

March 16, 2018

The Honorable Morris J. Murray
Defiance County Prosecuting Attorney
500 Court Street, Suite C
Defiance, Ohio 43512

SYLLABUS:

2018-006

1. R.C. 3313.33 shall be applied independently of R.C. 2921.42. The exception set forth in R.C. 2921.42(C) does not apply to a prohibited pecuniary interest under R.C. 3313.33(B). (1999 Op. Att’y Gen. No. 99-023, approved and followed.)
2. R.C. 3313.33 prohibits a person who is an owner of a limited liability company from holding the office of member of the board of education of a local school district when the board of education leases a building from the limited liability company and the person has an impermissible pecuniary interest in the lease. To avoid a violation of R.C. 3313.33, the person may refuse the office of board of education member or divest himself of his pecuniary interest in the lease.
3. Under R.C. 3313.33, when a newly elected member of a board of education of a local school district has a prohibited pecuniary interest in a contract of the board that was made before the person was elected as a member of the board of education, the members of the board of education and the county prosecuting attorney may, in the reasonable exercise of their discretion, determine whether or when the contract becomes void, voidable, or unenforceable.
4. So long as a member of a board of education of a local school district has an impermissible pecuniary interest in a lease between the board of education and a limited liability company, the member of the board of education will violate R.C. 3313.33 when a new lease is executed between the board of education and the limited liability company. Abstaining from any discussions, negotiations, deliberations, and votes concerning the new lease and related matters will not avoid a violation of R.C. 3313.33.



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OPINION NO. 2018-006

The Honorable Morris J. Murray
Defiance County Prosecuting Attorney
500 Court Street, Suite C
Defiance, Ohio 43512

Dear Prosecutor Murray:

You have requested an opinion about R.C. 3313.33 and its application to a member of the board of education of a local school district who was elected in November 2017 and whose term began on January 1, 2018. The local school district board of education leases a building for the operation of a preschool from a limited liability company. The newly elected member of the board of education of the local school district is a fifty percent owner of that company. At the time that the lease was signed and approved by the board of education, he was not a member of the board of education. The current term of the lease is from June 2, 2017, through June 1, 2018; the board of education pays the company \$456 per month to lease the building.

You have asked us to consider the following questions:

1. Is R.C. 3313.33 violated if the exception set forth in R.C. 2921.42(C) is satisfied?
2. When a part-owner of a limited liability company is elected to and becomes a member of the board of education of a local school district, does a lease between the board of education and the limited liability company that was executed before the part-owner was elected to the board of education become invalid under R.C. 3313.33?
3. Under R.C. 3313.33, is a person who is a part-owner of a limited liability company that has a lease with the board of education of a local school district prohibited from holding the office of member of the board of education of that same local school district when the lease was executed before the person was elected to the board of education?
4. If, when the person is elected as a member of the board of education, R.C. 3313.33 does not invalidate the lease or prohibit the person from holding office, will the board member's abstention from discussions, deliberations, and votes concerning the lease and related matters avoid a violation of R.C. 3313.33?

5. Alternatively, if, when the person is elected as a member of the board of education, R.C. 3313.33 invalidates the lease and prohibits the person from holding office, may the person transfer his interest in the limited liability company to a family member that does not reside in the same household or take any other action to avoid the ramifications of R.C. 3313.33?
6. Does R.C. 3313.33 prevent the board of education from entering into a new lease once the current lease expires?

Interplay of R.C. 3313.33 and R.C. 2921.42

R.C. 3313.33(B) prohibits a member of a board of education from having “directly or indirectly, any pecuniary interest in any contract of the board[.]” As a part-owner of the limited liability company, the newly elected member of the board of education has a pecuniary interest in the lease between the company and the board of education of the local school district. *See* 2014 Op. Att’y Gen. No. 2014-035, at 2-315 (“[a] ‘pecuniary interest in a contract,’ therefore, is an interest involving money or its equivalent in an agreement between two or more parties that is enforceable at law”). Exceptions to the prohibition in R.C. 3313.33 are found in divisions (C) and (D) of R.C. 3313.33, which state:

(C) A member of the board may have a pecuniary interest in a contract of the board if all of the following apply:

(1) The member’s pecuniary interest in that contract is that 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 participate in any discussion or debate regarding the contract or vote on the contract;

(3) The member files with the school district treasurer an affidavit stating the member’s exact employment status with the political subdivision, instrumentality, or agency contracting with the board.

