



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

Advisory Opinion Number 93-014
September 10, 1993

Syllabus by the Commission:

(1) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of a board of education who is a sales representative for an insurance company which sells tax sheltered annuities to school district employees via payroll deduction from selling annuities to school district employees, soliciting school district employees to purchase the annuities, participating in sales discussions with school district employees in response to their inquiries concerning the annuities, or servicing the accounts of school district employees;

(2) Division (E) of Section 102.03 of the Revised Code prohibits a member of a board of education who is a sales representative for an insurance company from servicing the accounts of school district employees who purchase annuities sold by the insurance company via payroll deduction and receiving compensation therefor, or receiving any compensation from the sale of annuities to school district employees by his employer;

(3) Division (D) of Section 102.03 of the Revised Code prohibits a member of a board of education who is a sales representative for an insurance company from participating in administrative actions of the board of education which could affect the ability of the insurance company to sell tax sheltered annuities via payroll deduction to school district employees or other matters involving his employer;

(4) Divisions (D) and (E) of Section 102.03 of the Revised Code do not prohibit a former board of education member who is a sales representative for an insurance company from selling tax sheltered annuities to school district employees via payroll deduction provided he has not used the authority or influence of his position while serving as a board member to secure business opportunities for himself after his departure from the board.

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In your letter to the Ethics Commission you ask whether the Ohio Ethics Law and related statutes prohibit a member of a board of education, who is a sales representative for an insurance company, from selling tax sheltered annuities to school district employees, soliciting school district employees to purchase tax sheltered annuities sold by his employer, or from participating in sales discussions with school district employees in response to their inquiries concerning annuities sold by the insurance company. You also ask whether a former board of education member who is a sales representative for an insurance company may sell tax sheltered annuities to school district employees.

You state that the United States Tax Code requires that all employee contributions to a tax sheltered annuity be made through payroll deduction. A board of education must take administrative action to enable school district employees to purchase a tax deferred annuity through payroll deduction. See R.C. 9.90 and 9.91. An employee who desires to purchase a tax deferred annuity designates the licensed agent, broker, or company through which the board shall arrange the placement or purchase of the annuity through payroll deduction and authorizes, in writing, the school district to make the appropriate payroll deduction. See R.C. 9.90. Provided that the requirements of R.C. 9.90 (B) are met, the school district's treasurer honors the employee's designation and forwards the amount deducted from the employee's pay to the company. A board of education may levy administrative costs upon a company which has been designated to provide an annuity program for school district employees. See Tax Deferred Annuities Corp. v. Cleveland Bd. of Educ., 24 Ohio App. 3d 105 (Cuyahoga County 1985).

R.C. 9.91 provides a board of education with the discretion to impose either one or both of two conditions which must be met in order to honor a school district employee's designation of a licensed agent, broker, or company. Pursuant to R.C. 9.91 (A), a board of education may require the designee to execute an agreement protecting the school district from liability attendant to procuring the annuity; pursuant to R.C. 9.91 (B), a board of education may require that the licensed agent, broker, or company be designated by a number of employees equal to at least one percent of the board's full-time employees or at least five employees, whichever is greater, except that the board may not require that the agent, broker, or company be designated by more than fifty employees.

You state that, in the instant situation, the board of education, pursuant to the authority granted by R.C. 9.91 (B), requires that the licensed agent, broker, or company be designated by at least five employees. You state that, in the instant situation, the board of education has designated five companies to receive payroll deductions for placement in tax sheltered annuities.

You state that a member of the board of education is a sales representative for an insurance company which the board has designated to receive payroll deductions for tax sheltered annuities. You also state that the board member has not actively solicited school district employees to purchase annuities sold by his employer; however, school district employees have asked the school board member questions regarding annuities sold by the insurance company. You further state that the board member is the representative that "services" all of the insurance company's accounts that come from the school district and it is possible that the compensation which the member of the board of education receives from the insurance company may be linked to the number of school district employees who purchase annuities from the company.

