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Advisory Opinion Number 99-004
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Syllabus by the Commission:

(1) Division (A)(4) of Section 2921.42 of the Ohio Revised Code does not prohibit a member of a governing board of an educational service center from also serving, in his official capacity, as a member of the board of a joint vocational education school district which is formed pursuant to Section 3311.19 of the Revised Code, and which enters into contracts with the member's educational service center board, provided that he has no other conflict of interest;

(2) Division (A)(1) of Section 2921.42 and Division (D) of Section 102.03 of the Ohio Revised Code do not prohibit a member of a board of a joint vocational education school district from voting on a contract between that board and a governing board of an educational service center of which he is also a member;

(3) Division (A)(4) of Section 2921.42 of the Ohio Revised Code prohibits a member of a governing board of an educational service center from serving as a member of the board of a joint vocational education school district formed pursuant to Section 3311.19 of the Revised Code, if he is also an employee of the joint vocational education school district; and

(4) The conclusions in this opinion would also apply to any member of a city, local, and exempted village board of education who serves as a member of a board of a joint vocational education school district.

* * * * *

You have asked whether any statute within the Ethics Commission's jurisdiction prohibits a member of a joint vocational education school district board of education (joint vocational board) from voting on a contract between that board and the governing board of an educational service center (ESC), on which the member also serves.

As set forth more fully below, the Ethics Law and related statutes do not prohibit a member of an ESC board from serving as a member of a joint vocational board which is formed pursuant to R.C. 3311.19, and which enters into contracts with the member's ESC board. Further, the Ethics Law and related statutes do not prohibit a member of an ESC board from voting on a contract between that board and the board of a joint vocational school district, so

long as the board member has no other interest in the contract aside from the excepted interest which results from his membership on both boards.

Composition and Powers of a Joint Vocational School District Board of Education

The composition of a joint vocational board is controlled by R.C. 3311.19(A), which provides in part:

Where a joint vocational school district is composed of local school districts of more than one county, or any combination of city, local, or exempted village school districts or educational service centers, unless administration by the educational service center governing board has been chosen by all participating districts in one county pursuant to this section, the board of education of the joint vocational school district shall be composed of one or more persons who are members of the boards of education from each of the city or exempted village school districts or members of the educational service centers' governing boards affected to be appointed by the boards of education or governing boards of such school districts and educational service centers.

The participating districts can choose to have the joint vocational school district administered by the county educational service center. Where the participating districts have not chosen this approach, this statute requires that a member of the governing board of an ESC served by the district must serve on the joint vocational board.

Next, R.C. 3311.19(D) provides that a joint vocational school district board shall have the same powers, duties, and authority for the management of the joint vocational school district as is granted to a board of education of a city school district, and shall be subject to all the provisions of law that apply to a city school district, with only a few exceptions which are not relevant for purposes of resolving the issues presented here.

Several other sections of the Revised Code confer important powers to a joint vocational board. R.C. 3313.843 allows for agreements for ESC governing boards to provide services to certain city boards of education. Based on the language in R.C. 3311.19(D), joint vocational boards would have the power to enter into the same type of agreement with ESC's. Second, R.C. 3313.842 generally allows the boards of education of any two or more school districts to enter into agreements for the joint or cooperative establishment and operation of any educational program. Each district that is a party to such an agreement contributes funds as the agreement provides. Joint vocational boards may enter into these kinds of agreements with other school districts. Third, R.C. 3311.212 provides that a board of education that is a part of a joint vocational school district and the board of education of such joint vocational school district may enter into agreements, free of cost or pursuant to stipulated rental agreements, to permit the school buildings of the former to be used to carry on a vocational school program.

Having an Interest in the Contract of a Board of Education—R.C. 2921.42(A)(4)

Before addressing your question of whether the Ethics Law prohibits a member of the joint vocational board from voting on a contract between that board and an ESC board of which

he is also a member, it is first necessary to examine the application of the Ethics Law to situations in which public officials serve as members of other public agencies. This situation implicates 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.

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 member of a board of education is a "public official" for purposes of the prohibitions of 2921.42. See generally Ohio Ethics Commission Advisory Opinions No. 93-008 and 93-003.

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, any contract for the purchase or acquisition of property or services by or for the use of the joint vocational board would be a "public contract."

