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September 26, 2011 Informal Opinion 2011-INF-0926-1

P. R. Casey, Chief Legal Counsel
Ohio Department of Education

Dear Mr. Casey:

On April 8, 2010, the Commission received a letter from the Department requesting an advisory opinion. I apologize for the delay in responding to the request.

The Department asked four questions regarding the propriety of school district board members, administrators, and employees simultaneously serving on the governing authority or as officers of a conversion community school sponsored by the district.

The Department also requested and received an opinion from the Ohio Attorney General's Office (AGO) on similar questions. The opinion from the Attorney General's Office resolved one of the questions you raised because it concluded that members of the board of education of a school district could not serve simultaneously as a member of the governing authority of a conversion community school sponsored by the district.¹

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.² For that reason, 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.³

You have asked about persons other than yourself. However, you have done so as a representative of the Department of Education, charged with overseeing school districts in the state. For that reason, the Commission can provide an advisory opinion to you about the future actions of school district personnel in situations of this kind. This opinion does not reach any conclusions about actions that may have been taken in the past.

Questions and Brief Answers

1. Can a school district employee serve as a member of the governing board of a conversion community school sponsored by the district?

No, unless the employee is serving as a member of the governing board in his or her official capacity as a district employee.

2. Can a school district superintendent and treasurer also serve in the same roles at a conversion community school sponsored by the district under a contract between the district and the community school?

Yes, if they are serving in their official capacities as district employees. However, if they are serving in these roles, they are barred from taking any action as school district employees on matters that affect the conversion community school.

3. Can a school district superintendent and treasurer also serve as employees of a conversion community school sponsored by the district?

No, unless they can meet an exception in the law. If they meet the exception, and are able to serve in these roles, they are barred from taking any action as school district employees on matters that affect the conversion community school.

Conversion Community Schools

A conversion community school is created by a school district when all or part of an existing school is made into a community school.⁴ A conversion community school can be opened by any school district and operates independent of the district.⁵ The district is the sponsor of the conversion community school.⁶

Although a conversion community school is considered “a public school independent of any school district,” it has significant regulatory and contractual connections with its sponsoring district. The Attorney General has concluded that the board of education of a school district that sponsors a conversion community school oversees and supervises the governing authority of the school and acts as a check upon the school’s authority.⁷ The law requires that a school district that is sponsoring a conversion community school must enter into a contract with the individuals

who will become the governing authority of the school.⁸ The contract specifies, among other things, the school's educational program and goals, facilities, teacher qualifications, and dispute resolution procedures between the sponsoring district and the governing board of the school.⁹

The sponsoring district oversees and supervises the governing board of the community school by monitoring and assisting the school in its compliance with applicable laws and the sponsor contract; evaluating and reporting the school's academic and fiscal performance; and intervening in the operation of the school if necessary.¹⁰ The district superintendent and treasurer may be assigned specific duties related to conversion community schools established by the district.

Public Contract Law—R.C. 2921.42

All three of your questions raise issues under the public contract law because there is a contractual agreement between a sponsoring school district and a conversion community school. Under the agreement, the sponsoring school district acquires educational services from the conversion community school. The agreement is, accordingly, a "public contract."¹¹

A school district employee, including a superintendent or treasurer, is a "public official."¹² R.C. 2921.42(A)(4) 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 the public official is connected.

R.C. 2921.42(A)(4) prohibits a public official from having a definite and direct, financial or fiduciary interest in a public contract by or for the use of a governmental agency with which the official is "connected."¹³ An officer, board member, or executive of a private entity has a fiduciary interest in the contracts of the entity.¹⁴ If he or she receives compensation for the services, the person may also have a financial interest.¹⁵

Therefore, if a school district employee serves as a governing board member, or as superintendent or treasurer, of a community school, the employee would have a prohibited fiduciary interest in the contracts of the community school, including the school's contract with the sponsoring district. For that reason, unless the employee can meet an exception in the law, a school district employee cannot also serve as a governing board member or as the superintendent or treasurer of a community school. There are two exceptions that may apply: (1) the official capacity exception; and (2) the statutory exception set forth in R.C. 2921.42(C).

Official Capacity

The Commission has recognized that, in some cases, a public official can serve as a member of the board or an employee of a nonprofit organization with which his or her public

agency has a contract provided that he or she acts as a representative of the public agency he or she serves. In that case, the public official would be serving with the organization in his or her “official capacity.”

When a public official serves an organization in his or her official capacity, “there would not be a dual interest in which private considerations would distract from his [or her] serving the public interest.”¹⁶ The Ethics Commission has recognized that a political subdivision may create, or become a participant in managing, a nonprofit organization as a means to provide necessary services to the citizens of the political subdivision.

The Commission has set forth four elements that must be met in order for a public official to be deemed to serve on the board of a nonprofit organization in his or her official capacity:

- (1) The governmental entity must create or be a participant in the nonprofit organization;
- (2) Any public official or employee connected with the jurisdiction . . . may be designated to serve on the nonprofit organization, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity;
- (3) The public official or employee must be formally instructed to represent the governmental entity and its interests; and
- (4) There must be no other conflict of interest on the part of the designated representative.

