

OHIO ETHICS COMMISSION

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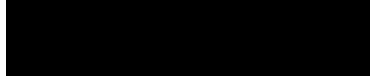
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Informal Opinion 2001-INF-1012-1

Fred L. Dailey
Director, Ohio Department of Agriculture



Dear Director Dailey:

You have asked whether the Ohio Ethics Law and related statutes preclude organizations from receiving grants or loans from the Southern Ohio Agricultural and Community Development Foundation (Foundation) if board members or officers of the organization also serve on the Foundation's Board of Trustees (Board).

Brief Answer

As explained below, because of the specific statutory composition and mission of the Foundation, the prohibitions imposed by R.C.2921.42(A)(3) and R.C. 2921.42(A)(4) do not preclude organizations from receiving grants or loans from the Foundation if board members or officers of the organizations also serve on the Foundation Board provided that the organizations are qualified and positioned to assist the Foundation to achieve its goal and that the Foundation board members adhere to the restrictions described in this opinion. However, these Foundation Board members are prohibited from personally benefiting from or occupying a position of profit in, and from discussing, deliberating, or voting on the award of grants or loans to the organization that they serve as a board member or officer. In addition, the Board member cannot use his position to secure a grant or loan for an organization that he serves as a board member or officer with terms that are in disproportion, selective, or differential to the grants and loans received by other qualified applicants.

Facts—The Foundation: Purpose and Composition

The Southern Ohio Agricultural and Community Development Trust Fund (Trust Fund) is one of the funds created as a result of the Tobacco Master Settlement Agreement Fund. The Trust Fund was earmarked for use by the Foundation, which is charged with the task of replacing tobacco production in southern Ohio with other agricultural products while mitigating the adverse economic impact created by the transition. R.C. 183.15. The Foundation is required to implement a plan that will entice tobacco growers to voluntarily shift their farming operation to other agricultural commodities. Id. The Foundation is required to make copies of its plan available to the public. R.C. 183.15(D). The Foundation is authorized to make grants or loans to individuals, public agencies, or privately owned companies to carry out the plan. Id. In addition, the Foundation is required to adopt rules under R.C. Chapter 119. regarding conflicts of interest in the making of grants or loans. Id.

The Foundation is governed by a twelve-member board of trustees. R.C. 183.12. The Board is comprised of the Director of Agriculture, Director of Development, Executive Director of the Ohio Rural Development Partnership, and the Director of the Ohio State University Extension who serve as ex officio members. R.C. 183.12(A). The remaining eight members of the Board are appointed by the Governor and include two residents of major tobacco-producing counties with experience in economic and community development; three active farmers from major tobacco-producing counties; and three active tobacco farmers from major tobacco-producing counties. R.C. 183.12(B)-(D). Board members serve without compensation but receive reasonable and necessary expenses incurred while conducting Foundation business. R.C. 183.12(D). Board members are required to file a public financial disclosure statement with the Ohio Ethics Commission. R.C. 102.02(A).

Interest In and Profit from a Public Contract—R.C. 2921.42(A)(3) and (A)(4)

Your attention is first directed to R.C.2921.42(A)(3), which reads:

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

...

(3) During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

The term "public official" includes any elected or appointed officer, or employee, or agent of the state or any political subdivision. R.C. 2921.01(A). The Ethics Commission has explained that members of state boards and commissions are officers for purposes of R.C. 2921.01(A) if their board or commission exercises the "sovereign power" of government. In Advisory Opinion No. 77-004, the Commission held that "[s]overeign power includes the exercise of a duty entrusted to one by virtue of statute or some other public authority, a duty that is not merely clerical, but that involves discretionary, decision-making qualities."

As explained above, the Board has final, discretionary, decision-making authority in meeting the Foundation's statutorily established goal of replacing tobacco production in southern Ohio with other agricultural products while mitigating the adverse economic impact created by the transition, and therefore, the Board exercises the sovereign power of government. Therefore, its members are state officers for purposes of R.C. 2921.01(A) and subject to the prohibitions imposed by R.C. 2921.42.

The term "public contract" includes any purchase or acquisition of property or services by or for the use of the state or any political subdivision. R.C. 2921.42(G)(1). The Ethics Commission has held that a grant or loan from the state or a political subdivision to an

individual, public agency, or privately owned company that is designed to provide a service for the grantor is a public contract for purposes of the prohibitions of R.C. 2921.42. See Ohio Ethics Commission Advisory Opinions No. 89-006, 89-008, and 92-014. A public contract is considered to be authorized by a public official or board if the contract could not have been awarded without the approval of the official, the position he holds, or the board upon which he serves. See Adv. Op. No. 87-004.

R.C. 2921.42(A)(3) prohibits a public official from profiting from a public contract, including a grant or loan, authorized by the board upon which he serves unless the contract was let by competitive bidding to the lowest and best bidder. The Ethics Commission has held that because grants and loans are not let by competitive bidding, a public board member is prohibited from profiting from grants and loans authorized by their board for a period of one year even if the official abstains from the proceeding and decision to award the grant or loan. Adv. Op. No. 88-006.