(D) 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 self of the exception, before entering upon such contract such person shall first file with the treasurer an affidavit stating the stockholder’s exact status and connection with said corporation.

This section does not apply where a member of the board elects to be covered by a health care plan under [R.C. 3313.202].

R.C. 2921.42 is a criminal statute that prohibits a public official from having an unlawful interest in a public contract or using official influence to obtain benefits under a public contract. Division (C) of R.C. 2921.42 sets forth the following exception:

This section does not apply to a public contract in which a public official, member of a public official's family, or one of a public official's business associates has an interest, when all of the following apply:

(1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;

(2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision or governmental agency or instrumentality involved;

(3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;

(4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of the public official's family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

The Attorney General has advised that the R.C. 2921.42(C) exception does not apply to R.C. 3313.33. 1999 Op. Att'y Gen. No. 99-023, at 2-159. That advice is consistent with advice provided by the Ohio Ethics Commission concerning the relationship of R.C. 3313.33 and R.C. 2921.42. *See, e.g.,* Ohio Ethics Comm'n, Advisory Op. No. 93-008 (“[i]t must be noted that the exception which [R.C. 2921.42(C)] provides to the prohibition imposed by [R.C. 2921.42(A)(4)] does not apply to R.C. 3313.33”); Ohio Ethics Comm'n, Advisory Op. No. 88-007 (suggesting that R.C. 3313.33 and R.C. 2921.42 are applied separately). That advice is also consistent with the Attorney General's advice about statutes similar to R.C. 3313.33. *See, e.g.,* 2008 Op. Att'y Gen. No. 2008-002, at 2-11 (“the exceptions set forth in R.C. 2921.42 do not apply to R.C. 511.13¹” (footnote added)); 2007 Op. Att'y Gen. No. 2007-044, at 2-438 (“R.C. 511.13 is not dependent upon R.C. 2921.42 and must be construed and applied separately”); 1982 Op. Att'y Gen. No. 82-008, at 2-30 (differentiating R.C. 2921.42 and R.C. 511.13 and concluding that the only exceptions that apply to R.C. 511.13 are those exceptions found in that statute); *see also* 2000 Op. Att'y Gen. No. 2000-015, at 2-88 (because no exceptions are expressly set forth in R.C. 308.04, the statute “has been construed as prohibiting a member of the board of trustees of a regional airport authority from having any sort of interest in a contract of the regional airport authority” and no exceptions may be implied in the statute).

The basis for not extending the exceptions of R.C. 2921.42 to R.C. 3313.33 is that R.C. 3313.33 is not a criminal statute and sets forth a broader prohibition than R.C. 2921.42. 1999 Op.

¹ R.C. 511.13 provides, in pertinent part, “[n]o member of the board of township trustees or any officer or employee thereof shall be interested in any contract entered into by such board.”

Att’y Gen. No. 99-023, at 2-159; *see also* 2008 Op. Att’y Gen. No. 2008-002, at 2-9 (a statute containing a similar prohibition as R.C. 3313.33 “is not a criminal statute and sets forth broader prohibitions than a criminal statute, with a view toward preventing situations that might provide the opportunity or temptation for wrongdoing”). In 1999 Op. Att’y Gen. No. 99-023, at 2-159, in order to explain the difference between R.C. 3313.33 and R.C. 2921.42, the Attorney General adopted the reasoning applied in an earlier opinion that distinguished R.C. 2921.42 and R.C. 511.13:

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. In contrast, R.C. 511.13 is a remedial statute. 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. Thus, it appears that R.C. 511.13 provides a broader prohibition than R.C. 2921.42, although it provides no criminal sanctions.

