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Advisory Opinion Number 94-002
March, 29 1994

Syllabus by the Commission:

(1) Division (A) (4) of Section 2921.42 of the Revised Code prohibits a teacher who owns and operates a commercial driver training school from receiving reimbursement from his school district for providing driver education to high school students, unless the exception of Division (C) of Section 2921.42 can be met;

(2) Division (A) (1) of Section 2921.42 of the Revised Code prohibits a teacher who owns and operates a commercial driver training school from discussing, recommending, or otherwise using the authority or influence inherent in his position as a teacher, either formally or informally, to persuade students to utilize the services of his commercial driver training school.

You have asked whether the Ohio Ethics Law and related statutes prohibit a teacher who owns and operates a commercial driving school from receiving reimbursement from his school district for providing driver education to high school students.

The Department of Education Driver Education Program

The department of education promotes highway safety by expending state funds to provide driver education to high school students in public and private schools. See R.C. 3301.17. High school students may receive department of education subsidized driver education by either taking a driver education course made available from the student's school district or a commercial driver training school. Id.

The department of education reimburses a school district fifty dollars for each high school student who completes a driver education course made available by his school district. Id. A school district which has made a driver education course available to its students cannot require a student to enroll in the course in lieu of taking a course from a commercial driver training school. Id.

Whenever a high school student chooses to enroll in a driver education course provided by a commercial driver training school licensed under R.C. Chapter 4508, the principal of the student's high school completes and signs a form which the pupil submits to the operator of the commercial driver training school prior to enrollment. Id. The operator of the commercial driver training school submits the form to the board of education of the student's school district for reimbursement. Id. Upon the student's completion of the driver education training course, the board of education pays the commercial driving training school fifty dollars out of funds paid to

the school district by the state board of education for the purpose of promoting highway safety through driver education. Id.

You state that a teacher who is employed by the school district and his wife own and operate a commercial driving school. You state that the teacher had been employed as the school district's driver's education teacher until last year when the school district dropped driver's education from its curriculum. You state that since the school district no longer makes driver's education available, students who wish to receive driver education enroll at commercial driver training schools including the driving school owned and operated by the teacher and his wife. You state that the teacher is not an administrator and has no authority to approve contracts.

Restriction Upon a School Teacher Having an interest in a Contract With His Employing School District

Your attention is directed to R.C. 2921.42 (A) (4) which 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.

R.C. 2921.42 (A)(4) prohibits a public official from having an "interest" in a public contract entered into by or for the use of the political subdivision, governmental agency, or instrumentality with which he is connected. The Ethics Commission has held that an "interest" under R.C. 2921.42 must be definite and direct, and may be pecuniary or fiduciary in nature. See Ohio Ethics Commission Advisory Ops. No. 78-005 and 81-008. An individual who holds an ownership interest in a business has a pecuniary interest in the contracts of the business for purposes of R.C. 2921.42. See Advisory Ops. No. 78-006, 81-008, and 92-006. See also Advisory Ops. No. 85-002 and 85-004 (a person who is a board member, officer, or partner in a business has an interest in the contracts of the business for purposes of R.C. 2921.42).

The term "public official" is defined to include "any elected or appointed officer, or employee, or agent of..... any political subdivision.,, The Ethics Commission has held that a teacher or other instructor, appointed or employed by a school district, is an employee of a political subdivision and is therefore a "public official" who is subject to the prohibitions of R.C. 2921.42. See Advisory Op. No. 93-017.

The term "public contract" is defined for purposes of R.C. 2921.42 in R.C. 2921.42 (G)(1), which reads:

(G) As used in this section:

(1) "Public contract" means any of the following:

(a) 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, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either;

(b) A contract for the design, construction, alteration, repair, or maintenance of any public property.

