

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

November 17, 2003 Informal Opinion 2003-INF-1117-2

Edward L. Ostrowski, Jr.
Scott, Scriven & Wahoff, LLP



Dear Mr. Ostrowski:

In a letter received by the Ohio Ethics Commission on July 10, 2003, you have asked for an advisory opinion about the application of the Ohio Ethics Law to a situation involving a community school.

You have explained that you represent a public school district in Ohio that has created and sponsored a community school. The contract between the school district and the community school expressly authorizes the school district to provide personnel and services to the community school, and the community school to reimburse the school district for the services. You have asked whether the Ohio Ethics Law prohibits the school district from giving a supplemental contract to one of its administrators to perform additional duties for the community school.

Brief Answer

As set forth more fully below, the Ohio Ethics Law does not prohibit a public employee from accepting additional duties, and additional compensation, from her public employer within the scope of her individual employment contract. However, where the public employee would be in consideration for a second or supplemental contract for employment with her public agency, the Ohio Ethics Law and related statutes are implicated.

R.C. 2921.42(A)(4) prohibits a public school district administrator from having an interest in a supplemental contract with the district, unless she can meet the exception contained in Division (C) of Section 2921.42. Among other things, the administrator must be able to show, after a competitive process, that the school district will be unable to obtain the services she will provide from any other person for the same or lower cost. If the administrator meets the exception, such that she can have a supplemental contract with the district, she is prohibited from authorizing, or using her position in any way to secure authorization of, her supplemental employment contract.

Facts

You have stated that the school district board of education has created and sponsored a community school. The board of directors of the community school consists of three administrators from the sponsor school district. Pursuant to the contract between the sponsor school district and the community school, the sponsor district is expressly authorized to provide personnel and services to the community school. The community school will reimburse the school district for the services.

You have stated that the sponsor board of education wishes to offer a supplemental contract to two of its current administrators to provide services to the community school. One of the administrators is among the three district employees serving on the community school governing board. You have stated that the administrator would retain her current administrative contract and continue to perform her current administrator duties for the sponsor district. You propose that the administrator would have an additional, separate contract to perform duties for the community school and receive compensation from the sponsor district for these services.

Assigning Duties to a Public Employee

It should be noted, at the outset, that governmental agencies have certain flexibility in assigning the performance of more than one duty to an employee and compensating the employee for all of the work assigned. The Ohio Ethics Law does not prohibit a public employee from accepting additional duties, and additional compensation, from her public employer within the scope of a single employment contract or relationship. (For example, a school district could assign a teacher additional coaching duties, and pay the teacher additional compensation to perform those duties.) However, when a public employee wishes to have a second or supplemental contract for employment with her public agency, the Ohio Ethics Law and related statutes are implicated.

The Ohio Ethics Law and Community Schools

In Advisory Opinion No. 2003-01, the Ohio Ethics Commission concluded that members and employees of community schools are bound by the provisions of R.C. Chapter 102, pursuant to the terms of the contract between the community school and the sponsor district. Further, members of the governing board of a community school are "agents" of the state and, therefore, "public officials" subject to the provisions of R.C. 2921.42 (the public contract law) and R.C. 2921.43 (the supplemental compensation law). Advisory Opinion No. 2003-01 is included for your information.

Officials and employees of school district boards of education, with the exception of some teachers,¹ are also subject to the provisions of R.C. Chapter 102. See R.C. 102.01(B) and (C). See also Ohio Ethics Commission Advisory Opinions No. 90-003 and 93-017. All school district officials and employees, regardless of their job duties, are subject to the provisions of R.C. 2921.42 and 2921.43. See R.C. 2921.01(A); Adv. Ops. No. 93-017 and 2001-04. Administrative employees, such as the ones you have described in your request, are within the class of public officials and employees subject to all of the provisions of R.C. Chapter 102. and Section 2921.42 and 2921.43.

Interest in a Public Contract—R.C. 2921.42(A)(4)

Specifically applicable to your question is 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.

As noted above, a school district administrator is a "public official" for purposes of R.C. 2921.42. A "public contract" is defined in R.C. 2921.42(G) to include any purchase or acquisition of property or services by or for the use of a public agency, including any employment contract.

R.C. 2921.42 (A)(4) prohibits a public official from having an interest in the profits or benefits of a public contract entered into by, or for the use of, the political subdivision with which she is connected. See generally Adv. Op. No. 87-002. An "interest" which is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. Adv. Op. No. 91-002. An individual who receives compensation or remuneration for services performed under a public contract would have a definite and direct, pecuniary interest in the public contract. See Adv. Ops. No. 88-001 and 91-002.

