



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 90-005
February 22, 1990

Syllabus by the Commission:

(1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a member of a board of education from having an interest in purchases made by the school district, regardless of whether such purchases are made by school district employees on a casual, "as needed" basis or pursuant to a formal contract;

(2) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a member of a board of education from profiting from a purchase authorized by the board of education where the purchase was not competitively bid and the board member's bid was not the lowest and best bid, even though the profit is of a minimal amount. Division (A)(1) of Section 2921.42 prohibits a member of a board of education from authorizing, or using the authority or influence of his position to secure authorization of, purchases in which he, a member of his family, or any of his business associates has an interest;

(3) A board of education will be deemed to "authorize" all school district purchases for purposes of Divisions (A)(1) and (A)(3) of Section 2921.42 of the Revised Code, unless the board has passed a general resolution dispensing with the adoption of resolutions authorizing purchases and approving payments, in accordance with the requirements of R.C. 3313.18.

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You asked whether the Ohio Ethics Law and related statutes would prohibit a member of a board of education from voting to approve the school district's monthly financial status report and a sampling of purchase orders compiled by the school board's treasurer, where the school district has purchased supplies from a lumber company in which the school board member's family owns the majority of stock.

You have stated, by way of history, that the school district has for many years made casual purchases from a local lumber company. The school board member owns less than five per cent of the outstanding shares of stock. He is not a director, officer, or employee of the company, and has no role in operating the company's business. The majority of the remaining shares of stock are owned by the board member's family, including his brother and mother. Some of the family members hold in excess of five per cent of the company's outstanding shares.

You have explained the school district's purchasing procedures as follows. The board of education annually appropriates money to various funds, which are classified as regular funds or

activity funds. Appropriations are not made by the board to a specific vendor and the board of education does not recommend or exclude specific vendors during the appropriation process.

You have explained that purchases of supplies are made by school district employees, who decide what supplies are needed and where the purchases will be made. Purchase orders are filled out by the employees, and reviewed and approved by the treasurer before being sent to the vendors. The vendors' invoices are forwarded to the treasurer for payment.

You have further stated that the board of education passes a resolution each January at its organizational meeting, specifically authorizing the treasurer to pay bills in a timely manner. Pursuant to this authorization, the treasurer pays bills after receipt and without further approval by the board of education. At each monthly board meeting, board members vote, as part of a single motion, to approve a "cash position report" and a "sampling" of invoices which represents the kinds of purchases made by the school district during the preceding month. The cash position report indicates the district's current financial status. It reflects expenditures made during the preceding month, including retail purchases, but does not identify individual vendors or purchases. You have indicated that the sampling of invoices is intended to give the board members an idea of the kinds of purchases made by the district during the preceding month. The vendors' names do appear on the sample purchase orders; however the vendors would have already been selected and the supplies ordered. The sampling usually consists of the bills paid on a randomly selected day or days shortly before the board meeting. You have stated that board members who vote to approve the report are not pre-approving purchases from a particular vendor, nor approving individual purchases after they are made, but are voting to approve whatever purchases were made to arrive at the figures reflected in the report. The resolutions in the board's minutes which you have attached as examples, however, state that the board is approving the payment of bills in a specified amount as presented with the financial report.

You have stated that the purchase procedures are carried out at the administrative level, without the input or approval of the board of education. The selection of a vendor is within the discretion of the employees and the board does not have actual knowledge of the identity of the vendors. The board member in question is generally aware that the school district makes purchases from the lumber company but has no knowledge of specific transactions. Your letter states that the board member has not discussed a purchase or prospective purchase with any school district employee or tried to encourage or influence the purchase of items from the lumber company by the school district. It is assumed that the board member is not the president of the board, such that his signature would be required on the certificate attached to all contracts or orders involving the expenditure of funds stating there are sufficient funds to pay the contract or order, as specified in R.C. 5705.412.

Section 2921.42(A) of the Revised Code reads, in part, as follows:

(A) No public official shall knowingly do any of the following:

(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; . . .

(3) During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission or board of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid;

(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.