The Ethics Commission has held that, a public contract exists whenever the state or a political subdivision purchases or acquires property or services, often demonstrated by money flowing from the state or political subdivision to the provider of the property or service. See Advisory Ops. No. 93-007 and 93-009. 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, the school district purchases or acquires of driver education training services for its students from a commercial driver training school with funds provided to the school district by the department of education for the purpose of promoting highway safety. This purchase or acquisition by the school district, with funds provided by the state, is a "public contract," as the term is statutorily defined in R. C. 2921.42 (G) (1) . Therefore, R.C. 2921.42 (A) (4) prohibits a teacher who owns and operates a commercial driver training school from receiving reimbursement from his school district for providing driver education to high school students.

Exception Provided by R.C. 2921.42 (C) to the Prohibition of R.C. 2921.42 (A)(4)

Division (C) of R.C. 2921.42, however, sets forth an exemption to the prohibition imposed by R.C. 2921.42 (A)(4). R.C. 2921.42 (C) establishes four requirements which must be met before the teacher may receive reimbursement from his school district for providing driver education to high school students. In the instant situation, Division (C)(2) is of particular note and requires that the teacher show that the driver education services provided by his commercial driver training school are "unavailable elsewhere for the same or lower cost." See Advisory Op. No. 90-003. The Ethics Commission has held that while R.C. 2921.42 (C) (2) does not indicate a geographical limitation on availability, the necessary supplies or services should be readily at hand for use by the political subdivision. See Advisory Op. No. 84-006. Therefore, the location of the teacher's commercial driver training school may be a factor in determining whether the services offered are "unobtainable elsewhere for the same or lower cost." The ability to meet the requirement of Division (C) (2) by showing a "continuing course of dealing" is not relevant to the instant situation and need not be discussed.

Division (C) (4) requires that the transaction be at arm's length, with the school district having full knowledge of the teacher's interest in the commercial driver training school, and that the teacher take no part in the deliberations and decisions of the school district with respect to the contract. See also R.C. 2921.42 (A)(1) (discussed below). Division (C)(1) requires that the school district reasonably and objectively demonstrate that the driver education services offered

by the teacher's commercial driver training school are necessary for the school district. Division (C) (3) requires that the treatment accorded the school district by the teacher's commercial driver training school is preferential to, or the same as, that accorded to other parties to which the school provides services. The commercial driver training program described may meet the application of these four requirements. However, the requirements of Division (c) are factual determinations and whether a particular transaction meets the criteria of Division (C) depends upon the facts and circumstances of each individual situation. See Advisory Ops. No. 78-001 and 88-008. These criteria are strictly applied against the public official and the burden is on the official to demonstrate that he is in compliance with the exemption. See Advisory Ops. No. 83-004, 84-001, and 88-008.

Restriction Upon a School Teacher Using His Authority to Secure a Public Contract In Which He Has An Interest

If the teacher can meet all of the provisions of R.C. 2921.42 (C) , such that he is not prohibited by R.C. 2921.42 (A) (4) from receiving reimbursement from his school district for providing driver education to high school students, he is also bound by other Division (A)(1) of Section 2921.42 which provides that no public official shall knowingly:

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.

R.C. 2921.42 (A) (1) prohibits a public official from authorizing, or using his authority or influence to secure authorization of, a public contract in which he, a member of his family, or any of his business associates has an interest.

The Ethics Commission has held that a public official will be deemed to have "authorized" a public contract for purposes of R.C. 2921.42 where the public contract could not have been awarded without the approval of the official. See Advisory Ops. No. 87-004, 88-008, 90-010, 91-007, and 92-008. You have stated that the teacher is not an administrator and has no authority to approve contracts; therefore, this prohibition of R.C. 2921.42 (A) (1) is not applicable to the instant situation. However, R.C. 2921.42 (A) (1) also prohibits a public official from employing the "authority or influence of his office" to secure authorization of any public contract in which a family member has an interest.

