

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

November 2, 2005 Informal Opinion 2005-INF-1102-2

Kimberley K. Haines
Associate General Counsel
State Teachers Retirement System of Ohio

Dear Ms. Haines

In a letter received by the Ohio Ethics Commission on August 18, 2005, you asked if the Ethics Laws and related statutes prohibit an employee of the State Teachers Retirement System of Ohio (STRS Ohio) from running for a position on her local school board and serving as a school board member.

Brief Answer

As set forth more fully below, the Ethics Law and related statutes do not prohibit an STRS Ohio employee from running for a school board position. Further, if the positions of STRS Ohio employee and school board member are found to be compatible, the Ohio Ethics Law and related statutes do not generally prohibit her from simultaneously holding both positions.

However, the Ethics Law will significantly condition her conduct while serving in both positions. For example, if any matters before one public agency would involve projects that affect the interests of the other agency, R.C. 102.03(D) and (E) would prohibit her from participating in those matters. Also, R.C. 102.03(A) would prohibit her from representing or acting in a representative capacity for either public agency before another public agency on any matter in which she personally participated while in government office or employment through the exercise of substantial administrative discretion. Further, R.C. 102.04(A) and (C) prohibit her from receiving, directly or indirectly, compensation from either public agency for any service rendered personally by her in any matter before any department, division, institution, instrumentality, board, commission, or bureau of the other agency. Finally, R.C. 2921.42 would prohibit her from having an interest, including a fiduciary interest, in any contracts between the two agencies.

Facts

In your letter, you indicated that an employee of STRS Ohio asked whether she can run for a seat on her local school district's board of education. You explained that the employee is a cash manager for STRS Ohio's liquidity reserve portfolio of approximately \$1.6 billion. The employee was approached by the Jefferson Local School District Board of Education to run for a four-year term on the board this year. If she ran and was elected, she could receive \$80.00 a month for her service or divert the monthly amount to a scholarship fund, which she planned to do. The STRS employee decided not to run this year but wishes to have an opinion for future guidance.

You indicated that you have reviewed R.C. Chapter 3307., which governs STRS Ohio and to which Jefferson Local School District, as an employer, is also subject, and it does not appear to directly prohibit an STRS employee from serving as a school board member. You ask if the STRS Ohio employee can run for and serve in a school board member position.

Running for the School Board

Before addressing the application of the Ethics Law to the potential dual service issues, it is important to note that the Ethics Law does not prohibit the STRS Ohio employee from running for a school board position. There may be laws outside of the Ethics Commission's jurisdiction, such as R.C. 124.57, or other statutes or STRS policies governing elections activity, which prohibit the individual from running for the position or limit her campaign fundraising activity.

The Ohio Ethics Law and Related Statutes

The Ethics Law and related statutes generally prohibit public officials or employees from participating in matters in which they have a conflict of interest and from misusing the authority or influence of their public position for personal gain or to benefit family members, business associates, and other person or entities with which the officials or employees are connected. Generally, the Ethics Law and related statutes do not per se prohibit a public official or employee from simultaneously serving in more than one public position, but they will restrict an official's or employee's actions in all the public positions which she serves.

Matters Beyond the Ethics Commission's Jurisdiction—"Compatibility of Public Positions"

Whenever a person desires to occupy more than one public position, the question arises whether the positions are "compatible"—that is, whether a person may simultaneously hold the two public positions. The Ethics Commission has explained that an interpretation of the restrictions imposed by the Ethics Law and related statutes (R.C. Chapter 102. and 2921.42 and 2921.43) is not the same as a determination of compatibility. Ohio Ethics Commission Advisory Opinion No. 91-002. See also 1990 Att'y Gen. Op. No. 90-037.

Questions regarding the compatibility of the two positions you have described should be directed to the Attorney General's Office or the legal advisor for the City or the District. This advisory opinion will apply provisions of the Ethics Law and related statutes to the potential dual service.

Conflict of Interest Prohibitions—R.C. 102.03(D) and (E)

All public officials and employees are subject to general conflict of interest prohibitions found in R.C. 102.03(D) and (E), which read:

- (D) 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.
- (E) No public official or employee shall solicit or accept 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.

An STRS Ohio employee is a "public official or employee," as that term is defined in R.C. 102.01(B) and (C), and is subject to the prohibitions of R.C. 102.03(D) and (E). See generally, Adv. Ops. No. 91-010 and 99-003. Additionally, a member of a local school district board of education is a public official or employee for purposes of R.C. 102.03. See Adv. Ops. No. 93-014 and 90-003.

