

Ben Rose, Chair
Shirley Mays, Vice Chair
Merom Brachman
Betty Davis
Steven Dettelbach
Ann Marie Tracey



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

David E. Freel,
Executive Director

www.ethics.ohio.gov

May 29, 2009

Informal Opinion 2009-INF-0529-2

William C. Koester, PE

Dear Mr. Koester:

On March 16, 2009, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you are a member of the Board of Trustees for the University of Toledo (University). You also serve as an unpaid volunteer Interim CEO for American Ag Fuels, L.L.C. (AAF). You have asked whether AAF is precluded from receiving funding from the University's Science, Technology, and Innovation Enterprise Corporation (STIE) in light of the fact that you serve as a University Trustee and also as the Secretary of STIE.

The University organized STIE as a non-profit limited liability corporation and is its single member. You serve as its Secretary. The purpose of STIE is to provide services and make loans and equity investments in public projects and private businesses to encourage economic development by promoting an innovative economy in the Toledo area.

You stated that, on December 15, 2008, you were appointed the Interim CEO of AAF. You stated that you have no ownership interest in AAF and receive no compensation for being Interim CEO. However, you stated that you receive travel expense reimbursements from AAF. You do not describe the circumstances of your appointment as AAF Interim CEO while also serving as the Secretary of STIE. You stated that AAF is in financial difficulty and you believe that it needs additional equity to resume production. You stated that, in addition to applying for funding from STIE, you believe that the University's Office of Research and Development may also be interested in supporting AAF.

You have asked whether: (1) you are allowed to submit an application for funds while remaining in a management position at AAF; (2) you are in violation of any ethics laws if AAF were to apply for any type of funds or financial assistance from the University or the STIE while you are interim CEO; and (3) you are required, should AAF apply for funds from UT or STIE, to leave the room when the matter is being discussed by STIE.

Brief Answer

As explained more fully below, and in specific response to your three questions:

- (1) The Ethics Law does not prohibit you from submitting an application for funds while you remain in a management position at AAF. However, you are prohibited from using your positions as University Trustee and secretary of STIE to secure authorization, approval, or more favorable consideration of the application submitted on behalf of AAF;
- (2) You are not in violation of any Ethics Law or related statute if AAF were to apply for funds or financial assistance from the University or STIE while you are interim CEO. However, if financial assistance is awarded to AAF while you are serving as interim CEO of AAF and as a University Trustee, you would have a prohibited interest in the STIE funding. In order to avoid having a prohibited interest in a University contract, you must *either* step down from your position with the University or from the CEO position before any STIE funding decision is made *or* show that you meet an exception to the Ethics Law. In order to meet the exception, you must show that: (a) the economic development services AAF is offering through its receipt of funding from STIE are “unobtainable elsewhere for the same or lower cost;” (b) you have fully disclosed your interest in AAF to the University; and (c) you are not in a decision-making position regarding awards of financial assistance by STIE; and
- (3) The Ethics Law prohibits you from participating, formally or informally, in any decisions of either the University or STIE that affect AAF and from using your unique working relationship with University officers and employees to affect their decisions regarding AAF. While the law does not absolutely prohibit you from leaving the room while the matter is discussed by STIE, it would help prevent any appearance of impropriety if you leave the room.

Having an Interest in a University Contract—R.C. 2921.42(A)(4)

The first matter that must be considered is how the prohibition against having an interest in a public contract, R.C. 2921.42(A)(4), applies to you. As a member of the University’s Board of Trustees, you are a “public official” subject to R.C. 2921.42(A)(4), which provides that no public official shall knowingly:

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 the public official is connected.

R.C. 3364.01; Ohio Ethics Commission Advisory Opinion No. 95-004.

The term "public contract" includes any purchase or acquisition of property or services "by or for the use of" the state. R.C. 2921.42(I)(1)(a). A public contract exists whenever a public agency either purchases services from a provider or acquires services as part of the contractor's responsibility under the contract. Adv. Ops. No. 91-011, 93-009, and 93-012.

