Ben Rose, *Chair*
Merom Brachman
Betty Davis
Diana Swoope

David E. Freel
Executive Director

OHIO ETHICS COMMISSION
William Green Building
30 West Spring Street, L3
Columbus, Ohio 43215-2256
Telephone: (614) 466-7090
Fax: (614) 466-8368

www.ethics.ohio.gov

September 8, 2010 Informal Opinion 2010-INF-0908-2

Roger McCauley
[redacted]

Dear Mr. McCauley:

On July 29, 2010, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you are interested in seeking a position on the State Board of Education (BOE). You stated that your spouse sells consulting services to school districts and educational service centers (ESCs). You asked whether the Ohio Ethics law and related statues prohibit you from serving on the BOE if your spouse continues to sell services to school districts and ESCs.

Commission staff contacted you for additional information about your spouse's contracts. You directed staff to your spouse, who explained that, when she works for ESCs, she sometimes works as a consultant on an Ohio Department of Education (Department) team performing school improvement services required by the Department. Further, your spouse explained that, as a contractor to local school districts, she sometimes provides services in connection with school improvement grants. School improvement grants are awarded from the federal government to the Department and then dispersed to school districts.

Brief Answer

As explained below, the Ohio Ethics law and related statues do not prohibit you from serving on the BOE if your spouse continues her work as described to the Commission. However, the Ethics Law will prohibit you from participating in some actions as a member of the BOE.

Facts—Authority of the BOE and Relationship to Department

R.C. 3301.01 provides that the BOE shall exercise general supervision of the system of public education in Ohio. The powers and duties of the BOE are set forth generally in R.C. 3301.07, which provides that, among other things, the BOE is empowered to:

(1) Exercise policy forming, planning, and evaluative functions for the public schools in Ohio, and for adult education, except as provided by law;

(2) Exercise leadership in the improvement of public education in Ohio, and administer the educational policies relating to public schools, and relating to instruction and instructional material, building and equipment, transportation of pupils, administrative responsibilities of school officials and personnel, and finance and organization of school districts, educational service centers, and territory;

(3) Administer and supervise the allocation and distribution of all state and federal funds for public school education;

(4) Formulate and prescribe minimum standards to be applied to all elementary and secondary schools in this state for the purpose of requiring a general education of high quality;

(5) Prepare and submit annually to the Governor and the General Assembly a report on the status, needs, and major problems of the public schools of the state, with recommendations for necessary legislative action and a ten-year projection of the state's public and nonpublic school enrollment, by year and by grade level;

(6) Prepare and submit to the Director of Budget and Management the biennial budgetary requests of the state board of education, for its agencies and for the public schools of the state; and

(7) Cooperate with federal, state, and local agencies concerned with the health and welfare of children and youth of the state.

These statutory duties mandate that the BOE exercise authority over school districts and ESCs through establishment of overall policy and standards in addition to providing oversight and making recommendations for necessary legislative action.

R.C. 3301.13 provides that the Department of Education consists of the BOE, the Superintendent of Public Instruction (Superintendent), and other employees as necessary. The Department is organized by law or by order of the BOE. R.C. 3301.13. The Superintendent of Public Instruction is the Chief Administrative Officer of the Department, subject to BOE policies, rules, and regulations. Id. The Superintendent is appointed by the BOE and serves at the pleasure of the BOE. R.C. 3301.08. Assistant superintendents and division heads within the Department are also appointed by the BOE, based on the recommendation of the Superintendent, and serve at the pleasure of the BOE. R.C. 3301.13.

Family Member Interested in a Public Contract—R.C. 2921.42(A)(1)

A member of the BOE is a "public official," subject to R.C. 2921.42(A)(1), which provides that no public official shall knowingly:

> Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public official's business associates has an interest.

R.C. 2921.01 (a "public official" includes any person elected or appointed officer of the state); R.C. 3301.01 and 3301.02.