1999 Op. Att’y Gen. No. 99-023, at 2-159 (quoting 1982 Op. Att’y Gen. No. 82-003, at 2-30 (internal citations omitted)).

In 1999 Op. Att’y Gen. No. 99-023, the Attorney General considered *Bd. of Ed. of the Boardman Local Sch. Dist. v. Ferguson*, No. 74 C.A. 82, 1974 Ohio App. LEXIS 2859 (Mahoning County Dec. 30, 1974). In *Boardman*, the court held that R.C. 3313.33 and R.C. 2921.42 “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.” *Id.* at **12-13. The court concluded that R.C. 2921.42(C) should be used to determine whether a member of the board of education of a school district has a sufficient “pecuniary interest” in a contract of the board to constitute a violation of R.C. 3313.33, “especially ... where the member of the board of education is an employee of a large corporation which has contracts with such board of education.” *Id.* at *16. The court held that “[u]nless the salary of such employee is based, directly or indirectly, on such contract we do not feel that such employee has the ‘pecuniary interest’ specified in R.C. 3313.33.” *Id.* at *18.

In declining to follow the reasoning and holding of the Seventh District Court of Appeals in *Boardman*, the Attorney General explained:

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).

1999 Op. Att’y Gen. No. 99-023, at 2-158 to 2-159.

Since the court’s decision in *Boardman* and the issuance of 1999 Op. Att’y Gen. No. 99-023, no Ohio court has cited or relied upon the holding of *Boardman*. Moreover, in 2004, the General Assembly amended R.C. 3313.33 to add division (C). Am. Sub. S.B. 2, 125th Gen. A. (2003) (eff. June 9, 2004). R.C. 3313.33(C) differs greatly from R.C. 2921.42(C). Had the General Assembly intended for the exception of R.C. 2921.42(C) to apply to R.C. 3313.33, it could have adopted language that accomplished that purpose. That the General Assembly did not is a clear indication that the exception in R.C. 2921.42(C) does not apply to R.C. 3313.33. Accordingly, we approve and follow the analysis of 1999 Op. Att’y Gen. No. 99-023 and decline to follow the holding of the *Boardman* court. We conclude that R.C. 3313.33 shall be applied independently of R.C. 2921.42. The exception set forth in R.C. 2921.42(C) does not apply to a prohibited pecuniary interest under R.C. 3313.33(B).

Effect of a Violation of R.C. 3313.33 on the Validity of the Current Lease and the Ability of the Part-Owner to Hold Office

Your second question asks when a part-owner of a limited liability company is elected to and becomes a member of the board of education of a local school district, does R.C. 3313.33 invalidate the lease between the board of education and the limited liability company that was executed before the part-owner was elected to the board of education? Your third question asks whether the person who is a part-owner of the limited liability company is prohibited from holding office as a member of the board of education. You further ask, if R.C. 3313.33 does not invalidate the lease or prohibit the person from holding office, will the board member’s abstention from discussions, deliberations, and votes concerning the lease and related matters avoid a violation of R.C. 3313.33? Alternatively, you ask, if R.C. 3313.33 invalidates the lease and prohibits the person from holding office, may the person transfer his interest in the limited liability company to a family member that does not reside in the same household or take any other action to avoid the ramifications of R.C. 3313.33?

We begin by considering the effect of R.C. 3313.33 on the ability of the member of the board of education of the local school district to hold that office. R.C. 3313.33 does not expressly address the situation described in your letter, in which a board of education and a limited liability company enter into a lease that is not in violation of R.C. 3313.33, but subsequently, a part-owner of the limited liability company is elected to the board of education. Regardless of the circumstances, however, R.C. 3313.33 prohibits any member of a board of education from having a direct or indirect pecuniary interest in a contract of the board, except as provided in R.C. 3313.33(C). The statute makes no exception for contracts that are executed prior to a person becoming a member of the board of education. Thus, even if the person did not participate in the formation of the contract as a member of the board of education, as soon as the person takes office as a member of the board of education, he has a prohibited pecuniary interest in a contract of the board in violation of R.C. 3313.33(B). So long as the person has an impermissible pecuniary interest in a contract of the board of education, he is prohibited by R.C. 3313.33 from serving as a member of the board of education. *See* 2007 Op. Att’y Gen. No. 2007-044, at 2-440 (“if a person enters into an ongoing multi-year contract to supply a township with garage storage facilities for a number of years in the future and is subsequently elected to the office of township trustee, the person is prohibited by R.C. 511.13 from serving as a township trustee and continuing to have an interest in that preexisting multi-year contract”); 1931 Op. Att’y Gen. No. 3845, vol. III, p. 1498 (syllabus, paragraph 1) (“[a] person who has been elected as a member of a board of education and has a contract with said board to transport pupils can not legally qualify as a member thereof without surrendering his rights under the contract”); *see also In re Removal of Leach*, 19 Ohio Op. 263, 32 Ohio L. Abs. 263 (C.P. Jackson County 1940) (“[i]f the contract is already in existence and a stockholder or member of the firm having the contract is elected a member of the board [of education], he cannot legally qualify”). *But see* 1918 Op. Att’y Gen. No. 911, vol. I, p. 20, at 22 (a person with a pre-existing contract with a school district who was subsequently elected as a member of the board of education of that school district could qualify for office even though the contract violated G.C. 4757 (a predecessor of R.C. 3313.33)). Therefore, R.C. 3313.33 prohibits a person who is an owner of a limited liability company from holding the office of member of the board of education of a local school district when the board of education leases a building from the limited liability company and the person has an impermissible pecuniary interest in the lease.

