

OHIO ETHICS COMMISSION

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July 27, 2001

Informal Opinion 2001-INF-0727-2

Jerry A. Vinci, Superintendent
Buckeye Local School District



Dear Mr. Vinci:

In a letter received by the Ethics Commission on May 10, 2001, you ask whether the Ohio Ethics Law and related statutes preclude the Buckeye Local School District (District) Board of Education (Board) from using a local bank as a public depository in light of the fact that the father of the District's Treasurer is a member of the bank's board of directors. You have also asked whether the Treasurer may delegate, to a member of her staff, her duties regarding the authorization and direction of the District's deposits to the bank that her father serves as a member of the board of directors.

Facts

You state that the Board hired Ms. Kelly Smith as Treasurer in February 1999. You state that, "[a]s Treasurer, one of Ms. Smith's duties is to authorize and direct the District's deposits to certain banking institutions under Ohio's Uniform Depository Act." You state that the District had depository agreements in place before Ms. Smith was hired; one agreement was with People's National Bank of Mt. Pleasant (Bank). Ms. Smith's father is a member of the Bank's board of directors. In August 1999, the depository agreement between the District and Bank expired. The Board declined to renew the agreement because of concerns that Ms. Smith faced a "conflict of interest" if she were to participate in the authorization and direction of the District's deposits to the Bank.

Brief Answer

The prohibition that R.C. 2921.42(A)(1) imposes upon the District Treasurer precludes the District from using a local bank as a public depository if the father of the District's Treasurer is a member of the Bank's board of directors. The District Treasurer cannot delegate her statutorily mandated duties to another party as a means of meeting the prohibition imposed upon her by R.C. 2921.42(A)(1).

R.C. 2921.42(A)(1)—Prohibition Against Securing A Public Contract In Which A Family Member Has An Interest

Division (A)(1) of Section 2921.42 of the Revised Code reads 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.

See also R.C. 2921.42(A)(2) which imposes a similar prohibition upon public officials with regard to the investment of public funds in shares, bonds, mortgages, or other securities.

The term "public official" is defined for purposes of R.C. 2921.42(A), to include any appointed or elected officer, employee, or agent of a political subdivision of the state. The treasurer of a school district is an employee of a political subdivision of the state and subject to the prohibitions of R.C. 2921.42. Ohio Ethics Commission Advisory Opinions No. 87-008 and 94-005.

The term "public contract" is defined in R.C. 2921.42(G)(1)(a), for purposes of R.C. 2921.42, to include 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 a political subdivision. The deposit of District funds in a bank is a "public contract" for purposes of R.C. 2921.42. Adv. Op. No. 92-008.

An "interest" that is prohibited under a division of R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary. Adv. Op. No. 81-008. The Ethics Commission has held that an officer or board member of a bank has an interest in the contracts of that bank. Adv. Op. No. 92-008. In the instant situation, the father of the District's Treasurer, as a member of the board of directors of a bank, has an interest in the bank's contracts for purposes of R.C. 2921.42(A)(1).

R.C. 2921.42(A)(1) prohibits a public official from either "authorizing" a public contract in which a family member has an interest, or employing the "authority or influence of his office" to secure authorization of a public contract in which a family member has an interest. The exact actions prohibited by R.C. 2921.42(A)(1) turn on what constitute actions that "authorize" and "employ the authority or influence of his office." Adv. Op. No. 98-004. The Ethics Commission has held that this statutory language means that a public official will be deemed to have "authorized" a public contract, for the purposes of R.C. 2921.42, where the contract could not have been awarded without the approval of the public position in which the official serves. Adv. Ops. No. 87-004, 90-010, and 92-012. Accordingly, R.C. 2921.42(A)(1) prohibits a public official from voting, discussing, deliberating, or otherwise participating in any official proceeding of the District's decision-making process with respect to the implementation or

continuation of any public contract in which a family member has an interest. Adv. Op. No. 92-003.

R.C. 2921.42(A)(1) also prohibits a public official from employing the "authority or influence of his office" to secure authorization of any public contract in which a family member has an interest. The words "authority or influence" are not defined for purposes of R.C. 2921.42. A primary rule of statutory construction requires that words used in a statute which are not defined must be construed according to rules of grammar and common usage. R.C. 1.42. The word "authority" is defined in Webster's New World Dictionary of the American Language as "power or influence resulting from knowledge, prestige, etc." Webster's New World Dictionary of the American Language 94 (2d College ed. 1970). The word "influence" is defined as "the power of persons . . . to affect others, seen only in its effects" and "the ability of a person . . . to produce effects indirectly by means of power based on . . . high position." Webster's New World Dictionary of the American Language 722 (2d College ed. 1970). Adv. Op. No. 94-002.

The General Assembly's use of the words "authority or influence" in R.C. 2921.42(A)(1) specifically characterize a broader range of activity than that described by the word "authorize." See Dougherty v. Torrence, 2 Ohio St. 3d 69, 70 (1982) (effect must be given to words used in a statute); Dungan v. Kline, 81 Ohio St. 371, 380-81 (the presumption is that every word in a statute is designed to have effect); Adv. Op. No. 74-001 ("it is to be assumed that the Legislature used the language contained in a statute advisedly and intelligently and expressed its intent by the use of the words found in the statute").