In Advisory Opinion No. 92-020, the Commission considered an issue similar to the one you have raised. In that opinion, the Commission was asked whether a city employee was prohibited from selling services as a labor negotiator to the city. The Commission concluded that R.C. 2921.42(A)(4) prohibited the individual from being employed or hired by the city to serve as the city's chief labor negotiator because he also served as the clerk of city council.

This same conclusion would apply to the questions you have raised. R.C. 2921.42(A)(4) prohibits both administrators from receiving a supplemental contract from the sponsor school district to perform additional duties for the district and the community school.

¹ Teachers and other educators are not subject to the conflict of interest, revolving door, and confidentiality provisions set forth in R.C. 102.03. However, they are subject to R.C. 102.04, 2921.42, and 2921.43. Adv. Op. No. 93-017.

The fact that one of the administrators is also assigned to serve on the community school governing board is immaterial to this conclusion. While R.C. 3314.03(A)(11)(e) does specifically permit a community school board member to be an employee of the community school, it cannot supersede the prohibitions in R.C. 2921.42(A)(4) that apply to a school district employee. When a person serves in more than one public position, the Commission must examine the application of the Ethics Law to that person in each of the public positions. As an administrator of the sponsor school district, the employee is subject to R.C. 2921.42(A)(4), and the exception in R.C. 3314.03(A)(11)(e) does not apply.

Exception to Public Contract Restriction—R.C. 2921.42(C)

Division (C) of Section 2921.42 provides an exemption to the prohibition of Division (A)(4). Division (C) contains four criteria that must be met in order for a public official to be exempt from the prohibition of R.C. 2921.42(A)(4). These criteria are strictly applied against the public official or employee and the burden is upon the public official to demonstrate her compliance with the exemption. See Adv. Ops. No. 84-011, 87-003, and 91-011.

Division (C)(2) requires that the goods or services provided by a public official to her own political subdivision be "unobtainable elsewhere for the same or lower cost." With respect to employment, this requirement may be particularly difficult to meet. Whether an individual's services are "unobtainable elsewhere for the same or lower cost" is determined by the facts and circumstances of each individual situation. Adv. Op. No. 93-008.

In order to meet the requirement of Division (C)(2), the school district administrator must be able to demonstrate, by some objective standard, that the services she will supply to the school district for the community school are unobtainable elsewhere for the same or lower cost. The application the administrator submits must be considered in the same manner as those submitted by all other applicants for the position. The school district must use an open and fair employment process, and cannot give the administrators any greater consideration than any other candidate. Assuming that the application from the administrators are not given any greater precedence, this requirement must be met by the objective showing that the administrators possess higher levels of education and broader experience. If the administrators possess exceptional educational backgrounds and experience, it may be argued that they would provide a superior quality of service to that the other applicants could provide at the same rate of pay.

The number of qualified applicants who respond to the job offering is also a factor. In a situation where there are few trained and experienced applicants, it may be easier to demonstrate that, among the applicants, the administrators are uniquely qualified for the position. Conversely, if many qualified and experienced professionals apply for the jobs, it would mitigate against the argument that the administrators are the most-qualified candidates for the available positions.

In the instant situation, the school district must conduct an open and fair selection process that is available to all interested and qualified individuals, and not limit its solicitations to school district employees. If, after such an open and fair selection process, it can be demonstrated that one or both of the administrators are the best and most-qualified persons for the positions, they meet the requirement in R.C. 2921.42(C)(2). But see Adv. Op. No. 90-007 (it may be extremely difficult to demonstrate that legal services provided by a firm in which a public official, or his law partner, has an interest would be "unobtainable elsewhere for the same or lower cost.") See also Adv. Ops. No. 78-001 and 84-002.

The school district administrators must also meet all the other criteria of Division (C). Another significant criterion within R.C. 2921.42(C) is Division (C)(4), which requires that the school district's decisions to hire the administrators are arms-length transactions in which the school district knows of the administrators' interests in the contracts for employment. In addition, the administrators must take no part in the deliberations or decisions with respect to supplemental public contracts for their employment with the school district.

Further, Division (C)(1) requires an objective showing that the services the administrators would provide are necessary for the operation of the community school. Division (C)(3) requires that the administrators perform the services for the community school in a manner either preferential to or the same as they would accord to other employers in similar situations.

As noted above, it may be very difficult for the administrators to show that they meet the requirements in R.C. 2921.42(C) such that the school district can enter into supplemental contracts with the administrators.

