



## OHIO ETHICS COMMISSION

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June 22, 1995

Informal Opinion 1995-INF-0622

Ted Sanders  
Superintendent of Public Instruction  
Department of Education

Dear Mr. Sanders:

In your letter to the Ohio Ethics Commission, you request guidance under the Ohio Ethics Laws and related statutes with regard to a unique set of circumstances involving your appointment of a Deputy State Superintendent to perform the duties of the Superintendent of the Cleveland City Schools under your direction, as the Superintendent of Public Instruction, pursuant to the order of the United States District Court.

As explained below, the provisions of Ohio's Ethics Law, specifically R.C. 2921.42 (A)(4) and R.C.102.03 (D), do not prohibit Dr. Boyd from serving the Cleveland City School District as superintendent, in his official capacity as Deputy State Superintendent, under the direction of the Superintendent of Public Instruction in compliance with an order from the U.S. District Court. R.C. 102.02 (A) requires Dr. Boyd to file a financial disclosure statement with the Ethics Commission as a Deputy State Superintendent.

You have provided the Ethics Commission with a description of the circumstances under which the Superintendent of Public Instruction (State Superintendent) has appointed the Deputy State Superintendent as a Department employee to serve as the Superintendent of the Cleveland City Schools.

In summary, the U.S. District Court (Court), on March 3, 1995, in the case of Reed v. Rhodes, determined that the Board of Education of the Cleveland City School District (District) is unable to function effectively and therefore, cannot implement the Court's pre-existing remedial desegregation orders. The Court determined that the District faced critical financial conditions, and that this problem was compounded by managerial difficulties created by the recent resignation of the District's Superintendent and vacancies in the offices of two key administrators. The Court ordered the State Superintendent to take charge of the fiscal and personnel management of the District. The Court Order directs that the State Superintendent "initiate and implement action to designate and appoint Professional and Executive Staffing under his immediate direction and control" in order that implementation of the Court's remedial desegregation orders would continue.

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On May 26, 1995, in compliance with the Court Order, you employed Dr. Richard Boyd as Deputy State Superintendent within the Department and directed him to serve as Superintendent of the Cleveland City School District. Dr. Boyd was not serving as an official or employee of either the Department or the Cleveland City School District prior to being employed by the Department as a Deputy State Superintendent. Dr. Boyd's duty is to operate and administer the Cleveland City School District. Dr. Boyd does not have any responsibility to carry out the duties of an official or employee of the Department. Pursuant to the Court Order, Dr. Boyd is not subject to the supervision of the Board of Education of the Cleveland City School District. Rather, Dr. Boyd serves at the direction of the Superintendent. The Department compensates Dr. Boyd and it is anticipated that the Cleveland City School District will reimburse the Department for this compensation. The Court stressed that this action was taken to remedy rights under the Fourteenth Amendment of the U.S. Constitution and stated in its order, that, "[t]he Court is unaware of any State laws which this order contradicts. To the extent any State law provision shall impede the implementation of this Order, such law is held to be inapplicable."

You have asked the Ethics Commission for guidance regarding the method of providing compensation, benefits, and terms of employment for Dr. Boyd in a manner consistent with the Ethics Law and related statutes. The Department wishes, through consultation with the Ethics Commission, to assist Dr. Boyd in meeting all the requirements of the Ohio Ethics Law and related statutes.

#### **Jurisdiction of the Ethics Commission**

The Ethics Commission's jurisdiction is limited to Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. These statutes generally prohibit public officials and employees from misusing their official positions for their own personal financial gain or benefit, or for the gain or benefit of family members, business associates, or others where there is a conflict of interest. These statutes also apply where the roles that a public official must serve, in more than one public capacity, conflict. In such instances, the conflict may not be capable of resolution simply by the abstention of the public official serving in one or the other public roles.

The Commission provides advisory opinions in response to questions involving Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. R.C. 102.08. The Commission has no authority to interpret laws outside of its jurisdiction. However, in rendering an advisory opinion, the Commission must consider the impact of all relevant laws upon the application of the prohibitions imposed by the Ethics Law and related statutes. This advisory opinion examines laws under the jurisdiction of the Department of Education and the recent Court Order only in order to address issues arising under the Ethics Law and related statutes, and does not purport to interpret laws outside of its jurisdiction. For example, the Ethics Commission does not have the authority to address issues pertaining to the compensation, benefits, and terms of employment for Dr. Boyd. We understand from

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your office, however, that your staff is working closely with the Attorney General on issues arising from this set of unique circumstances under laws outside the jurisdiction of the Ethics Commission.

