

OHIO ETHICS COMMISSION

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October 21, 2002 Informal Opinion 2002-INF-1021-2

Herbert Jenkins
Jenkins & Co. C.P.A.



Dear Mr. Jenkins:

In a letter received by the Ohio Ethics Commission on May 8, 2002, you have asked whether the Ethics Law prohibits you from serving simultaneously as Treasurer and member of the governing board of the Hamilton County Mathematics and Science Academy (Academy). You state that the Academy is a community school. You have also asked whether you can perform the duties of Treasurer of the community school as an independent contractor while you also serve as a member of the governing board of the community school.

Brief Answer

As explained more fully below, the Ohio Ethics Law prohibit you from serving simultaneously as a governing board member and treasurer of a community school because you would be unable to effectively perform the duties of both offices without a conflict of interest. This conclusion is the same regardless of whether you are employed by the community school to perform the services of treasurer or you provide the services of treasurer as an independent contractor.

The public contract law may also limit your service in both positions. However, because the conflict of interest law prohibits the service, it is unnecessary for this opinion to examine the application of the public contract law.

Application of Law to Community School Officials and Employees

Before turning to the application of the Ethics Law to the specific questions you have asked, it is first necessary to examine the general application of the Ethics Law to matters involving officials and employees of community schools. This preliminary examination is necessary due to the unique nature of community schools and the provisions of law that govern the operation of community schools.

Chapter 102. of the Revised Code establishes the Ethics Commission and defines its authority and duties. The Commission has investigative and advisory jurisdiction over Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. R.C. 102.06 and 102.08. Generally, the Ohio Ethics Law and related statutes prohibit public officials and employees from using their official positions for their own personal benefit, for the benefit of their family members or business associates, or where there is otherwise a conflict of interest.

In R.C. 3314.03(A)(11)(e), the General Assembly has mandated that, in each contract between the sponsor and governing authority for a community school, it must be specified that the school will comply with certain requirements, including the following:

The school shall comply with Chapter 102. of the Revised Code except that nothing in that chapter shall prohibit a member of the school's governing board from also being an employee of the school and nothing in that chapter or section 2921.42 of the Revised Code shall prohibit a member of the school's governing board from having an interest in a contract into which the governing board enters.

Thus, with limited exceptions, a member of the governing board of a community school is subject to all the restrictions imposed upon "public officials and employees" by R.C. Chapter 102. The General Assembly has expressed, in unambiguous terms, its intent to require officers and employees of community schools to comply with the requirements of the Ethics Law. The General Assembly, by this action, has also indicated the importance of the protections to the public contained in these provisions and its conviction that the people of the state of Ohio will benefit if the officers and employees of community schools are governed by general protections against conflicts of interest.

Exemptions Provided by R.C. 3314.03(A)(11)(e)

R.C. 3314.03(A)(11)(e) provides exemptions to the Ethics Law and related statutes to permit a member of the school's governing board to be an employee of the school and to have an interest in a contract with the governing board.

In Advisory Opinion No. 75-014, the Ethics Commission addressed the issue of exceptions to Ethics Law prohibitions, holding:

The general rule of construction is that an exception in a statute is an affirmation of the application of its provisions to all cases not excepted, and excludes all other exceptions. This well established theory of construction was restated in Hill v. Harris et al, 39 Ohio Op. 267 (1948), at page 271:

"Where an exception is grafted upon the general terms of a statute, that exception should be strictly construed and must be governed by the familiar rule that the exclusion clearly made in the exception only emphasizes the inclusion of all other things relative to the statute which are not so excluded." (Emphasis in original.)

Generally, R.C. 2921.42(A) and 102.03(D) and (E) prohibit a public official, serving as a member of a governing board, from accepting or holding employment with the public agency while serving as a member of the governing board. See Ohio Ethics Commission Advisory Opinions No. 87-008 (a member of a board of education is prohibited from soliciting or accepting employment with the school district) and 91-002 (a city council member may not be a compensated employee of his city). However, R.C. 3314.03(A)(11)(e) provides that "nothing in [R.C. Chapter 102.] shall prohibit a member of the school's governing board from also being an employee of the school." Thus, the application of R.C. 2921.42(A) and 102.03(D) and (E) to prohibit simultaneous service as a board member and an employee of the board does not apply to a member of a community school's governing board. Accordingly, except where pervasive conflicts of interest would effectively prohibit a community school governing board member, if he were to be employed by the school, from taking action in a majority of the matters before the board (as described below), a member of the community school's governing board may also be employed by the school without violating R.C. 2921.42(A) and 102.03(D) and (E) by serving in both capacities.

