

September 8, 2014

The Honorable Charles E. Coulson
Lake County Prosecuting Attorney
Administration Building
105 Main Street
P.O. Box 490
Painesville, Ohio 44077

SYLLABUS:

2014-035

1. A person who serves as a member of the governing board of an educational service center and as an independent contractor for a regional council of governments and who takes a substantial role in running the day-to-day affairs of the regional council of governments, has a pecuniary interest in a contract between the educational service center and the regional council of governments for purposes of R.C. 3313.33(B).
2. A person who serves as a member of the governing board of an educational service center and whose consulting company provides services to a regional council of governments that include taking a substantial role in running the day-to-day affairs of the regional council of governments, has a pecuniary interest in a contract between the educational service center and the regional council of governments for purposes of R.C. 3313.33(B).
3. A regional council of governments is a political subdivision for purposes of R.C. 3313.33(C)(1).



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OPINION NO. 2014-035

The Honorable Charles E. Coulson
Lake County Prosecuting Attorney
Administration Building
105 Main Street
P.O. Box 490
Painesville, Ohio 44077

Dear Prosecutor Coulson:

We have received your request for an opinion regarding the application of R.C. 3313.33 to a member of the governing board of the Lake County Educational Service Center (Lake County ESC) who also serves as an executive director, registered lobbyist, and consultant to the Alliance for High Quality Education (Alliance), a regional council of governments formed pursuant to R.C. 167.01 that contracts with the Lake County ESC.¹ R.C. 3313.33(B) prohibits a member of the governing board of an educational service center from having a pecuniary interest in a contract of the center, with certain exceptions. You would like to know whether the governing board member is violating this prohibition by means of his and his consulting company's contract with Alliance. Before answering your question, it is helpful to give some factual background information and explain regional councils of government formed pursuant to R.C. Chapter 167, educational service centers (ESCs), and R.C. 3313.33.

¹ You also inquire about the application of R.C. 2921.42 to this member of the governing board of the Lake County ESC (Lake County ESC). The Ohio Ethics Commission, rather than the office of the Attorney General, is required by R.C. 102.08 to address the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. 2014 Op. Att'y Gen. No. 2014-002, at 2-11 n.2; 2007 Op. Att'y Gen. No. 2007-011, at 2-83 n.1; 1999 Op. Att'y Gen. No. 99-023, at 2-158 (finding that the exceptions of R.C. 2921.42 do not apply to R.C. 3313.33). We will, therefore, refrain from interpreting and applying these provisions by way of a formal opinion. 2007 Op. Att'y Gen. No. 2007-011, at 2-83 n.1; 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph 3). Questions concerning the interpretation and application of these provisions in your particular situation should instead be directed to the Ohio Ethics Commission. 2014 Op. Att'y Gen. No. 2014-002, at 2-11 n.2.

Factual Background

According to a member of your staff and documents he provided, Alliance was formed in 1991. In August of that year a meeting was held in Upper Arlington with superintendents from the Cleveland, Columbus, and Cincinnati areas to discuss various issues facing school districts. The discussion focused on how school districts could work together to resolve the local and state school funding crisis. During the meeting, the superintendents agreed to, among other things, organize “The Alliance for Adequate School Funding”² in order to improve the local and state funding of all Ohio school districts; develop and promote a reform package to meet the needs of the individual student, society, and the work place; to develop a position paper, a resolution of joinder, suggestions for improving state funding, and a preliminary draft of ways to improve schools; to schedule several meetings throughout the state to explain the purpose of Alliance; to establish an interim governing board until the Alliance membership drive was completed; and to create an executive committee to formalize Alliance and begin to implement Alliance’s position paper. By December 1991, Alliance was formalized into a regional council of governments with a chairperson and by-laws, and was in the process of forming an executive committee. At that time, Alliance made a decision to hire an Executive Director who would undertake the day-to-day work of Alliance.