Official Capacity—Governing Board Service

If a district employee can show that he or she meets all of these elements, R.C. 2921.42(A)(4) does not prohibit the employee from serving on the governing board of a community school. Because the employee is required to serve on the community school governing board in the exercise of his public authority and performance of his public duties, he does not have a prohibited interest in the contract between the school district and the community school.

In order to demonstrate the second element, the school district board of education must formally appoint the school district employee to serve on the community school governing board. To meet the third element, the board of education must formally instruct the employee to represent the district’s interests on the community school governing board. Each of these two elements can be memorialized by some formal action of the district board of education. To meet the final element, the employee must be able to show, at a minimum, that he or she receives no financial benefit from the community school in return for service on its governing board.

Official Capacity—Superintendent or Treasurer

The official capacity exception may apply to a district superintendent or treasurer who is serving in the same positions with the conversion community school as part of his or her assigned duties to the district. Once again, the employee must show that he or she meets all four elements discussed on the previous page. Of course, the superintendent or treasurer must carefully account for his or her time when serving as an officer of the conversion community school and demonstrate that he or she is able to effectively perform all of the duties assigned to him or her in both roles.

You have stated that a superintendent or treasurer may be designated by the board of education to serve as superintendent or treasurer of the conversion community school under a contract between the district and the community school. In this situation, the district will provide compensation to the district employee in the form of a stipend. In order to demonstrate the final element, the stipend must be paid by the district, rather than the community school.

Attorney General Opinion 2010-020

As noted above, the Attorney General also considered this question. The opinion concluded, on the basis of common law conflict of interest analysis, that a superintendent or treasurer could serve as superintendent or treasurer of a conversion community school, but would be unable to perform significant duties in his or her role as district employee regarding the community school. This advisory opinion agrees with these conclusions of the Attorney General's Office. (See discussion below.)

The official capacity exception would only apply in situations when the superintendent or treasurer is assigned to perform the duties of superintendent or treasurer of the conversion community school by his or her employing school district. When the superintendent or treasurer would be employed directly by both the district and the conversion community school, he or she would have to meet a statutory exception to R.C. 2921.42(A)(4).

Four-Part Exception—R.C. 2921.42(C)

In order to meet the exception in R.C. 2921.42(C), the school district superintendent or treasurer must show that he or she meets four requirements. The application of each of the four requirements depends on the facts and circumstances.¹⁷ The burden is on the superintendent or treasurer to show that he or she meets the exception.¹⁸

Requirement 1: The goods or services are necessary goods or services.¹⁹ In the situation you have described, the district superintendent or treasurer can meet this requirement because the district has made a determination that a conversion community school is necessary.

Requirement 2: The products or services the conversion community school will provide to the district are “unobtainable elsewhere for the same or lower cost.”²⁰

In order to meet this requirement, the superintendent or treasurer would have to demonstrate, using some objective standard, that it costs the district less to provide educational services to district students using conversion community schools rather than through traditional schools. Unless the district can demonstrate such a savings, the superintendent or treasurer would be unable to meet this requirement.

Requirement 3: The treatment the community school will accord to the school district is either preferential to or the same as that accorded other clients in similar transactions.²¹ Because the community school would have no clients other than the sponsor district, the district employee can meet this requirement.

Requirement 4: The entire transaction is conducted at arm’s length, the school district must have full knowledge of the superintendent’s or treasurer’s interest in the purchase of educational services from the conversion community school, and the superintendent or treasurer must take no part in the district’s deliberations or decisions with respect to the transaction.²²

If the superintendent or treasurer is able to remove himself or herself completely from all decisions affecting the conversion community school and its contract with the district, he must also show that he meets the other aspects of R.C. 2921.42(C)(4).

Other Requirements of the Law

Even if the school district employee, superintendent, or treasurer could meet the exception in R.C. 2921.42(C), such that he or she would not be prohibited from providing services to the conversion community school, he or she must still observe other prohibitions.

A. Authorization of Public Contracts—R.C. 2921.42(A)(1)

R.C. 2921.42(A)(1) states that a public official shall not knowingly authorize or employ the authority or influence of his or her office to secure authorization of any public contract in which his or her business associate has an interest.²³ If a public official or employee has outside employment, whether with a public agency or private corporation, R.C. 2921.42(A)(1) prohibits the official from taking any action, within the scope of his or her public employment, to secure any contracts for the conversion community school.²⁴

Therefore, R.C. 2921.42(A)(1) would prohibit a school district superintendent or treasurer who also provides services to a conversion community school from authorizing, discussing, recommending, or lobbying other district officials and employees to secure authorization of, any contracts or financial benefits for the conversion community school.