You ask whether the prohibitions imposed by R.C. 2921.42 are applicable in this situation. R.C. 2921.42 imposes restrictions upon public officials with regard to "public contracts." See Ohio Ethics Commission Advisory Op. No. 90-003. In order for the restrictions of R.C. 2921.42 to apply in this instance, a tax sheltered annuity sold to a school district employee by a company via payroll deduction pursuant to the provisions of R.C. 9.90 and 9.91 must be a "public contract" as that term is defined in R.C. 2921.42 (F). The term "public contract" is defined, for purposes of R.C. 2921.42, in R.C. 2921.42 (F)(1), to include the purchase or

acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of a governmental entity.

The Ethics Commission has held that the purchase or acquisition of property or services by or for the use of a governmental entity constitutes a "public contract," regardless of whether the money to purchase the property or services flows from the governmental entity or from another party. See, e.g., Advisory Ops. No. 84-011, 90-003, and 93-007. In Advisory Opinion No. 93-007 the Commission explained:

The key factor in determining whether a contract is a "public contract" is whether the governmental entity is acquiring, either through purchase, grant, tax abatement, donation, loan, or other method, property or services. (Citations omitted.)

In the instant situation, it is apparent that the school district employee, not the school district, is purchasing or acquiring the product. A school district employee's purchase of an annuity from a licensed agent, broker, or company is a contract between the employee and the agent, broker, or company. As described above, a board of education must administratively act to implement, through payroll deduction, an employee's purchase of a tax sheltered annuity. However, with regard to the annuity, the board, in essence, acts merely as a conduit through which the school district employee's contributions to the annuity are withheld from the employee's pay and forwarded to the licensed agent, broker, or company designated by the employee.

The ability to purchase a tax sheltered annuity via payroll deduction may be considered a type of fringe benefit provided to employees of the school district; however it cannot be said that a school district employee's purchase of an annuity via payroll deduction results in the school district acquiring, either through purchase or other method, property or services. See Advisory Op. No. 93-007 (tuition payment contracts entered into between the Ohio Tuition Trust Authority and tuition credit purchasers are not "public contracts" for purposes of R.C. 2921.42, since no specific service flows from the tuition program participants back to the State). Also, a board of education's ability to collect administrative costs and require an agreement from the seller of the annuity protecting the school district from liability does not create a "public contract" since the board's levying of costs and requiring a liability agreement do not result in a specific service flowing from the seller back to the school district; rather, the costs and liability agreement are consideration from the seller to the school board for the school board's providing services.

Therefore, a school district employee's purchase of a tax deferred annuity via payroll deduction is not a "public contract" as that term is defined in R.C. 2921.42 (F). Accordingly, the prohibitions imposed by R.C. 2921.42 are inapplicable in this situation and need not be addressed. However, if the insurance company should wish to sell insurance or financial services to the board of education, the Ethics Commission should be contacted to determine whether R.C. 2921.42 would either prohibit or restrict such an arrangement.

Even though the prohibitions imposed by R.C. 2921.42 are inapplicable, the instant situation implicates Divisions (D) and (E) of Section 102.03 of the Revised Code, which provide:

(D) No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his 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 him with respect to his duties.

A member of a board of education is a "public official or employee" and subject to the prohibitions of R.C. 102.03 (D) and (E). See Advisory Op. No. 90-003.

R.C. 1.03 defines "anything of value" for purposes of R.C. 102.03 to include money and every other thing of value. See R.C. 102.01 (G). A definite pecuniary benefit to a person or his employer is considered to be a thing of value under R.C. 102.03 (D) and (E). See Advisory Ops. No. 79-008, 85-006, and 89-008. Thus, payments received by an insurance company from the sale of annuities, and commissions or compensation received by the company's sales representatives from the sale of the annuities fall within the definition of "anything of value."

R.C. 102.03 (D) and (E) prohibit a public official or employee from soliciting or accepting, or using the authority or influence of his position to secure, anything of value for himself or for his private employer that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. See Advisory Ops. No. 87-006 and 89-008. The Ethics Commission has held that a public official or employee is prohibited from soliciting, accepting, or using his position to secure anything of value from a party where such thing of value could impair the official's or employee's "independence of judgment in the performance of his duties and affect subsequent decisions in matters involving the donor of the thing of value." Advisory Op. 84-010.

