



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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(614) 466-7090

September 28, 1994

Informal Opinion 1994-INF-0928

The Honorable Paul H. Jones
Ohio House of Representatives

Dear Mr. Jones:

You have asked whether the Ohio Ethics Laws and related statutes prohibit an attorney who is a member of county board of elections from being a partner in a law firm which has a contract with the county commissioners of the county with which he serves. Particularly, you have inquired whether an exemption in the law is met for the county board of elections member under the circumstances presented.

Based upon the circumstances presented, and as is discussed in detail below, the public contract between the county and the law firm of a member of the county board of elections does meet one of four criteria contained in the exemption under the law. However, the other three criteria contained in the exemption must also be present for the contract to be exempted from the prohibition and the member of the board of elections to continue to serve.

By way of history, you have stated that on February 13, 1992, the board of county commissioners approved a contract with a law firm under which the law firm agreed to provide legal services to the county on matters related to labor contract negotiations. On February 19, 1992, you have stated that an attorney who is a partner in the law firm was sworn into office as a member of the county board of elections. The attorney who is the subject of your opinion request states that he took the oath of office on March 2, 1992 and attended his first board meeting on March 4, 1992.

In addition, documents show that the county commissioners first solicited a request for proposals for legal services with a deadline of November 4, 1991. The commissioners were sent a proposal from the law firm in question by the county prosecutor on November 1, 1991, and approved a resolution to contract with the law firm November 26, 1991. On February 11, 1992, the county prosecutor issued an opinion that the contract in question met the exemption under the law and the board of elections member could serve on the board while his law firm held the contract.

The Ohio Ethics Commission has previously held that a board of election member is prohibited by Division (A)(4) of Section 2921.42 of the Revised Code from having an "interest in the profits of benefits of a public contract entered into by or for the use of" the county with which he serves. See R.C. 2921.01 (A). See Ohio Ethics Commission Advisory Ops. No. 87-002, 92-006, and 93-004.

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In the circumstances you have described, the board of election member would be considered to have an "interest" in the contract between the board of county commissioners and the law firm in which he is a partner since he has a financial ownership interest in the company. See Advisory Ops. No. 81-008 and 92-06.

The term "public contract" is defined for purposes of R.C. 2921.42 to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of a political subdivision. R.C. 2921.42 (G)(1). Therefore, the purchase of a law firm's services by a political subdivision is a public contract for purposes of R.C. 2921.42. See Advisory Op. No. 84-002. As a result, unless one of the possible exemptions to the prohibition imposed by R.C. 2921.42 (A)(4) applies, R.C. 2921.42 (A)(4) would prohibit the board of election member from being a partner in a law firm which has a contract with the board of county commissioners of the county with which he serves.

Within R.C. 2921.42, Division (C) sets forth an exemption for a contract that would otherwise be prohibited by R.C. 2921.42 (A)(4). Division (C) establishes four requirements, and the board of election member must demonstrate compliance with all of those requirements in order not to be in violation of R.C. 2921.42 (A)(4). Of those four, you have requested that we focus upon the second criteria contained in Division (C)(2). This criteria requires that the board of election member show that the supplies or services that his law firm offered to the board of county commissioners are "unavailable elsewhere for the same or lower cost or are being furnished to [the county] as part of a continuing course of dealing established prior to the [the attorney] becoming associated with [the county.]" (Emphasis added.) See Advisory Ops. No. 84-011 and 88-008.

You have specifically asked that the "unobtainable elsewhere for the same or lower cost" portion of this criteria be addressed. However, it is important to note that this is only one of two separate conditions enumerated in R.C. 2921.42 (C)(2). The Ethics Commission, in interpreting statutes promulgated by the General Assembly, has consistently followed the rule of statutory construction also embodied in statute that words used in a statute must be construed according to rules of grammar and common usage. See R.C. 1.42. See also Advisory Ops. No. 75-004, 75-006, 75-014, 75-036, 76-008, 76-012, 87-002, and 89-001. As the Supreme Court has held, the word "or," in its usual sense and meaning, connotes the alternative, that is, one or the other of the designated things. See In re Marrs, 158 Ohio St. 95, 99 (1952). The word "or" as used in R.C. 2921.42 (C)(2) which sets out one of the four criterion necessary to meet the exemption to the prohibition of R.C. 2921.42 (A)(4), is used in the same sense as the Supreme Court noted in Marrs. The use of "or" is in the disjunctive, presenting

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alternative conditions, not the conjunctive, which would require that both conditions must exist for the criterion to operate. Therefore, under the language enacted by the General Assembly as a part of the exemption, it is unnecessary for a public contract which is part of a "continuing course of dealing" established prior to the time a public official became associated with his political subdivision to also be "unobtainable elsewhere for the same or lower cost."

