

June 5, 2007

The Honorable Dennis Watkins  
Trumbull County Prosecuting Attorney  
4th Floor Administration Building  
160 High Street N.W.  
Warren, Ohio 44481-1092

SYLLABUS:

2007-011

Neither R.C. 3313.33 nor R.C. 3319.21 prohibits a school board member who has a spouse or adult child employed in a position within a bargaining unit of the school district, and who does not receive any type of group insurance benefit through the spouse or adult child, from participating as a member of the school district's negotiating team when the spouse or adult child is neither an officer of the union nor a member of the bargaining unit's negotiating team. This opinion does not consider whether a prohibition exists under any other statutory provision, such as R.C. 102.03, R.C. 2921.42, or R.C. 4117.20(A).



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OPINION NO. 2007-011

The Honorable Dennis Watkins  
Trumbull County Prosecuting Attorney  
4th Floor Administration Building  
160 High Street N.W.  
Warren, Ohio 44481-1092

Dear Prosecutor Watkins:

We have received your request for an opinion regarding the participation of school board members in the collective bargaining process. Your specific question is as follows:

Is a school board member who has a spouse or adult child employed in a bargaining unit, but does not receive any type of group insurance benefit through the spouse or adult child, prohibited by Ohio Revised Code Section 3313.33 and Ohio Revised Code Section 2921.42 from participating as a member of the district's bargaining team when the spouse or adult child is neither an officer of the union nor member of the bargaining unit team?

The Ohio Ethics Commission has been given authority to interpret R.C. 2921.42 and to provide opinions that protect public officials from liability with regard to the matters addressed in those opinions. Therefore, this opinion does not address R.C. 2921.42 or other statutes within the jurisdiction of the Ohio Ethics Commission.<sup>1</sup> Further, this opinion does not address R.C.

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<sup>1</sup> The Ohio Ethics Commission has express authority to render opinions involving ethics, conflicts of interest, or financial disclosure under R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43. R.C. 102.08; *see* 2006 Op. Att'y Gen. No. 2006-036, at 2-329 n.1. When the Ohio Ethics Commission renders an advisory opinion relating to a specific set of circumstances under these statutes and finding no violation, "the person to whom the opinion was directed or who was similarly situated" may reasonably rely upon the opinion and "shall be immune from criminal prosecutions, civil suits, or actions for removal from his office or position of employment" for a violation of R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43 based on facts and circumstances covered by the opinion. R.C. 102.08. Therefore, with regard to any prohibition under R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43, this office refrains from rendering an opinion,

4117.20, which establishes standards for collective bargaining negotiations under the State Employment Relations Board.<sup>2</sup> Instead, this opinion considers only R.C. 3313.33 and the related provisions of R.C. 3319.21.

On the basis of the analysis set forth below, we conclude that neither R.C. 3313.33 nor R.C. 3319.21 prohibits a school board member who has a spouse or adult child employed in a position within a bargaining unit of the school district, and who does not receive any type of

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respectfully deferring to the advisory jurisdiction granted to the Ohio Ethics Commission. Hence, questions concerning R.C. 2921.42 or other provisions under the jurisdiction of the Ohio Ethics Commission should be addressed directly to the Ohio Ethics Commission. *See, e.g.*, 2006 Op. Att’y Gen. No. 2006-036, at 2-329 n.1; 2004 Op. Att’y Gen. No. 2004-25, at 2-224 n.6; 1989 Op. Att’y Gen. No. 89-030, at 2-124 n.1; 1987 Op. Att’y Gen. No. 87-025 (syllabus, paragraph 3) (“[b]ecause R.C. 102.08 grants the Ohio Ethics Commission the authority to render advisory opinions interpreting R.C. 2921.42, the Attorney General will not also render opinions construing R.C. 2921.42”). Matters relating to your question have been addressed by the Ohio Ethics Commission in such opinions as Ohio Ethics Comm’n, Advisory Op. No. 98-003; Ohio Ethics Comm’n, Advisory Op. No. 92-017; Ohio Ethics Comm’n, Advisory Op. No. 92-012; Ohio Ethics Comm’n, Advisory Op. No. 89-005; and Ohio Ethics Comm’n, Advisory Op. No. 82-003. Statutes of particular interest include R.C. 102.03 and R.C. 2921.42. *See* notes 8 and 9, *infra*.

<sup>2</sup> Provisions of Ohio’s public employees’ collective bargaining law prohibit a person who is a member of the organization with which a public employer is bargaining, or who has an interest in the outcome of collective bargaining that is in conflict with the interest of the public employer, from participating on behalf of the public employer in the collective bargaining process, except that the person may, where entitled, vote on the ratification of an agreement. R.C. 4117.20(A). You have not asked about the applicability of this provision, and this opinion does not address it. Decisions of the State Employment Relations Board (SERB) and related court decisions may provide guidance with regard to the applicability and operation of R.C. 4117.20(A). *See City of Streetsboro v. FOP*, No. 5:03 CV 1565, 2004 U.S. Dist. LEXIS 29340, \*15, 2004 SERB 4-44, 4-47 (N.D. Ohio July 22, 2004) (“the exclusion requirements in O.R.C. § 4117.20 are triggered only when one of the bargaining parties files a complaint with SERB”); *Harrison v. Judge*, 63 Ohio St. 3d 766, 771, 591 N.E.2d 704, 707 (1992) (“R.C. 4117.20 prohibits persons from being involved with the organizations on both sides of the bargaining table”); *Springfield Township Bd. of Trustees v. State Employment Relations Bd.*, 70 Ohio App. 3d 801, 806, 592 N.E.2d 871, 874 (Hamilton County 1990) (upholding SERB’s finding that an employer’s failure to exclude from the employer’s bargaining team persons whose participation was prohibited under R.C. 4117.20 constituted an unfair labor practice and stating: “reviewing courts must accord ‘due deference’ to SERB’s interpretation of R.C. Chapter 4117”); Ohio Ethics Comm’n, Advisory Op. No. 92-017, at 2-3; Ohio Ethics Comm’n, Advisory Op. No. 89-005, at 2-5.

group insurance benefit through the spouse or adult child, from participating as a member of the school district's negotiating team when the spouse or adult child is neither an officer of the union nor a member of the bargaining unit's negotiating team. This opinion does not consider whether a prohibition exists under any other statutory provision, such as R.C. 102.03, R.C. 2921.42, or R.C. 4117.20(A).

### **Background Information**

Your questions pertain to the negotiation of a contract between a board of education and a collective bargaining unit representing employees of the board. We understand that the situation involves the negotiation of a master contract, which is an agreement between the school district and the union establishing the general terms and conditions of employment (including compensation and fringe benefits) for employees in the bargaining unit. The situation also involves a contract of employment between the spouse or adult child and the board of education. *See generally* Ohio Ethics Comm'n, Advisory Op. No. 92-017, at 4; Ohio Ethics Comm'n, Advisory Op. No. 82-003, at 2.

You have asked whether a school board member who has a spouse or adult child employed in a job within a school district collective bargaining unit may participate as a member of the school district's negotiating team. You have specified that the spouse or adult child is neither an officer of the union nor a member of the bargaining unit's negotiating team, and that the board member does not receive any type of group insurance benefit through the spouse or adult child. It is our understanding that there is no arrangement between the board member and the spouse or adult child that grants the board member any particular benefit under, or interest in, the spouse's or adult child's compensation under the employment contract with the board of education. This opinion addresses the application of R.C. 3313.33 and R.C. 3319.21 to the situation as so described.

### **Prohibitions Under R.C. 3313.33**

R.C. 3313.33 contains various provisions pertaining to contracts of a board of education. Division (B) includes the following language prohibiting a member of the board of education from having a pecuniary interest in a contract of the board:

Except as provided in division (C) of this section, *no member of the board shall have, directly or indirectly, any pecuniary interest in any contract of the board or be employed in any manner for compensation by the board of which the person is a member.*

R.C. 3313.33(B) (emphasis added).

Divisions (C) and (D) of R.C. 3313.33 set forth three exceptions that permit a board member to have a pecuniary interest in a contract of the board. The first exception requires compliance with all of the following conditions: (1) the member is employed by a political

subdivision, instrumentality, or agency of the state that is contracting with the board; (2) the member does not discuss or vote on the contract; and (3) the member files with the school district treasurer an affidavit setting forth the member's exact employment status. R.C. 3313.33(C).<sup>3</sup> The second exception concerns a contract with a corporation if the member is a shareholder (but not an officer or director) owning less than five percent of the corporation's stock, provided that prior to entering into the contract the person files an affidavit with the school district treasurer. The third exception applies if a member of the board elects to be covered by a benefit plan of the school district under R.C. 3313.202(D).<sup>4</sup> R.C. 3313.33(D). It does not appear that these exceptions are relevant to the situation you have described.

### **Related Provisions of R.C. 3319.21**

A provision that is commonly considered in connection with R.C. 3313.33 is R.C. 3319.21, which states, in part:

Whenever a local director or member of a board of education votes for or participates in the making of a contract with a person as a teacher or instructor in a public school to whom he is related as father, brother, mother, or sister, or *acts*

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<sup>3</sup> Before this exception was enacted, 1999 Op. Att'y Gen. No. 99-023 concluded, in the syllabus, that R.C. 3313.33 prohibited "a contract under which the board of education of a local school district purchases technological services from an educational service center when a member of the board of education is employed by the educational service center as a technology consultant, even if the individual does not provide technological services directly to the local school district." *See also* 2004 Op. Att'y Gen. No. 2004-025, at 2-229 n.10.

<sup>4</sup> R.C. 3313.202(D) permits a member of the board of education and the dependent children and spouse of the member, at the option of the member, to be covered under any health care plan available to employees of the district, but requires the board member to pay the entire cost of coverage. Election for coverage under R.C. 3313.202(D) is different from the option of a member whose spouse or dependent is an employee of the school district to obtain insurance coverage under the employee's family coverage. *See generally* Ohio Ethics Comm'n, Advisory Op. No. 92-017, at 11-13.

In 2005, the General Assembly passed legislation amending R.C. 3313.202 and making other amendments contingent upon the subsequent enactment of laws confirming the amendments and ordering the implementation of provisions establishing pooled medical plans for school district employees. The General Assembly has not yet enacted the subsequent laws; however, like the existing provisions of R.C. 3313.202, the contingent language grants board of education members the option of participating in health care plans by paying the entire cost of coverage. *See* Am. Sub. H.B. 66, 126th Gen. A. (2005) (eff. Sept. 29, 2005) (Sec. 611.03, uncodified).

*in any matter in which he is pecuniarily interested, such contract, or such act in such matter is void.* (Emphasis added.)

R.C. 3319.21 contains an exception for a board member who is a shareholder (but not an officer or director) of a corporation, owns not more than five per cent of the stock of a value not in excess of \$500, and files with the treasurer of the board an affidavit disclosing this relationship.

R.C. 3319.21 thus provides that, if a member of a board of education votes for or participates in the making of a teaching contract with a person to whom the board member is related as father, brother, mother, or sister, the contract is void. This provision is narrowly directed to contracts for teachers or instructors and applies only to instances involving the named relatives. It does not extend to a master contract with a bargaining unit and, thus, is not relevant to your question. See 1932 Op. Att’y Gen. No. 4635, vol. II, p. 1091, at 1091 (saying of G.C. 12932, predecessor to R.C. 3319.21: “A statute cannot be construed to include that which is not covered by its terms”).

R.C. 3319.21 also states that, if a member of a board of education acts in any matter in which the member is pecuniarily interested, the act is void. See generally *Morrow County Airport Auth. v. Whetstone Flyers, Ltd.*, 112 Ohio St. 3d 419, 2007-Ohio-255, 860 N.E.2d 733, ¶8. This more general provision operates to void action of a board member who has a pecuniary interest in a matter on which the member acts, and is appropriately considered in connection with R.C. 3313.33.

**Question Whether a School Board Member Has a Pecuniary Interest Under R.C. 3313.33 or R.C. 3319.21 in the Compensation of a Spouse Who Is Employed by the School District**

Although R.C. 3313.33 expressly prohibits a member of a board of education from having, directly or indirectly, any pecuniary interest in a contract of the board, no statute defines the nature of such an interest. When no exception applies, R.C. 3313.33 has been construed literally to prohibit any direct or indirect pecuniary interest, even if the benefit is slight. See *In re Removal of Leach*, 19 Ohio Op. 263, 268 (C.P. Jackson County 1940) (“the statutes do not require the interest to be great, but merely provide that any pecuniary interest moving directly or indirectly to the officer is sufficient”); 1999 Op. Att’y Gen. No. 99-023, at 2-156 (“[i]n the absence of authority to recognize an exception, the statutory language must be construed and applied as written”); 1989 Op. Att’y Gen. No. 89-030, at 2-125 (“R.C. 3313.33 is a strong statement of public policy guarding against favoritism and fraudulent practices by prohibiting contracts in which a public official has any pecuniary interest moving directly or indirectly to the officer”); 1956 Op. Att’y Gen. No. 6672, p. 432, at 438; note 3, *supra*. This literal construction that prohibits any interest, however indirect, has been applied consistently to interests in contracts with the board where business operations are concerned and the board member is in a position to benefit financially.

With regard to the employment of the spouse of a board member, however, courts have taken a different approach. In construing the predecessor to R.C. 3313.33, the Ohio Supreme Court long ago declared that a school board member was permitted to have a spouse who was employed by the school board without running afoul of the prohibition against having a direct or indirect pecuniary interest in a contract of the board. In *Board of Education of Zaleski School District v. Boal*, 104 Ohio St. 482, 135 N.E. 540 (1922), the Ohio Supreme Court addressed the question whether the wife of a member of a board of education could be legally employed by the board to teach school and draw public funds as compensation. The court concluded that such an arrangement was permissible. The court focused on G.C. 12932 (now R.C. 3319.21) which prohibited a board member from voting for or participating in the making of a teaching contract between the board and a person to whom the board member was related as father, brother, mother, or sister. The court noted that, because the statute did not mention a spouse, the board member was not prohibited from voting on a contract for the member's spouse. The court also recognized and quoted the portion of G.C. 4757 (now R.C. 3313.33) that prohibited a board member from having, directly or indirectly, any pecuniary interest in any contract of the board, and failed to find a prohibited pecuniary interest in the situation there under consideration. The court stated, in part:

The rights of a married woman in this state have been extended by express provisions of our laws, and she now has the full power to contract, and the unlimited right to have and enjoy the benefits of her contracts and the fruits of her employment. These modern statutes relating to the property rights of married women are generally intended to cut off the common-law rights of the husband to the personal estate of the wife. They have been construed to constitute as her separate estate a separate business or trade which she may carry on, and all the property incident thereto. Under the provisions referred to, the earnings of a married woman, or property acquired by her labor, constitute her separate property, and no part thereof or interest therein can in any wise be claimed by the husband as against her. 13 Ruling Case Law, 1149, Section 173.

*Board of Education of Zaleski School District v. Boal*, 104 Ohio St. at 484.

In reliance upon the *Boal* case, Ohio Attorneys General concluded in 1955 Op. Att'y Gen. No. 5811, p. 499, at 500-02, that the wife of a member of a board of education could lawfully be elected as clerk of the board and also be appointed as secretary to a school superintendent, and concluded in 1962 Op. Att'y Gen. No. 2855, p. 168, that there was no violation of R.C. 3313.33 or R.C. 3319.21 when the wife of a school board member was appointed by the board as a janitor, with compensation including residence in a rent free house where the school board member also resided. The 1962 opinion states:

In the case of *Board of Education v. Boal*, . . . the court apparently found no pecuniary interest, direct or indirect, where the wife of the board member was appointed as a teacher, even though the allowance of salary to the wife would have seemed to be of some benefit to the husband. In the present case, there

would appear to be some evidence of a pecuniary interest since the board member resides in the rent free house, and actually cannot be excluded from his wife's dwelling except upon a decree or order of injunction made by a court of competent jurisdiction (Section 3103.04, Revised Code). There is not, however, sufficient evidence to distinguish the present case from *Board of Education v. Boal*, which decision has not been modified by any later cases.

1962 Op. Att'y Gen. No. 2855, p. 169, at 171; *see also* 1955 Op. Att'y Gen. No. 5811, p. 499, at 501 (“[t]he question you present as to the employment of the wife of a member, as clerk of the board, seems to have been conclusively settled by the decision of the Supreme Court in *Board of Education v. Boal*, 104 Ohio St., 482”); 1929 Op. Att'y Gen. No. 621, vol. II, p. 948.

A similar conclusion was reached in *In re Steed*, No. 1909, 1989 WL 411471 (Ohio App. Lawrence County July 27, 1989). In the *Steed* case, the court considered a situation in which a member of a board of education voted, on more than one occasion, on contracts to employ his wife as assistant school nurse. The court found that R.C. 3319.21 was inapplicable and there was no violation of R.C. 3313.33, stating that, although the board member did receive some indirect benefit from his wife's employment, the benefit to the husband “cannot be considered an indirect pecuniary interest.” *In re Steed*, 1989 WL 411471, at \*2. In support of its conclusion, the court cited 1962 Op. Att'y Gen. No. 2855 and *Board of Education of Zaleski School District v. Boal*. The court did go on to find, however, that by voting on his wife's individual employment contract, the board member violated R.C. 2921.42(A)(1), which prohibits a public official from knowingly authorizing a public contract in which a member of his family has an interest. *See* note 1, *supra*.

In a related case considering whether the employment contract was void as being in violation of R.C. 3319.21, the court reiterated the conclusions reached in *Steed*:

The phrase “pecuniarily interested” is not defined in R.C. Chapter 3319. Words and phrases shall be read in context and construed according to the rules of grammar and common usage. R.C. 1.42; *State v. Cravens* (1988), 42 Ohio App.3d 69, 72, 536 N.E.2d 686, 689. A “pecuniary interest” is a “direct interest related to money in an action or case \* \* \*.” Black's Law Dictionary (5 Ed.1979) 1018. Neither R.C. 3319.21's nor 3313.33's proscription of a board of education member's voting on something he has a pecuniary interest in is violated by the indirect benefit Ron Steed received from his wife's employment. *See, e.g.*, 1962 Ohio Atty.Gen.Ops. No. 2855. In *In re Removal of Steed* (July 27, 1989), Lawrence App. No. 1909, unreported, this court stated, in a related case, albeit in *dicta*, that the indirect benefit received by Ron Steed from his wife's employment did not constitute a pecuniary interest and was not violative of either R.C. 3319.21 or 3313.33. We now hold that to be the case herein.

*Scherer v. Rock Hill Local Sch. Dist. Bd. of Educ.*, 63 Ohio App. 3d 555, 558, 579 N.E.2d 525 (Lawrence County 1990) (footnote omitted).

Hence, various courts over a substantial number of years have construed R.C. 3313.33 and R.C. 3319.21 as permitting a member of a board of education to be married to an individual who is an employee of the board of education, without finding that the board member has a pecuniary interest in a contract of the board under R.C. 3313.33 or R.C. 3319.21. This judicial construction has permitted the spouse to obtain whatever fringe benefits are generally available to an employee in the position held, even when they benefit other family members, and has permitted the spouse to expend income for family and household purposes.

This interpretation of R.C. 3313.33 and R.C. 3319.21 was brought into question by 1989 Op. Att’y Gen. No. 89-030.<sup>5</sup> That opinion considered the issue of one spouse’s interest in the

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<sup>5</sup> 1989 Op. Att’y Gen. No. 89-030 states, at 2-125 to 2-127 (footnotes omitted):

Initially, I must note that R.C. 3103.04 addresses the issue of one spouse's interest in the earnings of the other. R.C. 3103.04 states, in relevant part: “Neither husband nor wife has any interest in the property of the other except as mentioned in section 3103.03 of the Revised Code, the right to dower, and the right to remain in the mansion house after the death of either.” The establishment of the legal relationship of marriage between two individuals does not, by itself, grant to one spouse property rights in the property owned by the other. *S.C. Kelley & Son v. Mills*, 1 Ohio N.P. 382 (C.P. Clinton County 1895). The earnings of a spouse are that spouse’s separate property. *Board of Education of Zaleski School District v. Boal*, 104 Ohio St. 482, 135 N.E. 540 (1922); *Bechtol v. Ewing*, 89 Ohio St. 53, 105 N.E. 72 (1913). Marriage does not impair the right to convert separate property, including earnings, to another form of ownership by gift, contract or otherwise. *See, e.g., Bechtol* 89 Ohio St. at 53, 105 N.E. at 72 (syllabus, paragraph one); *Dillingham v. Dillingham*, 9 Ohio App. 248, 265 Hamilton County 1917; *Richards v. Parsons*, 7 Ohio App. 422 (Tuscarawas County 1916); R.C. 3101.05. A spouse may, however, treat his or her separate property as available for the support of either spouse. *See Richards*, 7 Ohio App. at 428 (“[s]uch parts of her daily income as she sees fit to use in the payment of household expenses without any agreement between her and her husband that the same should be repaid, cannot be recovered...”). Moreover, each party has a common law duty to support the other. *Cleveland Metropolitan General Hospital v. Olesik*, 38 Ohio App. 3d 21, 23, 525 N.E.2d 831, 833 (Cuyahoga County 1987) (“both spouses are liable for necessary expenses incurred by either spouse in the course of the marriage. As long as the marriage subsists, the financial resources of both spouses should be available to pay a creditor who provides necessary goods and services to either spouse.”)

A significant exception to the separate property doctrine has been applied to property acquired during marriage; such property has frequently been referred to as “marital” property. *See, e.g., Cherry v. Cherry*, 66 Ohio St. 2d 348, 421

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N.E.2d 1293 (1981). In discussing the division of property on termination of a marriage, the Ohio Supreme Court has explicitly recognized that property accumulated during the marriage represents the contribution of both spouses. “The property of the husband is usually the result of the joint efforts of both husband and wife....” *Weidman v. Weidman*, 57 Ohio St. 101, 104, 48 N.E. 506, 507 (1897). “Recognizing the right of the wife to participate in the accumulations which are presumably the result of their joint efforts and joint economies,...the law wisely awards the wife a just and equitable portion of the whole....” *State ex rel. Cook v. Cook*, 66 Ohio St. 566, 573, 64 N.E. 567, 568 (1902). *See also Strong v. Bueschner & Sons Co.*, 19 Ohio N.P. (n.s.) 49, 58 (C.P. Cuyahoga County 1916) (“In this state we have legislation which seems to proceed upon the theory that husband and wife are, for all practical purposes, partners engaged in a joint enterprise, not only of raising and maintaining a family, supporting themselves and making a home, but also in accumulating property.”) The Ohio Supreme Court adopted this analysis in *Wolfe v. Wolfe*, 46 Ohio St. 2d 399, 413, 350 N.E.2d 413, 422 (1976), by stating: “The court must approach the proceeding much like a suit in partition or an action to dissolve, windup and distribute the assets and liabilities of a partnership.” The court subsequently explained its use of the partnership analogy and stated: “Marriage is a union of equals.” *Cherry*, 66 Ohio St. 2d at 355, 421 N.E.2d at 1299.

Therefore, although R.C. 3103.04 explicitly recognizes a spouse’s right to keep separate property from control or use by the other spouse, the Ohio Supreme Court implicitly acknowledges that such property, especially earnings or profits generated during a marriage, may be treated as “marital property” subject to an equitable division between the spouses. To the extent that separate property of one spouse is used or made available to meet the expenses of either spouse, a benefit is bestowed on the other spouse because that other spouse need not meet that duty of support to the extent the expenses are already met. While it is clear that R.C. 3103.04 permits separate property completely beyond the control of the other spouse, when separate property is expended within the marriage to meet a marital obligation to support either spouse or to meet an obligation of the board member to support another dependent, the expenditure bestows a pecuniary benefit on the board member.

R.C. 3103.04, by expressly providing for spousal separate property, makes it possible for the member of the board of education to have no pecuniary interest in the earnings of the spouse, if none of the earnings are used to discharge the marital support obligation. Whether, in a given case, separate property is applied to marital support obligations is a question of fact. If separate property is applied

earnings of the other and concluded that, “[w]hile it is clear that R.C. 3103.04 permits separate property completely beyond the control of the other spouse, when separate property is expended within the marriage to meet a marital obligation to support either spouse or to meet an obligation of the board member to support another dependent, the expenditure bestows a pecuniary benefit on the board member.” 1989 Op. Att’y Gen. No. 89-030, at 2-126. The 1989 opinion also concluded, in the second paragraph of the syllabus, that “[a] member of the board of education has a pecuniary interest in a contract of the board where the member’s spouse is a partner in a law firm that is paid to serve as counsel to the board, if any of the share of earnings from the contract is used for the support of the board member or the spouse or another dependent of the board member.” The facts considered in that opinion are distinguishable from the facts currently under consideration because that opinion concerned an independent contractor relationship with a private law firm, rather than an employment relationship. *See generally* 1999 Op. Att’y Gen. No. 99-023, at 2-153 to 2-154; 1990 Op. Att’y Gen. No. 90-040, at 2-161 to 2-162.

Taken to its logical conclusion, however, the analysis set forth in 1989 Op. Att’y Gen. No. 89-030 suggests that, if a member of a board of education has a spouse who is employed by the school district, the board member has a pecuniary interest in the spouse’s compensation whenever the compensation is used for the support of the board member or a dependent of the board member – which, in general usage, appears to mean whenever the compensation is used for ordinary household purposes. If we assume that, in most instances, the compensation of both partners to a marriage is used to pay costs of supporting the couple and their children or other dependents, we are compelled by this analysis to conclude that, in ordinary circumstances, an individual is not permitted to serve on a board of education if the individual’s spouse is employed by the board of education.

The Ohio Supreme Court rejected this conclusion in 1922 in *Board of Education of Zaleski School District v. Boal* and we are not inclined to adopt it at this time. Instead, we follow the courts in concluding that neither R.C. 3313.33 nor R.C. 3319.21 prohibits a school board member from having a spouse who is employed by the board and receives standard compensation (including fringe benefits) that may be expended for the support and benefit of spouse and family.<sup>6</sup> We do not reconsider 1989 Op. Att’y Gen. No. 89-030 as it applies to a spouse who is an independent contractor, but we decline to apply the analysis of 1989 Op. Att’y Gen. No. 89-030 to a spouse who is an employee of the board of education. *See* 1994 Op. Att’y

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to the marital support obligation of either spouse, a pecuniary benefit exists and R.C. 3313.33 is violated.

<sup>6</sup> Other statutory provisions impose limitations on the school board member’s ability to take action to secure particular benefits for the member’s spouse. *See generally* 1990 Op. Att’y Gen. No. 90-040, at 2-162; Ohio Ethics Comm’n, Advisory Op. No. 98-003; Ohio Ethics Comm’n, Advisory Op. No. 92-012; Ohio Ethics Comm’n, Advisory Op. No. 89-005; Ohio Ethics Comm’n, Advisory Op. No. 82-003.

Gen. No. 94-039, at 2-200 n.2 (“it is well settled that an individual does not, merely as a result of a marital relationship, have an interest in his spouse’s earnings. The facts of a particular case may show, however, that an individual does derive a benefit from his spouse’s employment, and that such benefit constitutes an interest in a contract for purposes of statutory prohibitions” (citations omitted)). We note, further, that the 1989 opinion was issued prior to the *Steed* and *Scherer* cases, which indicate that *Board of Education of Zaleski School District v. Boal* remains valid.

As noted above, the conclusion that a board member has no pecuniary interest in the employee spouse’s compensation applies also to fringe benefits that are part of that compensation. See 1962 Op. Att’y Gen. No. 2855, p. 168 (free housing). See generally Ohio Ethics Comm’n, Advisory Op. No. 92-017. The inclusion of fringe benefits suggests, in the instant case, that the fact that the board member does not receive any type of group insurance benefit through the spouse is not a necessary condition to the conclusion that there is no violation of R.C. 3313.33 or R.C. 3319.21. See 1962 Op. Att’y Gen. No. 2855, p. 168. The case law finding that a board member’s spousal relationship to an employee of the board does not result in a direct or indirect pecuniary interest in a contract of the board indicates that the possibility that the board member might receive group insurance benefits, or that the spouse might have an option of providing such benefits to the board member, does not constitute a direct or indirect pecuniary interest for purposes of R.C. 3313.33 or R.C. 3319.21. See generally Ohio Ethics Comm’n, Advisory Op. No. 92-017 (syllabus, paragraph 2) (“[t]he Ohio Ethics Law and related statutes do not prohibit a member of a city school district board of education whose spouse is employed in the same school district from being covered by health insurance received by his spouse as an employee of the board member’s district pursuant to a collective bargaining agreement”).<sup>7</sup>

**Question Whether a School Board Member Who Participates as a Member of the School District’s Negotiating Team Has a Pecuniary Interest Under R.C. 3313.33 or R.C. 3319.21 in the Board’s Collective Bargaining Agreement with the Bargaining Unit in Which the Member’s Spouse Is Employed**

Having concluded that a school board member whose spouse is employed by the school district does not, by virtue of that relationship, have a pecuniary interest in the spouse’s contract with the school board for purposes of R.C. 3313.33 or R.C. 3319.21, we turn now to the question whether, by participating as a member of the school district’s negotiating team, the board

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<sup>7</sup> You have stated that the board member in question does not receive any type of group insurance benefit through the spouse or adult child. Even if no benefit is currently provided, the usual arrangement for providing health insurance permits family coverage under which the employee spouse could include the board member. If the employee spouse possesses the option of securing coverage for the board member, that option may, in some sense, constitute a benefit to the board member.

member might have a prohibited interest in the collective bargaining agreement that is negotiated with the union. On the facts provided, we consider only a situation in which the spouse is neither an officer of the union nor a member of the bargaining unit's negotiating team. The fact that the board member's spouse will be paid under the union contract creates a connection between the board member's actions and the well-being of the board member's family and thus creates an interest of some sort. *See, e.g., Scherer v. Rock Hill Local Sch. Dist. Bd. of Educ.*; 1931 Op. Att'y Gen. No. 3200, vol. I, p. 624, at 625. The question at issue is whether this is a pecuniary interest, direct or indirect, under R.C. 3313.33, or a pecuniary interest under R.C. 3319.21.

Because it has been concluded, as outlined above, that the school board member does not have a prohibited pecuniary interest under R.C. 3313.33 or R.C. 3319.21 in the compensation of the spouse (including fringe benefits), it must be concluded also that the member does not have a prohibited pecuniary interest under R.C. 3313.33 or R.C. 3319.21 in the master contract for the bargaining unit in which the spouse is employed. Apart from prohibiting certain specific types of contracts, R.C. 3313.33 and R.C. 3319.21 pertain to pecuniary interests and not to fiduciary interests or other types of conflicts. The interest of an officer or member of a negotiating team in a collective bargaining agreement has been characterized as a fiduciary interest. *See generally* Ohio Ethics Comm'n, Advisory Op. No. 92-017, at 5.<sup>8</sup> For a board member to negotiate a collective bargaining agreement contract covering an employee spouse might affect the member's fiduciary duties or raise concerns regarding the member's loyalties, but would not ordinarily grant the board member a pecuniary interest in the collective bargaining agreement. *See generally* Ohio Ethics Comm'n, Advisory Op. No. 92-017, at 8 (for purposes of R.C. 2921.42, "a member of a school district board of education whose spouse is employed by the same school district does not have an interest in: (1) his spouse's individual contract of employment with the school district; (2) the collective bargaining agreement entered into between the board of education and the labor organization covering employees of the school district; or (3) the board of education's procurement from a firm of health insurance for its employees").<sup>9</sup>

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<sup>8</sup> Ohio Ethics Comm'n, Advisory Op. No. 92-017, at 5-6, finds that an individual employee who is a member of a labor organization and is covered by a collective bargaining agreement does not have a definite and direct interest in the collective bargaining agreement sufficient under R.C. 2921.42 to prohibit a school board member from authorizing a public contract in which the member's spouse has an interest, except that if the employee spouse is an officer, board member, or member of the negotiating team of the labor organization, the spouse has a fiduciary interest in the agreement. It concludes that when the spouse does not have an interest in the collective bargaining agreement, the board member does not have an interest in the agreement even if the board member is covered by the spouse's insurance policy.

<sup>9</sup> Ohio Ethics Comm'n, Advisory Op. No. 92-017, at 12-13, concludes that, even though a school board member who receives health coverage through an employee spouse under a

There is no other apparent basis on which R.C. 3313.33 or R.C. 3319.21 would affect the ability of a board member to participate as a member of the school district's bargaining team in labor negotiations with a union to which the member's spouse belongs. We conclude, therefore, on the facts you have presented, that a school board member who has a spouse employed in a position within a bargaining unit of the school district and does not receive any type of group insurance benefit through the spouse is not prohibited by R.C. 3313.33 or R.C. 3319.21 from participating as a member of the school district's negotiating team when the spouse is neither an officer of the union nor a member of the bargaining unit's negotiating team.

There may, however, be other statutes that affect the school board member's ability to participate in the negotiation of that contract. *See generally* Ohio Ethics Comm'n, Advisory Op. No. 92-017; Ohio Ethics Comm'n, Advisory Op. No. 82-003. This opinion does not consider whether a prohibition exists under any statutory provisions other than R.C. 3313.33 and R.C. 3319.21, such as R.C. 102.03, R.C. 2921.42, or R.C. 4117.20(A). *See, e.g.,* notes 8 and 9, *supra*.

**Question Whether a School Board Member Has a Pecuniary Interest Under R.C. 3313.33 or R.C. 3319.21 in an Adult Child's Contract of Employment with the School District in a Position Within a Bargaining Unit**

We consider next whether R.C. 3313.33 or R.C. 3319.21 prohibits a school board member who has an adult child employed in a position within a bargaining unit of the school district, but does not receive any type of group insurance benefit through the adult child, from participating as a member of the school district's negotiating team when the adult child is neither an officer of the union nor a member of the bargaining unit's negotiating team. As mentioned above, this opinion does not consider whether a prohibition exists under any other statutory provision, such as R.C. 102.03, R.C. 2921.42, or R.C. 4117.20(A).

The same authorities concluding that it is permissible under R.C. 3313.33 and R.C. 3319.21 for a board of education to employ the spouse of board member also conclude that it is

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collective bargaining agreement does not have an interest in the collective bargaining agreement for purposes of R.C. 2921.42, the board member receives a definite benefit from the ratification of the collective bargaining agreement because the board member receives benefits under more favorable circumstances than other school board members. *See* note 4, *supra*. Thus, "R.C. 102.03(D) prohibits a member of a city school district board of education who is covered by health insurance which his spouse receives as an employee in the same school district pursuant to a collective bargaining agreement from voting, discussing, deliberating, recommending, or otherwise using his authority or influence as a board member to secure ratification of the collective bargaining agreement." Ohio Ethics Comm'n, Advisory Op. No. 92-017, at 13.

permissible for the board of education to employ an adult child of a board member.<sup>10</sup> In 1932, the Attorney General wrote: “Inasmuch as the case of *Board of Education vs. Boal* . . . has held that the employment of a person by a board, the member of which was her husband, did not violate [G.C. 12932, now R.C. 3319.21, or G.C. 4757, now R.C. 3313.33], certainly none of the relationships set forth in [G.C. 12932] would come within the prohibition contained in those provisions as to employment other than that of teacher or instructor, except perhaps where the person employed is an unemancipated minor child of the member of the board employing him.” 1932 Op. Att’y Gen. No. 4635, vol. II, p. 1091, at 1092; *see also* 1929 Op. Att’y Gen. No. 621, vol. II, p. 948.

1955 Op. Att’y Gen. No. 5811, p. 499, quotes R.C. 3313.33 and R.C. 3319.21<sup>11</sup> and states, at 500-01 (emphasis added):

Many opinions have been written by this office endeavoring to determine just what constitutes such a pecuniary interest on the part of a member of a board of education as will invalidate a contract entered into by such board. Thus, it has been held that *a contract made with the adult son of a member of the board of education for the transportation of pupils where the father has no direct financial interest in the contract is not illegal*. Opinion No. 3200, Opinions of the Attorney General for 1931, page 624.

1936 Op. Att’y Gen. No. 5807, vol. II, p. 1014, at 1016-17, states plainly: “A contract may lawfully be made with a person as teacher or instructor in the public schools who is related as father or brother, mother or sister to one of the members of the board of education making the contract if that relative does not vote for or participate in the making of the contract.”

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<sup>10</sup> A different conclusion was reached with regard to a minor child who had not been emancipated, on the ground that the parent had a right to the child’s wages. 1955 Op. Att’y Gen. No. 5811, p. 499, at 501 (citing *In re Removal of Leach*, 19 Ohio Op. 263 (C.P. Jackson County 1940), and 1923 Op. Att’y Gen. No. 302, vol. I, p. 236).

<sup>11</sup> The reference in the 1955 opinion to a direct financial interest is apparently based on R.C. 3319.21, which renders an act void if a school board member acts in a matter in which the member is pecuniarily interested. Because there is no evidence of any pecuniary interest on the facts you have described, this condition does not apply. The remaining prohibition set forth in R.C. 3319.21 applies to “the making of a contract with a person as a teacher or instructor in a public school,” when there is the relationship of father, brother, mother, or sister. A contract, i.e. a collective bargaining agreement, between the board of education and an employee organization is not the making of a contract with a named relative of a school board member. Therefore, this prohibition is not applicable to the situation you have described.

The general rule governing the economic relationship between parent and child was set forth in 1931 Op. Att’y Gen. No. 3200, vol. I, p. 624, at 625, as follows:

As a general rule, there does not exist a pecuniary interest between a father and son except where the son is a minor and the father is charged with the duty of his support. Even though the son may be a minor, it is well settled in this state that if the son is emancipated there exists no financial interest on the part of the father in the son. See Opinions of the Attorney General for 1927, page 2059.

Of course, if it can be proved that the father has a financial interest in the contract between the board of education and his son, then the prohibitory provisions of [G.C. 12932 and 4757, predecessors to R.C. 3319.21 and 3313.33] would apply; but, in the absence of such showing, there is no prohibition by statute against a member of a board of education voting for a contract to be made between the board of education and his son, who is of age, for the transportation of school pupils.

It should be noted there is a distinction between the financial obligation imposed by law on a father for the support of his minor son and the moral financial obligation that is generally recognized as existing between father and son, regardless of the age of the son.

Thus, a father ordinarily has no pecuniary interest in compensation earned by an adult child. *See also* 1990 Op. Att’y Gen. No. 90-040, at 2-164. As noted above, we understand that your question relates to this ordinary situation. *See generally* Ohio Ethics Comm’n, Advisory Op. No. 93-008, at 3.

We conclude, therefore, on the facts you have presented, that a school board member who has an adult child employed in a position within a bargaining unit of the school district and does not receive any type of group insurance benefit through the adult child does not have a prohibited interest under R.C. 3313.33 or R.C. 3319.21 in the adult child’s contract of employment with the board. This opinion does not consider whether a prohibition exists under any other statutory provision, such as R.C. 102.03, R.C. 2921.42, or R.C. 4117.20(A). *See* notes 1 and 2, *supra*.