The Ethics Commission has stated that R.C. 2921.42(A)(4) prohibits a member of a public body 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 member of an ESC governing board and a joint vocational board is connected with both boards for purposes of 2921.42(A)(4). Adv. Op. No. 87-002.

A contract between a joint vocational board and an ESC board would not affect the pay or benefits of a member of both boards. Therefore, a member of both boards would not have a direct pecuniary interest in a contract between the two boards on which he or she sits, based merely on his or her position on both boards. However, a member of a public board, such as a school board, may have a fiduciary interest in the contracts of the public board on which he sits. In Advisory Opinion No. 81-003, the Commission held that a board member of a private agency had a fiduciary or pecuniary interest in the contracts of the agency, so that he was prohibited from also serving as a member of a county board of mental retardation and developmental disabilities where the private agency and county board had 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.

A member of a public board has the same kind of relationship to the public agency that he serves as a member of a private board has to the private entity that she serves. For purposes of the Uniform Fiduciary Act, a person is a "fiduciary" if he is an officer of a public or private corporation, a public officer, or any person acting in a fiduciary capacity for any person, trust, or estate. See R.C. 1339.03(B). The word "fiduciary" is defined in the Random House Webster's Unabridged Dictionary as "a person to whom property or power is entrusted for the benefit of

another," and "of, based on, or in the nature of trust and confidence, as in public affairs." Random House Webster's Unabridged Dictionary 714 (1997).

Members of a board of education are elected to offices of the school district and are required to take an oath to support the Constitutions of the United States and State of Ohio. R.C. 3313.09 and 3313.10. Further, a board of education is a body politic and corporate, capable of suing and being sued, contracting and being contracted with, and acquiring, holding, possessing, and disposing of real and personal property. R.C. 3313.17. R.C. 3313.47 states that the management and control of all public schools that it operates within its district resides with each city, exempted village, or local board of education.

Based on these statutory provisions, it is clear that a member of a school district board of education is a person to whom power is entrusted for the benefit of the citizens in the school district, and who has a relationship with the district that is based on trust and confidence. Accordingly, the Commission concludes that members of a school district board of education have a fiduciary relationship with the school district, and would have a fiduciary interest in contracts of the district.

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 board member from serving as a board member of a public or private entity with which his school district has a contract. 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, in his official capacity as a representative of the public agency he serves. This opinion will now examine that official capacity exception to determine whether it applies in this situation.

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 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 political subdivisions may create, or become participants 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, the Ethics Commission has applied the official capacity exception to situations where a public official is asked to serve on the board of a non-profit organization. In the situation that you have set forth, the public officials are appointed by the board they represent to serve in statutorily mandated positions on the board of a second public agency. See R.C. 3311.19(D). 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 employer 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 board.

This theory is equally applicable to the situation you have set forth. The ESC governing board member is appointed, by the governing board, to represent its interests on the joint vocational school board. Further, the legislature has determined that a joint vocational board should be composed of members of the school boards and educational service centers that participate in the joint vocational school district. R.C. 3311.19(A). This demonstrates that the General Assembly has recognized that there is a compelling need for the school boards that are members of the joint vocational district to be represented on the joint vocational school district board. Because of the statutory mandate, there is a stronger argument for allowing such dual membership in this situation than there is in a situation in which the governmental entity creates or participates in the non-profit corporation. Therefore, so long as the intent served by the four elements set forth above is met, the official capacity exception to R.C. 2921.42(A)(4) applies and the governing board member could serve as a fiduciary of the joint vocational school board that has or may have contracts with the ESC.

In the case you have set forth, the four elements can be met. First, the school boards that are members of a joint vocational district participate in, or approve of, the creation of the district. See R.C. 3311.18. Second, the joint vocational board member is appointed, pursuant to statute, to his position on the joint vocational board by his ESC. The appointment would constitute a formal designation for purposes of the second prong of the official capacity exception. Third, the joint vocational board member is expected to represent the interests of his ESC while serving on the joint vocational board. See State ex rel. Norman v. Viebranz, 19 Ohio St.3d 146 (1985) ("Under

R.C. 3311.19, membership on joint vocational school district boards of education is limited to representatives from local boards of education within their districts" (emphasis added)). So long as the joint vocational board member is instructed, as part of his appointment, to serve and represent the interests of the ESC, the third criterion of the "official capacity" exception is satisfied. Under these circumstances, a member of a board of an ESC and a joint vocational board does not have dual interests in which private considerations would distract from his service of the public interest.

