OPINION NO. 73-132

Syllabus:

A board of education cannot enter into a contract with a company in which a member of the board has a substantial ownership in the absence of extraordinary circumstances involving the continued operation of the schools.

To: Richard E. Bridwell, Muskingum County Pros. Atty., Zanesville, Ohio
By: William J. Brown, Attorney General, December 20, 1973

I am in receipt of your request for my opinion asking whether a community antenna cable television company, owned by a member of a local board of education, may contract with the board to provide service for a fee to the schools of the district. The company is the only one offering such service in the area.

The answer to your question depends on R.C. 3313.33, which governs the contracts entered into by school boards. It provides:

> "Conveyances made by a board of education shall be executed by the president and clerk thereof. 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 he is a member except as clerk. No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board.

This section does not apply where a member of the board, being a shareholder of a corporation but not being an officer or director thereof, owns not in excess of five per cent of the stock of such corporation. If a stockholder desires to avail himself of the exception, before entering upon such contract such person shall first file with the clerk an affidavit stating his exact status and connection with said corporation.
(Emphasis added.)

This Section specifically prohibits a board member having either a direct or indirect pecuniary interest in a contract of the board. In Grant v. Brouse, 1 Ohio N.P. 145 (1894), in which a member of a board of education sold goods valued at $28.09 to the board through a partnership of which he was a member, the court stated that:

"* * *The fact that Cornelius A. Brouse was, at this time, a member of the firm of C.A. Brouse & Co., necessarily implies that he had a pecuniary interest in the contract of sale made by the firm with the board, and being so, it was a contract the board was prohibited from making, and therefore one it had no right to make; nor did it have any right to allow the bill of the firm, or draw an order for its payment on the treasurer of the board.

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"* * *I have no doubt that the member of the board, who sold these articles, undertook to make a favorable arrangement for the public. Nothing to the contrary is asserted, and it is urged in fact, by the defendants, as a reason why this court should not interfere with its jurisdiction, that no pecuniary injury in fact resulted.

"But we cannot look upon it in this light. * * *The law was made in the interests of sound public policy, and while in some cases it may appear to be more advantageous to ignore than to obey the law, yet we think no public of can violate a direct provision of law, directing the performance of his duty, or prohibiting certain acts, and have his conduct judicially approved. And where the matter comes before the court, it ought to carefully see to it, that public policy is upheld. I know of no better way of preserving the virtue of the public, than to have its officers understand and act as if they were public servants, always recognizing that official position constitutes a public trust that must be sacredly carried out. * * *"

In Opinion No. 2466, Opinions of the Attorney General for 1961, which concerned school board members employed as milk truck route drivers for a company that had contracted with the board, and a board member who was also employed by an automobile agency which had contracted to sell buses to the board, my predecessor said:

> "1. Contracts for the sale of milk executed between a board of education and a milk company which employs two members of the bard of education as salaried milk truck drivers are invalid, being violative of Section 3313.33, Revised Code.
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> "2. Contracts for sales of school buses executed between a board of education and an automobile sales agency which employs a member of the board of education on a salary basis are invalid, being violative of Section 3313.33, Revised Code."

In a similar instance, another Attorney General said, in Opinion No. 6672, Opinions of the Attorney General for 1956:

> "1. A member of a board of education who is employed by a concern which sells large quantities of school supplies to such board, upon orders which he, as a member of such board, approves, has an interest in such contracts of sale within the provisions of Section 3313.33, Revised Code.
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> "2. A member of a board of education who is regularly employed as attorney by a casualty company from which said board purchases large amounts of insurance and bonds, has an interest in such contracts of purchase, within the provisions of Section 3313.33, Revised Code."

Cf., also, Opinion No. 73-043, Opinions of the Attorney General for 1973.

The prohibition is not quite as strict as some of the above language would lead one to believe. For instance, R.C. 3313.33 itself makes an exception for a board member who owns no more than five percent of the stock of a corporation with which the board contracts. And in Opinion No. 70-107, Opinions of the Attorney General for 1970, my predecessor found "extenuating circumstances" under which a contract between an electrical company and the board of education could be approved, even though a board member was employed by the company. In explaining this ruling my predecessor said:

> "If there were only one source of electrical power that could be used in the schools, it would be impossible for any employee (officer) to influence the school board's decision. This case could then be distinguished from the earlier opinions of this office mentioned above, on the grounds that any influence or advantage possessed by the board member for the benefit of his employer, under these circumstances, would be nonexistent."

In a situation in which the schools could not continue to operate without entering into a contract with a board member's

company, where the relationship of the board member to the company is fully disclosed, and where precautions are taken to ensure that no unfair advantage is taken of the board, I do not believe that the rule should be applied woodenly. See Opinion No. 71-048, Opinions of the Attorney General for 1971; and cf. also, State, ex rel. Corrigan v. Hensel, 2 Ohio St. 2d 96 (1965). The circumstances to justify such an exception must, of course, be extraordinary, and I am satisfied that the situation you propose does not meet the test.

In specific answer to your question it is my opinion, and you are so advised, that a board of education cannot enter into a contract with a company in which a member of the board has a substantial ownership in the absence of extraordinary circumstances involving the continued operation of the schools.