The term "public official" is defined for purposes of Section 2921.42 in R.C. 2921.01(A) to include any elected or appointed officer of a political subdivision of the state. Therefore, a member of a board of education is a "public official," who is subject to the prohibitions of R.C. 2921.42. See Ohio Ethics Commission Advisory Opinions No. 78-006, 85-009, and 90-003.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (E) 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 or any of its political subdivisions. Purchases by a political subdivision that are made on a casual or "as needed" basis, as well as purchases made pursuant to a formal contract are considered to be "public contracts" for purposes of R.C. 2921.42. See Advisory Opinion No. 87-002. Therefore, the purchase of lumber and other supplies by the school district from the lumber company, whether made on an "as needed" basis or pursuant to a formal, written contract is considered to be a "public contract." It is immaterial that the supplies may be purchased with moneys from student activity funds since such purchases are still made by or for the use of the school district. See generally Ohio Attorney General Opinions No. 75-008, 80-060, and 86-013 (moneys in student activity funds are public funds and are subject to constitutional and statutory restrictions on the expenditure of public funds).

Turning first to Division (A)(4) of Section 2921.42, this provision prohibits a public official from having an interest in a public contract entered into by or for the use of the political subdivision with which he is connected. An "interest" which is prohibited under R.C. 2921.42 must be definite and direct, and may be pecuniary or fiduciary in nature. See Ohio Ethics Commission Advisory Opinions No. 81-003 and 81-008. In this instance, the board member owns stock in the company which is providing supplies to the school district. He would, therefore, have a definite and direct pecuniary interest in the public contracts entered into between the school district and the lumber company. See Advisory Opinions No. 85-009 and 90-003. Division (B) of Section 2921.42 does, however, provide an exception to the prohibition of Division (A)(4) for persons who own five per cent or less of the outstanding shares of a corporation. Division (B) reads as follows:

(B) In the absence of bribery or a purpose to defraud, a public servant, member of his family, or any of his associates shall not be considered as having an interest in a public contract or the investment of public funds, when all of the following apply:

(1) The interest of such person is limited to owning or controlling shares of the corporation, or being a creditor of the corporation or other organization, which is the

contractor on the public contract involved, or which is the issuer of the security in which public funds are invested;

(2) The shares owned or controlled by such person do not exceed five per cent of the outstanding shares of the corporation, and the amount due such person as creditor does not exceed five per cent of the total indebtedness of the corporation or other organization;

(3) Such person, prior to the time the public contract is entered into, files with the political subdivision or governmental agency or instrumentality involved, an affidavit giving his exact status in connection with the corporation or other organization.

You have stated that the school board member owns less than five per cent of the outstanding shares of stock in the lumber company and is not a director, officer, or employee of the company. You have also stated that the board member has filed the affidavit specified in Division (B)(3). Therefore, R.C. 2921.42(A)(4) would not prohibit the school district from purchasing supplies from the lumber company, in the absence of bribery or a purpose to defraud. See also R.C. 3313.33.

As set forth above, Division (A)(3) of R.C. 2921.42 prohibits a public official from "occupy[ing] a position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid." A board member is subject to this prohibition regardless of whether he participated in the vote to authorize the public contract. See Advisory Opinions No. 88-008 and 90-003. In this instance, the board member does have an ownership interest in the lumber company, albeit under five per cent of the outstanding stock, and the board member would therefore profit from the lumber company's sales to the school board. Neither Division (B) nor any other provision in Section 2921.42 would except profits under any certain amount from the prohibition of Division (A)(3). Furthermore, you have indicated that there is no requirement that the school district's purchases from the lumber company be competitively bid. Therefore, Division (A)(3) would prohibit the school district and lumber company from doing business if the board of education is deemed to "authorize" the purchases.

The same issue is presented under Division (A)(1) of Section 2921.42, which prohibits a public official from authorizing or using the authority or influence of his position to secure authorization of any public contract in which he, a family member, or business associate has an interest. Members of the school board member's family own stock in the lumber company, and some of these family members hold more than five per cent of the outstanding shares. Therefore, members of the board member's family do have an interest in the school district's purchases from the lumber company. See generally Advisory Opinion No. 80-001 (setting forth who constitutes a member of a public officials family for purposes of R.C. 2921.42). It must be determined whether the vote of the board of education to approve the cash position report and sampling of invoices constitutes the authorization of the purchases of supplies from the lumber company.