The prohibition of R.C. 2921.42(A)(4) is also applicable to your question. R.C. 2921.42(A)(4) provides the following:

(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 or governmental agency or instrumentality with which he is connected.

As stated above, a member of the Foundation's Board is a public official for purposes of R.C. 2921.42. As also stated above, a grant or loan from the Board is a public contract. A prohibited "interest" in a public contract must be definite and direct, and may be either pecuniary or fiduciary in nature. Adv. Op. No. 89-008. Therefore, R.C. 2921.42(A)(4) prohibits a public official from receiving a grant or loan from the public agency he serves. Before determining the application of R.C. 2921.42(A)(3) and (A)(4) to the Board members, it is necessary to examine the responsibilities of the Board and its statutorily mandated goal.

Specific Statutory Composition of the Foundation—Legislative Intent

When interpreting the Ohio Ethics Law and related statutes, the Ethics Commission follows the rules of statutory interpretation codified in the Revised Code. R.C. 1.47 states that when interpreting a statute, it is presumed that the General Assembly intended the entire statute to be effective to achieve a just and reasonable result feasible of execution. In addition, R.C. 1.49 states that the consequences of a particular construction may be considered in interpreting a statute. See also Adv. Op. No. 89-001.

As stated above, the Foundation is statutorily charged with the unambiguous mandate to replace tobacco production in southern Ohio with other agricultural products while mitigating the adverse economic impact created by the transition. The reduction of tobacco farming within the state, without adverse economic consequences to tobacco farmers and their communities, is the just and reasonable result that the General Assembly intended when it created the Foundation.

It is apparent that the General Assembly specified the composition of the Foundation's Board in order to represent the interests of individuals, communities, and organizations that would be most directly affected by the implementation of its plan to encourage tobacco growers to voluntarily shift their farming operation to other agricultural commodities without adverse economic consequences. Governmental or private organizations that strive to foster positive economic and community development may be best qualified and positioned to assist the Foundation to achieve its goal. A Board member who serves as a board member or officer of, or has any other fiduciary connection with, such an organization would be equipped with experience and skills that would be of tremendous value to the Foundation.

The consequence of holding that R.C. 2921.42(A)(4), as well as R.C. 2921.42(A)(3), precludes organizations that may be best qualified to assist the Foundation in reducing tobacco farming within the state from receiving grants or loans from the Foundation if board members or officers of the organization also serve on the Foundation Board would not serve the result that the General Assembly intended by creating the Foundation. In such a situation, the organizations that may be best qualified to assist the Foundation in reducing tobacco farming within the state would be unable to assist the Foundation.

Accordingly, because of the specific statutory composition and mission of the Foundation, R.C. 2921.42(A)(3) and R.C. 2921.42(A)(4) do not prohibit individuals from serving as members of the Board if they serve as a board members or officers of, or have any other fiduciary connection with an organization that receives a grant from the Foundation provided that the organization is qualified and positioned to assist the Foundation to achieve its goal.

R.C. 2921.42(A)(3) and (A)(4) do prohibit a Foundation board member who also serves as a board member or officer of an organization that receives grants or loans from the Foundation from personally benefiting from, or occupying a position of profit in the prosecution of, the grant or loan. The Foundation board member would be prohibited from personally benefiting from any grant or loan awarded to the organization board. Further, R.C. 2921.42(A)(1) and R.C. 102.03(D), as discussed below, will limit these officials from participating in some matters.

Authorizing a Grant or Loan—R.C. 2921.42(A)(1)

The instant situation also implicates provisions of the Ethics Law and related statutes that prohibit a public official from participating in a matter in which he, a family member, or a business associate, has a definite and direct financial or fiduciary interest. R.C. 2921.42(A)(1) provides that no public official shall knowingly:

Authorize, or employ the authority or influence of his office to secure authorization or any public contract in which he, a member of his family, or any of his business associates has an interest.

R.C. 2921.42(A)(1) prohibits a Board member from voting, discussing, deliberating, or using his position, in any way, with respect to a grant awarded by the Foundation in which he, his family member, or his business associate, has a financial or fiduciary interest.

In the instant situation, if a Board member serves as a board member or officer of, or has any other fiduciary connection with, a governmental or private organization that desires to secure grants or loans from the Foundation, R.C. 2921.42(A)(1) prohibits the Board member from voting upon, discussing, or otherwise using the authority or influence of his public position, either formally or informally, to secure authorization of a grant or loan for the governmental or private organization from the Foundation. This includes a bar upon the Board member's participation in any issue relating to the grant or loan after it is entered into, such as a dispute regarding, or modification to, the terms of the grant or loan.

Prevention of Conflicts of Interest—R.C. 102.03(D)

R.C. 102.03(D) is also relevant to your question. R.C. 102.03(D) provides the following:

No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

For purposes of Chapter 102. of the Revised Code, "public official or employee" is defined as "any person who is elected or appointed to an office or is an employee of any public agency." R.C. 102.01(B).