The Ethics Commission has held that, when a public agency sponsors grants, loans, land reutilization programs, tax abatements, and other similar programs, and acquires community and economic development services in return, the grants, loans, and other programs are "public contracts." Adv. Op. No. 2001-02; State v. Lordi, 140 Ohio App.3d 561, 568 (2000), discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001). STIE's support for public projects and private businesses as a means of promoting an innovative economy in the Toledo area stimulates economic development and is a "public contract." Specifically, the funding that AAF would receive from STIE to enable it to resume fuel production is a public contract because the state is acquiring economic development services as a result of the agreement.

The Ethics Commission has explained that a public official would have a prohibited "interest" in a public contract if the official's interest is definite and direct, and either financial or fiduciary. Adv. Ops. No. 81-008 and 88-001. An officer of a company has a definite and direct fiduciary interest in the company's contracts. Adv. Ops. No. 78-006, 86-005, and 89-008. Because you are currently serving as CEO of AAF, you have a fiduciary interest in the contracts of AAF regardless of whether you have an ownership interest in, or receive compensation from, AAF.¹

R.C. 2921.42(A)(4) does not prohibit AAF from applying for or receiving funding from STIE. However, if AAF were to receive funding from STIE while you are serving as Interim CEO, you would have a prohibited fiduciary interest in a public contract.² If you resign from either your positions as University trustee and STIE secretary or as interim CEO of AAF *before* any STIE funding is awarded to AAF, you would not have a prohibited interest in the award of

¹ You have stated that you receive travel expenses from AAF. Provided that the payments reimbursed or made on your behalf are necessary, and do not exceed the cost incurred for your travel, you would not have a financial interest in AAF solely because you receive travel expenses from the company.

² R.C. 2921.42(A)(3) prohibits a public official from "occupy[ing] any position of profit in the prosecution of a public contract" which he or his board authorized and which was not let by competitive bidding to the lowest and best bidder. As an unpaid CEO of AAF, you do not "occupy [a] position of profit" in its contracts. R.C. 2921.42(A)(3) would apply if you were to receive, now or in the future, a fee or compensation that would be paid from, or is dependent upon STIE's funding of AAF. Adv. Ops. No. 88-008 and 95-007.

funding to AAF. If you would like to continue to serve both the University and AAF, you must be able to show that you meet the exception in R.C. 2921.42(C).

Exception to R.C. 2921.42(A)(4)—R.C. 2921.42(C)

R.C. 2921.42(C) provides that R.C. 2921.42(A) does not apply to a public contract in which a public official has an interest provided that the official meets four requirements. The requirements *are construed against the public official*, who has the burden of demonstrating that he or she meets the exception. Adv. Op. No. 88-008.

The first requirement is: “The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved.” R.C. 2921.42(C)(1). When a public contract involves an instrumentality’s purchase or acquisition of community and economic development services, or urban renewal or revitalization services, the Ethics Commission has concluded that the purchases are necessary services for the instrumentality. Adv. Ops. No. 85-002, 88-006, and 2001-02.

The second requirement is that the supplies or services are “unobtainable elsewhere for the same or lower cost.”³ R.C. 2921.42(C)(2). This requirement can be met in two ways when the contract is a grant, loan, or other financial assistance under a revitalization program. Adv. Op. No. 2001-02.

The first method to meet the R.C. 2921.42(C)(2) provision applies when a public official is competing for funds in a time-limited program offered by the instrumentality he or she serves. The official must demonstrate that any other equally qualified applicant who is *not* an official or employee of the instrumentality receives preference when competing for funds in the program. The Commission explained that the “unobtainable elsewhere” requirement can be met in these kind of programs where: (a) there were sufficient funds available; (b) all of the qualified applicants in the target area who are not officials or employees of the instrumentality had received grants or loans, except the employee; and (c) the funds would have lapsed if not used within a specified period of time. Adv. Op. No. 2001-02.