R.C. 3313.29 states in pertinent part:

The treasurer of each board of education shall keep an account of all school funds of the district. The treasurer shall receive all vouchers for payments and disbursements made to and by the board. . . . The treasurer shall render a statement to the board and to the superintendent of the school district, monthly, or more often if required, showing the revenues and receipts from whatever sources derived, the various appropriations made by the board, the expenditures and disbursements therefrom, the purposes thereof, the balances remaining in each appropriation, and the assets and liabilities of the school district. At the end of the fiscal year such statement shall be a complete exhibit of the financial affairs of the school district which may be published and distributed with the approval of the board. All monthly and yearly statements as required in this section shall be available for examination by the public.

The treasurer is, therefore, required to report the school district's monthly revenues, expenditures, disbursements, and balances.

It is apparent, however, that it is the board of education that is statutorily empowered to authorize the purchase of supplies, as well as other expenditures, and to approve payments for such purchases. For example, R.C. 3313.17, setting forth the corporate powers of a board of education, states that the board is capable of "contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property." R.C. 3313.33 states that "no contract shall be binding upon any board [of education] unless it is made or authorized at a regular or special meeting of such board. RC. 3313.18 provides that, "upon a motion to adopt a resolution authorizing the purchase or sale of real or personal property . . . or to pay any debt or claim . . . the treasurer of the board [of education] shall publicly call the role of the members composing the board," and, as set forth above, R.C. 3313.29 states that the treasurer shall receive vouchers for payments and disbursements made by the board. With regard to student activity funds, R.C. 3315.062(C) states that "expenditures from the fund shall be subject to approval of the board." See Ohio Attorney General Opinions No. 75-008, 80-060, and 86-013 (the approval of the board of education is specifically required before an expenditure can be made from a student activity fund). Other examples of the power of the board of education may be found in R.C. 3315.062(A) ("the board of education of any school district may expend moneys from its general revenue fund for the operation of such student activity programs as may be approved by the state board of education") and R.C. 3313.53 (the board of education "may pay from the public school funds, as other school expenses are paid, the expenses of establishing and maintaining" various departments, schools, and pupil activity programs). See Ohio Attorney General Opinion No. 80-060 ("other school expenses are paid upon the order of the board of education pursuant to a warrant drawn from an appropriate fund," citing R.C. 5705.41(C)).

R.C. 3313.18 does, however, provide a method whereby the board of education may dispense with the requirement that it act to authorize each purchase and approve payment therefor. As set forth above, R.C. 3313.18 states that a roll call vote must be taken of the board members upon a motion to adopt a resolution authorizing, inter the purchase of property, or the payment of any debt or claim. R.C. 3313.18 goes on to state:

Whenever a board of a city, exempted village, local, or county school district by a majority vote of its members has adopted an annual appropriation resolution, then such

board may, by general resolution, dispense with the adoption of resolutions authorizing the purchase or sale of property, except real estate, the employment, appointment, or confirmation of officers and employees, except as otherwise provided for by law, the payment of debts or claims, the salaries of superintendents, teachers or other employees, if provision therefor is made in such annual appropriation resolution, or approving warrants for the payment of any claim from school funds, if the expenditure for which such warrant is issued, is provided for in such annual appropriation resolution. (Emphasis added.)

The board of education may, therefore, in accordance with R.C. 3313.18, dispense with the adoption of resolutions either authorizing the purchase of personal property or the payment of debts or claims, or approving warrants for the payment of any claim. See R.C. 5705.38(B)-40 (describing adoption of annual appropriation measure).

If the board of education voted to dispense with the adoption of resolutions authorizing the purchase of property and the payment of debts or claims, and approving warrants for the payment of claims, and is voting merely to accept the balances in the treasurer's statement specified in R.C. 3313.29, then the board's vote would not be considered to be authorization of the specific purchases made by employees of the school district, so as to invoke the prohibitions of Divisions (A)(1) and (A)(3) of Section 2921.42. A vote by the board of education merely to accept the treasurer's statement and the figures contained therein would not constitute authorization of any particular purchase, even through such purchase may have been included by the treasurer in arriving at the figures in the statement required under R.C. 3313.29. It cannot be said that the board's vote to dispense with the adoption of resolutions authorizing purchases and approving payments, coupled with its vote to accept the treasurer's monthly report may be deemed to constitute authorization of specific purchases made by school employees and paid for by the treasurer, without further board participation.

