March 22, 1999

OPINION NO. 99-023

The Honorable Dean Holman
Medina County Prosecuting Attorney
60 Public Square
Medina, Ohio 44256

Dear Prosecutor Holman:

We have received your request for an opinion concerning a contract between the board of education of a local school district and an educational service center. The specific question is whether R.C. 3313.33 prohibits such a contract when an individual who serves as a member of the board of education is employed by the educational service center of the county in which the local school district is located.[1]

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[1] An educational service center is the successor to what was formerly known as a county school district. *See* Am. Sub. H.B. 117, 121st Gen. A. (1995) (eff. June 30, 1995) (amending, among other sections, R.C. 3311.05). In general, an educational service center consists of territory within a county that is not included in a city school district or exempted village school district. R.C. 3311.05(A); *see also* R.C. 3311.053-.054. For purposes of R.C. Title 33, an educational service center is included as a "school district" and the governing board of an educational service center is included as a "school board" or "board of education" when the statute does not expressly refer to types of school districts or school boards. R.C. 3311.055.

An educational service center is responsible for prescribing a curriculum for all schools under its control and for providing them with supervisory services. R.C. 3301.0712; R.C. 3313.60; R.C. 3317.11(A). It provides various types of services and support for school districts within its boundaries and can contract for cooperative arrangements. *See, e.g.*, R.C. 3301.0712; R.C. 3313.376; R.C. 3313.841; R.C. 3313.843; R.C. 3315.07; R.C. 3317.11; R.C. 3319.07; 5 Ohio Admin. Code Chapter 3301-38. If a local school district fails to perform its statutory duties, the educational service center must take action to carry out those duties. R.C. 3313.85. An educational service center has general powers to contract and to acquire property. R.C 3313.17; *see also* R.C. 3313.36-.371.

You have described a situation in which a particular individual was serving as a member of the board of education of a local school district. While so serving, that individual was hired by the educational service center.

The facts you have provided to us show that the educational service center in question has entered into a contract with the local school district under which the center will provide the district with certain technological services in exchange for specified fees.[2] The contract provides for consultant services, support hours, and film library services. A contract for the provision of such services to the local school district in question was in effect for the year during which the subject employment commenced. The board of education and educational service center also entered into similar agreements for the preceding and following years.[3]

Under the contract in question, the local school district agreed to pay nearly $6,000 to the educational service center to have technological services provided during the school year. That amount is less than one percent of the educational service center's technology budget.

The individual in question accepted employment with the educational service center as a technology consultant. He provides no services to the local school district in question, but does provide technological services to other school districts and primarily to a particular city school district.[4]

A question arose concerning the propriety of this arrangement in light of R.C. 3313.33. In the situation in question, the individual resigned from the school board. You have asked whether R.C. 3313.33 would prohibit a contract between the school board and the educational

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An educational service center is required to adopt a plan of service that sets forth the manner in which it will provide services to its local school districts. R.C. 3301.0712. The service plan must address such matters as physical facilities, fiscal monitoring, personnel, and curriculum development and must meet state minimum standards. An educational service center that fails to follow its plan and meet applicable requirements may be dissolved and its territory transferred to adjacent service centers. *Id*.

[2] Local school districts are given statutory authority to purchase technological services. *See, e.g.*, R.C. 3313.17; R.C. 3313.36-.37; note 1, *supra*.

[3] You have raised no questions concerning the authority under which the contract was adopted or the terms of its provisions, and this opinion does not consider those matters.

[4] It is understood that the individual is not a licensed employee for purposes of R.C. 307.031 and R.C. 3319.19.

service center had that individual not resigned. You are seeking guidance concerning the proper interpretation and application of R.C. 3313.33 in the event that a similar situation should occur again.

Let us begin by examining the statute in question. It states:

> Conveyances made by a board of education shall be executed by the president and treasurer 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. No contract shall be binding upon any board unless it is made or authorized at a regular or special meeting of such board.
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> 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 treasurer an affidavit stating his exact status and connection with said corporation.
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> This section does not apply where a member of the board elects to be covered by a benefit plan of the school district under division (D) of section 3313.202 [3313.20.2] of the Revised Code.

R.C. 3313.33 (emphasis added).

