



## OHIO ETHICS COMMISSION

8 East Long Street, 10th Floor  
Columbus, Ohio 43215  
Telephone: (614) 466-7090  
Fax: (614) 466-8368

January 30, 1998

Informal Opinion 1998-INF-0130-1

Patricia E. Snyder  
Chief Legal Counsel  
Ohio Department of Commerce

Dear Ms. Snyder:

In a letter received by the Commission on January 6, 1998, you ask whether the Ohio Ethics Laws and related statutes prohibit a member of the Ohio Board of Building Appeals (Board) from contracting with the Ohio Department of Commerce (Department) and its Division of Unclaimed Funds to perform audits of unclaimed funds holders. You have stated that members of the Board "enjoy regulatory independence" from the Department. The member of the Ohio Board of Building Appeals has submitted the same question to the Ethics Commission in a letter dated December 24, 1997. The Commission has considered the information provided in both letters in reaching its conclusion.

You state that the Director of the Department has sent copies of a proposed contract to interested parties to perform audits of holders of unclaimed funds, primarily outside the state. You state that the number of potential contractors is unlimited. You further state that neither competitive bidding procedures nor Controlling Board approval are required to enter into the proposed contracts.

As explained below, a member of the Board is "connected with" the Department of Commerce and the restrictions of Ohio's public contract statute apply. As a result, a member of the Board is prohibited from contracting with the Department, and its Division of Unclaimed Funds, to perform audits for the Division unless the member of the Board sells his auditing services to the Department by providing the lowest cost service and can otherwise meet all the provisions of R.C. 2921.42(C). Also, the member of the Board must file a 102.04(D) Statement with: (1) the Ohio Ethics Commission; (2) his own public agency--the Board of Building Appeals; and (3) the public agency to which he is selling the services--the Division of Unclaimed Funds within the Department of Commerce.

**Interest in a Public Contract--R.C. 2921.42(A)(4)**

Your attention is directed to Division (A)(4) of Section 2921.42 of the Revised Code, which reads:

- (A) No public official shall knowingly:  
    . . .
- (4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

The term "public official" is defined, in R.C. 2921.01(A), for purposes of R.C. 2921.42 to include any appointed officer of the state. The Board is a statutorily created entity within the Department of Commerce (see discussion below). Therefore, a member of the Board is a "public official" for purposes of R.C. 2921.42. See Ohio Ethics Commission Advisory Op. No. 75-011 (finding a member of the Board to be subject to the prohibitions imposed by R.C. 102.04(A) and R.C. 102.03(A), (B), and (C)).

The term "public contract" is defined in R.C. 2921.42(G)(1) to include a purchase or acquisition, or a contract for the purchase or acquisition of property or services, by or for the use of any agency or instrumentality of the state. Thus, a contract entered into between the Department and an individual for that individual to perform audits is a public contract for purposes of R.C. 2921.42(A)(4).

In order to be prohibited under R.C. 2921.42, an interest must be definite and direct, and may be either pecuniary or fiduciary in nature. Adv. Ops. No. 78-005, 81-003, and 86-002. An individual who contracts with the Department and its Division of Unclaimed Funds to perform audits would have a definite and direct pecuniary interest in the public contract between the Department and himself.

**Application of R.C. 2921.42(A)(4) to "Connected" Entities**

R.C. 2921.42(A)(4) prohibits a public official from having an interest in a public contract with the governmental agency with which he is connected. Adv. Ops. No. 87-002, 89-004, and 92-006. In Advisory Opinion No. 89-004, the Commission held:

It is apparent that the purpose of R.C. 2921.42 is best served if the statute is interpreted as prohibiting a public official from doing business with all political subdivisions, governmental agencies, and instrumentalities with which he is connected. (Emphasis added.)

A member of the Board of Building Appeals is clearly "connected with" the Board. The question, then, is whether a member of the Board is also "connected with" the Department. In order to answer this question, it is necessary to examine the establishment of the Board.