A "public contract" is any purchase or acquisition of property or services by or for the use of a public agency, including a local school district, ESC, or the Department or BOE. When a public agency authorizes grants, loans, and other similar programs, and acquires public services in return, the grants, loans, and other programs are "public contracts" regardless of whether they are funded through state, federal, or other moneys. See, e.g., Ohio Ethics Commission Advisory Opinion No. 2009-06; *State v. Lordi* (2000), 140 Ohio App.3d 561, 569, discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001).

In this instance, the Department is the state agency empowered to allocate and administer federal funds to achieve the objective of improving the system of public education in the state. Therefore, a school improvement grant from the Department to a school district or ESC is a public contract. Also, if the Department is collaborating with a school district or ESC on an improvement project, services provided by a contractor on the project are "acquired" by the Department. In that case, the payment for those services is a public contract for the Department as well as the school district of the ESC.

The Commission has explained that a public official is prohibited from authorizing a contract if the official's family member, including a spouse, has a "definite and direct, financial or fiduciary" interest in the contract. Adv. Op. No. 2009-06. When your spouse is paid by a school district or ESC to provide services in connection with a Department grant, she has a definite and direct financial interest in a Department contract. Adv. Op. No. 86-009 (a person has a definite and direct financial interest in a public contract when he is a subcontractor on a public contract, paid by a third party to perform the services required in the contract). In addition, when you spouse is working on a Department team on a school improvement project performing services required by the Department, she has an interest in a Department contract even though her compensation comes from the ESC using Department funds. Id.

R.C. 2921.42(A)(1) does not absolutely prohibit your spouse, if you were to become a member of the BOE, from having an interest in a Department contract. However, R.C. 2921.42(A)(1) does prohibit you, as a member of the BOE, from taking any action to secure a contract or grant in which your spouse has a definite and direct interest.

Therefore, as a member of the BOE, you are prohibited, as a member of the BOE, from voting on, discussing, deliberating about, or taking any other action to secure a Department contract, including a grant, to any school district or ESC if you spouse will have an interest in the contract or grant. For example, if your spouse has historically provided services to a particular school district under its school improvement grants from Department, you are prohibited from participating, in any way, in any BOE action on those Department grants to the district. It is not clear, from your letter, whether or to what extent the BOE is involved in specific Department contracts or grants. If the BOE has <u>any</u> involvement, you would be prohibited from taking any of the actions described above in connection with grants or contracts in which your spouse has an interest.

<u>Interest in a Contract—R.C. 2921.42(A)(4)</u>

You should also note 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 the public official is connected.

As stated above, while she is providing services to the Department as a member of a State Support Team, or performing services under a Department grant, your spouse has an interest in a Department contract even though she is paid by an ESC or local school district. R.C. 2921.42(A)(4) does not prohibit your spouse from having an interest in a Department contract.

However, if you were to become a member of the BOE, the law does prohibit *you* from having an interest in a contract of any agency with which you are "connected."

Based on an examination of the statutory duties and authority of Department and the BOE, as described on page 2 of this opinion, the Commission concludes that the Department exists to carry out the authority of the BOE. Therefore, a member of the BOE is also "connected" with the Department.

R.C. 2921.42(A)(4) would prohibit you from having any financial or fiduciary interest in the Department contracts your spouse performs. Your spouse has explained, in a conversation with Commission staff, that her business is a sole proprietorship. Provided that you are not an owner, officer, stockholder, partner, or employee of your spouse's company, and have no other definite and direct interest in the company's contracts, R.C. 2921.42(A)(4) does not prohibit her from continuing to provide the services you have described in connection with Department contracts and grants. Adv. Op. No. 88-007 (Although a public official may have an indirect interest in a contract from which her spouse will profit or benefit, the official is not considered to have a definite and direct interest in the contract absent facts showing a definite and direct interest.).

Conflict of Interest—R.C. 102.03(D)

Finally, as a member of the BOE, you are a "public official" subject to R.C. 102.03(D), which reads:

> 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. 102.01(B) and (C) (a "public official" include any person elected or appointed to an office of any state board).

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 1.03, 102.01(G). The compensation that your spouse receives from selling consulting services to school districts and ESCs is a thing of value. Adv. Op. No. 96-004. In addition, the Ethics Commission has determined that the beneficial or detrimental economic impact of a decision made by a public entity is a thing of value. Adv. Ops. No. 85-012, 90-002, and 90-012.