The language of the statue is clear: no member of a school board may have "*directly or indirectly, any pecuniary interest* in any contract of the board." R.C. 3313.33 (emphasis added). A statutory exception applies when a school board member is a shareholder of a corporation (but not an officer or director), owns no more than five percent of the stock, and files an affidavit describing the connection with the corporation. Another statutory exception permits a member of the board to elect coverage under a benefit plan of the school district pursuant to R.C. 3313.202.

Apart from the stated exceptions, the language of the statute prohibits a school board member from having a direct or indirect pecuniary interest in any contract of the board. *See Grant v. Brouse*, 1 Ohio N.P. 145, 145 (C.P. Summit County 1894) (finding the language "so plain as not to need construction"); *see also* 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"). The statute provides no exception if a member with a pecuniary interest does not participate in deliberations and refrains from voting. It provides no exception for a contract that works to the advantage of the school district and is entered into in good faith, even if it provides for the sale of merchandise or supplies below cost or without profit. *See, e.g., In re Removal of Leach*, 19 Ohio Op. 263 (C.P. Jackson County 1940); *Grant v.*

Brouse; 1989 Op. Att'y Gen. No. 89-030. To determine whether the prohibition is applicable in the situation you have described, it is necessary to determine whether an employee of the educational service center would be found to have a "pecuniary interest" in the contract in question.

On the facts that you have presented, the educational service center receives funds from the local school district in exchange for providing technological services. Thus, money that the local school district agrees to pay to an educational service center comes from the district's budget and benefits the educational service center. Accordingly, there is a pecuniary transfer. The money received by the educational service center is available for the center to use in funding its provision of technological services. That funding includes payment of individuals who staff the technology service program, including the individual in question. Money derived under the contract may affect the amount of compensation that the individual receives or the nature and extent of his duties. Even if the individual's particular duties and compensation cannot be tracked to the dollars in question, the existence, operation, and staffing level of the technology service program may be affected by the aggregate amounts received from school districts pursuant to contract. Therefore, because the contract in question helps to fund the entity that employs the individual in question, that individual has a pecuniary interest in the contract.

One of my predecessors addressed the question whether an employee must be considered to have a pecuniary interest in every contract of the employer, even if the employee's compensation bears no relationship to the particular contract. 1956 Op. Att'y Gen. No. 6672, p. 432. The conclusion was that there is a prohibited interest, even if the employee has no ownership interest in the company, sells on a commission basis, and does not sell to the school board. The opinion states:

> In the case of the board member who is an employee selling certain articles on commission for a company which has extensive dealings with his board, it would of course be impossible from the facts which you state to trace any actual interest which he might have as a member of the board, in contracts made by his board with that corporation. However, it must be manifest that a company which deals extensively with a board of education in the sale of school equipment, would certainly be put in a highly advantageous position by having one of its employees on the board of education, and the temptation on the part of that board member to throw all of his influence in favor of the company by which he is employed, would seem almost overpowering.

Id. at 440. Hence, even a very indirect interest was found to be prohibited.

The 1956 opinion relied on the reasoning set forth in an earlier opinion, as follows:

> Provisions such as these are merely enunciatory of common law principles. *Nunemacher* vs. *Louisville*, 98 Ky. 384. These principles are that no

> man can faithfully serve two masters and that a public officer should be absolutely free from any influence which would in any way affect the discharge of the obligations which he owes to the public. It is only natural that an officer who is an employe of a concern would be desirous of seeing a contract for the purchase of supplies by the city awarded to his employer, rather than to one with whom he has no relationship. Such an officer would certainly be interested in such a contract or expenditure, *at least to the extent that upon the success of his employer's business financially primarily depends the continued tenure of his position and the compensation he receives for his services as such employe*. This is especially objectionable where such officer is a member of the board which makes such contract or authorizes such expenditure on behalf of the city.

1933 Op. Att'y Gen. No. 179, vol. I, p. 214, at 215 (emphasis added).

The conclusion that a school board member employed by an educational service center would have a pecuniary interest in the board's contract with the center is consistent with prior Attorney General opinions which have found that a school board member employed by a private entity has an indirect interest in a contract between the board and the member's employer. The finding of a pecuniary interest is based upon the perceived benefits the board members would gain from sending their employers additional business. *See, e.g.*, 1961 Op. Att'y Gen. No. 2466, p. 494 (prohibiting contract when school board member is salaried milk truck driver or salaried employee of automobile sales agency, even if member receives no monetary benefits from the contract); 1956 Op. Att'y Gen. No. 6672, p. 432 (prohibiting contract when school board member is employed on a commission basis by concern that sells school supplies, even if the member does not sell the supplies, or when school board member is a member of law firm that is employed by casualty company that sells insurance and bonds to the school board); 1948 Op. Att'y Gen. No. 3075, p. 197 (prohibiting contract when school board member is foreman for a school bus dealer and is paid a salary only); *see also* 1973 Op. Att'y Gen. No. 73-043 (analogous situation involving member of city council who is employee of insurance company).