Authorizing the Contract—R.C. 2921.42(A)(1) and 102.03(D) and (E)

If the Administrators can meet the exception in R.C. 2921.42(C), such that they can enter into supplemental contracts with the school district, the administrators are bound by R.C. 2921.42(A)(1) and 102.03(D) and (E).

R.C. 2921.42(A)(1) prohibits the administrators from authorizing, or using their positions in any way to secure authorization, of the supplemental contract between the school district and themselves. An administrator would be prohibited from discussing, lobbying, making recommendations, or taking any other action to secure a contract for herself.

R.C. 102.03(D) and (E) prohibit the administrators from soliciting, accepting, or using their public positions to secure anything of value if the thing of value would have a substantial and improper influence upon them with respect to the performance of their duties. R.C. 102.03(D) would prohibit either administrator from using her position to secure a supplemental contract with the school district. R.C. 102.03(E) would prohibit either administrator from soliciting any benefits for herself, including the supplemental contract.

These restrictions would be especially compelling for the administrator who is serving on the community school governing board. While the Ethics Law does not prohibit a public employee from serving on the board of a non-profit corporation created by her public agency, as long as she is serving in her official capacity as a representative of the public agency, the law does prohibit the employee from using her position on the non-profit board in any way to benefit herself personally. See, generally, Adv. Op. No. 96-005. Further, while the exception in R.C. 3314.03(A)(11)(e) allows a community school governing board member to be an employee of the community school, it does not allow the board member to use her position to secure employment with the school district. Adv. Op. No. 2003-01.

Supplemental Compensation—R.C. 2921.43(A)

Assuming the administrators can meet the exception in R.C. 2921.42(C), such that they can enter into a supplemental contract with the school district, and comply with the requirements in R.C. 2921.42(A)(1) and 102.03(D) and (E), R.C. 2921.43(A) may also raise issues. R.C. 2921.43(A) prohibits a public servant, which includes a public official, from receiving any compensation, except as provided by law, to perform his official duties or as a supplement to the public servant's public compensation.

Generally, R.C. 2921.43 prohibits a public servant from receiving compensation from any party other than her public employer. Adv. Op. No. 2000-04 (a school district official or employee is prohibited from receiving payment from any party other than the school district for accompanying students on a school trip). This restriction applies whether the public servant receives payment directly from the outside party, or the outside party reimburses her public employer for the cost of the services provided by the public servant. Adv. Op. No. 2000-04.

However, in the situation you have described, the community school is created, and sponsored, by the school district. In the contract between the two agencies, the school district is expressly authorized to provide personnel and services to the community school. Further, there is a provision that the community school will reimburse the school district for the expenses it incurs in the operation of the school. Given all of these facts, any compensation earned by a school district employee, from the school district, for duties involving the operation of the school is not supplemental compensation, even if the district is later reimbursed by the community school for these and other expenses incurred by the district.

However, R.C. 2921.43(A) does prohibit a school district employee from accepting any compensation directly from the community school for duties she performs as a school district employee. Further, a school district employee is prohibited from accepting compensation, directly or indirectly, from a community school or any other party, for performance of duties she is already performing for the school district.

Conclusion

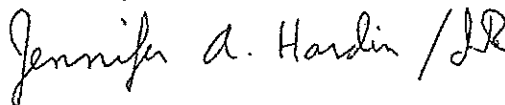
As set forth more fully above, the Ohio Ethics Law does not prohibit a public employee from accepting additional duties, and additional compensation, from her public employer within the scope of her individual employment contract. However, where the public employee would be in consideration for a second or supplemental contract for employment with her public agency, the Ohio Ethics Law and related statutes are implicated.

R.C. 2921.42(A)(4) prohibits a public school district administrator from having an interest in a supplemental contract with the district, unless she can meet the exception contained in Division (C) of Section 2921.42. Among other things, the administrator must be able to show, after a competitive process, that the school district will be unable to obtain the services she will provide from any other person for the same or lower cost. If the administrator meets the exception, such that she can have a supplemental contract with the district, she is prohibited from authorizing, or using her position in any way to secure authorization of, her supplemental employment contract.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on November 14, 2003. The Commission commends the school district for requesting guidance before taking any actions that could be prohibited by the Ethics Law.

The 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. If you have any questions or desire additional information, please contact this Office again.

Sincerely,

Handwritten signature of Jennifer A. Hardin in cursive script, followed by the initials "JR".

Jennifer A. Hardin
Chief Advisory Attorney

Enclosure: Advisory Opinions No. 2003-01