The Ethics Commission has consistently held that issues exist under the Ethics Law and related statutes whenever an individual serves in two public positions. These prohibitions will be addressed more fully below. Generally, the Commission has held that a public official who serves in two public capacities may have a prohibited interest in a public contract, for purposes of R.C. 2921.42 (A)(4), if one public agency grants funds or contracts for services from the other. See Ohio Ethics Commission Advisory Op. No. 92-002. Also, the Commission has held that R.C. 102.03 (D) prohibits a public official or employee from using the authority or influence of his official position to secure anything of value, for either himself or another public agency with which he is associated, if the other public agency is interested in matters before, regulated by, or doing or seeking to business with the official's or employee's agency. See Advisory Op. No. 88-002. As a result, this advisory opinion is limited to determining whether Dr. Boyd faces potential conflicts of interest, under the Ohio Ethics Law and related statutes, due to his appointment as a Deputy Superintendent in the Department of Education while performing the duties of operating and administering the Cleveland City School District under the U.S. District Court Order.

### **State Funding of School Districts**

The Department has the statutory duty to determine and distribute state aid to school districts in accordance with a statutory formula. The State Superintendent is required to determine the amounts payable to each district. See R.C. 3317.01. R.C. 3317.03 provides a uniform method that all school districts must use in order to determine the average daily membership of students within the school district. The superintendents of schools in each county, city, and exempted village school district must certify their district's average daily membership to the state board of education on or before the fifteenth day of October in each year. R.C. 3317.03. These average daily membership figures are used in the statutory scheme that determines the distribution of state funding to local school districts. See R.C. Chapter 3317. You state that Dr. Boyd has no role, as Deputy State Superintendent, in the State's release of funds to the Cleveland School District.

Furthermore, each year the State pays one-half of the costs of the Cleveland City Schools' desegregation programs. At the conclusion of each year, an audit is performed to determine the District's level of desegregation spending in the previous year. The State, through the Department, reimburses the school district for one-half of the District's desegregation expenses. These funds flow from a special desegregation line item in the Department's general revenue fund. The State's obligation to pay for one-half of the cost of the desegregation programs will terminate on July 1, 2000.

**Prohibition Imposed by R.C. 2921.42 (A)(4)**

Your attention is directed to Division (A)(4) of Section 2921.42 of the Revised Code, which reads as follows:

- (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.

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 with which he is connected.

R.C. 2921.01 (A) defines the term "public official" for purposes of R.C. 2921.42 as any elected or appointed officer, or employee of the state or any political subdivision thereof. Therefore, officials and employees of the Department of Education and local boards of education are "public officials" who are subject to the prohibitions of R.C. 2921.42. R.C. 2921.42 (G)(1)(a) defines the term "public contract" as the purchase or acquisition, or a contract for the purchase or acquisition, of services by or for the use of the state or a political subdivision, including the employment of an individual.

At least three public contracts exist in the instant situation. First, the Department's employment of Dr. Boyd as Deputy State Superintendent is a public contract since it is the employment of an individual. Dr. Boyd's service as Superintendent of the Cleveland City Schools is also a "public contract" because it is the acquisition of services by or for the use of a political subdivision. Furthermore, the Ethics Commission has held that a grant of funds from a public agency is a "public contract" as contemplated by the statutory definition, because a grant is the purchase or acquisition of services by or for the use of the use of the public agency that benefits from the award of the grant. See Ohio Ethics Commission Advisory Op. No. 82-004. Therefore, the provision of state aid, through the Department, to public school districts under the Foundation Program and the sharing of the costs of the desegregation programs is a public contract for purposes of R.C. 2921.42.

An "interest" which is prohibited under R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. See Advisory Op. No. 81-008. As a result of his employment as a Deputy State Superintendent with the duties to perform services as the Superintendent of the Cleveland City Schools, Dr. Boyd will have a definite and direct interest in all three of the public contracts described above.

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### **"Connected With" Prohibition**

The Ethics Commission held, in Advisory Opinion No. 87-002, that, "[c]ommon usage indicates that to be 'connected with' something is to be related to, or associated with, that entity." For example, in Advisory Op. No. 89-012, the Ethics Commission held that, because of the ties between a city and a port authority, which involve the rendering of legal advice by a city law director on behalf of his city, the law director is "connected with" a local port authority which is coextensive with the city.