B. Conflicts of Interest—R.C. 102.03(D) and (E)

The conflict of interest law, R.C. 102.03(D) and (E), prohibit a public official from soliciting, or using the authority or influence of his or her office, 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 him or her with respect to his or her duties. R.C. 102.03(D) and (E), in addition to R.C. 2921.42(A)(1), would prohibit a school district employee, superintendent, or treasurer who also provides services to a conversion community school from participating in any way in *any matters* before the district that would definitely and directly affect the conversion community school. The district employee, superintendent, or treasurer would, for example, be prohibited from using his or her position with the district, to secure additional students for the conversion community school from among current district students.

In other words, the administrative duties normally performed by the school district superintendent or treasurer, regarding oversight of the conversion community school, would have to be reassigned to another official or employee of the sponsoring district. The Commission cautions that such a reassignment must be open and fully documented, and notes that it may be both cumbersome and costly for the district to perform.

As noted above, in Advisory Opinion No. 2010-20, the Attorney General's Office reached a similar conclusion:

[A] person who serves simultaneously in the positions of superintendent of a school district and superintendent or chief administrative officer of a conversion community school sponsored by the school district is subject to an impermissible conflict of interest when he is directed by the school district's board of education to participate in (1) overseeing, monitoring, or evaluating the administration, management, organization, or operation of the community school as part of the district board of education's oversight of the community school, (2) reviewing or evaluating the finances or financial records of the community school as part of the district board of education's oversight of the community school, or (3) overseeing the provision of technical services to the community school.

[A] person who serves simultaneously in the positions of treasurer of a school district and treasurer or fiscal officer of a conversion community school sponsored by the school district is subject to an impermissible conflict of interest when he is directed by the school district's board of education to participate in (1) reviewing or evaluating the finances or financial records of the community school as part of the district board of education's oversight of the community school or (2) overseeing the provision of technical services to the community school.

R.C. 102.03(D) and (E) would also prohibit a school district employee, including the superintendent or treasurer, from engaging in any of the activities described in 2010 Op. Att'y Gen. No. 2010-020. If the school district were to assign any such duties to the superintendent or treasurer, and he or she is statutorily required to perform the duties, the superintendent or treasurer would be unable to withdraw from the exercise of his or her authority in order to also serve with the conversion community school. In that situation, the superintendent or treasurer would have an insurmountable conflict of interest that would effectively prohibit him or her from also serving as superintendent or treasurer of the conversion community school.

C. Representation—R.C. 102.04(C)

R.C. 102.04(C) prohibits a public official or employee from receiving compensation for representing any person before the district. While R.C. 102.04(D) provides an exception to this prohibition in certain circumstances, the exception does not apply to representation before a public employee's own public agency. Therefore, R.C. 102.04(C) prohibits a district employee, superintendent, or treasurer from accepting compensation from the community conversion school for representing the school's interest before the district, or performing any other services on any matter before the district involving the school.

D. Disclosure of Confidential Information—R.C. 102.03(B)

Finally, R.C. 102.03(B) prohibits a public official or employee from disclosing or using confidential information, acquired during the course of his or public employment, without appropriate authorization. This prohibition has no time limit. Therefore, a district employee, superintendent, or treasurer would be prohibited from using or disclosing any confidential information he or she acquired as an employee or official of the district to the community conversion school, or any other person, without appropriate authorization.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 26, 2011. 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

¹ See 2010 Op. Att’y Gen. No. 2010-020.

² Ohio Ethics Commission Advisory Opinion No. 94-002.

³ Adv. Ops. No. 75-037 and 94-002.

⁴ R.C. 33 14.02

⁵ Id.

⁶ Id.

⁷ 2010 Op. Att’y Gen. No. 2010-020

⁸ R.C. 3314.02 and R.C. 3314.03.

⁹ R.C. 3314.03(A).

¹⁰ R.C. 3314.03(D). See also 2010 Op. Att’y Gen. No. 2010-020.

¹¹ R.C. 2921.01(I)(1)(a) (A “public contract” includes any purchase or acquisition of property or services, or a contract for the purchase or acquisition, of property or services by or for the use of a public agency, including the public employment); R.C. 3314.02 and Adv. Op. No. 87-002.

¹² R.C. 2921.01(A); See R.C. 3313.17 (a school district board of education is a body politic and corporate) and Adv. Op. No. 93-017.

¹³ Adv. Ops. No. 78-005 and 81-003.

¹⁴ Adv. Ops. No. 85-009 and 86-005.

¹⁵ Id.

¹⁶ Adv. Op. No. 84-001.

¹⁷ Adv. Ops. No. 80-003 and 82-007.

¹⁸ Adv. Op. No. 84-011.

¹⁹ R.C. 2921.42(C)(1).

²⁰ R.C. 2921.42(C)(2) (There is another aspect to this exception that does not apply to the situation you described.).

²¹ R.C. 2921.42(C)(3).

²² R.C. 2921.42(C)(4).

²³ Adv. Op. No. 87-003.

²⁴ Adv. Op. No. 89-006.