



OHIO ETHICS COMMISSION

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Advisory Opinion Number 90-003
January 18, 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 who is a store owner from selling merchandise to the school district with which he serves, unless he is able to meet the exception of Division (C) of Section 2921.42;
- (2) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a member of a board of education who is a store owner from profiting from the sale of merchandise when the sale was approved or authorized by him or by the board of education, and where the merchandise was not sold through competitive bidding, or where his was not the lowest and best bid;
- (3) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a member of a board of education from knowingly selling goods to a Band Parent Boosters Club when the goods will be purchased for the use of the school district with which he serves, unless he is able to meet the exception of Division (C) of Section 2921.42;
- (4) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a member of a board of education from discussing, deliberating, voting, or otherwise using the authority or influence of his position as a school board member, either formally or informally, to secure the purchase from his store of merchandise by or for the use of the school district with which he serves;
- (5) Division (D) of Section 102.03 of the Revised Code prohibits a board of education member from using the authority or influence of his office over school personnel or students in the school district to secure business for his store;
- (6) The Ohio Ethics Law does not prohibit a member of a board of education who is the owner of a store from donating goods or services to the school district with which he serves provided that he receives no pecuniary gain from the donation and he does not use the donation to secure anything of value for himself or his business.

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You have asked whether the Ohio Ethics Law and related statutes prohibit your store from selling musical merchandise and musical instruments to the school district which you serve as a member of the board of education, to the Band Parent Boosters club, and to parents of

children participating in a school-sponsored music orientation program. You also ask if the Ethics Law prohibits you from donating musical merchandise to the school system or acting as a sponsor for fundraising events.

You stated, by way of history, that you are a newly elected member of the board of education, and are also the owner and operator of a private store that sells musical instruments. You stated further that, before you were elected, you sold and donated musical merchandise to the school district where you now serve as a member of the board. You have indicated that the merchandise was sold to the school district at your cost. You further stated that your store rents musical instruments, some of which are later purchased, to the parents of children in the school district. You also provide lessons to the students through your store. You state that the Band Parent Boosters group in the school district has purchased and continues to purchase musical merchandise from your store. Finally, you state that you sponsor musical acts which give concerts for the benefit of the Band Parent Boosters group. You have asked whether any of these transactions would be prohibited by the Ohio Ethics Law now that you are an elected school board member.

Your first question concerns whether you may sell musical merchandise to the school district. Division (A)(4) of Section 2921.42 of the Revised Code provides:

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

A "public official" is defined, for purposes of R.C. 2921.42, in R.C. 2921.01, as "any elected or appointed officer . . . of the state or any political subdivision thereof." A member of a school district board of education is a public official as set forth in this definition. See Ohio Ethics Commission Advisory Opinion No. 85-009. A "public contract" is defined in Division (E) of R.C. 2921.42 to include "[t]he 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." The purchase of musical merchandise by a school district fits within this definition of a public contract. See Advisory Opinion No. 80-003.

The determination whether a public official has an interest in a public contract entered into by his governmental entity depends on the facts and circumstances of each particular situation. See Advisory Opinions No. 84-009 and 89-006. An interest which is prohibited under Section 2921.42 must be definite and direct, and may be pecuniary or fiduciary in nature. See Advisory Opinions No. 81-008 and 89-004. A public official who has an ownership interest in, or who is a director, trustee, or officer of a company is considered to have an "interest" in the contracts entered into by his company. See Advisory Opinions No. 78-006, 85-009, 86-005, and 89-006. Accordingly, you are prohibited by R.C. 2921.42(A)(4) from selling merchandise from the store which you own to the school district or otherwise having an interest in a public contract with the school district with which you serve. See Advisory Opinions No. 88-001, 88-003, and 89-006.

However, Division (C) of Section 2921.42 provides an exception to the prohibition of Division (A)(4) of R.C. 2921.42 as follows:

(C) This section does not apply to a public contract in which a public servant, member of his family, or one of his business associates has an interest, when all of the following apply:

(1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;

(2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public servant's becoming associated with the political subdivision or governmental agency or instrumentality involved;

(3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;

(4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public servant, member of his family, or business associate, and the public servant takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

Each of the provisions in Division (C) is a question of fact which, when applied to the circumstances of the individual case, will determine whether a particular transaction fits within the exception. See Advisory Opinions No. 80-003 and 88-008. The criteria of Division (C) are strictly construed against the public official, who must show compliance with the exemption. See Advisory Opinions No. 83-004, 84-01 1, and 88-008.