The words "authority or influence" are not defined for purposes of R.C. 2921.42. It is a primary rule of statutory construction that words used in a statute which are not defined must be construed according to rules of grammar and common usage. See R.C. 1.42. The word "authority" is defined in Webster's New World Dictionary of the American Language as "power or influence resulting from knowledge, prestige, etc. 11 Webster's New World Dictionary of the American Language 94 (2d College ed. 1970). The word "influence" is defined as "the power of persons . . . to affect others, seen only in its effects" and "the ability of a person . . . to produce effects indirectly by means of power based on . . . high position." Webster's New World Dictionary of the American Language 722 (2d College ed. 1970).

The General Assembly's use of the words "authority or influence" in R.C. 2921.42 (A)(1) specifically characterize a broader range of activity than that described by the word "authorize." ' See Dougherty v. Torrence, 2 Ohio St. 3d 69, 70 (1982) (effect must be given to words used in a statute); Dungan v. Kline, 81 Ohio St. 371, 380-81 (the presumption is that every word in a statute is designed to have effect); Advisory Op. No. 74-001 ("it is to be assumed that the Legislature used the language contained in a statute advisedly and intelligently and expressed its intent by the use of the words found in the statute").

Therefore, the prohibition which R.C. 2921.42 (A)(1) imposes against a public official employing the "authority or influence of his office" to secure a public contract in which he has an interest prohibits the teacher from exercising the power and influence inherent in his position over students within the school district to affect their choice of a commercial driver training school. This prohibition includes, but is not limited to, discussing, recommending, or otherwise using the authority or influence of his position as a teacher, either formally or informally, in order to persuade students to utilize the services of his commercial driver training school. See generally Advisory Op. No. 90-003.

Prior Interpretation of "Public Contract"

It has been brought to the attention of the Ethics Commission that Attorney General Opinion No. 76-019 holds that a board of education's payment of state funds to a commercial driver training school for the provision of driver education to high school students within the school district for the purpose of promoting highway safety is not a "public contract" and, accordingly, R.C. 2921.42 does not prohibit public school administrators and employees involved in driver training programs from holding an ownership interest in a commercial driver training school. Attorney General Opinion No. 76-019 states:

[T]he subsidy which occurs under R.C. 3301.17 is a grant to the student of funds expended by the state department of education to provide driver education training as required by law. These expenditures are channeled through the local boards of education as a conduit for the reimbursement of licensed commercial facilities..... Any contractual relationship which thereby arises is a private contract between the student and the licensed commercial driving school. (Emphasis is original.)

Attorney General Opinion No. 76-019 was rendered on March 17, 1976 which was before the effective date of Am. H.B. 1040, 113th Gen. A. (1976) (eff. August 27, 1976) which vested the Ethics Commission with the authority to interpret R.C. 2921.42. See R.C. 102.08.

R.C. 2921.42, including the Division which provides a statutory definition of the term "public contract," was enacted as part of the new Ohio Criminal Code, Am. Sub. H.B. 511, 109th Gen. A. (eff. January 1, 1974) . R. C. 2921.42, within Division (G) (1) , specifically describes the term "public contract. Unfortunately, Attorney General Opinion No. 76-019 did not analyze this statutory definition of "public contract.' Since the enactment of R.C. 2921.42 in 1974 and the rendering of Attorney General Opinion No. 76-019, several courts have decided cases involving R.C. 2921.42 and, thus, have established precedent regarding public contracts. State v. Pinkney, 36 Ohio St. 3d 190 (1988); Walsh v. Bolas 82 Ohio App. 3 588 (Lake County 1992); In re

Removal of Steed, No. 1909, unreported (Lawrence County July 27, 1989); and Carroll Mercury Sales v. Nye, No. 76AP-1016, unreported (Franklin County April 21, 1977). The above cases demonstrate that the courts have applied the "public contract" restriction of R.C. 2921.42 to situations where the state or a political subdivision was involved in the purchase of property or services, with money flowing from the state or political subdivision, to the provider of the property or services.