To avoid a violation of R.C. 3313.33, the person may refuse the office of board of education member or, before taking office, divest himself of his pecuniary interest in the lease.² *See* 2007 Op. Att’y Gen. No. 2007-044, at 2-440. To divest his pecuniary interest, the person shall ensure that he does not directly or indirectly have a pecuniary interest in the lease of the building to the local school district. For the purpose of R.C. 3313.33(B), a “pecuniary interest in a contract” has been defined as

² It is also possible to avoid a violation of R.C. 3313.33(B) if the lease between the limited liability company and the local school district board of education is terminated prior to the person taking office as a member of the board of education. We presume from your letter that terminating the lease and no longer using the building for the preschool are not desirable or practical alternatives.

“an interest involving money or its equivalent in an agreement between two or more parties that is enforceable at law.” 2014 Op. Att’y Gen. No. 2014-035, at 2-315. R.C. 3313.33(B) prohibits direct as well as indirect pecuniary interests, no matter how slight. “[W]here a provision of the Revised Code prohibits an interest in a public contract such prohibition extends even to situations where an individual is not a direct party to the contract.” 2014 Op. Att’y Gen. No. 2014-035, at 2-315; 2008 Op. Att’y Gen. No. 2008-008, at 2-88 (“[t]here are numerous authorities finding that R.C. 511.13 and similar provisions prohibit interests in public contracts even when the individual in question is not a party to the contract”).

It is beyond the scope of an Attorney General opinion to set forth the various ways in which the person may divest himself of his pecuniary interest in the lease of the building to the local school district. Rather, it is sufficient to say that to avoid a violation of R.C. 3313.33, the newly elected board member shall fully and completely divest himself of his pecuniary interest in the lease. For the purpose of R.C. 3313.33(B), a full and complete divestment requires that the person ensure that he no longer has a direct or indirect pecuniary interest in the lease, even if he is not directly a party to the lease. *See generally* 2008 Op. Att’y Gen. No. 2008-008, at 2-86 (“even if the lease/sublease arrangement serves to eliminate any direct contractual relationship between the township and the trustee/owner and denies the trustee/owner many of the typical rights of a landlord, the trustee/owner has a prohibited interest under R.C. 511.13 in the township’s sublease, which provides for moneys of the township to be paid to rent the trustee/owner’s garage and to be channeled to the trustee/owner”).

We next consider the effect, if any, that a violation of R.C. 3313.33 has on the validity of the lease between the limited liability company and the local school district board of education. Unlike other similar sections that prohibit a public officer from having an interest in a public contract,³ R.C. 3313.33 does not expressly address the consequences of a violation of its prohibition on a contract made by the board of education.⁴ Insofar as R.C. 3313.33 does not specify the consequences of

³ *See, e.g.*, R.C. 305.27 (“[n]o county commissioner shall be concerned, directly or indirectly, in any contract for work to be done or material to be furnished for the county. For a violation of this section, a commissioner shall forfeit not less than two hundred nor more than two thousand dollars, to be recovered by a civil action, in the name of the state, for use of the county. Such commissioner shall also forfeit, in like manner, any compensation he may have received on such contract”); R.C. 308.04 (“[a]ny contract let by the regional airport authority in which a member of the board of trustees is directly or indirectly interested is void and unenforceable”); R.C. 731.02 (prohibiting a member of the legislative authority from being interested in any contract of the city and providing that a member who violates that provision shall forfeit his office); R.C. 731.12 (“[n]o member of the legislative authority [of a village] shall ... be interested in any contract with the village Any member who ceases to possess any of such qualifications ... shall forfeit the member’s office”).