Under most circumstances, an employee of a state agency is not generally "connected with" local political subdivisions. See generally Advisory Op. No. 85-013. However, this is not true in regard to Dr. Boyd serving the Cleveland City School District as superintendent, in his role as Deputy State Superintendent, under the direction of the Superintendent of Public Instruction in compliance with an order from the U.S. District Court. In the instant situation, due to the unique set of circumstances under which Dr. Boyd serves the District as superintendent while being employed by the Department and under the direct supervision of the Superintendent of Public Instruction, he, as a Department of Education employee, has a clear and substantial connection with the Cleveland City School District.

Therefore, at first glance, it appears that R.C. 2921.42 (A)(4) would prohibit a Department employee from having an interest in a public contract with a local board of education and would, in this instance, prohibit the Department employee from providing services as the local board of education's superintendent.

### **Official Capacity Exception to R.C. 2921.42 (A)(4)**

However, the Ethics Commission has recognized an "official capacity" exception to the prohibition imposed by R.C. 2921.42 (A)(4) in instances where a public official of an agency that awards a contract or grant to another agency also serves with the recipient agency in his official capacity as a representative of the awarding agency's interests. See Advisory Ops. No. 82-004, 83-010, 84-001, and 93-012. See also Advisory Op. No. 92-002.

The Ethics Commission has explained that whenever a public official serves in his "official capacity," where he would otherwise have an interest in a public contract with his own public agency, "there would not be a dual interest in which private considerations would distract from his serving the public interest." Advisory Ops. No. 82-004, 83-010, and 84-001. 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 in his official capacity:

- (1) the governmental entity must create or be a participant in the other entity;
- (2) any public official or employee connected with the jurisdiction . . . may be designated to serve, 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;
- (4) there must be no other conflict of interest on the part of the designated representative.

See also Att'y Gen. Op. No. 91-007.

These criteria were established in advisory opinions which pertained to a public official serving on the board of a non-profit corporation which received grants from the official's political subdivision. However, the same reasoning would apply in the unique set of circumstances where a public official serving a public agency with the authority to distribute funds is directed, by the order of a federal court that monitors the activities of both public agencies, to serve in his official capacity with another public agency that receives the funds.

In this instance, Dr. Boyd fits the four established criteria: (1) The Department and the State Superintendent, upon the order of the U.S. District Court, are actively participating in the operation of the Cleveland City School District; (2) the State Superintendent has directed Dr. Boyd to act on behalf of the Department; (3) it is assumed that Dr. Boyd has been formally instructed to represent the Department and its interests; and (4) the Department has taken steps to avoid other potential conflicts of interest.

The last criteria is specifically relevant in the instant situation. You have stated that Dr. Boyd, despite the fact that he is employed as a Deputy State Superintendent, has no duties as an official or employee of the Department and is not involved in the Department of Education's release of funds to the Cleveland School District. The exclusion of Dr. Boyd from any duties exercised by the Department insures that he would not be in a position to act on matters which he has personally handled while performing the duties of superintendent of the Cleveland City School District, particularly as that participation involved the Department's provision of funding to the District.

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**Prohibition Imposed by R.C. 102.03 (D)**

In addition to R.C. 2921.42 (A)(4), your attention is directed to R.C. 102.03 (D), which provides:

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.

The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official or employee from using the authority or influence of his official position to secure anything of value, for either himself or another public agency, if the thing of value is of an improper character. See Advisory Ops. No. 88-002 and 91-006.

A thing of value is considered to be of an improper character for purposes of R.C. 102.03 (D) where the thing of value is secured from a party that is interested in matters before, regulated by, or doing or seeking to do business with the public agency with which the official or employee serves, or where the thing of value could impair the official's or employee's objectivity and independence of judgment with respect to his official actions and decisions for the public agency with which he serves or is employed. See Advisory Ops. No. 79-002, 80-004, 84-009, 84-010, 87-006, 87-009, 89-006, 89-012, 90-012, and 92-009. Specifically, the Commission held in Advisory Opinion No. 77-006 that a person appointed to or employed by a state agency with review authority over another agency may be subject to a conflict of interest if he were then employed by the agency subject to review. See also Advisory Op. No. 88-002.

The Department of Education administers the powers of the State Board of Education and the Superintendent of Public Instruction in supervising the system of public education within the State. While a local board of education is responsible for the management and control of schools within its district, the Department exercises a myriad of regulatory and supervisory functions which govern the operation of local school districts. These functions are too numerous to itemize, but they range from the licensing of the local district's personnel to the classification and charter of school districts and individual schools within each district pursuant to standards established the Department. See generally R.C. 3301.074 and 3301.16. As explained above, the Department's duties also include the distribution of state funding to local school districts. R.C. 3317.01. In light of the regulatory and fiscal ties between the Department and local school districts, it is apparent that local boards of education are regulated by and interested in matters before the Department for purposes of R.C. 102.03 (D).