As used in the definition of "public official or employee," "public agency" includes the general assembly, all courts, any department, division, institution, board commission, authority, bureau or other instrumentality of the state. R.C. 102.01(C).

As stated above, the Foundation Board members exercise final, discretionary, decision-making authority, and, therefore, the Foundation is a "public agency" as that term is used in the definition of "public official or employee." Also, the Board members of Foundation are state officers, as stated above, and are therefore "appointed to an office . . . of a public agency" and subject to the prohibitions of R.C. Chapter 102., including the prohibition of R.C. 102.03(D).

The term "anything of value" is defined, for purposes of R.C. 102.03 in R.C. 1.03, to include money and every other thing of value. See R.C. 102.01(G). A pecuniary interest in a grant or public contract is a thing of value under R.C. 102.03(D). Adv. Ops. No. 86-007 and 87-006.

R.C. 102.03(D) prohibits a public official or employee from acting, formally or informally, to secure a thing of value that could manifest a substantial and improper influence upon the public official or employee with respect to that person's duties. Adv. Ops. No. 88-004 and 91-004. The Ethics Commission has held that a determination of whether a thing of value could manifest a substantial and improper influence upon a public official or employee with respect to that person's duties is dependent upon the facts and circumstances of each individual situation. Adv. Op. No. 87-008.

The Ethics Commission has held that R.C. 102.03(D) prohibits a public official or employee from participating in matters that will benefit himself or parties with whom he has a close family, economic, or business relationship because the relationships may impair the public official's objectivity and independence of judgment. Adv. Ops. No. 88-004, 89-008, and 97-002. For example, in Advisory Opinion No. 89-008, the Ethics Commission held that R.C. 102.03(D) prohibits a member of a city council from voting, deliberating, participating in discussions, or otherwise using his official authority or influence with regard to secure a tax abatement for his private employer, because the relationship between the public official and his private employer is such that the council member's objectivity and independence of judgment could be impaired by the relationship.

Thus, if a Foundation Board member serves as a board member, officer or employee of, or has any other fiduciary connection with, a governmental or private organization, and his organization desires to secure grants or loans from the Foundation, R.C. 102.03(D) prohibits him from voting upon, discussing, or otherwise using the authority or influence of his public position, either formally or informally, to secure authorization of a grant or loan for his organization from the Foundation. This includes a bar upon the Board member's participation in any issue relating to the grant or loan after it is entered into, such as a dispute regarding, or modification to, the terms of the grant or loan or securing a grant or loan for a governmental or private organization that a Foundation Board member serves as a board member or officer with terms that are in disproportion, selective, or differential to the grants and loans received by other qualified applicants. Adv. Op. No. 96-004.

Filing a Financial Disclosure Statement

As a final matter, it is apparent from the General Assembly's decision to include the Foundation Board members in the class of public officials and employees who are required by R.C. 102.02(A) to file a public financial disclosure statement that the General Assembly acted with full awareness of the restrictions imposed by the Ethic Law and related statutes when they created the Foundation. Ordinarily, the financial disclosure statements of members of uncompensated state boards and commissions are confidential. See R.C. 102.02(B).

In the case of the Foundation, the General Assembly determined that its members should be required to file financial disclosure statements that are available for public inspection even though the members of the board are not compensated for their service. R.C. 102.02(A) and (B). The public disclosure of a Board member's financial interests, which would include the names under which the Board member and his immediate family members do business, sources of income, investments, and fiduciary interests protects the public interest while advancing the Foundation's statutory mandated goal by enabling the Foundation to augment and coordinate its efforts with health organizations that have traditionally waged anti-smoking campaigns.

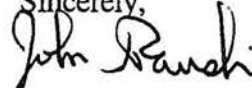
Conclusion

As explained above, because of the specific statutory composition and mission of the Foundation, the prohibitions imposed by R.C.2921.42(A)(3) and R.C. 2921.42(A)(4) do not preclude organizations from receiving grants or loans from the Foundation if board members or officers of the organizations also serve on the Foundation Board provided that the organizations are qualified and positioned to assist the Foundation to achieve its goal and that the Foundation board members adhere to the restrictions described in this opinion. However, these Foundation Board members are prohibited from personally benefiting from or occupying a position of profit in, and from discussing, deliberating, or voting on the award of grants or loans to the organization that they serve as a board member or officer. In addition, the Board member cannot use his position to secure a grant or loan for an organization that he serves as a board member or officer with terms that are in disproportion, selective, or differential to the grants and loans received by other qualified applicants.

The conclusion of this advisory opinion is based and dependent entirely on the recognition that the Foundation was created to achieve the goal of promoting good health by reducing the use of tobacco by Ohioans. Nothing in this advisory opinion should be construed as relieving a Board member from the restrictions described above that prohibit a public official from participating or voting in matters in which a family member or a business associate, would derive a definite and particular personal financial benefit.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 12, 2001. The Commission commends you for requesting guidance before taking any actions that could be prohibited by the Ethics Law.

The opinion is based on the facts presented and 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 questions or desire additional information, please contact this Office again.

Sincerely,


John Rawski
Staff Attorney