



**OHIO ETHICS COMMISSION**

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Note from the Ohio Ethics Commission:

Ohio Ethics Commission Informal Advisory Opinion No. 1989-INF-0120-2 (Murray) – Determination on page five that the donation of money to a public agency is not a public contract.

Overruled, in part, by Advisory Opinions No. 90-003 and 2023-01 noting that donations to public agencies are public contracts.

For more information on Overruled and Obsolete Formal Advisory Opinions please see [Formal Advisory Opinions - OEC \(ohio.gov\)](#). For more information on the Commission's Informal Advisory Opinions please see [Informal Advisory Opinions - OEC \(ohio.gov\)](#).

THIS COVER SHEET IS PROVIDED FOR INFORMATION PURPOSES. IT IS NOT AN ETHICS COMMISSION ADVISORY OPINION. INFORMAL ADVISORY OPINION NO. 1989-INF-0120-2 (MURRAY) IS ATTACHED.



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January 20, 1989      Informal Opinion 1989-INF-0120-2

Richard C. Murray  
Assistant to the Governor

Dear Rich:

You have asked whether the Ohio Ethics Law and related statutes prohibit Doug Fairbanks, Vice President of Operations of Ohio Bell, from serving as a member of the Ohio Expositions Commission. You have set forth several situations whereby Ohio Bell and the Expositions Commission conduct business, and each situation will be discussed in turn.

You state first that the Expositions Commission has contracted with Ohio Bell for Ohio Bell's Digital Centrex System, which includes line service and telephone equipment. The equipment was purchased by the Expositions Commission by means of a State Purchasing Term Contract, and the line service utilized by the Expositions Commission was negotiated between Ohio Bell and the Ohio Department of Administrative Services.

Division (A)(4) of Section 2921.42 of the Revised Code reads as follows:

(A) No public official shall knowingly do any of the following:

...

(4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision of governmental agency or instrumentality with which he is connected.

The term "public official" is defined for purposes of R.C. 2921.42 in Section 2921.01(A) of the Revised Code to include any appointed officer of the state. The Expositions Commission (hereinafter "Commission") is created pursuant to Section 991.02 of the Revised Code and is charged under Section 991.03 with conducting at least one fair or exposition annually, and with maintaining and managing property held by the state for the purpose of conducting fairs, expositions, and exhibitions. The Commission is composed of eleven members, nine of whom are appointed by the Governor, with the advice and consent of the Senate. The Directors of the Departments of Development and Agriculture, or their representatives, serve in their official capacities. See R.C. 991.02. Members serve six-year terms and are compensated by the state. Id. The Expositions Commission is a commission statutorily created within state government, and the members thereof are appointed officials of the state who are subject to R.C. 2921.42.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (E) of that section to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state. Therefore, the purchase or acquisition of telephone equipment and service by or for the use of the Expositions Commission is a "public contract" under R.C. 2921.42.

An "interest" which is prohibited under Section 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. See Ohio Ethics Commission Advisory Opinion No. 81-008. An officer of a corporation is deemed to have a definite and direct fiduciary interest in the contracts of the corporation, and may also have a pecuniary interest. See Advisory Opinions No. 79-004, 81-005, 81-008 and 85-009. The Vice President of Operations of Ohio Bell has an "interest" in the contracts of that company. Therefore, R.C. 2921.42(A)(4) would prohibit him from serving as a member of the Expositions Commission since the Commission and Ohio Bell have entered into a public contract.

Division (C) of Section 2921.42 provides an exception to the prohibition of Division (A)(4), when all of the following criteria apply:

- (C) This section does not apply to a public contract in which a public servant, member of his family, or one of his 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 servant'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 servant, member of his family, or business associate, and the public servant takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

The requirements of Division (C) are factual determinations, and whether a particular transaction meets the criteria of Division (C) depends upon the facts and circumstances of each individual case. See Advisory Opinion No. 78-001. These criteria are strictly applied against the public official, and the burden is on the official to demonstrate that he is in compliance with the exemption. See Advisory Opinions No. 83-004 and 84-011.