The "continuing course of dealing" exception applies to the contract in this situation because it is undisputed that the contract was entered into between the county commissioners and the law firm prior to the attorney becoming a member of the board of elections. The Ethics Commission has held that if a public contract exists between a firm in which an individual has an ownership interest and a political subdivision prior to the time the individual becomes associated with the political subdivision as an officer or employee, then the requirement of Division (C)(2) is met by a showing of a "continuing course of dealing" and the performance of the contract may be completed if it otherwise meets the remaining criteria of the exemption. See Advisory Ops. No. 82-007 and 88-008. Therefore, an individual who owns an interest in a firm which held a public contract with the county, and who subsequently becomes associated with the county, would be exempt from the prohibition imposed by R.C. 2921.42 (A)(4), so long as he also met the other requirements of R.C. 2921.42 (C).

You should note, however, that the "continuing course of dealing" exemption in R.C. 2921.42 (C)(2) applies only to contracts as they were entered into prior to the time the board of election member took office. The Ethics Commission has held that a material change in the contract made after the public official takes office is not within the Division (C)(2) exemption since such change alters the original understanding of the contracting parties. See Advisory Ops. No. 82-007 and 88-008.

As stated above, the board of election member must also show compliance with the other three provisions of R.C. 2921.42 (C). R.C. 2921.42 (C)(4) requires that the transaction be at arm's length, with full knowledge of the political subdivision of the public servant's interest, and that the public servant take no part in the deliberations and decision of the political subdivision with respect to the contract. See also R.C. 2921.42(A)(1) and R.C. 102.03(D) (discussed below). Division (C)(1) requires that the county reasonably and objectively demonstrate that the law firm's services are necessary for the county. Division (C)(3) requires that the treatment accorded the county by the law firm is preferential to, or the same as, that accorded to other parties to which the law firm provides services. These are factual determinations that must be demonstrated by the county official.

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Where the board of election member could meet all of the provisions of R.C. 2921.42(C), he is still bound by other provisions of the Ohio Ethics Law.

R.C. 2921.42(A)(1) prohibits a public official from authorizing, or using the authority or influence of his office to secure authorization of, a public contract in which he, a family member, or business associate has an interest. In this instance, the board of county commissioners authorized the contract prior to the time the attorney took office as a member of the county board of elections. However, the prohibition of R.C. 2921.42(A)(1) extends beyond the initial award of the contract, and prohibits a public official from participating in any matter or decision which would affect the continuation, implementation, or terms and conditions of the contract, even if the prohibitions of R.C. 2921.42(A)(1) were inapplicable at the time the contract was awarded. Advisory Op. No. 92-012. Accordingly, R.C. 2921.42(A)(1) would prohibit the attorney from using, formally or informally, the authority or influence which is inherent in the position and prestige of his office, to modify, or renegotiate the contract between his law firm and the board of county commissioners.

The board of election member is also subject to Division (D) of Section 102.03 of the Revised Code, which prohibits a public official or employee from using the authority or influence of his position to secure anything of value that is of an improper and substantial character. R.C. 102.03(D) would also prohibit the board of election member from using his official authority or influence in any manner to secure any benefit for the law firm. It is apparent that he could not have used any of the authority or influence of his office to secure the present contract since he did not hold any public office when the board of county commissioners and the law firm entered into the contract. However, R.C. 2921.42(A)(1) and R.C. 102.03(D) would require the board of election member to completely abstain from any formal or informal participation in matters affecting the contract, such as disputes, modifications, or renegotiates.

In the circumstances presented, it is noted that the county commissioners entered into the contract with the law firm only after the office of the county prosecutor issued a legal opinion to the board of county commissioners on February 11, 1992 on this issue. The opinion from the office of the county prosecutor correctly constructed the prohibition imposed against a public official having an interest in a public contract with his own political subdivision, the criteria contained within the exemption to this prohibition provided by R.C. 2921.42 (C) (2), and the Ethics Commission's precedent construing the statute.

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This informal advisory opinion was approved by the Ethics Commission at its meeting on August 19, 1994. The opinion is based on the facts presented and 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.

Please call me if you have any questions, or wish to request a formal opinion from the Commission.

Very truly yours,

A handwritten signature in black ink, appearing to read "David E. Freel". The signature is written in a cursive style with a large, looping initial "D".

David E. Freel
Executive Director