This conclusion is supported by cases and opinions considering similar statutory language relating to other public officers. In *Doll v. State*, 45 Ohio St. 445, 15 N.E. 293 (1887), the Ohio Supreme Court considered a statute that provided a criminal penalty for a public officer or employee who "shall become, directly or indirectly, interested in any contract for the purchase of any property or fire insurance for the use of the state, county, township, city, town, or village." *Doll v. State*, 45 Ohio St. at 446, 15 N.E. at 294. The court stated:

> To permit those holding offices of trust or profit to become interested in contracts for the purchase of property for the use of the state, county, or municipality of which they are officers, might encourage favoritism, and fraudulent combinations and practices, not easily detected, and thus make such officers, charged with the duty of protecting those whose interests are confided to them, instruments of harm. The surest means of preventing this, was to *prohibit all such contracts*; 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.

Id. at 449, 15 N.E. at 295 (emphasis added). *See also* 1968 Op. Att'y Gen. No. 68-111.

It is clear, on the facts you have presented, that the individual's pecuniary interest in the contract is a small one. It is also clear that the pecuniary interest is indirect, because the dollars expended by the school district are not paid directly to this individual. Nonetheless, there is a connection between the contract and the individual's employment that is sufficient to compel the conclusion that, on the facts presented, the employee has an indirect pecuniary interest in the contract between the center and the board.

The language that prohibits a member of the board from having a pecuniary interest in a contract of the board has generally been read as rendering void, or at least illegal, any contract that grants such an interest. *See, e.g.*, *Grant v. Brouse* (finding that a contract with a mercantile business firm is void when a member of the firm is a school board member, even if the arrangement is favorable for the board); 1961 Op. Att'y Gen. No. 2466, p. 494; 1948 Op. Att'y Gen. No. 3075, p. 197; 1918 Op. Att'y Gen. No. 911, vol. 1, p. 20; *see also* R.C. 3319.21 (when a member of a board of education "acts in any matter in which he is pecuniarily interested, … such act in such matter, is void"). Hence, the conclusion that a board member would have a pecuniary interest in the contract would generally render the contract invalid, unless an exception to the statute can be found. *But see Scherer v. Rock Hill Local School Dist. Bd. of Educ*., 63 Ohio App. 3d 555, 579 N.E.2d 525 (Lawrence County 1990) (finding that indirect benefit received by school board member where wife was employed by the board as an assistant nurse did not constitute a pecuniary interest for purposes of R.C. 3313.33 and stating that a violation of R.C. 3313.33 does not result in the contract being void).

Let us turn now to the question whether there is some exception that removes the case in question from the clear language of the statute. Your letter suggests that an exception to the general applicability of R.C. 3313.33 might be derived in the instant case from the fact that both entities are public entities and there is statutory authority for contracts between the two.[5] As noted above, an educational service center is authorized to provide certain services to local

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[5] Your letter of request makes reference to R.C. 3313.843 as authority for the contract in question. That section, however, contains express authority for a contract only between an educational service center and the board of education of a city or exempted village school district, within the limits set forth in the statute. Authority for a contract between an educational service center and a local school district must be derived, accordingly, from some other statutory provision. *See* notes 1-3, *supra*.

school districts. *See* note 1, *supra*. The manner in which funding of an educational service center is achieved is complicated and you have not asked that we examine that funding in detail. *See, e.g.*, R.C. 307.031; R.C. 3317.023-.024; R.C. 3317.05; R.C. 3317.11; R.C. 3319.19. It is sufficient for purposes of this opinion to note that, under the contract, the school district selects the amounts and types of technological services it chooses to purchase. The contract provides for the district to pay the educational service center money for the center to use in providing the designated services. The center can spend that money for any authorized purpose, including paying the people who provide the services. An individual who works for the center has an indirect interest in money that comes into the center, because the center provides that individual with compensation.