As long as there are no other conflicts of interest, R.C. 2921.42(A)(4) does not prohibit a member of an ESC board from serving on a joint vocational board which contracts with the ESC board. An example of other conflicts of interest would include a situation where an employee of the joint vocational school district wished to serve as a board member of the ESC. The board member of the ESC who is also employed by the joint vocational school district would have such a significant conflict of interest, because of his employment by the joint vocational school district, that R.C. 2921.42(A)(4) would prohibit him from serving as a board member of the joint vocational school district. See Adv. Op. No. 91-002. See also R.C. 3313.33 and 1999 Att'y Gen. Op. No. 99-023 (R.C. 3313.33 may prohibit contracts between the joint vocational school district and the ESC if an employee of the joint vocational school district serves as a member of the ESC governing board.).

R.C. 102.03(D) is also applicable to the question of whether a member of a board of an ESC is prohibited from also serving on a joint vocational board. R.C. 102.03(D) provides that:

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.

R.C. 102.03(D) would generally prohibit a joint vocational board member from discussing or participating in any matter that would benefit an ESC board of which he is a member, if the benefit accruing to the ESC board would be of such a character as to manifest a substantial and improper influence upon him with respect to his duties. In Advisory Opinion No. 88-005, however, 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). See also Adv. Op. No. 96-005. Therefore, the outcome of the application of R.C. 102.03(D) is the same as the outcome of the application of R.C. 2921.42(A)(4), as discussed above.

Voting on Contracts Affecting the ESC—R.C. 2921.42(A)(1) and R.C. 102.03(D)

Next, it must be determined whether the Ethics Law and related statutes prohibit a member of a joint vocational board from voting on a contract between the joint vocational board and the ESC board of which he is also a member. R.C. 2921.42(A)(1) and R.C. 102.03(D) are both applicable to this question.

R.C. 2921.42(A)(1) provides that:

(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.

As stated above, a member of a joint vocational board is a "public official" for purposes of the prohibitions of 2921.42. Also, as discussed above, a member of a joint vocational board has a fiduciary interest in the contracts of the ESC board. Therefore, 2921.42(A)(1) would generally prohibit the member of a joint vocational board from voting on a contract between the joint vocational board and the ESC board.

The Commission has never applied the "official capacity exception" to the prohibition of R.C. 2921.42(A)(1). Therefore, it is necessary to determine whether an exception to the prohibition should be applied to the facts presented here.

In prior advisory opinions, the Commission has applied both R.C. 102.03(D) and R.C. 2921.42(A)(1) to prohibit a public official from authorizing a contract in which he or she has an interest. See e.g. Adv. Ops. No. 89-008 and 92-008. R.C. 102.03(D) generally prohibits a public official from participating in matters that affect his own interests, or the interests of a private organization with which he has a fiduciary connection. Therefore, the Commission has stated that R.C. 102.03(D) prohibits a public official from voting, discussing, deliberating, or participating in any other way in matters that affect an entity of which he is a board member because the interests of the entity could manifest a substantial and improper influence upon him with respect to his duties. However, as discussed above, the "official capacity exception" applies to the prohibition imposed by R.C. 102.03(D).

In Advisory Opinion No. 96-005, the Commission determined that R.C. 102.03(D) did not prohibit a public official, who served with a non-profit corporation in his official capacity, from acting on matters before the non-profit corporation that affected his public agency. Similarly, in the instance you presented, the member of the joint vocational board is serving on that board in his capacity as an ESC board member. Any benefit accruing to the ESC board from the actions of the joint vocational board, such as a modification of an existing contract or a new contract, would not be of such a character as to manifest a substantial and improper influence upon the joint vocational board member with respect to his official duties, since he is serving on the joint vocational board as part of his statutorily mandated official duties as an ESC board member. Benefits accruing to the ESC as a result of the board member's service on the joint vocational board would not accrue to the board member's personal benefit or to the benefit of any party with which the board member is connected in his personal capacity. Therefore, the benefit accruing to the ESC would not be of such a character as to manifest a substantial and improper influence upon the board member with respect to his public duties. Based on these facts, R.C. 102.03(D) would not prohibit the joint vocational board member from participating in

decisions regarding a contract between that board and the ESC board of which he is also a member. See Adv. Op. No. 96-005.