**Establishment of the Board of Building Appeals--R.C. 3781.19**

R.C. 3781.19 reads, in pertinent part:

There is hereby established in the department of commerce a board of building appeals consisting of five members who shall be appointed by the governor with the advice and consent of the senate. (Emphasis added.)

See also R.C. 3781.07 (establishing, in the Department of Commerce, a Board of Building Standards). R.C. 3781.19 requires that the Department provide the Board with necessary employees and authorizes the Board to collect reasonable fees, based on actual costs for administration of filing and processing, not to exceed one hundred dollars for administering the filing and processing of appeals.

You state that the fees collected by the Board, and fees collected by the Division of Industrial Compliance regulatory sections, are deposited in a Division of Industrial Compliance Fund (see R.C. 121.07 pertaining to the Department powers regarding the superintendent of the Division of Industrial Compliance). You state that this Department fund is used to pay Board expenses, including the salary of an executive secretary, the per diem allowance and travel expenses of members of the Board, and overhead costs, including housing of the Board in the facilities of the Division of Industrial Compliance at 6606 Tussing Road in Reynoldsburg. You state that the fees collected by the Board cover only a portion of the Board's expenses (ranging from 50% to 70%) and that the Division of Industrial Compliance Fund supplements the remainder of the expenses of the Board. You state that the Department handles all administrative support for the Board, including the issuance of paychecks, payments of all bills, and control of the budget of the Board. You state that the executive secretary is compensated as a regular full-time state employee. The members of the Board do not receive medical benefits or accrue leave, but accrue time and benefits under the Public Employees Retirement System.

It is of particular note to your request that Am. Sub. S.B. 162 (eff. November 25, 1995) amended R.C. 3781.19 and relocated that Board from within the Department of Industrial Relations to within the Department of Commerce. The Department of Industrial Relations had the same kind of connection with the Board that the Department of Commerce has now. Had the General Assembly intended that the Board be independent of Departmental support, it could have determined that the Board was independent in 1995, rather than transferring it from the Department of Industrial Relations to the Department of Commerce.

In addition, it is clear that many administrative and financial relationships exist between the Department and the Board despite the fact that you state that the members of the Board "enjoy regulatory independence" from the Department. Your letter confirms that there are numerous ties between the Board and the Department. Therefore, a member of the Board is "connected with" both the Board and the Department, for purposes of R.C. 2921.42(A)(4). Accordingly, R.C. 2921.42(A)(4) prohibits a member of the Board from contracting with the Department and its Division of Unclaimed Funds to perform audits.

**Exception to the Restriction of R.C. 2921.42(A)(4)**

R.C. 2921.42(C) provides an exception to R.C. 2921.42(A)(4), as follows:

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

Each of the provisions in Division (C) is a question of fact which, when applied to the circumstances of the individual situation, will determine whether a particular transaction fits within the exception. Adv. Ops. No. 80-003 and 88-008. The criteria of Division (C) are strictly construed against the public official, and the official must show compliance with all four requirements in the exemption. Adv. Ops. No. 83-004, 84-011, and 88-008. As stated in Advisory Opinion No. 84-011:

[T]he application of the exemption [provided in Division (C) of Section 2921.42] must be consistent with the principle underlying Section 2921.42 of the Revised Code that a public official should not have an interest in a public contract with the governmental entity with which she serves unless the contract is the best or only alternative available to the governmental entity. (Emphasis added.)

#### **Application of Division (C)(2) of R.C. 2921.42**

Division (C)(2) of R.C. 2921.42 is of particular importance. Division (C)(2) requires that the supplies or services be furnished to the governmental agency as part of a continuing course of dealing established prior to the public official's becoming associated with the agency or be unobtainable elsewhere at the same or lower cost. Because the proposed contract is a new contract, the "continuing course of dealing exception" need not be addressed.

Where the "continuing course of dealing exception" cannot be met, a public official must be able to show by some objective standard that the services he would provide to a governmental agency with which he is connected are "unobtainable elsewhere for the same or lower cost." Adv. Ops. No. 84-006. As stated in Advisory Opinion No. 84-011:

The criterion that the goods or services be "unobtainable elsewhere for the same or lower cost" requires that a public official or employee be at a disadvantage when attempting to do business with his governmental entity, and that an equally qualified applicant who is not a [public official] must receive preference.

Competitive bidding, whereby the official submits the lowest bid, is one indication that this requirement has been met, but it is not determinative. Adv. Op. No. 86-002. Other factors must be considered, such as the availability and adequacy of notice to potential bidders, the openness and fairness of the bidding process, and the conditions of the market. Adv. Ops. No. 83-004 and 88-001. The Ethics Commission has held that competitive bidding is not the only method by which a public official may meet the "unobtainable elsewhere for the same or lower cost" exception provided by Division (C)(2). See Adv. Op. 84-006 (applying the Division (C)(2) exception where there is a geographical limitation on the availability of the service that could be provided by the public official). It is important to note that in order for a public official to sell property or services to a public agency with which he is connected, the official must offer the property or services at the lowest price. Adv. Op. 88-001. If the public agency is able to obtain the goods or services from any other source at a lower cost, or the same cost, the agency must purchase the goods or services from the other source.



### **Application of Other Divisions of R.C. 2921.42**

If the member of the Board can meet the criterion of Division (C)(2), he must, in addition, comply with the other provisions of R.C. 2921.42(C). R.C. 2921.42(C)(1) requires that the auditing services are necessary purchases for the Department and its Division of Unclaimed Funds. Division (C)(3) requires that the treatment provided by the member of the Board to the Department are as good as or better than the services that he provides to his other clients or customers. Finally, Division (C)(4) requires that the transaction be conducted at arm's length, with full knowledge of the Department of the interest of the member of the Board, and requires that he take no part in the deliberations and decision of the Department with respect to the contract. See also R.C. 2921.42(A)(1) (discussed below).

### **R.C. 102.04(B)-Sale of Goods or Services to a State Entity by a State Officer**

Your attention is also directed to R.C. 102.04(B), which reads:

Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall sell or agree to sell, except through competitive bidding, any goods or services to the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

An individual who serves as a member of the Board of Building Appeals is a person appointed to an office of a board of the state and is subject to the prohibitions imposed by R.C. 102.04(B). Adv. Ops. 75-002 and 75-011 (finding a member of the Board to be subject to the prohibitions imposed by R.C. 102.04(A)). Therefore, R.C. 102.04(B) prohibits a Board member from selling goods or services to any department, division, institution, instrumentality, board, commission, or bureau of the state, except through competitive bidding.

However, Division (D) of Section 102.04 of the Revised Code provides an exception to the competitive bidding requirement of Division (B). Adv. Ops. No. 89-006, 90-009, and 92-006. Divisions (D) and (E) of R.C. 102.04 read as follows:

- (D) A public official who is appointed to a nonelective office or a public employee shall be exempted from division (A), (B), or (C) of this section if both of the following apply:
  - (1) The agency to which the official or employee wants to sell the goods or services, or before which the matter that involves the rendering of his services is pending, is an agency other than the one with which he serves;

- (2) Prior to rendering the personal services or selling or agreeing to sell the goods or services, he files a statement with the appropriate ethics commission, with the public agency with which he serves, and with the public agency before which the matter is pending or that is purchasing or has agreed to purchase goods or services.

The required statement shall contain the official's or employee's name and home address, the name and mailing address of the public agencies with which he serves and before which the matter is pending or that is purchasing or has agreed to purchase goods or services, and a brief description of the pending matter and of the personal services to be rendered or a brief description of the goods or services to be purchased. The statement shall also contain the public official's or employee's declaration that he disqualifies himself for a period of two years from any participation as such public official or employee in any matter involving any public official or employee of the agency before which the present matter is pending or to which goods or services are to be sold. The two-year period shall run from the date of the most recently filed statement regarding the agency before which the matter was pending or to which the goods or services were to be sold. No person shall be required to file statements under this division with the same public agency regarding a particular matter more than once in a calendar year.

- (E) No public official or employee who files a statement or is required to file a statement under division (D) of this section shall knowingly fail to disqualify himself from any participation as a public official or employee of the agency with which he serves in any matter involving any official or employee of an agency before which a matter for which he rendered personal services was pending or of a public agency that purchased or agreed to purchase goods or services. (Emphasis added.)

In order to meet the exception provided by R.C. 102.04(D), two conditions must be met: (1) the official or employee must sell the goods or services to an agency other than his own; and (2) prior to selling the goods or services, the official or employee must file a 102.04(D) Statement which describes the goods or services to be sold and other information.

A state official or employee who sells goods or services to a state agency other than his own must file the 102.04(D) Statement with: (1) the Ohio Ethics Commission; (2) his own public agency; and (3) the public agency to which he is selling the goods or services. The official or employee must declare on his 102.04(D) Statement that he will disqualify himself for a period of two years from the date the statement is filed from participation as an official or employee in any

matter involving any public official or employee of the public agency to which he is selling the goods or services. Division (E) of Section 102.04 emphasizes that a official or employee who files, or is required to file, a 102.04(D) Statement must disqualify himself from any participation as a official or employee in any matter involving any official or employee of the agency to which he is selling the goods or services. Adv. Op. No. 92-006.

The issue is whether the member of the Board is able to meet the exception to the competitive bidding requirement of Division (B) of R.C. 102.04.

Divisions (D) and (E) repeatedly use the words "public agency" and "agency." The term "public agency" is statutorily defined in R.C. 102.01(C), in pertinent part, as:

"Public agency" means the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, township, and the five state retirement systems, or any other governmental entity. (Emphasis added.)

Therefore, whenever the words "public agency" or "agency" are used in Divisions 102.04(D) and (E), the above statutory definition must be read in place of the words "public agency" or "agency."

The fact that R.C. 102.01(C) defines the term "public agency" to include sub-units of state entities, such as divisions and boards, demonstrates that something narrower than the state entity as a whole is being referred to when the words "public agency" or "agency" are used in Division (D)(1) of R.C. Section 102.04. See Adv. Op. No. 92-020 (the use of the word "agency" in R.C. 102.04(C) evidences a legislative intent that the word "agency" means something different than the political subdivision as a whole).

The potential for abuse of authority exists when a person who serves on a state board, such as the Board of Building Appeals, wishes to sell goods or services to the same state board. See generally Adv. Op. No. 93-004. However, in the situation you have set forth, the Board member wishes to sell services not to the Board, but to a separate division of the Department of Commerce.

The Department of Commerce is comprised of the following sub-units: the Divisions of Financial Institution, Industrial Compliance, Liquor Control, Real Estate and Professional Licensing, Securities, State Fire Marshal, and Unclaimed Funds. Furthermore, as stated above, the Board of Building Appeals and the Board of Building Standards are established in the Department of Commerce. Due to the sub-units of the Department of Commerce and the diverse regulatory responsibilities exercised by its sub-units, it is apparent that the potential for abuse by a member of a Board of Building Appeals who wishes to sell goods or services to one of the Department's sub-units lessens whenever the Board has no regulatory, managerial, or fiscal authority over the sub-unit.



Therefore, to hold that R.C. 102.04(B) precludes the member of the Board from selling auditing services to the Department of Commerce and Division of Unclaimed Funds except by competitive bidding would serve no useful purpose of furthering the legislative intent of R.C. 102.04 of preventing abuse on the state level. (It should be noted that the Commission could reach a different conclusion with respect to a Department employee, assigned by the Department to one of its sub-units, who wished to sell goods or services to another sub-unit, since the individual may be considered to be serving the Department, rather than a unit.) It is also important that the disclosure and disqualification statement required by R.C. 102.04(D), combined with the requirement that the member of the Board show by some objective standard that he meets the all of the criterion of Division (C) of R.C. 2921.42, as explained above, serves the public policy purposes behind the prohibitions imposed by R.C. 2921.42 and R.C. 102.04(B).