It does not appear that the public nature of the center is sufficient to remove it from the general operation of R.C. 3313.33. Rather, authorities that have addressed the issue have concluded that prohibitions against interests in public contracts apply to contracts with other public entities as well as to contracts with private entities. For example, a California case considered a statute that prohibited a financial interest in any contract made by a county officer in his official capacity and stated: "There is no suggestion in the statutory language that [the prohibition] is not applicable to a situation such as the one before this court where an official has a private financial interest in a contract made by him in his official capacity with another governmental entity." *People v. Vallerga*, 67 Cal. App. 3d 847, 870, 136 Cal. Rptr. 429, 441 (2d Dist. 1977). Had the General Assembly intended to exclude public contracts from the provisions of R.C. 3313.33, it could easily have done so, but it did not. *See generally, e.g.*, 1938 Op. Att'y Gen. No. 2854, vol. II, p. 1596, at 1597 (code sections including predecessor to R.C. 3313.33 are "so drawn as to include by their words practically all officers and all types of contracts").[6]

Indeed, the conclusion that an interest accrued through employment with a public entity is also prohibited appears to be an appropriate result. The statutes are directed at those who would benefit themselves at the expense of the public. Even as a public official is not permitted to use a contract with a private entity to accrue personal benefits, so also the official is not permitted to use a contract with a public entity to accrue personal benefits. Although the center is not a profit-making entity, it must make management decisions concerning its staff, and those decisions could be made in a manner that favors a particular employee. For example, the employee could be placed in a better-paying job or be retained when other employees are laid off, and moneys from a contract with the board could be used to bring about such a result. The

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[6] This situation can be distinguished from a situation in which a public entity is performing statutory functions for other public entities without authority to charge those entities for costs of performing the functions. *See* 1982 Op. Att'y Gen. No. 82-011.

statute is designed to prohibit a school board member from having such an indirect pecuniary interest in a contract of the board.[7]

It might be suggested, also, that the interest in question should be excepted from R.C. 3313.33 either because it is very indirect or because it is very small in relation to the center's total budget for technological services. It can be argued that, when a number of school districts contract with an educational service center for technological services, the contract of a single district is not sufficient to create a prohibited interest under R.C. 3313.33. The problem with this argument is that it finds no support in the language of the statute. The statute excepts a shareholder interest of no more than five percent but does not establish any other de minimis

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[7] The prohibition applies only when the individual has a personal interest, and not when the individual has a legal responsibility to promote different public interests. *See People v. Vallerga*, 67 Cal. App. 3d 847, 136 Cal. Rptr. 429 (2d Dist. 1977). If the contract could afford no personal benefit to the individual, there is not a prohibited interest. For example, it has been found that a county commissioner does not have a direct or indirect personal interest in a contract under which the county authorizes the mining of coal on county land. *See* 1988 Op. Att'y Gen. No. 88-017. The commissioner serves the term for which he was elected or appointed, has compensation set by statute, and has no personal interest in money that accrues to the county treasury. Unlike an employee of an educational service center, a county commissioner does not have an employer or appointing authority that is authorized to change the status, conditions, or compensation of the commissioner's service.

When the General Assembly has intended that an individual be permitted to participate in two different capacities that might have prohibited interests, it has expressly so stated. *See* R.C. 135.11 (officer, director, stockholder, employee, or owner of interest in a public depository is not deemed to be interested, directly or indirectly, in moneys deposited); R.C. 715.70(G) (membership on the board of directors of a joint economic development district "shall not constitute an interest, either direct or indirect," in a contract with a political subdivision and the member shall not forfeit or be disqualified from holding any public office or employment); R.C. 1724.10(A) (same for membership on governing board of community improvement corporation); R.C. 4740.02(I) (same for membership on Ohio construction industry examining board); R.C. 3333.042 (officer or employee of state or state college or university who is assigned to assist a nonprofit entity in making proper use of a grant does not have a direct or indirect interest in a contract); *see also* R.C. 505.011 (township trustee may be volunteer firefighter or policeman if trustee is not paid for firefighter or policeman services, or may be member of private fire company that serves the township); 1990 Op. Att'y Gen. No. 90-037 (under R.C. 505.011, General Assembly has implicitly sanctioned arrangement under which township trustee serves, for compensation, as member of private fire company with which township contracts, notwithstanding that R.C. 511.13 prohibits trustee from having an interest in a contract entered into by the board of township trustees); 1987 Op. Att'y Gen. No. 87-084; 1986 Op. Att'y Gen. No. 86-059; 1984 Op. Att'y Gen. No. 84-018; 1978 Op. Att'y Gen. No. 78-017.

