

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

November 28, 2005

Informal Opinion 2005-INF-1128-1

Thomas M. McCarty
Thomas M. McCarty Co., L.P.A.



Dear Mr. McCarty:

In a letter received by the Ohio Ethics Commission on October 1, 2005, you state that you represent Loretta M. Haugh, a member of the Board of Education (Board) for the Akron School District (District). You ask whether the Ohio Ethics Law and related statutes prohibit her from being employed by Summit Academy Management (SAM), a private non-profit organization that operates community schools, due to a conflict of interest.

Brief Answer

As explained below, a member of the District Board of Education is not prohibited from being employed by an organization that operates community schools within the District while she serves a District Board member. However, the District Board member is prohibited by conflict of interest provisions set forth in the Ethics Law, R.C. Chapter 102., from participating in the Board's deliberations and decisions in matters that definitely and directly affect the financial or fiduciary interests of the Board member or her employer (SAM).

Facts

You have explained that the Board member is employed as the Director of Special Projects for SAM and is working to improve standardized test scores of the community school students. You have stated that two of the community schools operated by SAM are located within the boundaries of the District. You state that the District neither sponsors the community schools nor has contracts, regulatory relationships, or agreements with SAM.

The Commission understands that the community schools operated by SAM within the District are funded directly on a monthly basis by deductions from the District's average daily membership figures. Enrollments in charter schools are regulated by the District through a

monthly student enrollment audit and verification system. According to legal counsel for the District, schools operated by SAM receive approximately \$1.25 million from the District's funding.¹

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

Your attention is directed to R.C. 102.03(D) and (E), which provide:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or business 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.

The term "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 any governmental entity. R.C. 102.01(B) and (C). Thus, a member of a school district board of education is a "public official or employee" who is subject to the prohibitions of R.C. 102.03(D) and (E). Ohio Ethics Commission Advisory Opinion No. 80-003.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 1.03, 102.01(G). A definite and direct financial benefit or a fiduciary interest is within the definition of "anything of value" under R.C. 102.03(D). Adv. Op. No. 86-007. Compensation received from engaging in private employment is also a thing of value for purposes of R.C. 102.03(D) and (E). Adv. Ops. No. 79-002, 89-010, and 92-005. In addition, the beneficial or detrimental economic impact of a decision made by a governmental entity is a thing of value for purposes of R.C. 102.03. Adv. Ops. No. 85-012, 90-002, and 90-012.

The conflict of interest prohibitions imposed by R.C. 102.03(D) and (E) serve the public interest in effective, objective, and impartial government by preventing the creation of a situation that may impair the objectivity and independence of judgment, and therefore, the effectiveness, of a public official or employee, or the political subdivision with which she serves. Adv. Ops. No. 89-014. The application of the prohibitions imposed by R.C. 102.03(D) and (E) is dependent upon the facts and circumstances of each individual situation. Adv. Op. No. 87-008.

¹ It should be noted that, while you have stated that there are *two* schools, operated by SAM, located within the boundaries of the District, legal counsel for the District has stated that there are *three* schools, operated by SAM, that receive funding from the District.

R.C. 102.03(D) and (E) prohibit a public official from soliciting or using her position to secure anything of value, including any favorable decision, if the thing of value is of such a character as to have a substantial and improper influence upon the official with respect to the performance of her official duties. Where a matter before a public agency will result in a definite and direct thing of value accruing to an official of the agency, or any person with whom the official has a close family, business, or economic relationship, the thing of value will have a substantial and improper influence upon the official with respect to the performance of her duties. Adv. Op. No. 97-002. In such a situation, the official is prohibited from participating, in any way, in the decision-making of the agency related to the matter.

With respect to outside employment, R.C. 102.03(D) and (E) do not generally prohibit a public official or employee from engaging in private employment so long as no public time or resources are used and no actual conflict of interest exists between the official's or employee's public and private positions. Adv. Op. No. 96-004. However, an employer holds a position of power and authority over the hiring, compensation, discipline, and termination of its employees. Adv. Op. No. 89-008. A public official who is in the position of deciding matters that definitely and directly affect the financial interests of her private employer would have an inherent conflict of interest. Adv. Ops. No. 80-003 and 88-005. Therefore, a public official or employee is prohibited from accepting outside private employment, and the compensation that accompanies it, from any party that is doing or seeking to do business with, regulated by, or interested in matters before the public agency she serves unless the official is able to fully withdraw from the performance of any authority related to her outside employer. Adv. Op. No. 96-004.