In February 2012, the Lake County ESC’s governing board passed a “resolution of joinder” which detailed the Lake County ESC’s desire to join Alliance. The resolution set forth a number of objectives that the Lake County ESC wanted to achieve and determined that in order to accomplish those objectives it wished to work jointly with other similar districts. Thus, the Lake County ESC governing board agreed to join Alliance and to participate through Alliance in taking necessary action to promote the interests and concerns of the Lake County ESC. The Lake County ESC then authorized its treasurer to provide and pay reasonable dues to Alliance. These dues total approximately \$3,500.00 per year. It is our understanding that the membership dues Alliance receives from the Lake County ESC support Alliance’s operations and those membership dues are given, by agreement, in consideration for the services Alliance provides to the Lake County ESC. Thus, the Lake County ESC is a member of Alliance and Alliance provides services to the Lake County ESC pursuant to a contract.

The member of the governing board of the Lake County ESC that is the subject of this opinion owns and operates a for-profit corporation that provides consulting services. Alliance has a contract retaining the services of the governing board member and the board member’s consulting company. This contract, between the governing board member, his consulting company, and Alliance was signed on September 23, 2009, and states that the governing board member and his consulting company will be retained for a minimum of five years. The governing board member and his consulting company are responsible under the agreement for conducting the “day-to-day” affairs of Alliance, performing its legislative lobbying, and providing technical and administrative assistance to Alliance’s Executive Committee and its membership as requested. Additional duties of the

² This name has since been changed to the Alliance for High Quality Education (Alliance).

governing board member and his consulting company include conducting “all necessary business affairs” of Alliance; maintaining all necessary records of Alliance; recruiting new member districts to Alliance; directing and coordinating “any and all activities appropriately undertaken by Alliance as directed by the Executive committee and the members;” developing, implementing, and coordinating strategies and working closely with other education organizations and administration; conducting ongoing legislative research regarding issues that bear upon or contribute to the programs of Alliance; monitoring current and future litigation challenging the school funding formula; developing and implementing an effective “external communications program” to properly and effectively state the position of Alliance; and maintaining close working relationships with other education and education funding organizations to assure maximum coordination and cooperation.

Under the terms of the contract between the governing board member, his consulting company, and Alliance, Alliance was to pay the consulting company a fee of \$8,334.00 per month for thirty-six months from July 1, 2010 until June 30, 2013. These same terms were later extended by Alliance until 2015. A one-time allowance not to exceed \$10,000 was also paid to the governing board member for moving expenses. On January 14, 2014, when the member of the governing board of the Lake County ESC took office on the Lake County ESC governing board, he was also serving as the executive director and a registered lobbyist for Alliance.

Regional Council of Governments Formed Pursuant to R.C. Chapter 167

R.C. Chapter 167 authorizes the formation of regional councils of governments. Pursuant to R.C. 167.01, the governing bodies of two or more counties, municipal corporations, townships, special districts, school districts, or other political subdivisions may enter into an agreement to form a regional council of governments. These political subdivisions are members of the regional council of governments they act to establish. A regional council of governments is required to adopt by-laws designating the officers of the council and their method of selection, creating a governing board that may act for the council, and providing for the conduct of the council’s business. R.C. 167.04(A).

R.C. 167.03 sets forth the powers of a regional council of governments. In general, a regional council of governments has the power to study area governmental problems common to two or more members of the council, promote cooperative arrangements and coordinate action among its members, make recommendations for review and action to its members, promote cooperative agreements and contracts among its members or other governmental agencies and private parties, operate a public safety answering point, and perform planning directly by personnel of the council or under contracts between the council and other public or private planning agencies. R.C. 167.03(A)(1)-(6). A regional council of governments may also review, evaluate, comment upon, and make recommendations relative to the planning and programming, and the location, financing, and scheduling of public facility projects within the region, act as an area wide agency to perform comprehensive planning for public facility projects, and act as an agency for coordinating local public policies. R.C. 167.03(B)(1)-(3); *see* 2012 Op. Att’y Gen. No. 2012-026, at 2-226; 1986 Op. Att’y Gen. No. 86-084, at 2-473.