standards. In the absence of authority to recognize an exception, the statutory language must be construed and applied as written. *See, e.g.*, *In re Removal of Leach*, 19 Ohio Op. at 268 ("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…. It is not even necessary for the contract to be profitable to the officer"); 1956 Op. Att'y Gen. No. 6672, p. 432, at 438 ("[t]he fact that a board member may have only a slight pecuniary interest in a contract made by his board does not change the situation").

It has been argued that an exception to R.C. 3313.33 exists when no other source of a product or service is available. *See, e.g.*, 1970 Op. Att'y Gen. No. 70-107 (when no other source of electrical power is available, a school board may contract with a company that employs one of its members). This exception is derived not from the language of the statute but, rather, from troublesome factual situations in which it is presumed that the General Assembly could not have intended that the statute be applied literally. Even this exception, however, has been read narrowly. One prior Attorney General declined to allow a contract between a local board of education and a community antenna cable television company owned by a board member even when the company was the only one offering a service in the area. 1973 Op. Att'y Gen. No. 73-132. That opinion restricts exceptions to R.C. 3313.33 to "extraordinary circumstances" in which a contract is required for the schools to continue to operate. *Id*. (syllabus).

In the instant case, you have observed that a local school district would be able to acquire technological services from an entity other than the educational service center. Thus, it does not appear that there is only a single source of the service, though the educational service center may be the most economical source. Further, it appears that the types of technological services acquired are discretionary and involve matters of judgment and selection. Therefore, this is the type of purchase that may be subject to the abuses at which the statute is aimed, in contrast with a purchase of a required amount of a utility service from a single provider.

You have suggested that 1989 Op. Att'y Gen. No. 89-069 implies that the prohibitions contained in R.C. 3313.33 might not be strictly applied. That opinion considered the positions of public school teacher in a local school district and president of a board of education in another local school district within the same county school district (now educational service center) and concluded that the positions were compatible unless the school districts contracted for the exchange of teaching services under R.C. 3313.84 and the exchange included the individual in question. 1989 Op. Att'y Gen. No. 89-069 (syllabus, paragraph 3). An exchange of teaching services under R.C. 3313.84 permits the teachers who are exchanged to be paid by the district in which they are regularly employed and does not authorize any expenditure in excess of the payment of salaries. R.C. 3313.84. Thus, the arrangement at issue in 1989 Op. Att'y Gen. No. 89-069 did not involve a contract for the purchase of services, and that opinion did not consider an indirect pecuniary interest of the sort addressed in this opinion. Therefore, 1989 Op. Att'y Gen. No. 89-069 does not affect the analysis set forth in this opinion.

It is instructive to note that there are statutory provisions in addition to R.C. 3313.33 that restrict interests in contracts, and that various exceptions to those provisions have been recognized. The Ohio Ethics Law, found in R.C. Chapter 102, generally prohibits the use of official influence for personal gain. *See* R.C. 102.03(A), (D), (E); Ohio Ethics Comm'n, Advisory Op. No. 96-004. The criminal statute dealing with unlawful interests in a public contract contains more specific prohibitions against using official influence to obtain benefits under a contract, but also provides specific exceptions for contracts that are entered into at market value without the participation of a particular individual. R.C. 2921.42(A), (C). Questions concerning those provisions should be addressed to the Ohio Ethics Commission, which has been granted jurisdiction to render opinions on those subjects. *See* R.C. 102.08; *see also, e.g.*, 1997 Op. Att'y Gen. No. 97-061; 1994 Op. Att'y Gen. No. 94-079, at 2-397; 1991 Op. Att'y Gen. No. 91-007; Ohio Ethics Comm'n, Advisory Op. No. 93-008.[8]

Provisions dealing with the employment of a relative of a school board member appear in R.C. 3319.21. Employment of a board member's father, brother, mother, or sister in a teaching position is permitted if the member does not vote for, or participate in the making of, the contract. R.C. 3319.21; *see also, e.g., Scherer v. Rock Hill Local School Dist. Bd. of Educ.*