You have stated that "one of Ms. Smith's duties is to authorize and direct the District's deposits to certain banking institutions under Ohio's Uniform Depository Act." The prohibition against a public official employing the "authority or influence of his office" to secure a public contract in which a family member has an interest prohibits the District Treasurer from, either formally or informally, exercising the power and influence inherent in her official position to affect the decisions of the District Board of Education and other District officials and employees to select the bank that her father serves as a member of the board of directors as a depository of District funds. Therefore, R.C. 2921.42(A)(1) prohibits the Treasurer from authorizing or directing the District's deposits to the Bank because her father is a member of the Bank's board of directors.

Inapplicability of Exception Provided by the Uniform Depository Act

As stated above, R.C. 2921.42(A)(1) prohibits a public official or employee from authorizing a public contract in which she, or a family member, has an interest. R.C. Chapter 135., the Uniform Depository Act, provides an exception to the prohibition against public officials having an interest in a public contract with their own public agency for bank officers, directors, and employees who are public officials. R.C. 135.11 reads as follows:

An officer, director, stockholder, employee, or owner of any interest in a public depository receiving inactive, interim, or active deposits pursuant to sections 135.01 to 135.21, inclusive, of the Revised Code shall not be deemed to be

interested, either directly or indirectly, as a result of such relationship, in the deposit of such inactive, interim, or active deposits of public moneys for the purpose of any law of this state prohibiting an officer of the state or of any subdivision from being interested in any contract of the state or of the subdivision. (Emphasis added).

See also R.C. 135.38 (providing a similar exception for county officers). For purposes of R.C. 135.11, "subdivision" includes "any school district." R.C. 135.01(L).

The exception of R.C. 135.11 does not apply to the treasurer's father. A careful reading of R.C. 135.11 confirms that the exception provided by R.C. 135.11 applies to any "officer, director, stockholder, employee, or owner of any interest in a public depository" who serves as "an officer of the state or of any subdivision." In the instant situation, the Treasurer serves as an "officer" of a political subdivision; her father does not. Therefore, R.C. 135.11 does not negate the definite and direct interest that the Treasurer's father would have in a public contract between the District and the bank he serves as a member of the board of directors.

In this instance, the Treasurer's father is her family member for purposes of R.C. 2921.42(A)(1). See Adv. Op. No. 80-001 (a family member includes, but is not limited to, grandparents, parents, spouse, children, whether dependent or not, grandchildren, brothers and sisters, and any person related by blood or marriage and living in the same household). Because a member of the Treasurer's family, her father, has a direct interest in the placement of District deposits with the Bank, the Treasurer would also be prohibited from participating in the placement of District deposits with the Bank. See State v. Strabala, No. 94-C-22 (CP, Columbiana 8-30-94).

Delegation of Authority to Resolve the R.C. 2921.42(A)(1) Prohibition

You have asked whether the Treasurer may delegate, to a member of her staff, her duties regarding the authorization and direction of the District's deposits to the Bank that her father serves as a member of the board of directors. As explained below, because the District Treasurer exercises the functions of a treasurer as the term "treasurer" is defined in 135.01(M), she is unable to withdraw from depository matters involving the District and delegate her duties.

The Uniform Depository Act regulates the deposit of public funds in political subdivisions of this state. The Uniform Depository Act sets forth duties for officials within political subdivisions regarding the deposit of the subdivision's money. The deposits of each subdivision are divided into three types: "active deposits," "interim deposits," and "inactive deposits." The term "active deposit" means a public deposit necessary to meet current demands on the treasury. See R.C. 135.01(A). The term "interim deposit" means a deposit of interim moneys, which are public moneys in the treasury of any subdivision after the award of inactive deposits has been made in accordance with R.C. 135.07, and which the treasurer or the governing board finds should not be deposited as active or inactive funds because the money will not be needed for immediate use but will be needed before the treasurer or the governing board

can access the inactive deposits. See R.C. 135.01(F). The term "inactive deposit" refers to deposits that are not active or interim deposits. See R.C. 135.01(E).

The Uniform Depository Act defines the term "treasurer," as used in the Uniform Depository Act, as the officer exercising the functions of a treasurer in each political subdivision. R.C. 135.01(M). See also R.C. 135.01(L) (defining the word "subdivision" for purposes of the Uniform Depository Act to include "any school district"). A school district treasurer, as well as the school district board of education, exercise authority with regard to the deposit of public funds. R.C. 135.14(N)(1) and Section 135.09. See also Adv. Op. No. 92-008 (addressing the duties of a treasurer of a township and a township board of trustees).

