

OHIO ETHICS COMMISSION

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Advisory Opinion Number 2001-05
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Syllabus by the Commission:

- (1) Based on the "official capacity" exception to the prohibition of Division (A)(4) of Section 2921.42 of the Revised Code, a superintendent of a school district or educational service center is not prohibited from serving on the Governing Board of a Data Acquisition Site that provides services to the school district or educational service center the superintendent serves;
- (2) A school district or educational service center superintendent does not have a potential conflict of interest based on his service on the Governing Board of a Data Acquisition Site that provides services to the school district or educational service center the superintendent serves where the four elements of the "official capacity" exception are met. Therefore, Division (D) of Section 102.03 of the Revised Code does not prohibit a school district or educational service center superintendent who is a member of the Governing Board of a Data Acquisition Site that provides services to his school district or educational services center from participating in matters affecting the Data Acquisition Site where the four elements of the "official capacity" exception are met;
- (3) Division (B) of Section 102.02 of the Revised Code requires that the Ethics Commission make available for public inspection any portion of a financial disclosure statement filed by a school district or educational service center superintendent that reveals a potential conflict of interest. Because service by a school district or educational service center superintendent on a Governing Board of a Data Acquisition Site in his official capacity does not present the potential for a conflict of interest, the Commission will not make available for public inspection those portions of a statement filed by a superintendent that reveal service in such a position.

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You have asked whether you would have a potential conflict of interest based on your service as both a school district superintendent and a member of the Board of an "A Site" that has a contract with the school district you serve.

An "A Site" is a Data Acquisition Site formed, pursuant to R.C. 3313.92(A), by a voluntary consortium of school districts and educational service centers (ESC) to provide computer services for the schools' common needs. Each A Site provides on-line computerized

services to the member school districts and ESC's in its region. There are 24 A Sites in the state which form the Ohio Educational Computer Network (OECN). The 24 OECN A Sites serve more than 90 percent of the state's public school entities.

All 24 A Site data centers provide computerized fiscal services (i.e. accounting and payroll), as well as student support services (pupil scheduling, grade reporting, attendance reporting), to their member districts and ESC's. Each OECN A Site is connected to a state network that is administered by the Ohio Department of Administrative Services. This permits electronic data transfers between each A Site and the Department of Education, as well as electronic mail capabilities among all participating school entities and the Department of Education.

Pursuant to R.C. 3301.075, the Ohio Department of Education has established administrative rules for the operation of A Sites. Both R.C. 3313.92 and the administrative rules require that the schools in any A Site consortium enter into a written agreement clearly setting forth the services to be provided by the A Site, and the cost each district shall pay for those services. Although all Data Acquisition Sites offer a menu of basic services, additional services are provided as determined locally by each consortium.

Each A Site is locally governed by representatives of its member school districts. The governing body is typically a board of directors or governing board comprised of participating school superintendents. It is your membership on the Governing Board of an A Site that has given rise to your question.

In your letter to the Ethics Commission, you explain that most superintendents in the State of Ohio are required, by virtue of their positions, to serve on the Governing Board of A Sites on a rotating basis. You also explain that virtually all school districts in Ohio do business with the A Site of which they are a member district.

As discussed more fully below, based on the official capacity exception to the prohibition of R.C. 2921.42(A)(4), a school district or ESC superintendent is not prohibited from serving on the Governing Board of an A Site that provides services to the district or ESC the superintendent serves. Also, a superintendent does not have a potential conflict of interest based on his service on the Governing Board of an A Site that provides services to the school district or ESC the superintendent serves where the four elements of the official capacity exception are met. Therefore, R.C. 102.03(D) does not prohibit a school district or ESC superintendent from participating in matters affecting the A Site for which he is a member of the Governing Board where the four elements of the official capacity exception are met. Further, because service by a school district or educational service center superintendent on a Governing Board of a Data Acquisition Site does not present the potential for a conflict of interest, the Commission will not make available for public inspection those portions of a statement filed by a superintendent that reveal service in such a position in the superintendent's official capacity.