Division (C)(2) requires that the equipment and services of Ohio Bell are being furnished to the Commission as part of a continuing course of dealing established prior to Mr. Fairbanks' appointment to the Commission. In this instance, the current contracts for equipment and services between Ohio Bell and the Commission are in effect, and Mr. Fairbanks has not yet been appointed. This could establish the "continuing course of dealing" exception with respect to those contracts under Division (C)(2). See Advisory Opinion No. 88-008.

If, however, any material changes in the contracts, including modifications, extensions, or renewals, occur after Mr. Fairbanks' appointment, then he will no longer fall within the Division (C)(2) exemption. See Advisory Opinions No. 82-007 and 88-008. Furthermore, any new contracts for equipment or service (such as a maintenance agreement) entered into with Ohio Bell after Mr. Fairbanks' appointment would not be part of a "continuing course of dealing." See Advisory Opinion No. 88-008. However, if the current contracts are modified or a new contract is executed, the criteria of Division (C)(2) may still be met if it can be established that the equipment and services provided by Ohio Bell to the Commission are "unobtainable elsewhere for the same or lower cost." This requirement must be demonstrated by some objective standard, such as an open and fair competitive bidding process, or through a verifiable showing that Ohio Bell is the sole source of the equipment or service to be provided. See Advisory Opinions No. 87-003 and 88-001. The Commission must make every reasonable effort to open the selection process to all interested and qualified parties, and to award the contract to the company that will provide the necessary equipment or services at the lowest cost. See Advisory Opinion No. 88-001. Furthermore, the Commission's specifications or requirements for equipment and services must be valid and proper considerations, and may not be drawn to favor Ohio Bell. Id.

Competitive bidding may also be required pursuant to Division (A)(3) of Section 2921.42 which prohibits a public official from occupying a position of profit in the prosecution of a public contract authorized by him or by a commission of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding where his was not the lowest and best bid. See Advisory Opinion No. 88-008 (setting forth the circumstances under which a public official may be deemed to profit from a public contract). The prohibition of Division (A)(3) would not apply to any contract authorized or approved by the Commission prior to Mr. Fairbanks' appointment. See Advisory Opinion No. 88-008.

Assuming that all of the criteria of Division (C) of Section 2921.42 can be established and the requirements of Division (A)(3) of Section 2921.42, where applicable, can be met, so that Mr. Fairbanks can properly serve on the Commission, the prohibitions of R.C. 2921.42(A)(1) must be observed. This provision prohibits a public official from authorizing or employing the authority or influence of his office to secure authorization of a public contract in which he or any of his business associates has an interest. Therefore, R.C. 2921.42(A)(1) would prohibit him from voting, discussing, deliberating, or otherwise using his authority or influence, formally or informally, to secure for Ohio Bell a contract with the Commission, and from participating in any manner concerning the current agreements. See Advisory Opinions No. 85-009 and 88-001. See also R.C. 2921.42(C)(4) (set forth above).

You have stated as a second issue that Ohio Bell provides for the Commission payphone service on the fairgrounds. Ohio Bell has agreed to pay a commission based on the amount of revenue generated from the public telephones in exchange for the Commission's permission to install and maintain public telephone service on the fairgrounds. No expenditure is required by the Commission. A four-year contract was executed on June 30, 1987, and the contract provides that it shall be automatically renewed for one year at the same terms, unless either party provides notice of its intention not to renew the contract.

As discussed above, a public contract is defined to include a contract for the purchase or acquisition of property or services by the state. In this instance, the Commission is not purchasing payphone service for the fairgrounds; indeed, the Commission receives revenue from the payphones. However, the Commission is acquiring the payphone service for the benefit of those attending the fairgrounds. Therefore, the contract for payphone service is a "public contract" for purposes of R.C. 2921.42. As discussed above, Division (A)(4) of Section 2921.42 would prohibit Mr. Fairbanks from serving on the Expositions Commission, unless he can meet all criteria for the exception set forth in Division (C). Mr. Fairbanks would be able to establish the "continuing course of dealing" criterion set forth in Division (C)(2) for purposes of the contract executed on June 30, 1987, including the one-year automatic renewal period, see Advisory Opinion No. 88-008, unless there were some modification to the contract. Division (A)(1) would prohibit Mr. Fairbanks from voting, discussing, deliberating, or otherwise using his official authority or influence, formally or informally, to secure the payphone contract for Ohio Bell, and from participating in any manner concerning the contract.