⁴ R.C. 3319.21 states, in pertinent part, “[w]henever 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 in any matter in which he is pecuniarily interested*, such contract, or *such act in such matter, is void.*” (Emphasis

having a prohibited pecuniary interest in a contract of the board of education of a local school district, the members of the board of education and the county prosecuting attorney, may reasonably exercise discretion in determining whether a contract that did not violate R.C. 3313.33 at the time it was made, becomes void, voidable, or unenforceable after a person who has a pecuniary interest in the contract is elected as a member of the board of education. *See* 2007 Op. Att’y Gen. No. 2007-044, at 2-441 (“[b]ecause no consequences are prescribed by statute [(R.C. 511.13)], the trustees, county prosecuting attorney, and courts may have some discretion in determining how to address the situation”). Our research discloses that courts and previous Attorneys General have concluded that various consequences may result from a violation of R.C. 3313.33 or an analogous statute that prohibits a public officer from having an interest in a contract of the public entity he serves. There appear to be three possibilities.

The first possibility is that upon taking office, the person forfeits his interest in the lease and the lease is rendered void. In 1918 Op. Att’y Gen. No. 911, vol. I, p. 20, the Attorney General addressed whether a person with a pre-existing contract with a school district who was subsequently elected as a member of the board of education of that school district could continue to hold his interest in the contract under G.C. 4757 (a predecessor of R.C. 3313.33). The Attorney General advised that

added.) Attorney General opinions have considered R.C. 3313.33 and R.C. 3319.21 together and have advised that if a member of a school district board of education acts in any matter in violation of R.C. 3313.33, the board member’s acts are rendered void under R.C. 3319.21. 2014 Op. Att’y Gen. No. 2014-035, at 2-314 (“R.C. 3319.21 must be considered in connection with R.C. 3313.33”); 2007 Op. Att’y Gen. No. 2007-011, at 2-87 (“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. 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” (internal citations omitted)); 1963 Op. Att’y Gen. No. 122, p. 206, at 207 to 208 (a president of a board of education who is also an officer and director of a bank is prohibited by R.C. 3313.33 and R.C. 3319.21 from voting on a resolution authorizing the board to borrow money from the same bank). At least one court has ruled that the provision of R.C. 3319.21 providing that acts are void does not apply to violations of R.C. 3313.33. *Scherer v. Rock Hill Local Sch. Dist. Bd. of Ed.*, 63 Ohio App. 3d 555, 558, 579 N.E.2d 525 (Lawrence County 1990) (“neither provision [(R.C. 3313.33 and R.C. 2921.42(A)(1))], unlike R.C. 3319.21, provides, as a remedy for a violation thereof, the declaration that the employment contract is void”).

R.C. 3319.21 does not apply to the initial execution of the lease addressed in your letter. To the extent the person participated in the formation of the lease agreement as a part-owner of the limited liability company, he was not a member of the board of education, and, therefore, his participation does not come within the scope of R.C. 3319.21.

because the contract was executory, the portion of the contract already performed or capable of being performed prior to the first day of the newly elected member's term of office remained unaffected by the statute. *Id.* at 20 to 21. The Attorney General further advised that insofar as the statute does not declare that a person who has a pecuniary interest in a contract of the board of education may not qualify for the office of board member, the person may take office. *Id.* at 22. However, upon taking office, the person, by the act of taking office, "causes a forfeiture and a relinquishment of all his rights under [the] contract." *Id.* In addition, "[t]he contract becomes void and no further rights thereunder can accrue to either the board of education or the member who was formerly a party thereto." *Id.*

The second possibility is found in more recent opinions, where the Attorney General has advised that a contract in which a public officer has a prohibited interest is void or illegal, but the officer does not automatically forfeit his rights under the contract by taking office. 1999 Op. Att'y Gen. No. 99-023, at 2-154 ("[t]he 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"); 1961 Op. Att'y Gen. No. 2466, p. 494 (syllabus, paragraphs 1 and 2) (contracts made in violation of R.C. 3313.33 are invalid); 1959 Op. Att'y Gen. No. 51, p. 29, at 34 ("where a contract made by a public officer or board is tainted by violation of the statutes ..., particularly those imposing criminal liability, it will have the effect of invalidating a contract so made"); 1948 Op. Att'y Gen. No. 3075, p. 197 (syllabus) ("[w]here a board of education undertakes to purchase school buses of a dealer whose foreman is a member of such board, such contract is under the terms of Section 4834-6, General Code [the predecessor of R.C. 3313.33], an illegal contract").⁵

A third possibility is that the lease between the board of education and the limited liability company, while in violation of R.C. 3313.33, is not void. In *Morrow Cnty. Airport Auth. v. Whetstone Flyers, Ltd.*, 112 Ohio St. 3d 419, 2007-Ohio-255, 860 N.E.2d 733, at ¶1-2, the Ohio Supreme Court addressed whether a lease agreement between the Morrow County Airport Authority and Whetstone Flyers to construct and operate airplane hangars was void as a result of violating R.C. 308.04 and R.C. 2921.42. In that case, the president of the airport authority board was also a partner in Whetstone Flyers at the time the lease was signed. *Id.* at ¶2. The court found that the lease was not void as "[n]either R.C. 308.04 nor R.C. 2921.42 declares that contracts entered into in violation of either statute are void." *Id.* at ¶8, 11. The court held that "[i]n the absence of a statutory provision to the contrary, we conclude that the contract was not void, even though it was entered into in violation of R.C. 308.04 and 2921.42(A)(1)." *Id.* at ¶11.⁶ Accordingly, one may argue under the holding of

⁵ Other consequences are possible for a public officer who has an impermissible interest in a public contract. See 2007 Op. Att'y Gen. No. 2007-044, at 2-444 (discussing civil actions in *quo warranto* to challenge a person's right to hold a public office or to seek removal of a person from a public office).

⁶ After the court's decision in *Morrow Cnty. Airport Auth. v. Whetstone Flyers, Ltd.*, 112 Ohio St. 3d 419, 2007-Ohio-255, 860 N.E.2d 733, both R.C. 308.04 and R.C. 2921.42 were amended to add provisions declaring that contracts made in violation of those statutes are void. Am. Sub. H.B. 119,

Morrow County Airport Authority that a contract that violates R.C. 3313.33 is not void because R.C. 3313.33 does not expressly declare that a contract made in violation of its terms is void. *See* 2007 Op. Att’y Gen. No. 2007-044, at 2-443 n.7; *see also Scherer v. Rock Hill Local Sch. Dist. Bd. of Ed.*, 63 Ohio App. 3d 555, 558, 579 N.E.2d 525 (Lawrence County 1990) (holding that unlike R.C. 3319.21, R.C. 3313.33 does not declare that the contract is void as a remedy for a violation of its terms).

With R.C. 3313.33’s lack of an express remedy for its violation, the variation in case law and opinions, and the circumstance that the lease involved in your letter was executed prior to the person’s membership on the board of education, it is unclear whether or at what point the lease may be deemed void, voidable, or unenforceable. *See* 2007 Op. Att’y Gen. No. 2007-044, at 2-442 to 2-444. A board of education may reasonably exercise discretion to determine whether or when the lease is void, voidable, or unenforceable. Therefore, under R.C. 3313.33, when a newly elected member of a board of education has a prohibited pecuniary interest in a contract of the board that was made before the person was elected as a member of the board of education, the members of the board of education of a local school district and the county prosecuting attorney may, in the reasonable exercise of their discretion, determine whether or when the contract becomes void, voidable, or unenforceable.

Divesting the Board Member’s Pecuniary Interest after Taking Office

Thus far we have advised that a person who is an owner of a limited liability company that has a lease with a board of education of a local school district should divest himself of his pecuniary interest prior to taking office as a member of the board of education. If the person does not divest his pecuniary interest prior to taking office, he will be unable to qualify for office. In the event that the person has taken office without divesting his pecuniary interest in the lease, and has been perceived as lawfully holding that office, he may be considered a *de facto* member of the board of education. *See State ex rel. Purola v. Cable*, 48 Ohio St. 2d 239, 241, 358 N.E.2d 537 (1976) (“[u]nder Ohio law, one who assumes public office, even if he is later held to be ineligible to hold office, or if his appointment is later held invalid, is a *de facto* officer”); *State ex rel. Witten v. Ferguson*, 148 Ohio St. 702, 710, 76 N.E.2d 886 (1947) (“where an officer holds the office and performs the duties thereof with the acquiescence of the public authorities and the public and has the reputation of being the officer he assumes to be and is dealt with as such, he is, in the eyes of the law, a *de facto* officer”).

Under the *de facto* officer doctrine, the person’s acts as a *de facto* member of the board of education are upheld and given legal effect until it is determined that his ability to hold the office is legally deficient. *State ex rel. Paul v. Russell*, 162 Ohio St. 254, 257-58, 122 N.E.2d 780 (1954) (“the doctrine of *de facto* officers rests on the principle of protection to the interests of the public and third

127th Gen. A. (2007) (eff. June 30, 2007, with amendments to R.C. 308.04 and R.C. 2921.42 eff. Sept. 29, 2007).

parties The law validates the acts of *de facto* officers as to the public and third persons on the ground that, although not officers *de jure*, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid”); *State ex rel. Westcott v. Ring*, 126 Ohio St. 203, 208, 184 N.E. 757 (1933) (“acts of a *de facto* officer are to be upheld as valid, so far as they involve the interests of the public and of third persons, until his title to the office is adjudged insufficient”); 1975 Op. Att’y Gen. No. 75-046, at 2-179 (“[w]ith respect to the actions of a *de facto* officer, it is a well settled rule that they are valid as to the public and third persons”); 1962 Op. Att’y Gen. No. 2878, p. 208 (syllabus, paragraph 2) (“[a] person holding a position under color of a known appointment that is void because of the person’s ineligibility to hold that position is a *de facto* officer and his acts are valid, insofar as they involve the interests of the public and of third persons, until his title to office is adjudged insufficient”). Thus, until such time as it is determined that the person is unable to qualify for office by virtue of his prohibited pecuniary interest, official actions of the board of education in which the person took part are not rendered invalid by virtue of the person’s status as a *de facto* member of the board of education.

Moreover, “a candidate for public office need not be qualified in order to run for that office, but must remove any disqualifications immediately upon assuming the office; otherwise the officeholder forfeits that office.” *State ex rel. Vana v. Maple Heights City Council*, 54 Ohio St. 3d 91, 94, 561 N.E.2d 909 (1990); *State ex rel. Wolfe v. Lorain Cnty. Bd. of Elections*, 59 Ohio App. 2d 257, 258, 394 N.E.2d 321 (Lorain County 1978) (“a candidate generally need not qualify for the prospective office in order to run for or be elected to that office. He must be qualified when he assumes that office”). The court’s use of “immediately” in *Vana* has been construed to mean a “reasonable length of time[.]” *State ex rel. Powers v. Curtis*, 12th Dist. No. CA2002-10-039, 2003-Ohio-6104, 2003 Ohio App. LEXIS 5453, at ¶51; *see also State ex rel. Gains v. Rossi*, No. 98-C.A.-51, 1999 Ohio App. LEXIS 986 (Mahoning County March 9, 1999), at **25-27. Unless a statute states that the office holder forfeits his office during the reasonable time in which he is proceeding to remove a disqualification, the office holder does not forfeit any rights or claims to the office. *State ex rel. Powers v. Curtis*, at ¶51. Accordingly, in this matter the person may qualify for office by divesting himself of his pecuniary interest in the lease between the limited liability company and the board of education after his term of office has commenced, so long as he does so within a reasonable time of taking office.⁷

⁷ What amount of time is reasonable depends upon the actions that are necessary to remove the disqualification. *See State ex rel. Powers v. Curtis*, 12th Dist. No. CA2002-10-039, 2003-Ohio-6104, 2003 Ohio App. LEXIS 5453, at ¶52-55 (discussing facts relevant to determining whether disqualification was removed within a reasonable time). A delay in taking steps to cure a defect in an officer’s ability to hold office that is caused, in part, by awaiting the issuance of an Attorney General opinion regarding an issue affecting a person’s qualification for public office may be deemed a reasonable delay. *See State ex rel. Gains v. Rossi*, No. 98-C.A.-51, 1999 Ohio App. LEXIS 986 (Mahoning County March 9, 1999), at **26-27.