Disclosure of a Fiduciary Interest on a Financial Disclosure Statement—R.C. 102.02(A)(3)

You have disclosed, on your annual financial disclosure statement, your position on the Governing Board of the A Site as a fiduciary interest. R.C. 102.02(A)(3) requires a financial disclosure filer to disclose the name of "every corporation on file with the secretary of state that

is incorporated in this state or holds a certificate of compliance authorizing it to do business in this state, trust, business trust, partnership, or association that transacts business in this state in which the person filing the statement . . . holds any office or has a fiduciary relationship." As stated above, an A Site is formed by a voluntary consortium of school districts and educational service centers (ESC) to provide computer services for the schools' common needs pursuant to R.C. 3313.92(A). Therefore, an A Site is an association that transacts business in the State of Ohio for purposes of R.C. 102.03(A)(3). See Black's Law Dictionary (6th Ed. 1991) at p. 81 (defines association as "an unincorporated society; a body of persons united and acting together without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise"). In addition, as a member of a Governing Board of an A Site, you have a fiduciary relationship with the A Site for purposes of R.C. 102.02(A)(3). See Ohio Ethics Commission Advisory Opinions No. 81-003 (a board member of a private entity has a fiduciary interest in the contracts of that entity) and 99-004 (a board member of a public entity has a fiduciary interest in the contract of that entity). Therefore, you properly disclosed your fiduciary relationship with the A Site on your financial disclosure statement.

Identification of a Potential Conflict of Interest

R.C. 102.02(B) requires the Ohio Ethics Commission to examine financial disclosure statements filed by school district or ESC superintendents, treasurers, and business managers, and other statements filed by public officials and employees who file confidential statements, and determine whether the information provided on the financial disclosure statements reveals the potential for a conflict of interest. A potential conflict of interest exists "if the private interests of the person, as indicated by the person's disclosure statement, might interfere with the public interests the person is required to serve in the exercise of the person's authority and duties in the person's office or position of employment" (emphasis added). R.C. 102.02(B). If the Commission determines that a potential conflict of interest exists, the Commission is required, by statute, to make available for public inspection those portions of a financial disclosure statement that reveal a potential conflict of interest. Therefore, it is necessary to determine whether a superintendent's position on a Governing Board of an A Site that provides services to the school district or ESC the superintendent serves might interfere with the public interests the superintendent is required to serve in the exercise of his authority and the duties of his public position.

Having an Interest in a School Contract—R.C. 2921.42(A)(4)

R.C. 2921.42(A)(4), a public contract restriction contained within the Ethics Law and related statutes, is applicable to the question you have presented. 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 he is connected.

The term "public official" is defined in R.C. 2921.01(A), for purposes of R.C. 2921.42, to include "any elected or appointed officer, or employee, or agent of . . . any political subdivision" of the state. A school district or ESC superintendent is a "public official" for purposes of the prohibitions of R.C. 2921.42. See generally Adv. Op. No. 98-003.

The term "public contract" is defined, for purposes of R.C. 2921.42, in Division (G)(1)(a) of that section, to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either. Thus, the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of a school district or ESC would be a "public contract."

The Ethics Commission has stated that R.C. 2921.42(A)(4) prohibits a public official from having a pecuniary or fiduciary interest in the profits or benefits of a public contract entered into by a political subdivision or governmental agency or instrumentality with which he is "connected." A superintendent is connected with the school district or ESC he serves for purposes of R.C. 2921.42(A)(4).

A contract between a school district or ESC and a Governing Board of an A Site would not affect the compensation of a superintendent. Therefore, a superintendent may not have a direct financial interest in a contract between the Governing Board of the A Site on which he sits and a school district or ESC by which he is employed. However, a superintendent does have a fiduciary interest in the contracts of the Governing Board of the A Site on which he sits. In Advisory Opinion No. 81-003, the Commission stated that a board member of a private agency has a fiduciary, and, in some cases, both a fiduciary and a pecuniary, interest in the contracts of the agency, such that he is prohibited from also serving as a member of a county board of mental retardation and developmental disabilities where the private agency and county board have contractual relationships. The Commission has also stated that an officer or chief administrative official of a private for-profit or non-profit corporation has a fiduciary interest in the contracts of the corporation, and may have a pecuniary interest as well. Adv. Ops. No. 81-008, 85-009, and 86-005.