The second method to meet the R.C. 2921.42(C)(2) provision applies when a public official is competing for funds in a program offered by the instrumentality he or she serves that accepts applications through the life of the program on a first-come, first-served basis. The official must demonstrate that all interested and qualified applicants have an equal opportunity to be considered for the program. Adv. Op. No. 2001-02. The Commission has explained that the official can meet the “unobtainable elsewhere” requirement in these situations when he or she can demonstrate that sufficient funds have historically been available to meet demand under the program and the instrumentality can reasonably project the sufficient funds are, and will be,

³ The criterion of R.C. 2921.42(C)(2) can also be met if the services under the public contract are being furnished as part of a continuing course of dealing established prior to the time the individual takes public office. Because you are already a University trustee, you would be unable to meet this requirement.

available to fully serve all interested and qualified applicants including eligible and interested public officials of the instrumentality. *Id.*

The third requirement, in R.C. 2921.42(C)(3), is that the official who has an interest in the contract treats the instrumentality either better than or the same as the official treats other customers or clients in similar transaction. When the contract involves economic development situations, the Commission has explained that an instrumentality's officers and employees who wish to participate in the programs have no "customers or clients in similar transactions." Adv. Ops. No. 84-011 and 2001-02.

The final requirement in the exception is that: (a) the entire transaction is conducted at arm's length; (b) the instrumentality has full knowledge of the official's interest; and (c) the official takes no part in the deliberations or decision of the instrumentality regarding the contract. The award of funds to participants in economic development programs must be conducted at "arm's length." Adv. Ops. No. 84-011, 85-002, and 88-006. The Ethics Commission has also held that the instrumentality's procedures must be fair and objective with no preference given to entities in which the instrumentality's officials have an interest. Adv. Op. 2001-02. A public official with an interest in an economic development program operated by his public agency cannot determine the eligibility of participants in the program or make decisions with regard to the applications made by prospective participants. *Id.*

Application to Facts

If AAF were to seek financial support from STIE, you would have a prohibited fiduciary interest in a public contract entered into between the University and AAF unless you can demonstrate that the transaction meets all four requirements in R.C. 2921.42(C). As noted above, two of the requirements, R.C. 2921.42(C)(1) and (3), can be met in situations of the kind you have described.

Depending on the nature of the STIE program, you may be able to demonstrate that you meet R.C. 2921.42(C)(2) in either of the ways described above. If STIE's program is a time-limited program, you would have to show that all other qualified applicants for STIE support have received funds and that funds will lapse if not used. If the program is not time-limited, you would have to show that applicants are accepted on a first-come, first-served basis, in an open and fair process, and that sufficient funds have historically been available to meet demand under the program and that public agency can reasonably project that funds will be available to serve all interested and qualified applicants. Because the STIE program is relatively new, it may be difficult for you to establish that you meet the second requirement.

To meet the final requirement, you must show that you have fully disclosed your relationship to AAF and that you are not in a decision-making position regarding awards of financial assistance by STIE. Because, in addition to being a University Trustee, you are the Secretary of STIE, it may be particularly difficult for you to establish that you meet this requirement.

If you cannot meet the requirements in R.C. 2921.42(C), you would have a prohibited interest in any award of funds from STIE to AAF while you serve as CEO of the company and University Trustee. As noted above, if you were to resign from your position with either AAF or the University, you would not have a prohibited interest in any financial support awarded by STIE to AAF *after* your resignation.

Even if you can meet the requirements in R.C. 2921.42(C), and would not have a prohibited interest in the award of funds to AAF, you are subject to the following limits on your actions if you continue to serve as a Trustee.

Authorizing a Contract and Using Position to Secure Benefit—R.C. 2921.42(A)(1) and R.C. 102.03(D)

As a member of the University's Board of Trustees, you are subject to both R.C. 2921.42(A)(1) and 102.03(D). 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.