Our research has disclosed that, in at least one case, a court has applied to the standards established by R.C. 3313.33 the exceptions set forth in other statutes. In the unreported case *Board of Education of the Boardman Local School District v. Ferguson*, No. 74 C.A. 82 (Ct. App. Mahoning County Dec. 30, 1974), the Seventh Appellate District Court of Appeals applied the exceptions set forth in R.C. 2921.42 to the contractual prohibition of R.C. 3313.33, stating: "We hold that R.C. 2921.42 and the part of R.C. 3313.33 cited in this opinion relate to the same subject matter, have the same purpose and are in pari materia to the extent that they apply to the same facts." *Board of Educ. of the Boardman Local School Dist. v. Ferguson*, No. 74 C.A. 82, slip op. at 12-13 (Ct. App. Mahoning County Dec. 30, 1974). The *Boardman* court thus would exclude from the application of R.C. 3313.33 a contract in which a school board member has an interest when the following requirements are met: (1) the subject of the contract is necessary supplies or services for the school board; (2) the supplies or services cannot be obtained elsewhere for the same or lower cost, or are provided as part of a continuing course of dealing; (3) the treatment afforded the school district is preferential to or the same as that accorded other customers or clients in similar transactions; and (4) the entire transaction is conducted at arm's length, with knowledge of the board member's interest, and the board member takes no part in the deliberations or decision of the school board with respect to the contract. *Id.*, slip op. at 11-19 (with reference to R.C. 2921.42(C)). *See generally* Ohio Ethics Comm'n, Advisory Op. No. 90-003 (noting that an interest which is prohibited under R.C. 2921.42 must be definite and direct and may be pecuniary or fiduciary in nature); Ohio Ethics Comm'n, Advisory Op. No. 82-

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[8] You have indicated that your office has examined R.C. 2921.42 and has concluded that the contract in question does not create unlawful interests for purposes of that statute. This opinion does not attempt to interpret or apply R.C. 2921.42.

003 (stating that the Commission has found that an employee of a large firm is not generally considered to be interested in the contracts of the employer for purposes of R.C. 2921.42); Ohio Ethics Comm'n, Advisory Op. No. 78-006 (finding that a member of a board of education who is employed by a company that contracts with the board does not per se have an interest that is prohibited by R.C. 2921.42).

While the equitable concerns of the court are clear, we cannot find statutory authority sufficient to justify a wholesale adoption of R.C. 2921.42 exceptions in the construction of R.C. 3313.33. The *Boardman* court stated that R.C. 2921.42(C), then newly-enacted, "for the first time gives some indication of legislative intent in the determination of what constitutes 'pecuniary interest' as used in R.C. 3313.33 especially under the facts of this case where the member of the board of education is an employee of a large corporation which has contracts with such board of education." *Id*., slip op. at 16; *see* 1971-1972 Ohio Laws, Part II, 1866, 1954 (Am. Sub. H.B. 511, eff. Jan. 1, 1974) (enacting R.C. 2921.42). The language of R.C. 2921.42(C), however, does not find that no pecuniary interest exists when its requirements are met. Instead, it acknowledges that, in such circumstances, the public servant "has an interest" and states merely that the criminal provisions of R.C. 2921.42 do not apply.

In contrast, R.C. 3313.33 sets forth a simple prohibition, with no criminal penalties. It sets a high standard for school board members, prohibiting any pecuniary interest, direct or indirect, in any contract of the board. The exception for small stockholders predates the enactment of R.C. 2921.42(C), going back to the General Code. *See* 1943-1944 Ohio Laws 475, 520 (H.B. 217, filed June 17, 1943) (enacting G.C. 4834-6). The exception for election of a benefit plan was adopted in 1985. *See* 1985-1986 Ohio Laws, Part II, 3418, 3424 (Sub. H.B. 369, eff. Oct. 17, 1985) (amending R.C. 3313.33). The General Assembly has not seen fit to incorporate into R.C. 3313.33 the exceptions contained in R.C. 2921.42(C). The Ohio Ethics Commission has noted that "the exception which Division (C) [of R.C. 2921.42] provides to the prohibition imposed by Division (A) (4) [of R.C. 2921.42] does not apply to R.C. 3313.33." Ohio Ethics Comm'n, Advisory Op. No. 93-008, slip op. at 9; *cf.* Ohio Ethics Comm'n, Advisory Op. No. 78-006 (discussing the *Boardman* case). We decline to follow the *Boardman* court in reading that exception into R.C. 3313.33. *See* S. Ct. R. Rep. Op. 2(G)(2) (except as applied to the original parties, an "unofficially published opinion or unpublished opinion shall be considered persuasive authority on a court, including the deciding court, in the judicial district in which the opinion was rendered").

