include money and every other thing of value. R.C. 102.01(G) and 1.03. It includes any definite and direct pecuniary benefit, such as a payment for goods or services. Adv. Op. No. 90-003. R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his office to secure anything of value for any person, business, or other entity, if the relationship between the official and that person or other entity is such that the official's objectivity or independence of judgment could be impaired with respect to matters that affect the interests of that party. Adv. Op. No. 89-008. The Commission has stated that R.C. 102.03(D) prohibits a public official from participating in any matter that would provide a benefit to an organization which he serves as an officer or board member. See Adv. Ops. No. 89-005 and 94-001. In addition, the Commission has stated that R.C. 102.03(D) prohibits a public official from participating in any matter that would provide a benefit to his employer. See Adv. Op. No. 88-005.

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If you have the authority to make binding decisions on behalf of the board, or if you perform any of the same duties as the board members, then you would occupy a position of trust similar to an officer or board member and you would be prohibited from participating in any matter as County Auditor that would provide a benefit to the community school. In addition, if you are employed by the board of the community school, you would likewise be prohibited from participating in any matter as county auditor that would provide a benefit to the community school. In particular, you would be prohibited from: (a) using your relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding the community school; (b) discussing, deliberating, or taking any action, as county auditor, on any matter involving the community school; and (c) using your public position or authority in any other way to secure a benefit for the community school. See Adv. Op. No. 96-004.

Conclusion

As explained above, the Ethics Law and related statutes do not prohibit you from serving in an advisory capacity to the board of a community school, even though the community school acquires property or services from the county that you serve, provided that, as an advisor to the board, you do not perform any of the same duties as the board members or community school officers, or have the authority to make binding decisions on behalf of the board. In addition, if you were to become employed by, or were provided compensation as an advisor to, the board, or if you were to be entrusted with any of the same powers as those held by the board members, the Ethics Law and related statutes may prohibit you from performing your required duties in one, or both, of these positions, and, therefore you should contact our office again for information and guidance.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 26, 2001. 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. If you have any questions or desire additional information, please contact this Office again.

Sincerely,



Timothy L. Gates
Staff Attorney