The Ethics Commission has held that public officials and employees must exercise their official duties without hindrance by any improper influence. Adv. Op. No. 89-010. The prohibition in by R.C. 102.03(D) serves the public interest in effective, objective, and impartial government by preventing the creation of a situation that may impair the objectivity and independence of judgment of a public official or employee, and therefore, the effectiveness of the public agency with which such official or employee serves. Adv. Ops. No. 89-014 and 90-002. The application of R.C. 102.03(D) is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 87-007 and 89-003.

The Ethics Commission explained, in Advisory Opinion No. 92-010, that R.C. 102.03(D) prohibits a public official or employee from participating, formally or informally, in issues that definitely and directly affect the private financial interests of his close family members because, in such circumstances, his objectivity and independence of judgment could be impaired. See Adv. Ops. No. 79-008 (spouse), 88-005 (children), and 98-002 (siblings).

For example, in Advisory Opinion No. 2009-02, the Ethics Commission held that, when a matter before a public agency affects the *employer* of a public official's family member, *and* the family member would receive a definite and direct benefit or detriment from the agency's decision on the matter, R.C. 102.03(D) prohibits the official from participating in the agency's decision-making on the matter. See also Adv. Op. No. 89-008. If a public official's family member *will not* receive a definite and direct benefit from, or suffer a definite and direct detriment as a result of, a matter affecting the family member's employer, then R.C. 102.03(D) does not prohibit the official from participating in the matter. Id.

Application to Facts

If you were appointed to the BOE, then R.C. 102.03(D) would prohibit you from authorizing, approving, voting upon, discussing, deliberating, recommending, or otherwise using the authority or influence inherent in as a BOE member in any issue before BOE if your spouse would receive any beneficial or detrimental economic impact as a result of the BOE decision. This prohibited activity would include participating in any formal or informal discussions with BOE officials or employees. However, R.C. 102.03(D) would not prohibit you from participating in issues that affect school districts and ESCs provided that your spouse *receives no definite and direct financial benefit or detriment as a result of* the BOE decision. See also R.C. 2921.42(A)(1) (described on pages 3 and 4).

The authority of the BOE regarding school districts and ESCs, described on page 2 of this Opinion, largely involves broad policy making including establishing the planning, evaluation, and formulation of minimum standards for elementary and secondary schools. It would be difficult to establish that the actions of the BOE in this area would result in a *definite and direct financial benefit or detriment* for a BOE member's spouse who is a contractor selling consulting services to school districts and ESCs. Therefore, if you are appointed to the BOE, R.C. 102.03(D) will not prohibit you from participating in actions of the board that affect all of most schools and ESCs in the state, including any that are clients of your spouse's business.

However, the BOE does exercise considerable authority over the officials and employees of the Department. R.C. 102.03(D) would prohibit you, as a member of the BOE, from using your position of authority over the Superintendent, Assistant Superintendents, and other officials and employees of the Department to secure any benefits, such as school improvement consulting contracts, for your spouse. For example, you would be prohibited from recommending your spouse as a consultant to Department officials and employees and from discussing her consulting business with them.

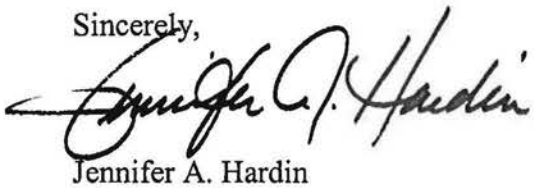
If an issue were to come before the BOE that would result in a definite and direct thing of value for your spouse or her consulting business, you would not be prohibited from serving on the BOE. Rather, you would be prohibited from participating in the matter. Usually, with conflicts of the kind you have described, the Law does not prohibit a person from serving as a public official provided that he can manage the conflict of interest.

Conclusion

As explained above, the Ohio Ethics law and related statues do not prohibit you from serving on the BOE if your spouse continues her work as described to the Commission. However, the Ethics Law will prohibit you from participating in some actions as a member of the BOE.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 8, 2010. The 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. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney