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June 29, 2010

Informal Opinion 2010-INF-0629-1

William L. Lodermeier
Superintendent
Bath Local Schools

Dear Mr. Lodermeier:

On January 8, 2010, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you are the Superintendent of the Bath Local School District ("local district") in Allen County. You explained that the local district is part of the Apollo Joint Vocational School District ("JVSD") created pursuant to R.C. 3311.19. You explained that, as provided under the operating plan adopted under R.C. 3311.19(B), the JVSD board is composed of and appointed by the governing boards of the participating school districts. You also stated that the JVSD board members may be compensated for attendance at JVSD meetings and training programs and reimbursed for their expenses under R.C. 3319.11(F).

You have asked whether the Ethics Law and related statutes prohibit the local district from appointing one of its members to the JVSD Board. You also asked whether a local district school board member is prohibited from voting to appoint himself to a position on the JVSD board.

Purpose of an Advisory Opinion

The purpose of Ethics Commission advisory opinions is to provide guidance to public officials or employees upon which they can rely *before* engaging in actions that may be prohibited by the Ethics Law. The Commission has explained that its function in rendering an advisory opinion is not a fact-finding process. Ohio Ethics Commission Advisory Opinion No. 94-002. Thus, the Commission can render an advisory opinion only in response to a question that involves the prospective conduct of the person who requests the opinion. Adv. Ops. No. 75-037 and 94-002.

Your letter does not specifically refer to a situation that has already occurred. However, the attached documents indicate that you are asking about facts that have already occurred, and that the board has received differing opinions from two law firms on the topic.¹ This opinion does not consider or reach any conclusions about the past actions of any school board member. Rather, it provides guidance for school board or ESC members in future situations.

Brief Answer

As explained more fully below, because local board members are serving on JVSD boards in their "official capacities," the Ethics Law and related statutes do not prohibit the local district board from appointing one of its members to the JVSD board. However, absent a statute expressly authorizing such action, the law prohibits local district board members from voting to appoint themselves to compensated positions on JVSD boards.

Dual Service of a School Board Member—Advisory Opinion No. 99-004

In Advisory Opinion No. 99-004, the Commission considered whether the Ethics Law and related statutes would prohibit a member of an educational service center (ESC) governing board, of a city local or exempted village school district board of education, from serving simultaneously as a member of a JVSD board formed pursuant to R.C. 3311.19. The Commission examined R.C. 2921.42(A)(4), which prohibits a public official or employee from having a fiduciary interest in the profits or benefits of a public contract entered into by a public agency with which he is connected.

A member of local school board and a JVSD board is connected with both boards for purposes of 2921.42(A)(4). Adv. Op. No. 87-002. The local school district's acquisition of vocational education services from the JVSD for the use of the students in the district would be a "public contract." Adv. Op. No. 99-004. A member of a public board, such as a school board, may have a fiduciary interest in the contracts of the public board on which he sits. Therefore, R.C. 2921.42(A)(4) would generally prohibit a local school district board member from serving as a board member of a JVSD with which his school district has a contract.

However, the Commission has previously explained that a public official does not have a prohibited interest in a contract of his or her public agency if the official also serves as a member of the board of another public agency, or a private organization, in his or her "official capacity." Adv. Op. No. 92-002, 93-012, and 99-004; Att'y Gen. Op. No. 91-007. Applying the official capacity analysis to a person serving on both an ESC/school board and a JVSD board, the Commission determined that R.C. 2921.42(A)(4) does not prohibit service in both positions,

¹ In *State v. Urbin* (2003), 100 Ohio St.3d 1207, 2003-Ohio-5549 at ¶ 13 (dismissed, *sua sponte*, as having been improvidently allowed), Chief Justice Moyer took the opportunity, while concurring in the dismissal, to "review and validate the authority of the Ethics Commission" regarding advisory opinions. The Chief Justice wrote: "While they are not binding on the courts, these opinions are entitled to weight by the courts, and Ohio courts have found commission opinions useful in applying and interpreting the law."

provided the person can demonstrate that he or she is serving on the JVSD board in an official capacity. Adv. Op. No. 99-004.