Thus, the Commission has held that a public official or employee who is engaged in a private outside business may not accept, solicit, or use his authority or influence to secure commissions, fees, or other payments from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the official's or employee's public agency since such payments are of such a character as to improperly influence the official or employee with respect to the performance of his duties regarding those parties. See, e.g., Advisory Ops. No. 83-007 (an employee of the Board of Cosmetology is prohibited from selling products to regulated salons), 84-009 (an MRDD employee is prohibited from selling consulting services to a corporation which operates group homes under contract to MRDD), 84-014 (a city fire chief is prohibited from soliciting or receiving a commission on the city's purchase of fire equipment), and 87-006 (an official or employee of a county MRDD board is prohibited from being employed by a residential service provider).

In this instance, a member of a board of education holds a position of power and authority over the hiring, compensation, discipline, termination of board employees, and other terms and conditions of employment of board employees. See R.C. 3313.47 and 3319.07. The board member who is employed by the insurance company has the power to act upon the

interests of school district employees. It is apparent that the relationship of a member of a board of education to school district employees is similar to the examples of interested and regulated parties set forth above. Due to a board member's power and authority over school district employees, a board member's sale of annuities to school district employees or solicitation of school district employees to purchase annuities from his employing insurance company, including responding to specific questions from employees, creates a situation which could impair the board member's objectivity and independence of judgment and affect the performance of his duties in matters involving school district employees.

For example, if the board member's solicitation of a school district employee were unsuccessful, then any participation by the board member in an action by the board of education which adversely affects the employee could give rise to a challenge by the employee and create controversy that the board member's action was improperly motivated. In the same situation, the board member could be inclined to recommend that the board of education be lenient in its action towards the school district employee in an attempt to avoid the appearance of improper retaliation. On the other hand, the board member could be favorably disposed towards a school district employee whom he had successfully solicited to purchase an annuity from his employing insurance company. See generally Advisory Op. No. 90-002 (a public official or employee with a private outside business would be subject to impaired objectivity and independence of judgment in making regulatory decisions involving a competitor).

In any event, the solicitation of school district employees by a member of a board of education to purchase annuities from the board member's employing insurance company places the school district employees in an untenable situation due to the board member's power and authority over their employment. See Advisory Ops No. 89-015 (a subordinate of a city law director cannot handle a case where a member of the city law director's law firm represents a client against the city) and 92-009 (employees under the supervision of the Executive Director of the Ohio State Barber Board could not inspect a barber shop owned and operated by the Executive Director).

Also, any participation by the board member in an action by the board of education which adversely affects an employee he solicited or discussed business with could result in the board member's employer losing continued deposits in the annuity and the board member losing commissions. The potential for the board member and his employer to incur these losses would subject the board member to an inherent conflict of interest or divided loyalties such that his independence of judgment could be impaired with respect to acting upon the employee's employment with the school district. See Advisory Op. No. 91-004 (R.C. 102.03 (D) prohibits a city planning commission member from participating in a matter affecting his outside employer's customers if his employer's interests are contingent upon the commission's actions).

Furthermore, since administrative action by the board of education is necessary to make tax sheltered annuities available to school district employees, there is a potential that a school district employee could become confused as to whether the board of education member is acting in his private capacity as a sales representative or providing an endorsement in his official capacity on behalf of the board of education. See also Advisory Op. No. 84-013 (R.C. 102.03 (D) prohibits a public official or employee from using his official title or identification on private

business cards or appearing in uniform while soliciting business or conducting demonstrations for clients).

Therefore, it is readily apparent that a superior's sale of products to a subordinate or solicitation of a subordinate to purchase a product from the superior's outside employer creates conditions rife with inherent coercion and impropriety. See generally Advisory Op. No. 90-003. A member of a school district board of education has the responsibility to fulfill the statutorily mandated and defined duties of his office in an objective and impartial manner. See Advisory Op. No. 90-003. Therefore, R.C. 102.03 (D) prohibits a member of a board of education who is a sales representative for an insurance company from selling tax sheltered annuities to school district employees or soliciting school district employees to purchase tax sheltered annuities sold by his employer, including participating in sales discussions with school district employees in response to their inquiries concerning annuities sold by the insurance company.