In Advisory Opinion No. 99-004, the Commission stated that a member of a public board has a similar kind of relationship to the public agency that he serves as a member of a private board has to the private entity that he serves. Therefore, a superintendent who serves on the Governing Board of an A Site has a fiduciary relationship with the A Site, and would have a fiduciary interest in the contracts of the Governing Board of the A Site. See Adv. Op. No. 99-004.

As stated above, R.C. 2921.42(A)(4) generally 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. Therefore, R.C. 2921.42(A)(4) would generally prohibit a school district or ESC superintendent from serving as a board member of a public or private entity from which his school district or ESC acquires services. However, the Commission has recognized that, in some cases, a public official can serve as a member of the board of directors of a non-profit corporation, with which his public agency has a contract, as a representative of the public agency he serves, and therefore, in his "official capacity." This opinion will now examine that official capacity exception to determine whether it applies to the situation you have presented to the Commission.

The "Official Capacity" Exception to the Prohibition of R.C. 2921.42(A)(4)

The Ethics Commission has held that the prohibition imposed by the Ethics Law and related statutes does not apply to a public official of a political subdivision who serves on the board of directors of a non-profit agency that may serve a quasi-governmental purpose if he serves in his "official capacity" in order to represent his political subdivision's interests because "there would not be a dual interest in which private considerations would distract from his serving the public interest." Adv. Op. No. 84-001. The Ethics Commission has recognized that a political subdivision may create, or become a participant in managing, a non-profit corporation as a means to provide necessary services to the citizens of the political subdivision. See Adv. Ops. No. 83-010 (community development), 84-010 (paramedic services), and 92-012 (hospital services). See also 1979 Att'y Gen. Op. No. 79-055 (a statutorily-created public body may participate in the establishment or operation of a non-profit corporation only if the power to do so is expressly conferred by statute or necessarily implied from powers which are expressly granted).

In Advisory Opinion No. 84-001, the Commission set forth four criteria which must be met in order for a public official to be deemed to serve on the board of a non-profit corporation in his official capacity:

1. the governmental entity must create or be a participant in the non-profit corporation;
2. any public official or employee connected with the jurisdiction . . . may be designated to serve on the non-profit corporation, 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.

See also Adv. Ops. No. 82-004, 83-010, 92-002, and 93-012; Att'y Gen. Op. No. 91-007.

As stated above, in situations where a public official is asked to serve on the board of a non-profit organization, the Ethics Commission has examined four criteria to determine whether the "official capacity" exception applies. In the situation that you have set forth, it appears that superintendents are appointed by their respective school districts or ESC's to serve on the Governing Boards of A Sites in which their school districts or ESC's participate. The theory that allows a public official to serve in a fiduciary position with a non-profit agency, in his official capacity, is that there is no dual interest such that the official's private considerations would distract from his serving the public interest. In other words, the public official is expected to serve as a representative of the public agency that appointed him to the non-profit board position. His service with the non-profit board is an extension of his service with the public agency with which he is connected.

This theory is equally applicable to the situation you have set forth. A superintendent is appointed, by the school district or ESC he serves, to represent its interests on the Governing Board of the A Site. Therefore, the intent served by the first three elements set forth above is met, and the official capacity exception to R.C. 2921.42(A)(4) applies so long as there are no other conflicts of interest, and, where each of the elements of the exception are met, the superintendent can serve as a fiduciary of the Governing Board of the A Site that provides or may provide services to the school district he serves.

Where the four elements of the official capacity exception can be met, a school district superintendent's position on the Governing Board of an A Site that provides services to the school district the superintendent serves would not interfere with the public interests the superintendent is required to serve in the exercise of his authority and the duties of his public position. Therefore, a school district or ESC superintendent who serves on the Governing Board of an A Site that provides services to the superintendent's school district or ESC would not have a potential conflict of interest by virtue of his service on the Governing Board of an A Site where the four elements of the official capacity exception are met.