A similar conclusion was reached by a prior Attorney General, who declined to apply the exceptions contained in R.C. 2921.42(C) to a statute prohibiting township officers or employees from being "interested in any contract entered into" by the board of township trustees. R.C. 511.13; *see* 1982 Op. Att'y Gen. No. 82-008. That opinion distinguished the nature and purposes of R.C. 2921.42 and R.C. 511.13 in language that, by analogy, can be applied also to the instant situation:

> The difference between R.C. 511.13 and R.C. 2921.42 may be explained by the differing nature and purpose of the two statutes. R.C. 2921.42 is part of the Criminal Code. The legislature did not wish to impose penal sanctions under R.C. 2921.42 for dealings in which the public officials' personal interest would be very remote or clearly aboveboard. Committee Comment, Am. H.B. No. 511, 109th Gen'l Assembly (1972). In contrast, R.C. 511.13 is a remedial statute. See State ex rel. National Mutual Insurance Co. v. Conn, 115 Ohio St. 607, 620, 155 N.E. 138, 142 (1927) (a statute which safeguards the public interests or remedies a public evil is a remedial statute); In re Arnold, 8 Ohio N.P. 112, 115 (Hamilton County Common Pleas 1900), rev'd on different grounds sub nom. Board of County Commissioners v. Arnold, 65 Ohio St. 479, 63 N.E. 89 (1902) (remedial statutes have for their object the introduction of some regulation conducive to the public good). Like other statutes which forbid public officers to have an interest in public contracts, R.C. 511.13 is intended to introduce a regulation which will safeguard the public interest. Cf. Doll v. State, 45 Ohio St. 445, 449, 15 N.E. 293, 295 (1887) ("To permit those holding offices of trust or profit to become interested in contracts for the purchase of property for the use of the state, county, or municipality of which they are officers, might encourage favoritism, and fraudulent combinations and practices…. The surest means of preventing this, was to prohibit all such contracts…"). Thus, it appears that R.C. 511.13 provides a broader prohibition than R.C. 2921.42, although it provides no criminal sanctions.

1982 Op. Att'y Gen. No. 82-008, at 2-30. A similar conclusion applies in the instant case. R.C. 3313.33 provides a broader prohibition than R.C. 2921.42, although it provides no criminal sanctions.

Therefore, notwithstanding the fact that the result may in some circumstances appear harsh, we feel constrained to apply R.C. 3313.33 as written. It may be that a rule less stringent than the one set forth in R.C. 3313.33 would be more equitable in some circumstances, and it may be appropriate for the General Assembly to consider whether additional exceptions, such as those appearing in R.C. 2921.42(C), should be included in R.C. 3313.33. Nonetheless, in construing R.C. 3313.33 as it currently exists, we must first look to the language of the statute and, when there is no ambiguity, apply that language as written. *See, e.g.*, 1938 Op. Att'y Gen. No. 2854, vol. II, p. 1596, at 1597 ("where legislative intent is clearly and definitely expressed, this office is bound to give effect to it and cannot, however liberal it may wish to be, nullify, change or amend by its rulings the express provisions of a statute"). In the instant case, the individual in question would have an indirect pecuniary interest in the contract at issue. Hence, the language of the statute prohibits the contract.

It is important to note that the conclusion reached in this opinion in no way challenges the integrity or impugns the motives of any particular individual. Rather, it is set forth as a general principle of law adopted as a strict prohibition to prevent any possibility that an

individual might be able to secure personal benefit at the expense of the public trust. *See, e.g.*, *Grant v. Brouse*; 1956 Op. Att'y Gen. No. 6672, p. 432.

For the reasons discussed above, it is my opinion, and you are advised, that R.C. 3313.33 prohibits 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.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

March 22, 1999

The Honorable Dean Holman
Medina County Prosecuting Attorney
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SYLLABUS: 99-023

R.C. 3313.33 prohibits 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.