If the part-owner of the limited liability company has taken office as a member of the board of education without divesting himself of his pecuniary interest in the lease, there may be a period of time in which the board of education makes payments to the limited liability company under the lease and the board member violates R.C. 3313.33. As discussed above, because R.C. 3313.33 does not expressly set forth the consequences of a violation of its terms, the board of education may reasonably exercise discretion to determine whether the lease continues to be valid and enforceable after the board member has taken office but has not yet divested his pecuniary interest in the lease. We believe that a board of education and the county prosecuting attorney may reasonably conclude that the lease continues to be valid and enforceable after the part-owner of the limited liability company takes office as a member of the board of education, provided that several conditions are met. First, at the time that the lease was executed, the lease did not constitute a violation of R.C. 3313.33 for any member of the board of education as it was constituted at that time. Second, after the part-owner takes office as a member of the board of education, the board of education shall not take any action to alter the terms of the lease that was executed before the part-owner took office. Third, the board member shall divest himself of his prohibited pecuniary interest in the lease within a reasonable period of time after taking office. As part of divesting himself of his pecuniary interest in the lease, the board member shall relinquish his share of the lease payments that the limited liability company receives from the board of education after he commenced his term of office.

The Board of Education's Ability to Enter into a New Lease

Your final question asks whether R.C. 3313.33 prevents the board of education of the local school district from executing a new lease with the limited liability company once the current lease expires. Unless the member of the board of education has divested himself of his pecuniary interest in a lease with the board of education, the member of the board of education will violate R.C. 3313.33 when a new lease is executed between the board of education and the limited liability company. Numerous Attorney General opinions have concluded that abstaining from any discussions, negotiations, deliberations, and votes concerning a contract will not avoid a violation of a statute that prohibits a public officer from having an interest in a public contract once that contract is executed. *See, e.g.*, 2017 Op. Att'y Gen. No. 2017-036, at 2-361; 2016 Op. Att'y Gen. No. 2016-029, at 2-336; 2008 Op. Att'y Gen. No. 2008-002, at 2-12 to 2-13; 2000 Op. Att'y Gen. No. 2000-015, at 2-91. R.C. 3313.33(B) and other similar statutes apply to interests that the public officer has. Those prohibitions are directed to the existence of a public officer's interest in a contract that exists regardless of whether the officer participates in the formation of the agreement. Therefore, so long as a member of the board of education of a local school district has, directly or indirectly, a pecuniary interest in a lease between the board of education and a limited liability company, the member of the board of education will violate R.C. 3313.33 when a new lease is executed between the board of education and the limited liability company. Abstaining from any discussions, negotiations, deliberations, and votes concerning the new lease and related matters will not avoid a violation of R.C. 3313.33. Under those circumstances, the board of education is prevented from executing a new lease with the limited liability company once the current lease expires.

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. R.C. 3313.33 shall be applied independently of R.C. 2921.42. The exception set forth in R.C. 2921.42(C) does not apply to a prohibited pecuniary interest under R.C. 3313.33(B). (1999 Op. Att’y Gen. No. 99-023, approved and followed.)
2. R.C. 3313.33 prohibits a person who is an owner of a limited liability company from holding the office of member of the board of education of a local school district when the board of education leases a building from the limited liability company and the person has an impermissible pecuniary interest in the lease. To avoid a violation of R.C. 3313.33, the person may refuse the office of board of education member or divest himself of his pecuniary interest in the lease.
3. Under R.C. 3313.33, when a newly elected member of a board of education of a local school district has a prohibited pecuniary interest in a contract of the board that was made before the person was elected as a member of the board of education, the members of the board of education and the county prosecuting attorney may, in the reasonable exercise of their discretion, determine whether or when the contract becomes void, voidable, or unenforceable.
4. So long as a member of a board of education of a local school district has an impermissible pecuniary interest in a lease between the board of education and a limited liability company, the member of the board of education will violate R.C. 3313.33 when a new lease is executed between the board of education and the limited liability company. Abstaining from any discussions, negotiations, deliberations, and votes concerning the new lease and related matters will not avoid a violation of R.C. 3313.33.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General