You state that the board member services the accounts of school district employees who purchase annuities sold by the insurance company via payroll deduction and it is possible that the compensation which the member of the board of education receives from the insurance company may be linked to the number of school district employees who participate in the company's annuity program. As explained above, R.C. 102.03 (D) prohibits a public official or employee from using the authority or influence of his office or employment to secure an improper thing of value and he would, based upon the discussion above, be prohibited from servicing the accounts of school district employees; however, R.C. 102.03 (E) prohibits a public official or employee from merely accepting an improper thing of value regardless of whether he has used the authority or influence of his office. See Advisory Op. No. 90-004.

Thus, R.C. 102.03 (E) prohibits a member of a board of education who is a sales representative for an insurance company from servicing the accounts of school district employees and receiving commissions therefor, or from receiving any compensation from the sale of annuities to school district employees by his employer, even if he was not involved in the sale of the annuities. See Advisory Op. No. 90-008 (R.C. 102.03 (E) prohibits a city council member who is an attorney employed by a law firm from receiving a distributive share of fees earned by members of his law firm for representing a client before city council even though he did not participate in the matter affecting the law firm's client).

A second issue raised by your question concerns the ability of a member of a board of education who is employed by an insurance company to participate as a board member in matters which could affect the ability of the insurance company to sell its products to school district employees via payroll deduction.

The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official or employee from participating in matters which would secure a thing of value for his outside private employer. See Advisory Ops. No. 89-008 and 93-003. Therefore, R.C. 102.03 (D) prohibits a member of a board of education, who is a sales representative for an insurance company, from participating in administrative actions of the board of education which establish the requirements for companies to sell annuities to school district employees, and thus affect the ability of his employing insurance company to sell annuities to school district employees, or

other matters affecting his employer. He is subject to this prohibition even if he does not solicit employees or service their accounts.

You have also asked whether a former board of education member who is a sales representative for an insurance company may sell tax sheltered annuities to school district employees.

The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official or employee from using his position to secure for himself a direct financial benefit from actions which he took in his official capacity, regardless of whether he is still serving as a public official or employee at the time he realizes the financial benefit. See Advisory Ops. No. 84-012, 84-013, and 85-013. See also 79-003, 79-008, and 80-007. Generally, R.C. 102.03 (D) and (E) would not per se prohibit a former board of education member who is a sales representative for an insurance company from selling tax sheltered annuities to school district employees. However, R.C. 102.03 (D) would require that the former board member did not use the authority or influence of his position while serving as a board member to secure business opportunities for himself after his departure from the board. See Advisory Op. No. 87-008.

Finally, Division (B) of Section 102.03 of the Revised Code reads as follows:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

Therefore, a board of education member who is a sales representative for an insurance company is prohibited from disclosing to his employer or its personnel any confidential information acquired by him in his official duties as a school board member. It is important to note that no time limit exists for this prohibition and it is effective while he presently serves as a board member and after leaving office. See Advisory Op. No. 88-009.

This advisory 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.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of a board of education who is a sales representative for an insurance company which sells tax sheltered annuities to school district employees via payroll deduction from selling annuities to school district employees, soliciting school district employees to purchase the annuities, participating in sales discussions with school district employees in response to their inquiries concerning the annuities, or servicing the accounts of school district employees; (2) Division (E) of Section 102.03 of the Revised Code prohibits a member of a board of education who is a sales

representative for an insurance company from servicing the accounts of school district employees who purchase annuities sold by the insurance company via payroll deduction and receiving compensation therefor, or receiving any compensation from the sale of annuities to school district employees by his employer; (3) Division (D) of Section 102.03 of the Revised Code prohibits a member of a board of education who is a sales representative for an insurance company from participating in administrative actions of the board of education which could affect the ability of the insurance company to sell tax sheltered annuities via payroll deduction to school district employees or other matters involving his employer; and (4) Divisions (D) and (E) of Section 102.03 of the Revised Code do not prohibit a former board of education member who is a sales representative for an insurance company from selling tax sheltered annuities to school district employees via payroll deduction provided he has not used the authority or influence of his position while serving as a board member to secure business opportunities for himself after his departure from the board.


Jack Paul DeSario, Chair
Ohio Ethics Commission