It should be noted, however, that Division (A)(4) would, in instances where the board member himself has an ownership or fiduciary interest in the company, prohibit the company from selling items to the school district regardless of whether the board of education had dispensed with the authorization resolution, as described in R.C. 3313.18. But see R.C. 2921.42(C) (providing exception to prohibition of Division (A)(4)).

It must also be stressed that R.C. 2921.42(A)(1) would prohibit the board of education member from voting, participating in deliberations or discussions, or otherwise using his position as a board member, formally or informally, to secure the authorization of purchases of supplies from a company in which he, a member of his family, or a business associate has an interest, regardless of whether the board formally votes to authorize purchases. See Advisory Opinion No. 90-003. He may not use his position with other board members, school district employees, students, or parents to secure such purchases. This conduct would also be prohibited by R.C. 102.03(D), which prohibits a public official or employee from using the authority or influence of his position to secure anything of value that is of such character as to manifest a substantial and improper influence upon him with respect to his duties. See Advisory Opinions No. 87-008 and 90-003.

If the board of education has not dispensed with the authorization resolutions, then any action by the board to authorize the purchase of items or approve the payments therefor- would be considered to be the authorization of such purchases for purposes of R.C. 2921.42(A)(1) and (A)(3), regardless of whether such authorization or approval occurred before or after the purchase of, or payment for, such supplies. Therefore, if the board of education is, in this instance, voting to approve the payment of bills, then such action would be considered the authorization of those purchases for which the payments are being approved, regardless of whether the authorization or approval occurs before or after the actual payment. Division (A)(3) of Section 2921.42 prohibits the board member from profiting from any public contract authorized by the board while he is a member thereof if the contract is not competitively bid and is not the lowest and best bid. In this instance, the board member would, as a stockholder in the lumber company, profit from the sales to the school district, and the purchases are not competitively bid. Therefore, R.C. 2921.42(A)(3) would prohibit the school district from purchasing supplies from the lumber company if the board passes a resolution authorizing the purchases or approving payments.

Similarly, Division (A)(1) of Section 2921.42 would prohibit the board member from participating in the discussion of, or vote to pass, a resolution authorizing the purchases of property or approving payments therefor, where the board member, a family member, or business associate has an interest in the purchases. In instances where the board member himself does not have an interest in the purchases and would not profit from the purchases so as to implicate the prohibitions of Divisions (A)(3) and (A)(4), the board may wish to separate the purchases in which his family member or business associate has an interest from the other purchases being authorized. In this way, the board member could abstain, as required by Division (A)(1), from the vote to authorize the purchases in which the family member or business associate has an interest, but could participate in the vote to authorize the other purchases.

Of course, if the board initially votes to dispense with the adoption of resolutions authorizing the purchase of property and the payment of claims, but then subsequently acts to, in fact, authorize or approve purchases or payments therefor, then Divisions (A)(1) and (A)(3) would operate to restrict the board member, as described more fully above.

In closing, the Ethics Commission wishes to emphasize that the application of R.C. 3313.18 by the Commission to the issues raised herein should not be viewed as a recommendation on whether a board of education, as a matter of public policy or administrative discretion, should handle expenditures in the manner set forth in R.C. 3313.18.

This advisory opinion is based on the facts presented, and is rendered only with regard to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code hat: Therefore, it is the opinion of the Ethics Commission, and you are so advised, (1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a member of a board of education from having an interest in purchases made by the school district, regardless of whether such purchases are made by school district employees on a casual, "as needed" basis or pursuant to a formal contract; (2) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a member of a board of education from profiting from a purchase authorized by the board of education where

the purchase was not competitively bid and the board member's bid was not the lowest and best bid, even though the profit is of a minimal amount. Division (A)(1) of Section 2921.42 prohibits a member of a board of education from authorizing, or using the authority or influence of his position to secure authorization of, purchases in which he, a member of his family, or any of his business associates has an interest; (3) A board of education will be deemed to "authorize" all school district purchases for purposes of Divisions (A)(1) and (A)(3) of Section 2921.42 of the Revised Code, unless the board has passed a general resolution dispensing with the adoption of resolutions authorizing purchases and approving payments, in accordance with the requirements of R.C. 3313.18.



David L. Warren, Chairman
Ohio Ethics Commission