The third situation you have presented is that Ohio Bell annually leases from the Commission display space at the Ohio State Fair. You have stated that the standard rate is paid for space, concessionaire tickets, grounds service, and electrical service connection. It has been indicated that the Commission has broad discretion as to location and accommodations provided to an exhibitor.

Again, the issue arises whether the lease of display space is a "public contract" under R.C. 2921.42. The Ethics Commission has held that a contract may be "for the use of" a governmental entity to the extent that the governmental entity derives some benefit or service as a result of the contract, even where the governmental entity is leasing or conveying property it owns in exchange for that benefit or service. See Advisory Opinions No. 78-003 and 88-006.

In this instance, the Commission would, under the lease of display space, acquire the services of Ohio Bell in providing exhibitions to fairgoers. The lease of the display space is for "the use of" the Commission in fulfilling its duties to provide exhibitions at the fair, to defray costs, and to manage the state's property for the purpose of conducting fairs. See R.C. 991.03, 991.04. The lease is, therefore, a public contract for purposes of R.C. 2921.42, and Division (A)(4) would prohibit Mr. Fairbanks from serving on the Commission, unless he can meet the exception of Division (C). With regard to Division (C)(2), there is no lease existing at this time so as to address the continuing course of dealing exception. Furthermore, the criterion of Division (C)(2) that the services are "unobtainable elsewhere for the same or lower cost" would not be met if Ohio Bell pays a standard rate under the lease, and would be extremely difficult to otherwise establish.

As a final matter, you have indicated that Ohio Bell has been, and is anticipated to be a sponsor of the State Fair. Under the Sponsorship Agreement, Ohio Bell would donate money in exchange for being permitted to use the official fair logo in advertising and publicity materials, being listed as a sponsor on a billboard at the fair, receiving an ad in the official fair program, receiving signage directing fairgoers to the Ohio Bell exhibit, having the opportunity to supply Kroger booths on the fairgrounds with information concerning Ohio Bell and its exhibit, and receiving the opportunity to run an announcement over the fair public address system. The donation of money by Ohio Bell in exchange for the opportunity to advertise itself as a sponsor does not constitute a "public contract" under R.C. 2921.42 since the Commission is acquiring no specific service from Ohio Bell. The sponsorship is, basically, a donation to the Commission, and donations have never been considered to be public contracts under R.C. 2921.42. Therefore, the fact that Ohio Bell would be a sponsor of the fair would not preclude Mr. Fairbanks from serving on the Commission. However, he would be prohibited by R.C. 102.03(D) from voting, discussing, deliberating, or otherwise using his official position, formally or informally, to obtain any benefit for Ohio Bell under the sponsorship agreement, or otherwise. R.C. 102.03(D) prohibits a public official or employee from using his authority or influence to secure anything of value that is of such character as to manifest a substantial and improper influence upon him with respect to his duties.

With regard generally to Mr. Fairbanks' membership on the Commission, R.C. 102.04(C) would prohibit him from receiving compensation from Ohio Bell for personally representing or personally rendering any other service in any case, proceeding, application or other matter that is before any agency, department, board, bureau, commission, or other instrumentality of the state, and R.C. 102.03(A) would prohibit him, while in office and for one year thereafter, from representing Ohio Bell before any public agency on any matter in which he personally participated as a member of the Commission. Division (B) of Section 102.03 would prohibit him from using, or disclosing to Ohio Bell without appropriate authorization, confidential information acquired by him in his official capacity. He is subject to his prohibition during his term of office and after he leaves office.

This informal advisory opinion is based on the facts presented, and was approved by the Ethics Commission at its meeting on January 20, 1989. The opinion is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions concerning this matter, please contact me.

Sincerely,



Melissa A. Warheit  
Executive Director

MW/pg