Conflict of Interest Law—R.C. 102.03(D) and (E)

However, because the language of the exception in R.C. 3314.03(A)(11)(e) is specific and limited, a member of a community school's governing board is subject to all other prohibitions imposed by R.C. Chapter 102., including other prohibitions imposed by R.C. 102.03(D) and (E), which read:

- (D) 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.
- (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 the public official or employee with respect to that person's duties.

R.C. 102.03(D) prohibits a public official from participating in deliberations, voting, or otherwise using his public position with regard to matters affecting his own personal financial interests. Adv. Ops. No. 87-008 and 88-004. See R.C. 1.03(H) (a promise of future employment is a thing of value for purposes of R.C. 102.03). R.C. 102.03(E) prohibits a public official from soliciting any benefit to his own financial interests.

Therefore, while R.C. 3314.03(A)(11)(e) allow a member of the governing board to serve as an employee of the community school, R.C. 102.03(D) and (E) prohibit the board member from improperly soliciting, or using the authority or influence of his position to secure, employment with the community school. R.C. 102.03(D) also prohibits that board member from participating, as a board member, in matters, after he becomes an employee, that result in a

definite and direct benefit for him, such as renewal or approval of his own performance evaluations and pay increases. See also Att'y Gen. Op. No. 79-086 (addressing the well-established principle of common law that an appointing authority may not appoint himself to an appointive position).

Application of Charter School and Ethics Law Provisions to Your Specific Questions

In your letter to the Ethics Commission, you ask whether you can serve simultaneously as a treasurer and governing board member of a community school. In your letter to the Ethics Commission, you indicate that Paul Russell, an Attorney for the Ohio Auditor's Office, has advised you that you can serve in both positions provided that you abstain from voting, as a governing board member, on any fiscal matter or any other matter that could be construed as a conflict of interest. The requirement that you abstain extends beyond voting to all formal and informal manners of participation. Therefore, the practical effect of your abstention in this broad range of matters must be more closely examined.

Every community school established under Chapter 3314. of the Revised Code must have a designated fiscal officer. R.C. 3314.01. In most cases, that fiscal officer would be the treasurer of the community school. The fiscal officer would perform the same duties and exercise the same responsibility regardless of whether he served the community school as an employee or through some other arrangement.

The members of the governing board of a community school would, due to the nature of their duties, discuss and decide a wide variety of fiscal matters involving the community school. In fact, nearly every matter brought before the governing board would be one that would have a financial impact on the community school. An individual who serves as treasurer and governing board member would need to abstain from all fiscal matters brought before the governing board, because such matters would directly involve the governing board member's interests as treasurer, and could affect, reflect upon, or validate, the performance of the treasurer's duties. Continually recurring divided loyalties would make it impossible for an individual to serve as a governing board member while performing the duties of treasurer of a community school. Therefore, R.C. 102.03(D) and (E) prohibit you from serving simultaneously as a governing board member and treasurer of a community school. This conclusion is the same regardless of whether you are employed by the community school to perform the services of treasurer or you provide the services of treasurer as an independent contractor.

Based on the conclusion reached above, it is not necessary to consider the application of public contract provisions of R.C. 2921.42 to the situation you have described.

Conclusion

As explained above, the Ohio Ethics Law prohibit you from serving simultaneously as a governing board member and treasurer of a community school because you would be unable to effectively perform the duties of both offices without a conflict of interest. This conclusion is the same regardless of whether you are employed by the community school to perform the services of treasurer or you provide the services of treasurer as an independent contractor.

The public contract law may also limit your service in both positions. However, because the conflict of interest law prohibits the service, it is unnecessary for this opinion to examine the application of the public contract law.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 21, 2002. The Commission commends you for requesting guidance before any actions were taken that could be prohibited by law.

This opinion is based on the facts presented and 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. If you have any questions or desire additional information, please contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney