OPINION NO. 81-101

Syllabus:

1. Pursuant to R.C. 340.02, a school principal may not serve on a community mental health board when his employing school board has contracted with the mental health board.

2. If a school principal was appointed to a board of mental health prior to the effective date of Am. Sub. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980), he may serve out the remainder of his term, even when the school board and mental health board have entered into a contract for services, as long as he has no definite, direct interest in the contract between the school board and the mental health board.

To: Gregory W. Happ, Medina County Pros. Atty., Medina, Ohio
By: William J. Brown, Attorney General, December 21, 1981

I have before me your predecessor's request for an opinion concerning whether, in light of R.C. 340.02, as amended by Am. Sub. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980), a school principal may serve as a member of a community mental health board, when his employing school board has entered into a contract for services with the mental health board. I understand from the request that the principal was appointed to the mental health board prior to the enactment of Am. Sub. S.B. 160. Your predecessor mentioned, as a point of information, that the principal is not employed at the school which offers the program provided by the mental health board.

In responding to your predecessor's question, two issues must be addressed:

whether the language of R.C. 340.02, as amended, prohibits the principal from serving on the mental health board; and, if so, whether R.C. 340.02, as amended by Am. Sub. S.B. 160, should be applied to board members appointed prior to the effective date of the act.

R.C. 340.02 was revised by Am. Sub. S.B. 160 to read in part: "No member of a community mental health board shall be an employee of any agency with which the mental health board has entered into a contract for the provision of services or facilities." In this situation, the mental health board has entered into a contract for the provision of services with the school board. The school principal is an employee of the school board. See R.C. 3319.02. Thus, by the clear language of R.C. 340.02, the principal is prohibited from serving as a member of the mental health board, even though he would have no direct involvement with the contract for services between the two boards. There is no exception from the absolute prohibition against an employee of a contract agency serving on a mental health board.

It is instructive to compare R.C. 340.02 to the conflict of interest provisions concerning members of boards of mental retardation, which were also enacted by Am. Sub. S.B. 160. R.C. 5126.03 reads in part:

> (B) A person may not serve as a member of a county board of mental retardation and developmental disabilities when either he or a member of his immediate family is a board member of a contract agency of that county board unless there is no conflict of interest. In no circumstance shall a member of a county board vote on any matter before the board concerning a contract agency of which he or a member of his immediate family is also a board member or an employee. All questions relating to the existence of a conflict of interest shall be submitted to the local prosecuting attorney and the Ohio ethics commission for resolution.
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> (C) No employee of an agency contracting with a county board of mental retardation and developmental disabilities or member of the immediate family of such an employee shall serve as a board member or an employee of the county board unless the county board passes a resolution establishing the eligibility of such person for appointment. (Emphasis added.)

(Divisions (A), (D), and (E) of R.C. 5126.03 set out those arrangements which are absolutely prohibited.) R.C. 5126.03(B) and (C), which closely resemble the common law rule regarding conflict of interest,[1] demonstrate that, when the legislature

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[1]Under the common law rule of conflict of interest, which applies to a public officer who holds a private position, as well as to a public officer who holds another public office or employment, see 1979 Op. Att'y Gen. No. 79-055, a public officer is prohibited from holding dual positions if he would be subject to conflicting duties or loyalties, or if he would be exposed to the temptation of not acting in the best interest of the public. See 1979 Op. Att'y Gen. No. 79-111. A conflict of interest can also arise when a person in one position is charged with supervising his performance in a second position. See State ex rel. Attorney General v. Gebert, 12 Ohio C.C. (n.s.) 274 (Cir. Ct. Franklin County 1909). However, "where possible conflicts are remote and speculative, the common law compatibility or conflict of interest rules are not violated." Op. No. 79-111 at 2-372 (citations omitted). Where a conflict is remote and speculative, a public officer may hold a second position, but is expected to abstain from voting upon, or otherwise participating in, any matter between the two entities he serves. See 1981 Op. Att'y Gen. No. 81-010.

1970 Op. Att'y Gen. No. 70-068 and 1979 Op. Att'y Gen. No. 79-049 dealt with community mental health board members under a common law approach to conflict of interest. However, these opinions were overruled in 1981 Op. Att'y Gen. No. 81-100, due to the change in statutory law made by Am. Sub. S.B. 160.

intended to prohibit only those arrangements and actions which present an actual conflict of interest, it used language different from that used when the legislature intended to absolutely prohibit certain situations. The language of R.C. 340.02 clearly falls within the latter classification.

I am aware that the result seems rather harsh under these particular circumstances. However, where the legislature has so clearly indicated its intent that community mental health board members are not to serve as employees of a contract agency, I have no authority to read in exceptions to the prohibition. See Doll v. State, 45 Ohio St. 445, 449, 15 N.E. 293, 295 (1887) ("[t]he surest means of preventing this [fraudulent practices by public officials], was to prohibit all such [public] contracts [in which public officials are interested]; and the legislature having employed language sufficiently clear and comprehensive for this purpose, there is no authority in the courts under the pretext of construction to render nugatory the positive provisions of the statute"). See also Wachendorf v. Shaver, 149 Ohio St. 231, 237, 78 N.E.2d 370, 374 (1948) ("general words are to have a general operation, where the manifest intention of the Legislature affords no ground for qualifying or restraining them. . . . The Legislature will be presumed to have intended to make no limitations to a statute in which it has included by general language many subjects, persons or entities, without limitation").