The only remaining issue is whether this same conclusion can be reached with respect to the prohibition of R.C. 2921.42(A)(1), when the activity involved is the same as that excepted from the prohibition of R.C. 102.03(D).

The same reasoning that leads to the conclusion that R.C. 102.03(D) does not prohibit a public official from voting on a contract between his public agency and the non-profit he serves in his official capacity also applies to R.C. 2921.42(A)(1). Again, the board member would not have dual interests merely by virtue of the board member's service on both boards. In his service on the joint vocational board, the ESC board member would represent the interests of the ESC board. Therefore, the concern that would lead to a prohibition under R.C. 2921.42(A)(1) is not present. Compare Adv. Op. No. 92-014 (An elected municipal or township official who also serves on a regional planning commission is prohibited, by R.C. 102.03(D) and 2921.42(A)(1), from acting on matters that affect the municipality or township for which he is an elected official. However, this situation can be distinguished from the one in 92-014. The statute that enables a regional planning commission does not require that its membership be composed of elected officials from the townships and municipalities that participate in the planning commission. Thus, the statute did not envision that municipal or township officials would be required to represent the interests of their municipality or township while serving on the regional planning commission. The statute that enables a joint vocational school district does require that the members of the joint vocational board represent the interests of their ESC board while serving on the joint vocational board.)

The statutory mandate for the composition of the joint vocational board envisions that the board members will represent the concerns of their respective school districts, as well as the collective interests of the joint vocational school district, as they serve on the joint vocational board. See R.C. 3311.19(D) and State v. Viebranz, *supra*. It would defeat the purpose of the joint vocational board to prohibit the joint vocational board member in your question from voting on contracts between the joint vocational board and the ESC board on which the board member is also a member.

While R.C. 2921.42(A)(1) does not prohibit a joint vocational board member from voting on a contract between that board and an ESC board even though the joint vocational board member has a fiduciary interest in the contract by virtue of his presence on the ESC board, R.C. 2921.42(A)(1) would prohibit a joint vocational board member from voting on a contract between that board and an ESC board if the joint vocational board member, his family members, or his business associates, have any other pecuniary or fiduciary interest in the contract.

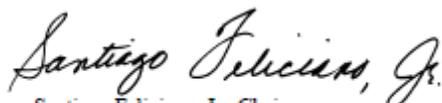
Conclusion

As set forth above, the Ethics Law and related statutes do not prohibit a member of an ESC board from serving as a member of a joint vocational board which is formed pursuant to R.C. 3311.19, and which enters into contracts with the member's ESC board. Further, the Ethics Law and related statutes do not prohibit a member of an ESC board from voting on a contract

between that board and the board of a joint vocational school district, so long as the board member has no other interest in the contract aside from the excepted interest which results from his membership on both boards.

Finally, while this opinion specifically deals with a situation in which a member of an ESC governing board also serves on a joint vocational board, the reasoning and conclusions of this opinion would equally apply to a situation in which a member of a board of education of a city, exempted village, or local school district, also serves on a joint vocational board. The Ethics law does not prohibit a member of a board of education of a city, exempted village, or local school district from voting on contracts between that board and a joint vocational board, of which the board member is also a member.

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) Division (A)(4) of Section 2921.42 of the Ohio Revised Code does not prohibit a member of a governing board of an educational service center from also serving, in his official capacity, as a member of the board of a joint vocational education school district which is formed pursuant to Section 3311.19 of the Revised Code, and which enters into contracts with the member's educational service center board, provided that he has no other conflict of interest; (2) Division (A)(1) of Section 2921.42 and Division (D) of Section 102.03 of the Ohio Revised Code do not prohibit a member of a board of a joint vocational education school district from voting on a contract between that board and a governing board of an educational service center of which he is also a member; (3) Division (A)(4) of Section 2921.42 of the Ohio Revised Code prohibits a member of a governing board of an educational service center from serving as a member of the board of a joint vocational education school district formed pursuant to Section 3311.19 of the Revised Code, if he is also an employee of the joint vocational education school district; and (4) The conclusions in this opinion would also apply to any member of a city, local, and exempted village board of education who serves as a member of a board of a joint vocational education school district.


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