Participating in Matters Affecting an A Site Board—R.C. 102.03(D)

Your question also implicates R.C. 102.03(D), which provides the following:

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.

The term "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is an employee of any public agency. See R.C. 102.01(B) and (C). A school district or ESC superintendent is a "public official or employee" subject to the prohibitions of R.C. 102.03. See Adv. Op. No. 98-003.

R.C. 102.03(D) would generally prohibit a school district or ESC superintendent from discussing or participating in any matter that would benefit the Governing Board of an A Site of which he is a member, if the benefit accruing to the A Site Governing Board would be of such a character as to manifest a substantial and improper influence upon him with respect to his duties. However, in construing the application of R.C. 102.03(D), the Commission adopted the four criteria discussed above, which had been previously applied to the prohibition of R.C. 2921.42(A)(4), as the requirements that must be met before a public official may be considered to serve on the board of a private agency in his official capacity without violating R.C. 102.03(D). Adv. Op. No. 88-005. See also Adv. Ops. No. 96-005 and 99-004. Therefore, the outcome of the application of R.C. 102.03(D), under these circumstances, is the same as the outcome of the application of R.C. 2921.42(A)(4), as discussed above.

Treatment of Disclosure of Governing Board Position on Financial Disclosure Statement

As stated above, you are required to disclose your position on a Governing Board of a Data Acquisition Site on your financial disclosure statement as a fiduciary interest. However, R.C. 102.02(B) requires that the Ethics Commission make available for public inspection only those portions of a financial disclosure statement filed by a school district superintendent that reveal a potential conflict of interest. Therefore, the Commission will not make available for public inspection those portions of a statement filed by a school district superintendent that reveal a position on a Governing Board of a Data Acquisition Site.

Conclusion

As explained above, based on the official capacity exception to the prohibition of R.C. 2921.42(A)(4), a school district or ESC superintendent is not prohibited from serving on the Governing Board of an A Site that provides services to the district or ESC the superintendent serves. Also, a superintendent does not have a potential conflict of interest based on his service on the Governing Board of an A Site that provides services to the school district or ESC the superintendent serves where the four elements of the official capacity exception are met. Therefore, R.C. 102.03(D) does not prohibit a school district or ESC superintendent from participating in matters affecting the A Site for which he is a member of the Governing Board where the four elements of the official capacity exception are met. Further, because service by a school district or educational service center superintendent on a Governing Board of a Data Acquisition Site does not present the potential for a conflict of interest, the Commission will not make available for public inspection those portions of a statement filed by a superintendent that reveal service in such a position in the superintendent's official capacity.

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Based on the "official capacity" exception to the prohibition of Division (A)(4) of Section 2921.42 of the Revised Code, a superintendent of a school district or educational service center is not prohibited from serving on the Governing Board of a Data Acquisition Site that provides services to the school district or educational service center the superintendent serves; (2) A school district or educational service center superintendent does not have a potential conflict of interest based on his service on the Governing Board of a Data Acquisition Site that provides services to the school district or educational service center the superintendent serves where the four elements of the "official capacity" exception are met. Therefore, Division (D) of Section 102.03 of the Revised Code does not prohibit a school district or educational service center superintendent who is a member of the Governing Board of a Data Acquisition Site that provides services to his school district or educational services center from participating in matters affecting the Data Acquisition Site where the four elements of the "official capacity" exception are met; and (3) Division (B) of Section 102.02 of the Revised Code requires that the Ethics Commission make available for public inspection any portion of a financial disclosure statement filed by a school district or educational service center superintendent that reveals a potential conflict of interest. Because service by a school district or educational service center superintendent on a Governing Board of a Data Acquisition Site in his official capacity does not present the potential for a conflict of interest, the Commission will not make available for public inspection those portions of a statement filed by a superintendent that reveal service in such a position.

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