The Uniform Depository Act, however, imposes duties that must be specifically performed by the person who serves as school district treasurer. See R.C. 135.14(M) ("[t]he treasurer is responsible for the safekeeping of all documents evidencing a deposit.") For example, the school district treasurer is required to annually prepare, for the school district board of education, a report listing each investment of interim funds made during the preceding fiscal year. R.C. 135.142(C). The treasurer is required to collect and hold securities from public depositories as security for deposits of subdivision funds. R.C. 135.18. Interest on inactive and interim deposits shall be paid or credited to the treasurer according to the terms and conditions of the time certificates of deposit, or savings or deposit accounts or when the funds are withdrawn. R.C. 135.16. If the public depository fails to pay over any portion of the funds deposited, then R.C. 135.18 empowers the treasurer to sell the securities deposited with him at public sale with appropriate notice. The depository may substitute one eligible security for another one only upon the authorization of the treasurer, or if the treasurer fails to object to the substitution after notice is submitted to him. R.C. 135.18(G)(1). A public depository is given the option of pledging a single pool of eligible securities to secure the repayment of all public money held by the depository, and designating a qualified trustee with whom to deposit the eligible securities for safekeeping. R.C. 135.181. Up to four times each year, the treasurer may request that a public depository report the amount of public money deposited and secured pursuant to R.C. 135.181(B), and the total value of the pool of securities pledged to secure public money held by the depository. See R.C. 135.181(L). The treasurer may also request that the qualified trustee report the total value of the securities deposited with it by the depository, and provide an itemized list of the securities in the pool. Id. The fact that the treasurer carries significant responsibilities with respect to District funds is demonstrated by R.C. 135.14 and 135.19, which state, respectively, that the treasurer is neither held accountable for loss occasioned by the sale or liquidation of District investments or deposits at prices lower than their cost, nor held liable for the loss of public money deposited by him if the loss is caused by the failure of a public depository.

It is apparent that the District Treasurer's decisions concerning the classification, deposits, investments, withdrawals, and transfers of District funds, would directly affect the pecuniary interests of the Bank that her father serves as director if the Bank is a depository of District funds. The statutes enumerated above illustrate that the treasurer of a school district has significant independent authority and duties regarding deposits and investments of school district funds that are statutorily required to be performed only by the treasurer. However, as discussed

above, R.C. 2921.42(A)(1) prohibits the Treasurer from authorizing, discussing, recommending, or otherwise using her authority or influence as District Treasurer, formally or informally, to secure the deposit of District funds with a bank that her father serves as a member of the board of directors. As discussed above, R.C. 135.11 does not provide an exemption to 2921.42(A)(1). See Adv. Op. No. 85-007.

The Ethics Commission has determined that, in some circumstances, a public official may withdraw from consideration of matters that would pose a conflict of interest due to the provisions of R.C. 2921.42. Adv. Ops. No. 89-006 and 90-002. There may be instances where a public official may delegate responsibility to a subordinate, with review of the subordinate's action by an official or entity independent of, or superior to, the official with the conflict of interest. It may also be possible to empower an authority who is independent of, or superior to, the official with the conflict of interest to approve the matter, if such transfer of authority is permitted under relevant statutes. Adv. Ops. No. 92-004 and 92-008. However, the Commission has held that such a withdrawal may not interfere with the official's or employee's performance of her duties. Id.

In this instance, the District Treasurer is the ultimate authority for performing certain statutorily defined duties. Therefore, it is impossible for her to withdraw from performing the duties statutorily imposed upon her office and to transfer that authority to another party as a means of meeting the prohibition imposed upon her by R.C. 2921.42(A)(1). Adv. Op. No. 92-008. The issue of delegation of duties by a treasurer of a board of education was addressed by the Attorney General in Advisory Opinion No. 80-006, which reads in part:

[I]f the duty in question is one which the treasurer of a board of education is required, by statute, to perform, and the duty involves the protection of public funds, rights or interests, the treasurer may not substitute the performance of another unless he has express authority to do so. See State ex rel. Brennan, 49 Ohio St. 33, 29 N.E. 593 (1892) (a public officer has the power to control public property and to perform public functions in the interest of the people). I am aware of no general statute which authorizes the treasurer of a board of education to delegate the performance of such duties. Cf. R.C. 314.05 (county auditor may appoint deputy auditor); 321.04 (county treasurer may appoint deputy treasurer). Thus, in the absence of a specific statute that authorizes the treasurer of a board of education to delegate the performance of a particular duty, which he, as a public officer, is required to perform, it must be concluded that the treasurer of a board of education has no authority to make such a delegation.

Therefore, in the instant situation, the District Treasurer cannot delegate her duties to another party as a means of meeting the prohibition imposed upon her by R.C. 2921.42(A)(1).

Conclusion

The prohibition that R.C. 2921.42(A)(1) imposes upon the District Treasurer precludes the District from using a local bank as a public depository if the father of the District's Treasurer is a member of the Bank's board of directors. The District Treasurer cannot delegate her statutorily mandated duties to another party as a means of meeting the prohibition imposed upon her by R.C. 2921.42(A)(1).

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on July 27, 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.

Very truly yours,



John Rawski
Staff Attorney