Division (C)(2) is of particular note. The division requires that the supplies or services be unobtainable elsewhere at the same or lower cost. You must prove by some objective standards that the supplies or services you are providing are "unobtainable elsewhere for the same or lower cost." See Advisory Opinion No. 84-006. Competitive bidding, whereby the official submits the lowest bid, is one indication that this requirement has been met, but it is not determinative. See Advisory Opinion No. 86-002. Other factors must be considered, such as the availability and adequacy of notice to potential bidders, the openness and fairness of the bidding process, and the conditions of the market. See Advisory Opinions No. 83-004 and 88-001.

In the absence of a showing that the goods or services are unavailable for the same or lower cost, the provision in Division (C)(2) can be met by a showing that the goods are provided as part of a continuing course of dealing established prior to you taking office. A contract for the sale of goods or services which is in existence at the time when you take office would show a continuing course of dealing. See Advisory Opinions No. 82-007, 84-006, and 88-008. However,

if any material changes are made in the agreement between the parties, the sales would not fall within the exemption because such changes alter the original understanding between the parties. See Advisory Opinion No. 82-007. If the sales of musical merchandise do not fall under a formal contract between the store and the school district, each sale is an individual contract, and does not demonstrate a continuing course of dealing. See Advisory Opinions No. 82-007, 84-006, and 88-008.

Division (A)(3) of R.C. 2921.42 may also apply in this situation. This provision states that no public official shall knowingly:

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.

An official or legislative body will be deemed to have authorized a public contract where the contract could not have been awarded without the public officials or legislative body's approval. See Advisory Opinion No. 87-004 and 88-008. Therefore, you are prohibited by R.C. 2921.42(A)(3) from profiting from a public contract which was approved or authorized by you or by the school board, unless the contract was competitively bid, and yours was the lowest and best bid. You are subject to the prohibition of Division (A)(3) regardless of whether you participated in discussions or voted on the contract as a school board member. See R.C. 2921.42(A)(1) (as discussed below). However, the prohibition would not apply to any contract authorized or approved by the school board prior to your election to the school board. See Advisory Opinion No. 88-008.

Assuming that all the criteria of Division (C) of Section 2921.42 can be established and that the requirements of R.C. 2921.42(A)(3), if applicable, are met, and the school board may contract with your shop, the prohibitions of R.C. 2921.42(A)(1) must be met. R.C. 2921.42(A)(1) provides:

(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.

Accordingly, you are prohibited from discussing, deliberating, voting, or otherwise using the authority or influence of your position as a school board member, either formally or informally, to secure approval of purchases by the school district from your store, and from participating in any manner concerning the sales. See Advisory Opinions No. 85-009 and 89-006. See also R.C. 2921.42(C)(4) (set forth above).

Your next question concerns sales of musical merchandise to the Band Parent Boosters group (hereinafter Boosters). You have stated that these sales are made on an infrequent,

sporadic basis. The Boosters purchase merchandise which is given to the school for the use of the school band. The definition of a "public contract," as set forth in R.C. 2921.42(E), includes "[t]he 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." (Emphasis added.) Therefore, such purchases of musical materials by the Boosters would [it within the definition of a public contract, since they are for the use of the school district. See Advisory Opinion No. 85-009. The fact that these purchases are sometimes informal purchases by individual members of the Boosters does not alter the fact that they are public contracts. See Advisory Opinion No. 87-002.

Accordingly, your actions with regard to these transactions are governed by the provisions of R.C. 2921.42. You are prohibited by R.C. 2921.42(A)(4) from knowingly selling equipment to the Boosters, where the Boosters plan to donate such equipment to the school district with which you serve. See Advisory Opinions No. 85-009, 88-001, 88-003, and 89-006. The exemption in R.C. 2921.42(C) could also apply in this case, if the transactions meet the strictures of the exemption, as explained above. Further, you are prohibited by R.C. 2921.42(A)(1) from discussing, deliberating, voting, or otherwise using the authority or influence of your position as a school board member, either formally or informally, to secure approval of sales from your store to the Boosters. See Advisory Opinions No. 85-009 and 89-006.