The term "anything of value" is defined for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 1.03, 102.01(G); Adv. Ops. No. 82-002 and 89-003. Any compensation that the employee would receive for her service in either public position is a "thing of value" for purposes of R.C. 102.30(D) and (E). In addition, the beneficial or detrimental economic impact of a decision by a public decision-making body is a thing of value for purposes of R.C. 102.03. Adv. Ops. No. 85-012, 90-002, and 90-012.

R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of her public position to secure anything of value that is of such a character as to manifest a substantial and improper influence upon her with respect to her duties. A public official or employee who serves in two public positions is prohibited from using her authority or influence in one position to benefit either herself or the interests she serves in her other public capacity. Adv. Op. No. 91-006. Therefore, a public official or employee who serves with two public entities is prohibited from participating, in either public position, with respect to matters that affect the other public entity.

In the instant situation, if the STRS Ohio employee were to serve as both a state employee and school board member, then she would be prohibited from soliciting, accepting, or using the authority or influence of either position to secure anything of value for herself or the other public agency that she serves. See Adv. Op. No. 91-006 (a member of city council who is employed by a school district may not participate as a council member in matters that affect the school district). She is prohibited from taking any action, formally or informally, in either public position, on matters that affect the interests of the other public agency with which she is connected.

If matters before STRS Ohio would involve projects that affect the interests of the school district she serves, then she may not participate as an STRS Ohio employee in those matters. The Ethics Law would prohibit her from participating in the matter in any way, including voting, discussing, deliberating, the rendering of advice, or any other exercise of administrative discretion. She would be prohibited from making recommendations to officials and employees of STRS Ohio or taking any other action on a matter before STRS Ohio in which the school district has an interest.

If a matter would ordinarily be assigned to the individual as a school board member that affects the interests of STRS Ohio, then she would be prohibited from participating as a board member in that matter. She would be prohibited from discussing, making recommendations, and formally or informally lobbying officials or employees of the school board, on matters involving STRS Ohio, including, for example, any changes to retirement contribution "pick-ups" made to STRS Ohio by the school district on behalf of teachers in the district.

The Commission has explained that, in certain situations, a public official or employee who engages in private employment or business activity may withdraw from consideration of matters as a public official or employee that could pose a conflict of interest. Adv. Ops. No. 89-006 and 89-010. However, the Commission has also explained that some high-level public officials and employees possess unique authority from which they cannot withdraw and therefore they are prohibited from pursuing certain kinds of private employment or business activity. Adv. Op. No. 92-009. A public official's or employee's withdrawal from consideration of issues concerning parties who are interested in matters before, regulated by, or doing or seeking to do business with her own public agency may be accomplished only if such a withdrawal: (1) does not interfere with the official's or employee's performance of her assigned duties; and (2) is approved by her employing agency. Adv. Op. No. 90-002.

Therefore, if the individual would ordinarily be required to participate, as an STRS Ohio employee, in projects involving the school district, she would have to be able to fully withdraw from those projects if she wished to serve on the school board. It must be clear that her withdrawal does not interfere with the general performance of her assigned duties and is approved by STRS Ohio. If it is necessary for her to withdraw, as an STRS Ohio employee, from matters affecting the school district, her withdrawal must be approved by her immediate supervisor and chief legal counsel at STRS Ohio.

The STRS employee should also be aware that, because of her role with STRS regarding investments, there may be additional limits on her with respect to soliciting or accepting campaign funds from individuals who have contracts related to the investment of STRS funds. An official with authority related to the investment of public funds may serve in a position where the potential for conflict of interest is heightened. See Adv. Op. No. 2002-03.

Revolving Door Restrictions—R.C. 102.03(A)(1)

Division (A)(1) of R.C. 102.03 prohibits a public official or employee from representing or acting in a representative capacity for any person, including a public agency she serves, before any public agency on any matter in which she personally participated while in government office or employment through the exercise of substantial administrative discretion. Adv. Op. No. 91-006. This prohibition applies during government service and for one year thereafter.

The term “matter” includes “any case, proceeding, application, determination, issue or question,” and the term “represent” includes “any formal or informal appearance before, or written or oral communication with, any public agency on behalf of any person.” R.C. 102.03(A)(5). However, “matter” has not been interpreted so broadly as to include a general subject matter or a party. The term “matter” includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, or investigation, a legal proceeding, an application, and a settlement of a dispute or question. Adv. Op. No. 99-001. “Matter” also includes such items as a dispute of special or public importance and a controversy submitted for consideration. Id.

In the instant situation, if the STRS Ohio employee were to be elected to the school board position, she would be prohibited from representing the school district before STRS Ohio or another public agency on any matter in which she personally participated as an STRS employee. She would also be prohibited from representing STRS Ohio before the school district or another public agency on any matter in which she personally participated as a school board member.