The Commission stated that an ESC or school board member could meet the four elements of the "official capacity" exception where: (1) the ESCs or school boards that are members of a joint vocational district participate in, or approve of, the creation of the district; (2) the JVSD board member is appointed, pursuant to statute, to his position on the JVSD board by his ESC or school board; (3) the JVSD board member is instructed, as part of the appointment, to serve and represent the interests of the ESC or school board; and (4) the board member has no other conflicts of interest. Adv. Op. No. 99-004. Therefore, provided that a local district board member or ESC governing board member meets these four elements, the board member is not prohibited from serving on a JVSD board. If the resolution whereby the board appoints one of its members to the JVSD board incorporates the requirement that the board member is serving and representing the interests of the appointing board, the board member can demonstrate that he meets these requirements and would be serving in his official capacity on the JVSD board. The "official capacity" exception is explained more fully in Advisory Opinion No. 99-004, which is attached for your reference.

Voting to Appoint Oneself to a Compensated Board

Members of local school district boards and JVSD boards are "public officials" bound by R.C. 102.03(D), which reads:

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.

Adv. Op. No. 99-004. "Anything of value" is defined in R.C. 1.03 to include money and every other thing of value. R.C. 102.01(G). A financial benefit to a person is considered to be a thing of value under R.C. 102.03(D). Adv. Op. No. 88-004. You have stated that the JVSD board members are compensated for their service under R.C. 3319.11(F). Compensation falls within the definition of "anything of value."

The Ethics Commission has explained that R.C. 102.03(D) prohibits a public official from participating, formally or informally, with respect to decisions of the official's political subdivision that could result in a definite and direct financial benefit for the official. Adv. Ops. No. 92-013 and 92-019.

For example, in Advisory Opinion No. 96-004, the Commission determined that public officials are prohibited from using their official authority or influence, formally or informally, to secure employment or compensation for themselves from an outside source. Also, the Commission has determined that R.C. 102.03(D) prohibits a public official from accepting travel

reimbursements and free conference registration from any source that is doing business with or interested in matters before the official's public agency. Adv. Op. No. 92-018.

There is also a common law rule against a public official appointing himself to a public position. This general rule serves to avoid conflict of interest situations and is consistent with the common law compatibility principles. 1994 Ohio Att'y.Gen.Ops. No. 94-062 at 2-303. The Ohio Attorney General has rendered numerous opinions concerning this common law rule. See, e.g., 2007 Ohio Att'y.Gen.Ops. No. 2007-020; 2006 Ohio Att'y.Gen.Ops. No. 2006-015; and 2005 Ohio Att'y.Gen.Ops. No. 2005-016. See also *State ex rel. Louthan v. Taylor*, 12 Ohio St. 130, 134 (1861) and 63C Am Jur 2d Public Officers and Employees § 94. For example, the Ohio Attorney General has stated:

It is a general rule of law that a public officer cannot lawfully exercise the powers reposed in him by law to his own personal advantage. The corollary of this rule is that a public officer possessing by law the power of appointment to another public office or to a public employment, cannot use that power to place himself in office or to employ himself in the absence of a statute permitting the same.

1936 Ohio Att'y.Gen.Ops. No. 5114, vol. I, p. 71, at 75.

You have noted R.C. 3311.19(A), which provides for the administration of any JVSD. Where a JVSD is composed of local school districts of more than one county, or of any combination of city, local, or exempted village school districts, or ESCs, the JVSD can be administered by one of the ESCs or:

[T]he board of education of the joint vocational school district shall be composed of one or more persons who are members of the boards of education from each of the city or exempted village school districts or members of the educational service centers' governing boards affected to be appointed by the boards of education or governing boards of such school districts and educational service centers.

R.C. 3311.19(A). It is clear that R.C. 3311.19 confers appointing power to members of the participating district boards. However, R.C. 3311.19 does not expressly authorize individual board members to nominate or vote to appoint themselves to a JVSD board. Therefore, in the absence of any specific legal or legislative authority to the contrary, the application of both R.C. 102.03(D) and the general rule prohibits a local district school board member from voting on, or otherwise using his authority to secure, his own appointment to a compensated position on a JVSD board.

Application of the Opinion

While your question specifically involves members of local school district boards of education, the conclusions in this opinion would apply to any school board members, or governing board members, whose districts or ESCs have joined to form a JVSD. The

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conclusions would also apply to any other public official with authority to make appointments to other public offices or employment.

Conclusion

As explained more fully above, because local board members are serving on JVSD boards in their "official capacities," the Ethics Law and related statutes do not prohibit the local district board from appointing one of its members to the JVSD board. However, absent a statute expressly authorizing such action, the law prohibits local district board members from voting to appoint themselves to compensated positions on JVSD boards.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on June 29, 2010. 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, appearing to read "Jennifer A. Hardin". The signature is fluid and cursive, with a large initial "J" and "H".

Jennifer A. Hardin
Chief Advisory Attorney

Enclosure: Ohio Ethics Commission Advisory Opinion No. 99-004