Your next question concerns the sale or rental of musical merchandise to the parents of fifth-grade students who participate in a school program to introduce children to music lessons. Generally, private contracts which are not for the use of a governmental agency do not fall within the purview of R.C. 2921.42 See Advisory Opinion No. 85-009. In this instance, you have explained that the school board acts to select the five dealers who take part in this program through a bid process, wherein each dealer presents to the board the package of charges they will make to the parents. Since the time the bids were selected three school years ago, the same five dealers have been invited to participate in the program, presumably under the terms bid in 1987. Further, the high school band directors provide lessons to fifth grade students as a part of this program. The band directors also counsel parents concerning whether or not their children should continue to take music lessons, which may be provided through the schools or through your store. As described above, a public contract is defined for purposes of R.C. 2921.42 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 political subdivision of the state. Although the rentals and sales you have described are part of a program administered by employees of the school district, they do not fall within this definition of "public contract." Therefore, the prohibitions contained in R.C. 2921.42 do not apply to these transactions.

Division (D) and (E) of R.C. 102.03 are, however, relevant in this circumstance:

- (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 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 "public official or employee" is defined, for purposes of Chapter 102., to include any person who is elected or appointed to an office of any governmental entity. See R.C. 102.01(B) and (C). An elected member of a board of education is a "public official or employee" as the term has been defined for purposes of R.C. Chapter 102. See Advisory Opinion No. 80-003.

The term "anything of value" is defined in R.C. 1.03, for purposes of R.C. 102.03(D) and (E), to include money, goods, any promise of future employment, and every other thing of value. See R.C. 102.01(G) and R.C. 1.03. A definite, pecuniary benefit to a person is considered a thing of value under R.C. 102.03(D) and (E). See Advisory Opinions No. 79-008, 85-006, and 86-007. Any payment to your store for the rental or purchase of instruments and for music lessons is considered to be a thing of value. Divisions (D) and (E) of R.C. 102.03 prohibit a public official from accepting, soliciting, or using his official authority or influence to secure anything of value, for himself or anyone else, if the thing of value is of such a character as to manifest a substantial and improper influence upon him with respect to his official duties. See Advisory Opinions No. 80-003 and 88-004. The Ethics Commission has consistently held that public officials and employees are not prohibited by the Ohio Ethics Law from operating a private outside business so long as no actual conflict of interest exists between the public officials or employee's public position and private interests. See Advisory Opinions No. 85-006, 86-007, 86-008, and 87-006. However, R.C. 102.03@D prohibits a public official or employee from participating in the discussions or decisions of his public agency regarding the interests of a business in which he has an ownership interest. See Advisory Opinions No. 79-008, 86-005, and 86-006. R.C. 102.03 would prohibit you from participating in the discussions or decisions of the board of education regarding the interests of your music store, such as the board's decision to include certain vendors in this program. You are also prohibited from otherwise using your official position as a board member to benefit your store. The Commission has held that R.C. 102.03(D) prohibits a public official or employee with a private business from performing his official duties in a manner which would provide an economic advantage for his business. See Advisory Opinions No. 84-012, 84-013, 85-013, and 85-014.

In this situation, the financial interests of your store depend upon the actions of band directors employed by the school district. You have stated that these band directors meet with individual students, providing lessons and assessing performance. The band directors then advise parents whether their children should continue to study the instruments. If the band director recommends that the student continue to study the instrument, the student's parents may continue to rent or may purchase the instrument from the vendor's shop. Further, the parents may elect, on the band director's recommendation, to enroll their child in private lessons which are offered by the vendors.

A member of a board of education holds a position of power and authority over the employees, business affairs, and budget of the school district. See R.C. 3313.17, 3313.201, 3313.47, and 3319.07. For example, you may be required, as part of your official duties and responsibilities, to make contract and salary decisions regarding the band directors who

administer the music program in the elementary schools. A board of education member has the responsibility to provide services which fulfill the statutorily mandated and defined duties of his office in an objective and impartial manner. See Advisory Opinion No. 89-010. You are prohibited from using your authority or influence as a board member with respect to the band directors in order to secure business for your store, and from acting upon the interests of the band directors based upon their decisions regarding the purchase or rental of instruments or the continuation of lessons. You should, in order to avoid any appearance of impropriety, abstain from participating in matters affecting school employees who are involved in making recommendations to parents about the acquisition of musical instruments or the continuation of music lessons. You are also prohibited from using your authority or influence as a board member with regard to students or parents, in order to secure business for your store.