Accordingly, the member of the Board must file a 102.04(D) Statement with: (1) the Ohio Ethics Commission; (2) his own public agency--the Board of Building Appeals; and (3) the public agency to which he selling the goods or services--the Division of Unclaimed Funds within the Department of Commerce. The member of the Board must declare on his 102.04(D) Statement that he will disqualify himself for a period of two years from the date the statement is filed from participation as a Board member in any matter involving any public official or employee of the Division of Unclaimed Funds within the Department of Commerce. Division (E) of Section 102.04 emphasizes that member of the Board must disqualify himself from any participation as a member of the Board in any matter involving any official or employee of the Division of Unclaimed Funds within the Department of Commerce. Adv. Op. No. 92-006.

### **Other Applicable Prohibitions**

If the member of the Board can meet the requirements imposed by R.C. 102.04(B) and the exception provided by R.C. 2921.42(C), other provisions of the Ethics Law and related statutes will also condition his conduct. R.C. 2921.42(A)(1) prohibits the member of the Board from using his official position in any way to secure authorization of the proposed contract. Accordingly, the member of the Board is prohibited from discussing, deliberating, recommending, or otherwise using the authority or influence of his official position, either formally or informally, to secure approval of a contract between the Department and himself. Adv. Ops. No. 85-009 and 89-006. See also R.C. 2921.42(C)(4) (set forth above).

Divisions (D) and (E) of R.C. 102.03 are also relevant to your question. These sections prohibit a public employee from soliciting, accepting, or using his position in any way to secure, anything of value, if the thing of value is of such a character as to manifest a substantial and improper influence upon him with respect to his official duties. Adv. Ops. No. 80-003 and 88-004. The Ethics Commission has consistently held that public officials and employees are not prohibited by the Ohio Ethics Law from operating a private outside business so long as no actual conflict of interest exists between the public official's or employee's public position and private interests. Adv. Ops. No. 85-006, 86-007, 86-008, and 87-006. However, R.C.

102.03(D) prohibits a public official or employee from participating in the discussions or decisions of his public agency regarding the interests of a business in which he has an ownership interest. Adv. Ops. No. 86-005, 86-006, and 90-003. R.C. 102.03(D) and (E) would prohibit the member of the Board from participating in the discussions or decisions of the Department regarding the proposed contract.

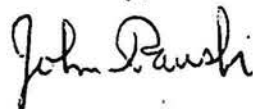
### Conclusion

As explained above, a member of the Board is "connected with" the Department of Commerce. As a result, a member of the Board is prohibited from contracting with the Department, and its Division of Unclaimed Funds, to perform audits for the Division unless the member of the Board sells his auditing services to the Department by providing the lowest cost service and can otherwise meet all the provisions of R.C. 2921.42(C). Also, the member of the Board must file a 102.04(D) Statement with: (1) the Ohio Ethics Commission; (2) his own public agency--the Board of Building Appeals; and (3) the public agency to which he selling the services--the Division of Unclaimed Funds within the Department of Commerce.

In addition, the public policy purposes behind R.C. 2921.42 and R.C. 102.04(B) are to generally prohibit those who are public servants from having business ties to their own public agencies. Where the official is a member of a state board, in a position of discretion and influence in matters affecting the public safety and interest, it is even more important to show that the objective criteria of the exceptions are met, in order to preserve the safeguards to the public provided by the prohibitions.

This informal advisory opinion was approved by the Ethics Commission at its meeting on January 30, 1998. It represents the views of the undersigned, based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. If you have any further questions or desire additional information, please feel free to contact this Office again.

Sincerely,



John Rawski  
Staff Attorney

cc: Donna Owens, Director, Ohio Department of Commerce  
Jessie Baker, Chief, Division of Unclaimed Funds, Ohio Department of Commerce  
Maria Armstrong, Chief Legal Counsel to the Governor