**Question Whether a School Board Member Who Participates as a Member of the School District’s Negotiating Team Has a Pecuniary Interest Under R.C. 3313.33 or R.C. 3319.21 in the Board’s Collective Bargaining Agreement with the Bargaining Unit in Which the Member’s Adult Child Is Employed**

As in the situation involving the spouse, there remains the question whether, even though a school board member does not have a prohibited interest in the employment contract of the adult child, a school board member who participates on the school district’s negotiating team might have a prohibited interest in the master contract that is negotiated with the union. As in the case of the spouse, the fact that the member’s adult child will be paid under the union contract creates a connection between the board’s action and the well-being of the member’s

adult child and thus creates an interest of some sort. *See, e.g.*, 1931 Op. Att’y Gen. No. 3200, vol. I, p. 624, at 625. As concluded in the case of the spouse, however, because the board member does not have a prohibited pecuniary interest under R.C. 3313.33 or R.C. 3319.21 in the compensation of the adult child, it must be concluded also that the member does not have a prohibited pecuniary interest under R.C. 3313.33 or R.C. 3319.21 in the master contract with the bargaining unit in which the adult child is employed. *See generally* Ohio Ethics Comm’n, Advisory Op. No. 92-017, at 6 (an officer, board member, or member of the negotiating team of a labor organization has a fiduciary interest, but not a pecuniary interest, in a collective bargaining agreement); Ohio Ethics Comm’n, Advisory Op. No. 82-003, at 2 (a teacher has a definite, direct, and pecuniary interest in the teacher’s individual contract of employment; however, an individual teacher’s interest in the master union contract is analogous to an employee’s interest in the employer’s contracts and does not invoke the prohibitions of R.C. 2921.42 unless the employee is an officer, board, member, or member of the union’s negotiating team). Again, there may be other statutes that affect the board member’s ability to participate in the negotiation of that contract. *See generally* Ohio Ethics Comm’n, Advisory Op. No. 92-017; Ohio Ethics Comm’n, Advisory Op. No. 82-003.

We conclude, accordingly, on the facts you have presented, that a school board member who has an adult child employed in a position within a bargaining unit of the school district and does not receive any type of group insurance benefit through the adult child is not prohibited by R.C. 3313.33 or R.C. 3319.21 from participating as a member of the school district’s negotiating team when the adult child is neither an officer of the union nor a member of the bargaining unit’s negotiating team. This opinion does not consider whether a prohibition exists under any other statutory provision, such as R.C. 102.03, R.C. 2921.42, or R.C. 4117.20(A).

### **Implications of this Opinion**

This opinion follows the principles set forth in *Board of Education of Zaleski School District v. Boal* and reaches the reasonable conclusion that R.C. 3313.33 and R.C. 3319.21 should not be read to find a prohibited pecuniary interest in the fact that a member of a board of education has a spouse who is employed by the board of education and receives standard compensation (including fringe benefits) that may be used for the support and benefit of spouse and family. The provisions of R.C. 3313.33 and R.C. 3319.21 establish general prohibitions and set forth very limited exceptions. It is appropriate to construe them to reflect the understanding of the courts and the apparent intent of the General Assembly. *See, e.g., Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902) (syllabus, paragraph 1) (“[t]he object of judicial investigation in the construction of a statute is to ascertain and give effect to the intent of the law-making body which enacted it”).

In contrast, the provisions of R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43 contain numerous exceptions and are designed to be applied to particular fact patterns. They are under the jurisdiction of the Ohio Ethics Commission, and persons who request opinions may be guaranteed immunity under an opinion of the Ohio Ethics Commission. *See* note 1, *supra*. In addition, the provisions of R.C. 4117.20 may be applied by the State Employment Relations

Board (SERB) to determine whether an unfair labor practice exists in a particular situation. *See* note 2, *supra*. Hence, our conclusion that R.C. 3313.33 and R.C. 3319.21 do not prohibit particular situations does not mean that those situations are in all cases permissible. It means only that they are not prohibited by these two statutes. We acknowledge, of course, that this opinion expresses our analysis of R.C. 3313.33, R.C. 3319.21, and related legal authorities, and that we cannot predict what conclusion a court might reach if it were to consider these issues in a specific case. *See, e.g.*, 2006 Op. Att’y Gen. No. 2006-054, at 2-566.

In addition to statutory provisions, there may be common law principles that are applicable to the actions of a school board member, such as principles governing conflicts of interest and the appearance of impropriety. *See generally, e.g.*, 1994 Op. Att’y Gen. No. 94-039, at 2-200 to 2-201; 1990 Op. Att’y Gen. No. 90-040, at 2-162 to 2-163; Ohio Ethics Comm’n, Advisory Op. No. 98-003, at 4 (“[t]he Commission has repeatedly advised public officials that when a family member is employed by a political subdivision subject to the terms and conditions of a collective bargaining agreement, the officials should refrain from taking an active role in the negotiations of that agreement in order to avoid an appearance of impropriety”). While we are aware of these principles, it is our judgment in the instant case that relevant statutes address your question with sufficient specificity that it is not necessary for us to discuss uncodified principles of ethics in government.

### **Conclusion**

For the reasons discussed above, it is my opinion, and you are advised that neither R.C. 3313.33 nor R.C. 3319.21 prohibits a school board member who has a spouse or adult child employed in a position within a bargaining unit of the school district, and who does not receive any type of group insurance benefit through the spouse or adult child, from participating as a member of the school district’s negotiating team when the spouse or adult child is neither an officer of the union nor a member of the bargaining unit’s negotiating team. This opinion does not consider whether a prohibition exists under any other statutory provision, such as R.C. 102.03, R.C. 2921.42, or R.C. 4117.20(A).

Respectfully,



MARC DANN  
Attorney General