In light of judicial decisions regarding the application of the prohibition of R.C. 2921.42 to the provision of services and precedent of the Ethics Commission, upon which several of these courts relied, the school district's purchase or acquisition of driver education services for its students from a commercial driver training school with funds provided to the school district by the department of education for the purpose of promoting highway safety is a "public contract" as that term is defined in R.C. 2921.42 (G)(1). Thus, despite the fact that, as correctly explained in Attorney General Advisory Opinion No. 76-019, the student and the commercial driver training school have a private contract, a public contract also exists since the school district is purchasing driver education services for its students from a commercial driver training school with funds provided to the school district by the department of education for the purpose of promoting highway safety.

It must be noted that the Attorney General no longer renders advisory opinions interpreting the Ohio Ethics Law and related statutes. See Ohio Op. Atty Gen. No. 92-039. The Attorney General explained the reasons for declining to interpret statutes within the Ethics Commission's jurisdiction in Attorney General Advisory Opinion No. 87-025:

Pursuant to R.C. 102.08, the Ohio Ethics Commission has the authority to render advisory opinions interpreting R.C. 2921.42. In light of this expressed statutory grant of power, my predecessors and I have taken the position that it would be inappropriate for the Attorney General to also render opinions construing R.C. 2921.42. This policy respects the jurisdiction of the Ethics Commission and prevents the possibility that the Attorney General and the Ethics Commission would render conflicting opinions on the same question. (Emphasis added.)

Since the General Assembly has vested the Ethics Commission with the authority to interpret R.C. 2921.42 and the Attorney General does not render advisory opinions construing R.C. 2921.42, it is appropriate for the Ethics Commission to issue an advisory opinion which differs in its conclusion from an earlier opinion rendered by the Attorney General.

It must be noted that this advisory opinion is strictly limited to addressing a situation where a teacher, whose position does not involve the performance of, or the authority to perform, administrative or supervisory functions, owns and operates a commercial driver training school in a school district which does not make driver's education available to its students. The existence of facts which differ from those present in the instant situation would require further analysis.

Also, it is noted that this advisory opinion addresses issues which have already occurred. Generally, an advisory opinion from the Ethics Commission or its staff is written in response to a

question which is hypothetical or prospective. See Advisory Op. No. 75-037. The Commission has explained that its function in rendering advisory opinions is not a fact-finding process and it cannot, in rendering an advisory opinion, determine whether a public official has violated the law. Id. An advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes and sets forth the standards and criteria which a public official must observe in order to avoid violating the law in a given set of circumstances. See Advisory Ops. No. 75-037, 90-013, 92-003, and 92-015. If a question is raised with regard to activity which has already occurred, the Commission can only act through its confidential investigative function to determine whether there are facts indicating that the Ethics Law may have been violated and to refer those matters required for prosecution. See Advisory Op. No. 92-003. However, the commission has issued advisory opinions in limited instances where a practice has existed for many years and public officials and employees have relied on past practices without the guidance of precise and uniform legal precedence addressing the specific issue. See, e.g., Advisory Ops. No. 91-010 (the acceptance or use by a public official or employee of discounted or free "frequent flyer" airline tickets earned through travel on state business) and 92-015 (the acceptance or use by a public official or employee of a discount offered by a retailer as a community service acknowledgement and recognition for their public service).

Summary

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 opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a teacher who owns and operates a commercial driver training school from receiving reimbursement from his school district for providing driver education to high school students, unless the exception of Division (C) of Section 2921.42 can be met; and (2) Division (A) (1) of Section 2921.42 of the Revised Code prohibits a teacher who owns and operates a commercial driver training school from discussing, recommending, or otherwise using the authority or influence inherent in his position as a teacher, either formally or informally, to persuade students to utilize the services of his commercial driver training school.


Jack Paul DeSario, Chair
Ohio Ethics Commission