In some situations, the nature of a public official's authority makes it impossible for her to fully withdraw from matters that affect her own interests, or the interests of her outside employer. Adv. Ops. No. 87-006, 87-009, and 89-006. See also Ohio Sup Ct, Bd of Comm'rs on Grievances and Discipline, Op. 02-10 (2002) (a court probation officer is prohibited, by R.C. 102.03(D) and (E), from seeking or accepting employment from a company that provides a drivers' intervention program if individuals found guilty of motor vehicle infractions are sentenced to attend the program as a condition of probation). In such situations, R.C. 102.03(D) and (E) prohibit the public official or employee from holding the private employment. Adv. Op. No. 96-004. See also Adv. Ops. No. 77-006, 84-009, and 86-008.

Application of R.C. 102.03(D) and (E) Prohibitions

Community schools are public schools that operate independently from, and offer an alternative to, schools operated by a school district. A community school receives funds from the state department of education through a complex statutorily established formula. R.C. 3314.08(D). The essence of the statutorily established formula is that community schools receive money that is deducted from the state aid paid to the school districts where the students would otherwise be attending school. Thus, despite the fact that the District has no contracts, regulatory relationships, or agreements with SAM, the community school competes with the District for students and the state funds that would accompany the students. Because of the competitive nature of the relationship between them, the community schools operated by SAM

have interests in matters before the District. Therefore, R.C. 102.03(D) and (E) prohibit the Board member from accepting employment from SAM, unless she is able to fully withdraw from participating in any matters that result in a definite and direct thing of value for SAM.

The Ethics Commission has explained that, for purposes of R.C. 102.03(D), the thing of value that is secured by the action of the public official must be both definite and direct. When the thing of value, in a particular situation, is the economic impact that would occur from a decision of a public entity, the prohibition of R.C. 102.03(D) and, by extension, R.C. 102.03(E), does not apply if the economic impact is indirect or speculative, rather than definite and direct. Adv. Op. 91-006. See also Adv. Op. No. 93-016, (R.C. 102.03(D) does not prohibit a member of a county district board of health from participating in the enactment of a general regulation because it was merely speculative to assert that the financial interests of his business would be affected either positively or negatively by the board's regulation).

Boards of education perform a myriad of duties pertaining to the operation of a school district. Every matter before a Board will, generally, affect the educational opportunities for the students within the District. However, the issue presented here is whether any decisions of the Board will definitely and directly affect the interests of the Board member's employer where parents within the District send their children to the community schools operated by SAM. As noted earlier, SAM is receiving approximately \$1.25 million that would otherwise go to the District for educating students within the District.

In the majority of issues before the Board, any financial benefit that SAM would receive would not be a definite and direct result of the Board's decisions. In general, the realization of some definite and direct benefit to SAM is ultimately dependent upon the parents within the District who must decide where to send their children for education, and is outside the control of Board action. While the question presented the Commission concerns whether an employee of a community school that operates within the District can serve on the Board, there may well be other circumstances in which employees of private or parochial schools located within a school district serve as a member of the board of education. The fact that the board member's employer may be competing for students within the district, in and of itself, does not subject the member to such a conflict of interest that she cannot serve in both positions. However, the board member is prohibited from participating in matters before the board or actively using the influence of her office to secure a definite and direct thing of value either for the board member or her outside employer.

R.C. 102.03(D) and (E) do not prohibit the District Board member from serving on the Board even though she is employed by SAM, which competes for students within the District. Further, R.C. 102.03(D) and (E) do not prohibit the Board member from discussing, participating in deliberations, or voting in matters involving the District's general operation even though it is possible that the Board's actions could, in some indefinite manner, affect the interests of SAM.

However, if any specific issue or question arises before the Board that definitely and directly affects the financial interests of SAM, as distinguished from matters that generally affect the District and all community schools operating within the District, R.C. 102.03(D) and (E) will prohibit the District Board member from participating, formally or informally, in the Board's deliberations and decisions on that matter. For example, the financial interests of SAM would be definitely and directly affected if the Board were requested to provide any services for students attending SAM schools. Also, if the Board decided to sponsor SAM, the community school would have a definite and direct interest in the consideration and decision on such a matter so that the member could not participate in the issue.² Should any such situation arise, the Board member would be prohibited from participating in a matter that would result in a definite and direct thing of value for SAM.

Conclusion

As explained above, a member of the District Board of Education is not prohibited from being employed by an organization that operates community schools within the District while she serves as District Board member. However, the District Board member is prohibited by conflict of interest provisions set forth in the Ethics Law, R.C. Chapter 102., from participating in the Board's deliberations and decisions in matters that definitely and directly affect the financial or fiduciary interests of the Board member or her employer (SAM).

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on November 28, 2005. The Commission commends your client for requesting guidance on this matter.

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,



Jennifer A. Hardin
Chief Advisory Attorney

² Any contract between the District and SAM would also implicate R.C. 2921.42(A)(1), which prohibits a public official from securing a public contract for a business associate, including a private employer. Adv. Op. No. 89-008. If the District is considering entering into a contract with SAM, the Board member should seek further guidance from the Commission.