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### **Official Capacity Exception to R.C. 102.03 (D)**

However, the Commission has noted that whenever a public official or employee serves another entity, pursuant to a direction from, and stated awareness of, his employing agency to serve in his official capacity to represent the interests of his employing agency, any benefit that would accrue to the other entity would not be of such a character as to manifest a substantial and improper influence upon the official or employee with respect to his duties. See Advisory Op. No. 88-005. See also 76-007 (addressing a city employee serving as a city representative to the Chamber of Commerce in his official capacity). In Advisory Opinion No. 88-005, the Ethics Commission adopted and restated the four criteria set forth above which were originally recognized to address this issue under R.C. 2921.42 (A)(4). In this instance, Dr. Boyd fits the four established criteria.

Again, it is important to note that the exclusion of Dr. Boyd from any duties exercised by the Department insures that he would not be a position to act on matters which he has personally handled while performing the duties of superintendent of the Cleveland City School District. This is in accordance with the Ethics Commission's previous analysis of this general issue. In Advisory Opinion No. 88-005, the Commission addressed the issue of city officials serving on a designated community improvement corporation in their official capacity, and held, "[t]he broader interests of the community may best be served if those city officials who are selected to serve on the community improvement corporation do not include those officials who . . . otherwise have decision-making responsibilities with regard to the corporation."

### **Financial Disclosure Requirement**

Based upon the appointment of Dr. Boyd as a Deputy Superintendent of the Department of Education, a question under the Ethics Law arises as to whether Dr. Boyd is required to file a financial disclosure statement.

R.C. 102.03 (A) requires "the director, assistant directors, deputy directors, division chiefs, or persons of equivalent rank of any administrative department of the state" to file a financial disclosure statement with the Ethics Commission. The financial disclosure statements of high-ranking state officials and employees are subject to public inspection. R.C. 102.02 (A)(10). Newly enacted amendments to R.C. 102.02 (A) also require superintendents of school districts to file a financial disclosure statement with the Ohio Ethics Commission. The Ethics Commission is required to keep financial disclosure statements that are filed by superintendents of city school districts confidential, except for purposes of an audit of the district conducted pursuant to R.C. 115.56 or R.C. Chapter 117. See R.C. 102.02 (B).

In response to questions concerning Dr. Boyd's appointment, your office has informed the Commission that another individual who serves as a Deputy State Superintendent files a public financial

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disclosure statement with the Ethics Commission pursuant to R.C. 102.02 (A). In the instant situation, Dr. Boyd is a Deputy State Superintendent and, pursuant to the order of the U.S. District Court, will perform his duties under the direct supervision of the State Superintendent of Education.

The instant situation, however, entails the unique set of circumstances described above. These circumstances arise in response to the order of the U.S. District Court that the operation of the Cleveland City School District be removed from local authority and be entrusted to the State through the Superintendent of Public Instruction. While Dr. Boyd will operate and administer a school district, however, for purposes of Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code, he is performing a duty as a State official or employee rather than a superintendent of a city school district. Accordingly, R.C. 102.03 (A) requires Dr. Boyd to file a financial disclosure statement with the Ethics Commission as a Deputy State Superintendent.

### Conclusion

Chapter 102. and related statutes, and specifically R.C. 2921.42 (A)(4) and R.C.102.03 (D), do not prohibit Dr. Boyd from serving the Cleveland City School District as superintendent, in his official capacity as Deputy State Superintendent, under the direction of the Superintendent of Public Instruction in compliance with an order from the U.S. District Court. R.C. 102.03 (A) requires Dr. Boyd to file a financial disclosure statement with the Ethics Commission as a Deputy State Superintendent.

This advisory opinion is written in response to issues arising under exigent circumstances that involve a multitude of matters outside the jurisdiction of the Ethics Commission. The breadth of this opinion, as explained above, is limited to issues which arise under the Ohio Ethics Law and related statutes because of Dr. Boyd's service with the Cleveland City School District as superintendent, in his official capacity as Deputy State Superintendent, under the direction of the Superintendent of Public Instruction. The Ethics Commission duly appreciates and supports the request of the State Superintendent for the Commission's guidance and advice in complying with the Ethics Law under these circumstances.

This advisory opinion embodies a decision rendered by the Ethics Commission at its meeting on June 16, 1995. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. of the Revised Code and does not purport to interpret other laws or rules. If you have any questions, please feel free to contact me, or John Rawski, Staff Attorney, at our office.

Sincerely,



David E. Freel  
Executive Director