A regional council of governments also is permitted to exercise the powers of its member political subdivisions. R.C. 167.03(C); *see* 2012 Op. Att’y Gen. No. 2012-013, at 2-108 to 2-109 (“[a] regional council of governments may also, when authorized, step into the shoes, and perform the duties, of its members”); 1990 Op. Att’y Gen. No. 90-012, at 2-49 (a regional council of governments may be empowered to perform a variety of functions on behalf of its members). *But see* 2006 Op. Att’y Gen. No. 2006-008, at 2-71 n.3 (noting that regional councils of government may not be delegated tasks that require the exercise of discretion regarding financial matters). Pursuant to R.C. 167.08, political subdivisions also may contract with a regional council of governments to receive any service from the council or to provide any service to the council. These contracts may permit a political subdivision to contract with a regional council of governments to have the council perform any function or render any service that the political subdivision may perform or render. *Id.*; 2012 Op. Att’y Gen. No. 2012-026, at 2-226 to 2-227.³ A regional council of governments is an entity separate and distinct from its members. 2012 Op. Att’y Gen. No. 2012-013, at 2-109; 1992 Op. Att’y Gen. No. 92-079, at 2-329; 1989 Op. Att’y Gen. No. 89-063, at 2-281.

Educational Service Centers

The public school system is organized into school districts, which include “city school districts, local school districts, exempted village school districts, joint vocational school districts, and cooperative education school districts.” 2010 Op. Att’y Gen. No. 2010-028, at 2-

³ R.C. Chapter 167 contains a specific provision exempting a regional council of governments from other conflict of interest provisions in the Revised Code. Specifically, R.C. 167.07 states:

Membership on the council and holding an office of the council does not constitute the holding of a public office or employment within the meaning of any section of the Revised Code. Membership on the council and holding an office of the council shall not constitute an interest, either direct or indirect, in a contract or expenditure of money by any municipal corporation, township, special district, school district, county, or other political subdivision. No member or officer of the council shall be disqualified from holding any public office or employment, nor shall such member or officer forfeit any such office or employment, by reason of his position as an officer or member of the council, notwithstanding any law to the contrary.

This exception, however, is not applicable under the facts you have presented because, according to a member of your staff, the member of the Lake County ESC governing board is not a member of the Alliance for High Quality Education and does not hold an office of Alliance.

203; R.C. 3311.01. Each school district is governed by a board of education. 2010 Op. Att’y Gen. No. 2010-028, at 2-203; *see* R.C. 3313.01-.02.

For purposes of R.C. Title 33 (education; libraries), the term “school district” encompasses educational service centers when the statute does not expressly refer to a city, local, exempted village, or joint vocational school district. R.C. 3311.055. The governing board of an ESC is included as a “school board” or “board of education” in the same circumstances. R.C. 3311.055; 2014 Op. Att’y Gen. No. 2014-026, slip. op. at 1-2. ESCs are an important part of Ohio’s public school system. 2010 Op. Att’y Gen. No. 2010-028, at 2-203. ESCs only provide services to certain school districts and are permitted to provide services to city or exempted village school districts by agreement. *See* R.C. 3311.05(A); R.C. 3313.843.

R.C. 3313.33

Because an ESC is a school district and the governing board of an ESC is a school board for purposes of R.C. Title 33, restrictions set forth in R.C. Title 33 for school districts and school boards apply to ESCs, unless otherwise specified. *See* R.C. 3311.055. R.C. 3313.33 sets forth one such restriction in the case of school board contracts and conveyances. Division (B) includes the following language prohibiting a member of a board of education, which includes a governing board of an ESC, from having, directly or indirectly, a pecuniary interest in a contract of the board:

Except as provided in division (C) of this section, 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 the person is a member.

R.C. 3313.33(B) (emphasis added).

Division (C) of R.C. 3313.33 sets forth an exception to the rule set forth in R.C. 3313.33(B), by permitting a board member to have a pecuniary interest in a contract of the board so long as 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.

Division (C) was added to R.C. 3313.33 in 2003-2004 Ohio Laws, Part V, 7099, 7136 (Am. Sub. S.B. 2, eff. Jun. 9, 2004).

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. It states that whenever a member of a board of education acts in any matter in which he is pecuniarily interested, such act in such matter, is void. R.C. 3319.21; *see, e.g.*, 1961 Op. Att’y Gen. No. 2466, p. 494 (syllabus, paragraph 1) (contracts between a milk company and board of education are invalid where milk company employs two members of the board as milk truck drivers); 1918 Op. Att’y Gen. No. 911, vol. I, p. 20, at 22. This provision operates to void action of a board member who is pecuniarily interested in a matter on which the member acts. *See* 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”).

Application of R.C. 3313.33

We will now turn to your specific question regarding the application of R.C. 3313.33 to the member of the governing board of the Lake County ESC who also serves as the executive director and lobbyist for the Alliance for High Quality Education, the regional council of governments that has a contract with the Lake County ESC. Pursuant to R.C. 3313.33(B), no member of a governing board of an ESC shall have, directly or indirectly, any “pecuniary interest” in any contract of the board. Therefore, R.C. 3313.33(B) prohibits a member of the Lake County ESC governing board from having any pecuniary interest in the contracts of the Lake County ESC, including the one between the Lake County ESC and Alliance. The issue central to your question is whether a board member of the Lake County ESC has a “pecuniary interest,” as that term is used in R.C. 3313.33(B), in the contract between the Lake County ESC and Alliance by virtue of the fact that the board member and his consulting company have contracted to provide services to Alliance.

R.C. 3313.33(B) prohibits a member of a governing board of an ESC from having, directly or indirectly, a pecuniary interest in any contract of the board. R.C. 3313.33(B) leaves the term “pecuniary interest” undefined. When no specific definition is given for a word in the Revised Code, the word is given “its natural, literal, common, or ordinary meaning.” 1994 Op. Att’y Gen. No. 94-025 (syllabus, paragraph 1); *see* R.C. 1.42 (“[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage”); *State v. Dorso*, 4 Ohio St. 3d 60, 62, 446 N.E.2d 449 (1983). The dictionary defines the term “pecuniary interest” as “an interest involving money or its equivalent.” *See Black’s Law Dictionary* 885 (9th ed. 2009) (defining “financial interest” which is also termed “pecuniary interest”); *see also* 2007 Op. Att’y Gen. No. 2007-011, at 2-89. A contract is “an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.” *See Black’s Law Dictionary* 365 (9th ed. 2009). 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.

Opinions of the Attorney General have addressed this term’s application. Generally, “[w]hen no exception applies, R.C. 3313.33 has been construed literally to prohibit any direct or indirect pecuniary interest, even if the benefit is slight.” 2007 Op. Att’y Gen. No. 2007-011, at

2-87; 1999 Op. Att’y Gen. No. 99-023, at 2-156 (finding that the interest in question should not be excepted from R.C. 3313.33 because it is indirect or very small in relation to the total budget); 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”); 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”). Numerous authorities have found that where 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. 2008 Op. Att’y Gen. No. 2008-008; *see In re Removal of Leach*, 19 Ohio Op. 263, 267-268 (C.P. Jackson County 1940) (the school board member “did have a pecuniary interest in the coal contract.... While [he] did not have the direct contract for the sale of the coal, ... since the coal was furnished from two mines on land of which he owned an interest as a partner, he would have a pecuniary interest in the sale of the coal much more so than would a shareholder in a corporation”); 1959 Op. Att’y Gen. No. 51, p. 29 (a prohibited interest was found where a township trustee leased his land to a gravel company on a royalty basis, receiving a certain sum for each ton of gravel sold, and the board of trustees entered into a contract to purchase gravel from that gravel company).

Many opinions have concluded that a person who is employed by an entity that has a contract with a school board has an interest in that contract, even when there is no direct connection between the employee and the proceeds of that contract. *See, e.g.*, 1999 Op. Att’y Gen. No. 99-023 (member of the school board had a pecuniary interest in a contract of the school board because he was employed by an entity that provided technology services to the school board); 1961 Op. Att’y Gen. No. 2466, p. 494 (syllabus, paragraphs 1 and 2) (contracts between a milk company and a board of education are invalid where milk company employs two members of the board as milk truck drivers; contracts for sales of school buses executed between a board of education and an automobile sales agency that employs a member of the board of education are invalid); 1956 Op. Att’y Gen. No. 6672, p. 432 (a member of a board of education who is employed by a business that sells large quantities of school supplies to the board has an interest in the contracts of sale); 1948 Op. Att’y Gen. No. 3075, p. 197, at 199 (“[i]t is too obvious to admit of argument that if an employee who is a member of the board of education is in a position to throw his employer large and profitable contracts, he will inevitably build up for himself a standing with his firm and in all probability ultimately reap substantial rewards growing out of his usefulness in that respect,” and prohibiting a contract between a school board and a bus dealer when a school board member is foreman for the dealer); *see also* 1973 Op. Att’y Gen. No. 73-043 (an employee of an insurance company which has contracts with a city cannot at the same time become a member of the city council); *see generally* 2008 Op. Att’y Gen. No. 2008-002, at 2-12 (under Ohio law an “individual who is employed by an enterprise that has a contract with a public body has an interest in that contract, even if there is no direct connection between the employee and the proceeds of that contract”). Thus, a pecuniary interest in a contract is prohibited even when the benefit the governing board member receives is indirect, as in the case of the benefit received by an employee of a contracting entity.

There is some question, however, whether an independent contractor relationship, as opposed to an employment relationship, is sufficient to constitute a prohibited pecuniary interest under R.C. 3313.33(B). See 1970 Op. Att’y Gen. No. 70-107, at 2-202 (to prohibit a contract with an entity that uses a board member as an independent contractor would “seriously inhibit the power of school boards to contract, due to the representation on boards of education of many professions”); *but see* 1956 Op. Att’y Gen. No. 6672, p. 432 (syllabus, paragraph 2) (a member of a board of education who is regularly employed as an attorney by a casualty company from which the board purchases large amounts of insurance and bonds, has an interest in such contracts of purchase, within the provisions of R.C. 3313.33). Thus, we will determine first whether the governing board member of the Lake County ESC is an employee of Alliance or an independent contractor of Alliance.

Generally, the term “employee” refers to a person who works under the supervision and control of another person for wages or salary. See *Merriam-Webster’s Collegiate Dictionary* 408 (11th ed. 2005); *Black’s Law Dictionary* 602 (9th ed. 2009); see also 2014 Op. Att’y Gen. No. 2014-017, at 2-142; 2006 Op. Att’y Gen. No. 2006-042, at 2-412; 1996 Op. Att’y Gen. No. 96-007, at 2-27 to 2-28. Typically, an employment relationship arises by express or implied contract. 1996 Op. Att’y Gen. No. 96-007, at 2-28; 1974 Op. Att’y Gen. No. 74-064, at 2-265. In contrast, the term “contractor” is generally defined as “one who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method of accomplishing it.” *Black’s Law Dictionary* 839 (9th ed. 2009). Accord *Merriam-Webster’s Collegiate Dictionary* 271 (11th ed. 2005); see also 2014 Op. Att’y Gen. No. 2014-017, at 2-143; 2007 Op. Att’y Gen. No. 2007-046, at 2-454 to 2-455 (“independent contractor,” in contrast to an “employee,” has responsibility for determining the manner or means of performing the work or job).

According to the terms of the contract Alliance has with the governing board member and his consulting company, the governing board member and the company are responsible for conducting “the day-to-day” affairs and conducting “all necessary business affairs” of Alliance. Although there are a number of additional duties specified, nothing in the contract specifies how this work must be accomplished and the contract does not subject the board member or his consulting company to direct control of anyone at Alliance. Thus, it appears that the board member “is entrusted to undertake a specific project but is left free to do the assigned work and to choose the method of accomplishing it,” *Black’s Law Dictionary* 839 (9th ed. 2009), which would mean that the board member is an independent contractor of Alliance rather than an employee.

Now that we have determined the governing board member is an independent contractor of Alliance, we must determine whether his interest as an independent contractor, as opposed to an employee, of Alliance rises to the level of a pecuniary interest in a contract between Alliance and the Lake County ESC. We must also consider whether the contractual relationship between the consulting company and Alliance is one that gives the governing board member a pecuniary interest in a contract between Alliance and the Lake County ESC. To determine whether the governing board member has a pecuniary interest in the Lake County ESC and Alliance

contract, we must look to the “perceived benefits the board member[] would gain from sending [his] employer[] additional business.” 1999 Op. Att’y Gen. No. 99-023, at 2-153. The \$3,500.00 that the Lake County ESC agrees to pay Alliance each year comes from the Lake County ESCs budget and benefits Alliance. Accordingly, there is a pecuniary transfer. *See id.* at 2-152. When Alliance receives the \$3,500.00, it is used to fund Alliance’s operations and the services it provides to school districts. Such funding includes paying the board member and his consulting company for the services they render to Alliance. *See id.* Additionally, the board member and his consulting company have been retained to exclusively run the affairs of Alliance and receive \$8,334.00 per month for doing so. Money received by Alliance pursuant to the contract with the Lake County ESC may affect the amount of compensation that the board member and his consulting company receive or the nature and extent of the board member or the consulting company’s duties pursuant to the contract with Alliance. *See id.* Even if the board member or his consulting company’s duties and compensation cannot be tracked to the dollars in question “the existence, operation, and staffing level of [the regional council of governments] may be affected by the aggregate amounts received from the [school district] pursuant to contract.” *See id.* at 2-152 to 2-153. Thus, the board member and his consulting company receive a tangible, financial benefit as a result of the contract between Lake County ESC and Alliance.

The board member and his consulting company are essentially in charge of running the operations of Alliance and providing assistance to the executive council only when requested. They conduct “all necessary business affairs” of Alliance; maintain all necessary records of Alliance; recruit new member districts to Alliance; direct and coordinate “any and all activities appropriately undertaken by Alliance as directed by the Executive committee and the members”; develop, implement, and coordinate strategies and work closely with other education organizations and administration; conduct ongoing legislative research regarding issues that bear upon or contribute to the programs of Alliance; monitor current and future litigation challenging the school funding formula; develop and implement an effective “external communications program” to properly and effectively state the position of Alliance; and maintain close working relationships with other education and education funding organizations to assure maximum coordination and cooperation. Given the substantial role the board member and his consulting company have in Alliance’s operation, the financial benefit that accrues to the board member and his consulting company as a result of the contract between Alliance and the Lake County ESC means that the governing board member has a pecuniary interest in the contract between the Lake County ESC and Alliance.

Having determined that the board member of the Lake County ESC has a pecuniary interest in the contract that the Lake County ESC has with Alliance, we must determine whether the exception contained in R.C. 3313.33(C) applies. Pursuant to R.C. 3313.33(C), a member of the governing board of an ESC may have a pecuniary interest in a contract of the board if the following three conditions apply: 1) the member’s interest in the 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, and 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 of the state. "[E]xceptions to a general law are not favored and must be strictly construed, and what is not clearly excluded from the operation of a law is clearly included therein." *Pioneer Linen Supply Co. v. Evatt*, 146 Ohio St. 248, 251, 65 N.E.2d 711 (1946).

The first part of this exception requires that the board member be "employed by a political subdivision." The term "employ" means "the state of being employed." *See Merriam-Webster's Collegiate Dictionary* 408 (11th ed. 2005). We have already determined that the board member is not an employee of Alliance for purposes of R.C. 3313.33, but rather an independent contractor. Thus, the R.C. 3313.33(C) exception does not apply to the facts you have presented us.

Nevertheless, you would like to know whether a regional council of governments qualifies as a political subdivision for purposes of R.C. 3313.33(C)(1). Although a regional council of governments is made up of political subdivisions, it is not clear whether a regional council of governments is a political subdivision in its own right. 1989 Op. Att'y Gen. No. 89-063, at 2-280. Some opinions of the Attorney General have found that a regional council of governments is a political subdivision for certain purposes, while others have not. *Compare* 2012 Op. Att'y Gen. No. 2012-013, at 2-112 (a regional council of governments is a "subdivision" for purposes of R.C. 135.01(L)), and 1971 Op. Att'y Gen. No. 71-010 (a regional council of governments is a political subdivision and therefore not subject to sales tax pursuant to R.C. 5739.02), *with* 1998 Op. Att'y Gen. No. 98-004 (a regional council of governments is not a "subdivision" for purposes of R.C. Chapter 5705) (syllabus paragraph 1), 1992 Op. Att'y Gen. No. 92-079, at 2-330 to 2-331 (a regional council of governments is not a political subdivision for purposes of statutory vacation pay for county employees under R.C. 124.39(C), R.C. 325.19, and R.C. 9.44), 1979 Op. Att'y Gen. No. 79-018, at 2-62 (a regional council of governments is not a "subdivision" for purposes of R.C. 133.01), and 1974 Op. Att'y Gen. No. 74-080, at 2-330 ("[t]here is no indication of a legislative intent to confer taxing power upon a [regional council of governments], which would make it, in effect, a governmental subdivision rather than a council of subdivisions"); *compare also* R.C. 9.44(C), R.C. 2744.08(A)(2)(a), and R.C. 1551.25(A)(2), *with* R.C. 2744.01(F).

R.C. 3313.33 has left the term "political subdivision" undefined. The term "political subdivision" is susceptible of a wide variety of definitions, depending upon the context in which it is used. *Cincinnati Metro. Hous. Auth. v. State Employment Relations Bd.*, No. C-880205, 1989 WL 6149, *12 (Hamilton App. Jan. 31, 1989) *rev'd on other grounds*, 53 Ohio St. 3d 221, 560 N.E.2d 179 (1990); 1983 Op. Att'y Gen. No. 83-059, at 2-247; *see, e.g.*, R.C. 2744.01(F) (defining "political subdivision" for purposes of tort liability); R.C. 2743.01(B) (defining "[p]olitical subdivisions" for purposes of Court of Claims provisions); R.C. 3501.01(T) (defining "[p]olitical subdivision" for purposes of elections provisions); R.C. 5705.01(A) (defining "[s]ubdivision" for purposes of tax levy law); R.C. 5713.081 (defining "political subdivision" for purposes of the collection of delinquent taxes levied on real property owned by the public). In its general sense, the term "political subdivision" is used "to encompass all types

of public agencies authorized to exercise governmental functions.” 1979 Op. Att’y Gen. No. 79-018, at 2-59; 1983 Op. Att’y Gen. No. 83-059, at 2-247. *Black’s Law Dictionary* defines political subdivision as “[a] division of a state that exists primarily to discharge some function of local government.” *Black’s Law Dictionary* 1277 (9th ed. 2009); see 1995 Op. Att’y Gen. No. 95-018, at 2-104 (relying on the *Black’s Law Dictionary* definition of “political subdivision”).

In determining whether various public entities are political subdivisions, prior opinions have stated that the entity must be a public agency that exercises some governmental function within a limited geographical area. 1995 Op. Att’y Gen. No. 95-018, at 2-103; 1993 Op. Att’y Gen. No. 93-031, at 2-158; 1990 Op. Att’y Gen. No. 90-087, at 2-374; 1972 Op. Att’y Gen. No. 72-035 (syllabus). These opinions have also found that political subdivisions are entities created by statute that have a legal existence independent of the subdivision in which they are located. 1995 Op. Att’y Gen. No. 95-018, at 2-103 (citing a regional library district under R.C. Chapter 3375 as an example of a political subdivision created by the Ohio Constitution or the General Assembly); 1993 Op. Att’y Gen. No. 93-031, at 2-158.

Applying this framework to regional councils of government formed pursuant to R.C. Chapter 167, a regional council is a political subdivision for purposes of R.C. 3313.33(C)(1). It is made up of two or more political subdivisions. Among other things, a regional council of governments may study area governmental problems common to its members, promote cooperative arrangements and coordinates action among its members, make recommendations for review and action to its members, promote cooperative agreements and contracts among its members or other governmental agencies and private parties, operate a public safety answering point, and perform planning directly by personnel of the council or under contracts between the council and other public or private planning agencies. R.C. 167.03(A)(1)-(6). It also has authority to take any action that any of its individual members are permitted by law to take if the individual members’ governing bodies authorize such action. R.C. 167.03(C); 2012 Op. Att’y Gen. No. 2012-026, at 2-226. Thus, it exercises governmental functions in that its main purpose is to promote and foster government action of its political subdivision members and exercise the governmental functions of its member political subdivisions. Moreover, a regional council of governments exercises its government functions in a limited geographic area—namely within the region encompassed by the political subdivisions that make up the membership of the council. Finally, a regional council of governments is an entity separate and distinct from its members. 2012 Op. Att’y Gen. No. 2012-013, at 2-109; 1992 Op. Att’y Gen. No. 92-079, at 2-329; 1989 Op. Att’y Gen. No. 89-063, at 2-281. Viewing these factors together, we find that a regional council of governments is a political subdivision for purposes of R.C. 3313.33(C)(1).

The purpose of the exception in R.C. 3313.33(C) also supports this conclusion. See 1971 Op. Att’y Gen. No. 71-010 (a regional council of governments is a political subdivision pursuant to R.C. 5739.02 because such a conclusion served the legislative purpose behind R.C. 5739.02). The purpose of the exception contained in R.C. 3313.33(C) is to allow a political subdivision that employs a school board member to contract with the board, so long as the board member meets the

other conditions of the exception. This enables school boards to contract more freely. Concluding that a regional council of governments is a political subdivision, thus, is compatible with the legislative policy for the R.C. 3313.33(C) exception.⁴ Thus, for purposes of R.C. 3313.33(C)(1), a regional council of governments is a political subdivision.

Conclusions

For the reasons discussed above, it is my opinion, and you are hereby advised that:

1. A person who serves as a member of the governing board of an educational service center and as an independent contractor for a regional council of governments and who takes a substantial role in running the day-to-day affairs of the regional council of governments, has a pecuniary interest in a contract between the educational service center and the regional council of governments for purposes of R.C. 3313.33(B).
2. A person who serves as a member of the governing board of an educational service center and whose consulting company provides services to a regional council of governments that include taking a substantial role in running the day-to-day affairs of the regional council of governments, has a pecuniary interest in a contract between the educational service center and the regional council of governments for purposes of R.C. 3313.33(B).
3. A regional council of governments is a political subdivision for purposes of R.C. 3313.33(C)(1).

Very respectfully yours,



MICHAEL DEWINE
Ohio Attorney General

⁴ Lending additional support are two sections of R.C. Chapter 3313. R.C. 3313.846 and R.C. 3313.848 specifically define political subdivision as it is defined in R.C. 2744.01. This statute explicitly includes regional councils of governments in the definition of political subdivision.