Compensation for Rendering Services Before a Public Agency—R.C. 102.04(A)

Division (A) of Section 102.04 of the Revised Code applies to state officers and employees and reads as follows:

Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

R.C. 102.04(A) prohibits a state employee or officer who serves a political subdivision from receiving, directly or indirectly, compensation from the political subdivision for any service rendered personally by her in any matter that is before any department, division, institution, instrumentality, board, commission, or bureau of the state. If the STRS Ohio employee would receive compensation for service on the school board, R.C. 102.04(A) would apply. In that case, R.C. 102.04(A) would prohibit the STRS Ohio employee from performing any services, for the district, on matters that are before STRS Ohio. There is no exception to this prohibition.

R.C. 102.04(A) would also prohibit the STRS employee from performing any services for the district on matters that are before any other state agency, unless the employee could meet the exception set forth in R.C. 102.04(D). Division (D) of Section 102.04 provides an exception to the prohibition of Division (A). A state officer or employee is exempted from Division (A) if both of the following apply: (1) the agency before which the matter that involves the rendering of services is pending, is an agency other than the one with which she serves; and (2) prior to rendering the personal services, the employee files a statement with the Ethics Commission, the public agency with which she serves, and the public agency before which the matter is pending. Division (D) sets forth the information that the statement must contain. Under no circumstances may a state officer or employee receive compensation from anyone other than the agency she serves for personally rendering services on matters before that agency. Adv. Op. No. 91-006.

Similarly, Division (C) of Section 102.04 prohibits an officer or employee of a political subdivision from receiving "directly or indirectly compensation other than from the agency with which she serves for any service rendered or to be rendered by her personally in any case, proceeding, application, or other matter which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which she is an officer or employee."

Therefore, a member of a local school board who is employed by STRS Ohio, is prohibited from receiving compensation from STRS Ohio for any service rendered personally in any case, proceeding, application, or other matter before any agency, department, board or commission of the school district. There is no exception to this prohibition for an elected school board member.

Restrictions Involving Public Contracts—R. C. 2921.42

The public contract restrictions of R.C. 2921.42(A)(1) and (4) provide that no public official shall knowingly:

- (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; . . .

- (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.

An STRS Ohio employee and a local school board member are “public officials” for purposes of R.C. 2921.42(A)(1) and (4). Adv. Ops. No. 91-010 and 90-003. A “public contract” includes any purchase or acquisition of property or services by STRS Ohio or the school district, and any contract for the design, construction, alteration, repair, or maintenance of any public property.

If there are any public contracts between the two public agencies, the STRS Ohio employee would be prohibited from having an interest, including a fiduciary interest, in the contracts. In some instances, the existence of a contractual relationship may—even if the positions have already been determined to be “compatible”—create an insurmountable obstacle that will preclude the official from serving both public agencies. However, the Ethics Commission has recognized a narrow exception to the prohibition against a public official having an interest in a contract with her own public agency when the official serves with another public agency in her “official capacity” as a representative of the primary public agency she serves. See Adv. Op. No. 99-004.

If the school district and STRS Ohio have contracts with one another, then the prohibitions of R.C. 2921.42 may be implicated. In that case, this office should be contacted for a determination of whether the individual could meet an exception to the prohibitions of R.C. 2921.42.

Conclusion

As set forth more fully above, the Ethics Law and related statutes do not prohibit an STRS Ohio employee from running for a school board position. Further, if the positions of STRS Ohio employee and school board member are found to be compatible, the Ohio Ethics Law and related statutes do not generally prohibit her from simultaneously holding both positions.

However, the Ethics Law will significantly condition her conduct while serving in both positions. For example, if any matters before one public agency would involve projects that affect the interests of the other agency, R.C. 102.03(D) and (E) would prohibit her from participating in those matters. Also, R.C. 102.03(A) would prohibit her from representing or acting in a representative capacity for either public agency before another public agency on any matter in which she personally participated while in government office or employment through the exercise of substantial administrative discretion. Further, R.C. 102.04(A) and (C) prohibit her from receiving, directly or indirectly, compensation from either public agency for any service rendered personally by her in any matter before any department, division, institution, instrumentality, board, commission, or bureau of the other agency. Finally, R.C. 2921.42 would

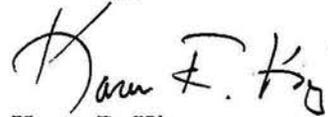
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prohibit her from having an interest, including a fiduciary interest, in any contracts between the two agencies.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 28, 2005. The Commission commends the STRS Ohio employee for requesting guidance before taking any actions that could be prohibited by 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 feel free to contact this Office again.

Sincerely,

A handwritten signature in black ink that reads "Karen R. King". The signature is written in a cursive style with a large initial "K" and a distinct "R".

Karen R. King
Staff Advisory Attorney