Indeed, if R.C. 340.02 were ambiguous and susceptible of construction, an applicable rule of statutory construction would be that statutes enacted to prohibit fraud are to be construed to prevent, rather than encourage, the improper behavior meant to be avoided. See State ex rel. Taylor v. Pinney, 13 Ohio Dec. 210 (C.P. Franklin County 1902). See also Chesapeake & Ohio Ry. Co. v. W.G. Ward Lumber Co., 1 Ohio App. 164 (Lawrence County 1913). "The public policy against conflicts in interest is so strong that, even where such an arrangement appears to be clearly innocent and beneficial to the public, the courts have refused to give it their sanction." 1971 Op. Att'y Gen. No. 71-020 at 2-56. See Madison County v. Lukens, 35 Ohio L.Abs. 66, 39 N.E.2d 534 (Ct. App. Madison County 1939). Even though it may actually be of benefit to the public for certain employees of the school board (or of any contract agency) to serve on the mental health board, the legislature has conclusively determined that such a situation is impermissible. We have no choice at this time but to follow the statutory mandate. If the consequences appear to be harsh or unfair, the remedy lies with the legislature.

Having concluded that R.C. 340.02, as amended by Am. Sub. S.B. 160, does prohibit a school principal from serving as a mental health board member when the mental health board and employing school board have contracted, the next question for resolution is whether this prohibition applies to board members appointed prior to the enactment of Am. Sub. S.B. 160, necessitating their removal from the board. (Prior to the enactment of Am. Sub. S.B. 160, a board member could be removed only for neglect of duty, misconduct, or malfeasance in office. See 1967-68 Ohio Laws 333 [Am. H.B. 648, eff. Oct. 26, 1967]). This question has been discussed at length in 1981 Op. Att'y Gen. No. 81-100. I will briefly summarize this discussion in order to provide an answer to your predecessor's specific question.

Section three (uncodified) of Am. Sub. S.B. 160 states in part: "members appointed to. . .a community mental health and retardation board prior to the effective date of this act shall complete the terms for which they were appointed,

unless a member. . .is removed from office in accordance with section 340.02. . .of the Revised Code." R.C. 340.02[2] does not provide for the mandatory removal of board members who are also employees of a contract agency. Thus, they may serve out the remainder of their terms, pursuant to section three of the act.

I note, however, that R.C. 2921.42(A)(4), which became effective January 1, 1974 (1971-72 Ohio Laws 1866 [Am. Sub. H.B. 511, eff. Jan. 1, 1974]) provides that, "[n]o public official shall knowingly. . .[h]ave 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." Pursuant to R.C. 2921.42(A)(4), a public official may be prohibited from serving as an employee of an agency which contracts with his governmental body, if the particular facts indicate that he has a definite, direct interest in his employer's contracts (and if he does not fall within the exceptions to R.C. 2921.42(A) set out in divisions (B) and (C)). See Ohio Ethics Commission, Advisory Opinion No. 80-003; Ohio Ethics Commission, Advisory Opinion No. 78-006. A board member in violation of R.C. 2921.42(A)(4) (a first degree misdemeanor, R.C. 2921.42(D)), could be removed, regardless of the date of his appointment, since such a violation could be found to constitute malfeasance or misconduct, grounds for removal under the previous, as well as current, version of R.C. 340.02. (R.C. Chapter 102 and R.C. 2921.42(A)(1) set out other conflict of interest provisions with which a mental health board member must comply.)

Under the facts presented by your predecessor, it would appear that the principal involved does not have a definite, direct interest in the school board's contract with the mental health board. Accordingly, I find that, the principal may serve out his term with the mental health board.

In conclusion, it is my opinion, and you are advised, that:

1. Pursuant to R.C. 340.02, a school principal may not serve on a community mental health board when his employing school board has contracted with the mental health board.

2. If a school principal was appointed to a board of mental health prior to the effective date of Am. Sub. S.B. 160, 113th Gen. A. (1980) (eff. Oct. 31, 1980), he may serve out the remainder of his term, even when the school board and mental health board have entered into a contract for services, as long as he has no definite, direct interest in the contract between the school board and the mental health board.

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[2]The removal provisions of R.C. 340.02 read as follows:

> Any member of the board may be removed from office by the appointing authority for neglect of duty, misconduct, or malfeasance in office, and shall be removed by the appointing authority if the member's spouse, child, parent, brother, sister, stepparent, stepchild, stepbrother, stepsister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law serves as a county commissioner of a county or counties under the jurisdiction of the community mental health board or serves as a member or employee of the board of an agency with which the mental health board has entered a contract for the provision of services or facilities. The member shall be informed in writing of the charges and afforded an opportunity for a hearing. (Emphasis added.)