As set forth above, you have a fiduciary interest in AAF. In addition, AAF is your business associate.⁴ Because you serve as the CEO of AAF, R.C. 2921.42(A)(1) prohibits you from voting upon, discussing, or otherwise using the authority or influence of your University position, either formally or informally, to secure authorization of funding for AAF through STIE. You are prohibited from participation in any issue related to the funding while it is being considered by STIE and matters that arise after it is entered into, such as a dispute regarding, or modification to, the terms of the funding.

R.C. 102.03(D) provides that:

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.

The term "anything of value" is defined to include money and every other thing of value. R.C. 102.01(G), 1.03. A definite and direct pecuniary benefit is considered to be a thing of value

⁴A business association is created whenever persons join together, formally or informally, to pursue a common business purpose. Adv. Op. No. 86-002.

under R.C. 102.03(D). Adv. Op. No. 2001-02. In addition, the financial benefit that results from a favorable decision of a public agency is also a thing of value.

A thing of value is considered to be of an improper character for purposes of R.C. 102.03(D) whenever the thing of value could impair the official's or employee's objectivity and independence of judgment with respect to his official actions and decisions for the public agency he serves. Adv. Op. No. 89-006. R.C. 102.03(D) prohibits a public official from participating, formally or informally, in matters that will benefit any party with which he has a close family, economic, or business relationship because the relationship may impair the official's objectivity and independence of judgment. Adv. Op. No. 98-002. For example, 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. Adv. Op. No. 89-008.

You are prohibited from using your position as a University Trustee to secure financing from STIE for AAF. Further, R.C. 102.03(D) prohibits you from making use of your unique access to and influence over University officials and employees, as a University Trustee, to affect their decisions regarding the STIE application from AAF. R.C. 102.03(D) and 2921.42(A)(1) prohibit you from using the authority or influence of your University position with regard to any other matter that would provide a definite and direct pecuniary benefit to AAF.

Disclosure of Confidential Information—R.C. 102.03(B)

Finally, you are subject to R.C. 102.03(B) of the Revised Code, which prohibits you from disclosing or using, without appropriate authorization, any confidential information that you acquired as a Board member to any party. No time limitation exists for this prohibition. Adv. Op. No. 88-009. For example, R.C. 102.03(B) would prohibit you from using your access to confidential information regarding the STIE program to gain any kind of favorable advantage for AAF.

Conclusion

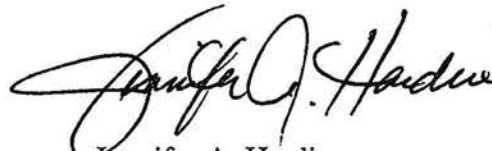
As explained more fully above, and in specific response to your three questions:

- (1) The Ethics Law does not prohibit you from submitting an application for funds while you remain in a management position at AAF. However, you are prohibited from using your positions as University Trustee and secretary of STIE to secure authorization, approval, or more favorable consideration of the application submitted on behalf of AAF;

- (2) You are not in violation of any Ethics Law or related statute if AAF were to apply for funds or financial assistance from the University or STIE while you are interim CEO. However, if financial assistance is awarded to AAF while you are serving as interim CEO of AAF and as a University Trustee, you would have a prohibited interest in the STIE funding. In order to avoid having a prohibited interest in a University contract, you must *either* step down from your position with the University or from the CEO position before any STIE funding decision is made *or* show that you meet an exception to the Ethics Law. In order to meet the exception, you must show that: (a) the economic development services AAF is offering through its receipt of funding from STIE are “unobtainable elsewhere for the same or lower cost;” (b) you have fully disclosed your interest in AAF to the University; and (c) you are not in a decision-making position regarding awards of financial assistance by STIE; and
- (3) The Ethics Law prohibits you from participating, formally or informally, in any decisions of either the University or STIE that affect AAF and from using your unique working relationship with University officers and employees to affect their decisions regarding AAF. While the law does not absolutely prohibit you from leaving the room while the matter is discussed by STIE, it would help prevent any appearance of impropriety if you leave the room.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on May 12, 2009. The opinion is based on the facts presented. It 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 or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney