OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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May 6, 1997

FILE NO. 97-005

GOVERNMENTAL ETHICS AND
CONFLICT OF INTEREST:
Spouse of Member of State Board of Education
as Subcontractor on Board Contract

Joseph A. Spagnolo
State Superintendent of Education
100 North First Street
Springfield, Illinois 62777-0001

Dear Mr. Spagnolo:

I have your letter wherein you inquire whether it is unlawful for the spouse of a member of the Illinois State Board of Education (hereinafter referred to as "ISBE") to render consulting services to a school district, where the fees for the consulting services are paid for with funds received by the district pursuant to a contract with the ISBE. For the reasons hereinafter stated, it is my opinion that this transaction is not prohibited by section 11.1 of the Illinois Purchasing Act (30 ILCS 505/11.1 (West 1994)), nor is it a per se violation of section 3 of the Public Officer Prohibited Activities Act (50 ILCS 105/3 (West 1994)).

You have stated that the ISBE contracted with Schaumburg Community Consolidated School District No. 54 for performance of a specific research project. In carrying out its duties under the contract, the school district contracted with the spouse of a member of the ISBE, who provided consulting services on the project and was paid from funds which the district received pursuant to the contract with the ISBE.

Section 11.1 of the Illinois Purchasing Act provides, in part:

> "It is unlawful for any person holding an elective office in this State, holding a seat in the General Assembly, or appointed to or employed in any of the offices of State government * * * or who is the wife, husband or minor child of any such person to have or acquire any contract, or any direct pecuniary interest in any contract therein, whether for stationery, printing, paper or for any services, materials or supplies, which will be wholly or partially satisfied by the payment of funds appropriated by the General Assembly of the State of Illinois * * *.
>
> It is unlawful for any firm, partnership, association or corporation in which any such person is entitled to receive more than 7½% of the total distributable income to have or acquire any such contract or direct pecuniary interest therein.
>
> It is unlawful for any firm, partnership, association or corporation in which any such person together with his or her spouse or minor children is entitled to receive more than 15%, in the aggregate, of the total distributable income to have or acquire any such contract or direct pecuniary interest therein.
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> * * * "

In opinion No. 92-003 (Ill. Att'y Gen. Op. No. 92-003, issued February 4, 1992), my predecessor concluded that section 11.1 did not prohibit a member of the General Assembly from serving as a grant employee for a regional superintendent of schools. As is discussed in that opinion, section 11.1, and its antecedent, have long been construed to apply only to those contracts which are entered into directly with the State. Thus, when a grant recipient contracts with a third party for services necessary to administer or carry out the grant requirements, the State is not a party to the contract, and the third party does not have a direct interest in any contract with the State. Therefore, section 11.1 does not apply to such contracts.

Similarly, in opinion No. S-212 (1970 Ill. Att'y Gen. Op. 148), Attorney General Scott concluded that the Acting Director of the Department of Conservation did not violate the provisions of the Illinois Purchasing Act by having a financial interest in a magazine which accepted advertisements from voluntary tourism councils which, in turn, were reimbursed for their advertising costs by the State Department of Business and Economic Development, because there was no direct contractual agreement between the magazine and the State. In reaching this conclusion, he quoted Electrical Contractors Association v. Illinois Building Authority (1966), 33 Ill. 2d 587, 594:

" * * *

'Also relevant to interpretation of the scope of the definition of "expend" and "encumber" as used by the legislature in the definition of "State agency" is appellant's argument that, if the receipt of State funds appropriated to a State agency and by it paid to a third party constitutes the expenditure or encumbrance of State funds by the third party, the provisions of the Purchasing Act may well be extended, at least arguably, to a point never contemplated nor intended by the General Assembly. It seems to us clear that the legislative intent was not to subject such third party to the Purchasing Act requirements in that party's use of the funds so derived, but to apply the Purchasing Act to the use of the appropriated funds by those to whom the appropriation is made.'

* * * "

Lastly, in opinion No. S-1165 (1976 Ill. Att'y Gen. Op. 313), Attorney General Scott concluded that a member of the General Assembly did not violate section 11.1 of the Illinois Purchasing Act by entering into a subcontract with a general contractor who had contracted with a State agency. It was concluded therein that the subcontractor did not have a direct pecuniary interest in the contract with the State agency, because the subcontractor had no direct claim on the funds that the agency had agreed to pay to the general contractor. Rather, the subcontractor had merely an interest or lien contingent upon the general contractor's default.

In the circumstances you have described, the interest of the spouse of the ISBE member is indistinguishable from that

of the subcontractor discussed in opinion No. S-1165 (1976 Ill. Att'y Gen. Op. 313) or the grant consultant in opinion No. 92-003. He or she has no direct interest in a contract with the State. Therefore, it is my opinion that section 11.1 of the Illinois Purchasing Act would not prohibit the spouse from performing services for a local school district despite payment being made from funds paid to the district pursuant to contract by the ISBE.

Section 3 of the Public Officer Prohibited Activities Act provides, in part:

> "(a) No person holding any office, either by election or appointment under the laws or constitution of this state, may be in any manner interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. * * * Any contract made and procured in violation hereof is void. * * *
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> * * * "

None of the exceptions enumerated in section 3 would be applicable to this situation.

Section 3, unlike section 11.1 of the Illinois Purchasing Act, extends not only to direct contractual interests, but to indirect interests in contracts as well. A subcontractor or an employee of a contractor is held to have at least an indirect interest in the contract between a public entity and a general contractor. (People ex rel. Pearsall v. Sperry (1924), 314 Ill.

205; 1972 Ill. Att'y Gen. Op. 263.) Thus, a State Board of Education member would be precluded by section 3 from having even an indirect interest in a contract upon which he or she may be called upon to act or vote, such as granting funds to a local school district for research. At issue, however, is whether the ISBE board member in this instance is deemed to have an interest in the contract of his or her spouse.

Our appellate court has held that the existence of a marital relationship between a public officer and an employee of the public body which that officer serves does not constitute a per se violation of section 3 of the Public Officer Prohibited Activities Act. (Hollister v. North (1977), 50 Ill. App. 3d 56; People v. Simpkins (1977), 45 Ill. App. 3d 202.) In Hollister v. North, the spouse of a school board member was employed as a teacher in the school district; in People v. Simpkins, the wife of a city mayor was employed as a clerk in the city water department. In each case, the court cited what is now the Rights of Married Persons Act (750 ILCS 65/0.01 et seq. (West 1994)) for the proposition that married persons can contract, earn income and own property separately from one another. Consequently, the court concluded that one spouse does not, as a matter of law, have an interest in the income or property of the other. This rule may be contrasted with that which applies in community property States, where it has been held that a public officer does, as a matter of law, have an interest in the income of a

spouse employed by the public body, because of the benefit to the marital community. (State v. Miller (1948), 32 Wash. 2d 149, 201 P.2d 136.) Statutes requiring each spouse to support the other, however, have been considered too speculative to give rise to a presumptive interest in Illinois. Hollister v. North (1977), 50 Ill. App. 3d 56, 59.

The court in both Hollister v. North and People v. Simpkins emphasized that no allegations were made and no evidence was presented in either case which would have shown that the public officer in question had an actual, pecuniary interest in the contract of his spouse. The rule remains that the interest in a contract which disqualifies a public officer from acting upon the contract in his official capacity must be certain, definable, pecuniary or proprietary. Panozzo v. City of Rockford (1940), 306 Ill. App. 443, 456; People v. Simpkins (1977), 45 Ill. App. 3d 202, 208.

In those cases from other jurisdictions in which a public officer has been deemed to have had an interest in his spouse's contract with the public body which he served, specific facts regarding the existence of that interest have been produced. Thus, in Sturr v. Borough of Elmer (1907), 75 N.J.L. 443, 67 A.1059, property held in the name of the wife of a member of the Borough council was purchased by the Borough. The evidence showed that the husband, however, had paid the taxes on the property, negotiated the sale and fixed the sale price. Woodward

v. City of Wakefield (1926), 236 Mich. 417, 210 N.W.322, involved the sale of property to a city by the wife of the mayor. The husband, who acted as agent for his wife on the sale, regularly managed his wife's property, and the proceeds of the sale were used to discharge his endorsements on notes secured by mortgages on the property. In Githens v. Butler County (1942), 350 Mo. 295, 165 S.W.2d 650, the wife of a judge of the county court purchased land from the county at a private sale authorized and approved by the vote of her husband and his two associate judges. As a matter of law, the husband had a right of dower in any property of the wife, which was held to be a sufficient interest to void the sale. Similar cases from community property States point to the community interest in income or property of each spouse. State v. Miller (1948), 32 Wash. 2d 149, 201 P.2d 136; Beakley v. City of Bremerton (1940), 5 Wash. 2d 670, 105 P.2d 40.

The only modern Illinois case which has specifically held that a husband had an interest in the business of his wife also considered evidence beyond the marital relationship alone. In Bock v. Long (1972), 3 Ill. App. 3d 691, the court affirmed the finding of a city fire and police commission that a police captain held a prohibited interest in the manufacture, sale or distribution of alcoholic liquor. The evidence showed that during the captain's leave of absence from duty, his wife became licensed to operate and took on proprietorship of a dram shop. The profits from its operation were listed on a joint Federal

income tax return of the captain and his wife, and he performed janitorial and bartending services for the business.

Courts in other States have also held, consistently with People v. Simpkins and Hollister v. North, that the existence of a marital relationship is not, standing alone, evidence of an interest of one spouse in the income of the other. In Frazier v. State (Miss. 1987), 504 So.2d 675, a member of the State legislature and his wife were both school teachers. The court held that the legislator's vote on school funding acts gave rise to a conflict of interest with respect to his salary as a teacher, but there was no such conflict, as a matter of law, with respect to his wife's salary. In State ex rel. Meier v. McBride (Ohio App., Feb. 28, 1995), Docket No. 94-C-34, the court concluded that there was no conflict of interest when a husband, who was a member of a village council, voted to appoint his wife to fill a vacancy on the council.

We have not been furnished with the information which would be necessary to establish the existence of an actual interest of one spouse in a contract of the other, nor is it the province of this office to make such findings of fact. Therefore, it can only be said that, as a matter of law, the interest of a spouse of a board member in a contract funded by the ISBE is not a per se violation of section 3 of the Public Officer Prohibited Activities Act.

In summary, it is my opinion that the rendering of services to a school district by the spouse of a State Board of Education member, when the funds from which the services will be paid have been received by the district from the ISBE, is not a violation of section 11.1 of the Illinois Purchasing Act, or a per se violation of section 3 of the Public Officer Prohibited Activities Act.

Sincerely,

JAMES E. RYAN
ATTORNEY GENERAL