Further, R.C. 102.03(D) and (E) will otherwise condition your activities in conducting business. Specifically, you are prohibited from: (1) using school board time, resources, or facilities to operate your store or solicit business; and, (2) using your official title or position as a school board member while conducting business or in order to solicit any business for your shop. See Advisory Opinions No. 84-012 and 84-013.

Finally, you asked about the propriety, under the Ohio Ethics Law, of making donations to the school district. You wish to donate musical merchandise and to sponsor fundraising events. Division (A)(4) of R.C. 2921.42 prohibits a public official from having an interest in a public contract. The Ethics Commission has determined that an interest which is prohibited under R.C. 2921.42 must be definite and direct and must be pecuniary or fiduciary in nature. See Advisory Opinions No. 78-005, 81-003, 81-008, and 89-004. A donation of goods or services, or the donation of money in the form of fundraising sponsorship, by a public official to the political subdivision which he serves would not result in the public official receiving any pecuniary gain, absent facts indicating otherwise. Therefore, a public official who donates goods, services, or money to the political subdivision with which he serves would not be considered to have an interest in a public contract with his own political subdivision, provided that he does not receive any pecuniary gain from the donation. Your proposed donation of musical merchandise to a school or the school district and your proposed sponsorship of fundraising events are, therefore, not prohibited by R.C. 2921.42, provided that you receive no pecuniary gain from the transaction. Therefore, the fact that you have been elected to a position on the school board would not prohibit you from continuing to make donations to the school system.

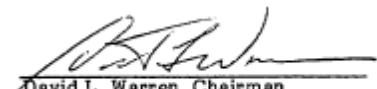
However, you should take notice, once again, of R.C. 102.03(D) and (E). You would be prohibited, by these provisions, from using the donations made by your company to secure anything of value for yourself or anyone else that is of such character as to manifest a substantial and improper influence upon you with respect to your duties. For instance, you may not use the instruments donated to the school as demonstration instruments to persuade parents or others to purchase similar merchandise from your store. Further, you are prohibited from mentioning the donations or the sponsorship arrangements in advertisements for your shop.

Finally, you should note that statutory provisions outside the Ethics Law may also condition your conduct. Of particular relevance is R.C. 3313.33 which reads, in pertinent part: "No member [of the board of education] shall have, directly, or indirectly, any pecuniary interest

in any contract of the board." You should contact the board of education's legal advisor to determine whether the activities you have described would violate the prohibition of R.C. 3313.33.

The conclusions of this opinion are based on the facts presented and are rendered only with regard to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.

Therefore, it is the opinion of the Ohio 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 who is a store owner from selling merchandise to the school district with which he serves, unless he is able to meet the exception of Division (C) of Section 2921.42; (2) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a member of a board of education who is a store owner from profiting from the sale of merchandise when the sale was approved or authorized by him or by the board of education, and where the merchandise was not sold through competitive bidding, or where his was not the lowest and best bid; (3) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a member of a board of education from knowingly selling goods to a Band Parent Boosters Club when the goods will be purchased for the use of the school district with which he serves, unless he is able to meet the exception of Division (C) of Section 2921.42; (4) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a member of a board of education from discussing, deliberating, voting, or otherwise using the authority or influence of his position as a school board member, either formally or informally, to secure the purchase from his store of merchandise by or for the use of the school district with which he serves; (5) Division (D) of Section 102.03 of the Revised Code prohibits a board of education member from using the authority or influence of his office over school personnel or students in the school district to secure business for his store; (6) The Ohio Ethics Law does not prohibit a member of a board of education who is the owner of a store from donating goods or services to the school district with which he serves provided that he receives no pecuniary gain from the donation and he does not use the donation to secure anything of value for himself or his business.



David L. Warren, Chairman
Ohio Ethics Commission