

OPINION NO. 92-074**Syllabus:**

R.C. 340.02 does not require the removal from office of a member of the board of alcohol, drug addiction, and mental health services solely because that member's spouse is an employee of an entity which has a contract with an agency that is under contract to the board; however, that member may be removed from office for malfeasance in office if he or she participates in votes or other proceedings in which they have a direct pecuniary interest.

To: Peter R. Seibel, Defiance County Prosecuting Attorney, Defiance, Ohio
By: Lee Fisher, Attorney General, December 30, 1992

You have requested an opinion on the following: May a person serve on a board of alcohol, drug addiction, and mental health services ("ADAMH board") if the person's spouse is employed by an entity which has a contract with an agency that is under contract to the ADAMH board. R.C. 340.02 provides in relevant part that a member of an ADAMH board "shall be removed by the appointing authority if the member's spouse ... serves as [an] ... employee of the board of an agency with which the [ADAMH board] has entered a contract for the provision of services or facilities" and "may be removed from office by the appointing authority for ... malfeasance in office." See, e.g., 1981 Op. Att'y Gen. No. 81-100; see also Ohio Const. art. II,

§38 ("[L]aws shall be passed providing for the prompt removal from office ... of all officers ... for any misconduct involving moral turpitude or for other cause provided by law"); R.C. 3.07 (providing generally for the removal of public officers).

Removal of a Member of an ADAMH Board Because the Member's Spouse Is an Employee of an Entity which Has a Contract with an Agency that Is under Contract to the Board

R.C. 340.02 expressly mandates the removal of a member of an ADAMH board if the member's spouse is an employee of an entity which has entered into a contract with the board for the provision of services or facilities. The plain language of this section indicates that the General Assembly's intention in enacting R.C. 340.02 was to prohibit a board member from having an interest in a contract between the board and an entity employing the member's spouse. *Cf., e.g.,* R.C. 305.27 (prohibiting county commissioners from having an interest in county contracts); R.C. 511.13 (prohibiting township officials from having an interest in township contracts); R.C. 731.02 and R.C. 731.12 (prohibiting the members of the legislative authority of a municipal corporation from having an interest in the municipal corporation's contracts); R.C. 2921.42 (prohibiting public officials from having an unlawful interest in public contracts); R.C. 3313.33 (prohibiting members of a board of education from having an interest in any contract of the board of which he or she is a member).

In the situation presented by your request letter, the spouse of the ADAMH board member is *not* an employee of an agency which has entered into a contract with the board for the provision of services or facilities; rather, the spouse is an employee of a separate entity which has a contract with a service agency that is under contract to the board. As the ADAMH board does not have a direct contractual relationship with the spouse's employer, the provisions of R.C. 340.02 do not apply. An interpretation of R.C. 340.02 that requires the removal of a member of an ADAMH board when the member's spouse is an employee of an entity which has a contract with a service agency that is under contract to the board would extend the prohibition of R.C. 340.02 to a situation not contemplated by that section. *See generally Ohio St. Bd. of Pharmacy v. Frantz*, 51 Ohio St. 3d 143, 145, 555 N.E.2d 630, 632 (1990) (where legislative intention is clearly expressed through the language of a statute, the statute may not be extended or improved to apply to a situation not contemplated by the statute); *Bayer v. American Ship Bldg. Co.*, 79 Ohio App. 450, 455, 72 N.E.2d 394, 396 (Cuyahoga County 1946) (the enlargement of the scope of a statute is exclusively within the province of the General Assembly). R.C. 340.02, therefore, does not require the removal of a member of an ADAMH board solely by virtue of the fact that the member's spouse is an employee of an entity which has a contract with an agency that is under contract to the board.

Removal of a Member of an ADAMH Board for Malfeasance in Office

While R.C. 340.02 does not automatically require the removal of a member of an ADAMH board in the circumstances set forth in your question, it should be noted that a member of an ADAMH board also may be removed from office by the appointing authority for malfeasance in office. R.C. 340.02. "Malfeasance" is defined, generally, as the doing of an act which a person ought not do at all. *State ex rel. Neal v. State Civil Serv. Comm'n*, 147 Ohio St. 430, 434, 72 N.E.2d 69, 71 (1947). Accordingly, a member of the board may be removed if he or she does an act which he or she ought not have done.

As indicated in the information provided with your request, the ADAMH board in question approves not only direct contracts with service agencies, but also all contracts entered into by those agencies with other entities. The ADAMH board also approves the funding to be made available for contracts by the board with

various agencies. The board member in question, therefore, could theoretically have an opportunity to participate in a vote to approve a new contract between the service agency and the spouse's employer,¹ or to provide funding to the service agency that has a contract with the spouse's employer.

"It is contrary to public policy for a public officer to be in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than the best interest of the public." 1970 Op. Att'y Gen. No. 70-168 at 2-336 (overruled, on other grounds, by Op. No. 81-100); *accord* 1990 Op. Att'y Gen. No. 90-040 at 2-162. A public officer who has a direct pecuniary interest in a matter is subject to the temptation of acting in a manner inconsistent with the best interests of the public. Op. No. 90-040 at 2-163. Accordingly, a public officer is disqualified from voting on a matter coming before the board on which he or she serves, if he or she has a direct pecuniary interest in the matter. *Id.*; *see also* R.C. Chapter 102 and R.C. 2921.42.² *See generally* Ohio Ethics Commission, Advisory Op. No. 90-004, slip op. at 4 ("[t]he Ethics Commission has held that the standard in judging whether a city council member is prohibited from participating in a matter is whether the matter before council would provide such a definite and particular benefit for the council member or for someone with whom he has a close relationship such as a family member, that these private interests could impair his independence of judgment or unbiased discretion in making his official decisions"). The issue in each case is whether participation in the vote to approve a contract between an agency under contract to the board and the entity which employs his or her spouse, or participation in the vote to provide funding to the agency that has entered into a contract with the entity that employs his or her spouse, constitutes participation in a matter that bestows a direct pecuniary benefit upon the board member.

The Ohio Ethics Commission has previously determined that a spouse of a board member who is an employee of a private entity receives a direct pecuniary benefit from the receipt of compensation for the performance of his or her duties. *See* Ohio Ethics Commission, Advisory Op. No. 90-004, slip op. at 2. Moreover, 1989 Op. Att'y Gen. No. 89-030 discussed the issue of one spouse's interest in the earnings of the other:

[A]lthough R.C. 3103.04 explicitly recognizes a spouse's right to keep separate property from control or use by the other spouse, the Ohio Supreme Court implicitly acknowledges that such property, especially earnings or profits generated during a marriage, may be treated as "marital property" subject to an equitable division between the spouses. To the extent that separate property of one spouse is used or

¹ Information provided indicates that the board member did not participate in the vote to approve the current contract between the service agency and the spouse's employer.

² R.C. Chapter 102 and R.C. 2921.42 prohibit public officials, in general, from using their positions to secure anything of value which manifests a substantial and improper influence upon them, from having unlawful interests in public contracts, and from authorizing or using their authority or influence to secure authorization of public contracts in which they, family members, or business associates have an interest. Under R.C. 102.08, the Ohio Ethics Commission is authorized to render advisory opinions on these provisions of law. Because the Ohio Ethics Commission has statutory authority to render such advisory opinions, the Attorney General will abstain from rendering an opinion with respect to these matters. *See* 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three).

made available to meet the expenses of either spouse, a benefit is bestowed on the other spouse because that other spouse need not meet that duty of support to the extent the expenses are already met. While it is clear that R.C. 3103.04 permits separate property completely beyond the control of the other spouse, *when separate property is expended within the marriage to meet a marital obligation to support either spouse or to meet an obligation of the board member to support another dependent, the expenditure bestows a pecuniary benefit on the board member.* (Emphasis added.)

Op. No. 89-030 at 2-126.

A board member, thus, would generally be viewed as having a direct pecuniary interest in a vote to approve a contract between an agency under contract to the board and the entity which employs his or her spouse, and in a vote to provide funding to an agency that has entered into a contract with the entity that employs his or her spouse. See Op. No. 90-040; Op. No. 89-030. *But see generally Scherer v. Rock Hill Local School Dist.*, 63 Ohio App. 3d 555, 558, 579 N.E.2d 525, 526-27 (Lawrence County 1990) ("[n]either R.C. 3319.21's nor 3313.33's proscription of a board of education member's voting on something he has a pecuniary interest in is violated by the indirect benefit [the member] received from his wife's employment" by the board as an assistant nurse). Consequently, the board member should not participate in a vote to approve a contract between an agency under contract to the board and the entity which employs his or her spouse, or participate in a vote to provide funding to an agency that has entered into a contract with the entity that employs his or her spouse since such participation could subject him or her to removal for malfeasance in office. See *In re Removal of Leach*, 19 Ohio Op. 263, 32 Ohio Law Abs. 263 (C.P. Jackson County 1940); Op. No. 90-040; Op. No. 89-030. *But see generally* Ohio Ethics Commission, Advisory Op. No. 82-003, slip op. at 2 (R.C. 2921.42 "does not prohibit a school board member, whose spouse is a teacher and a member of the teachers' union, from voting on a master contract between the school district and the teachers' union").

Conclusion

Based upon the foregoing, it is my opinion, and you are hereby advised, that R.C. 340.02 does not require the removal from office of a member of the board of alcohol, drug addiction, and mental health services solely because that member's spouse is an employee of an entity which has a contract with an agency that is under contract to the board; however, that member may be removed from office for malfeasance in office if he or she participates in votes or other proceedings in which they have a direct pecuniary interest.