



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion No. 85-001
January 17, 1985

Syllabus by the Commission:

(1) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a park manager employed by the Department of Natural Resources from authorizing or otherwise using the authority or influence of his office to secure approval of a contract between the Department and his private company to provide machine repair and maintenance services in his park and elsewhere in the state park system.

(2) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a park manager employed by the Department of Natural Resources from having an interest in a contract with the Department to provide machine repair and maintenance services in his park and elsewhere in the state park system, unless the requirements of Division (C) of Section 2921.42 of the Revised Code are satisfied.

(3) Division (A)(5) of Section 2921.42 and Division (B) of Section 102.04 of the Revised Code prohibit a park manager employed by the Department of Natural Resources from contracting with the Department to provide machine repair and maintenance services in his park and elsewhere in the state park system, except through competitive bidding.

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You asked whether a park manager employed by the Division of Parks and Recreation of the Department of Natural Resources is prohibited from contracting with the Department to provide machine repair and maintenance services in his park and elsewhere in the state park system.

You stated, by way of history, that the Division of Parks and Recreation of the Department of Natural Resources (hereinafter Department) is responsible for the operation of the state park system. You stated further that a park manager employed by the Department owns a private company, which has offered to sell the Department machine repair and maintenance services to be provided at his own park and elsewhere in the state park system. You indicated that a park manager may authorize the purchase of labor or services under guidelines established by the Department of Administrative Services, which prescribe the following: (1) direct charges for services costing up to \$500; (2) obtaining two or three estimates and submitting a purchase order for up to \$10,000; and (3) obtaining State Controlling Board approval or following the competitive bidding procedures for more than \$10,000. You asked whether the transaction under such a procedure would comply with the Ohio Ethics Law and related statutes.

Division (B) of Section 102.04 of the Revised Code provides the following:

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.

A park manager employed by the Department is a person employed by a department of the state. Therefore, the park manager is prohibited from selling machine repair and maintenance services to the Department, except through competitive bidding. He is not eligible for the exemption of Division (D) of Section 102.04 of the Revised Code because he seeks to sell to the agency with which he serves.

However, even if the contract is bid competitively, other prohibitions would apply to the transaction. Section 2921.42 of the Revised Code provides, in pertinent part:

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

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

....

(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;

(5) Have an interest in the profits or benefits of a public contract which is not let by competitive bidding when required by law, and which involves more than \$150.

A park manager employed by the Department is a "public official" as defined in Division (A) of Section 2921.01 of the Revised Code. The purchase or acquisition of machine repair and maintenance services by or for the use of the Department is a "public contract" as defined in Division (E)(1) of Section 2921.42 of the Revised Code. The park manager would have an interest in contracts with a private company that he owns. Therefore, Division (A)(1) of Section 2921.42 of the Revised Code prohibits the park manager from authorizing or otherwise using the authority or influence of his office to secure approval of a public contract between the Department and his private company (See also: Division (D) of Section 102.03 of the Revised Code). Division (A)(4) of Section 2921.42 of the Revised Code prohibits the park manager from having any interest in a public contract between his private company and the Department, the governmental agency with which he is connected. This prohibition applies even if the park manager refrains from authorizing or approving the contract. Finally, Division (A)(5) of Section 2921.42 of the Revised Code prohibits the park manager from having any interest in a public contract that is required by another provision of law to be bid competitively, unless the contract was let by competitive bidding or involves less than \$150. Since Division (B) of Section 102.04

of the Revised Code requires competitive bidding of the contract, the prohibition of Division (A)(5) of Section 2921.42 of the Revised Code also would apply. While competitive bidding would avoid this prohibition, Division (A)(4) of Section 2921.42 of the Revised Code still would apply to the transaction.

Division (C) of Section 2921.42 of the Revised Code provides an exemption from the prohibitions of Division (A) of that Section:

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 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 to 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.

In Ohio Ethics Commission Advisory Opinion No. 83-004, the Commission held the following:

The criteria for the exemption of Division (C) of Section 2921.42 of the Revised Code are strictly applied, and the burden is on the public official claiming the exemption to demonstrate compliance. It is particularly important that the requirement that the goods or services are "unobtainable elsewhere for the same or lower cost" be demonstrated by some objective standard.

Significantly, the phrase "competitive bidding" is not used in Division (C)(2) of Section 2921.42 of the Revised Code, as it is in Division (A)(5) of Section 2921.42 of the Revised Code. Thus, the Commission concluded the following:

If a particular bid is lowest, it would be some indication that the goods are "unobtainable elsewhere for the same or lower cost," but it is not determinative. Factors such as the availability and adequacy of notice to potential competitors, the openness and fairness of the bidding

process, and the conditions of the market must be considered in determining whether the public official complies with Division (C)(2) of Section 2921.42 of the Revised Code.

It is necessary to analyze how all of the provisions of law described above apply to the facts presented. First, Division (A)(1) of Section 2921.42 of the Revised Code prohibits the park manager from authorizing or otherwise using the authority or influence of his office to secure approval of a contract between his private company and the Department (See also: Division (D) of Section 102.03 of the Revised Code). If the park manager or his subordinates are the only Department officials or employees with the authority to approve contracts with his park, he must refrain from entering the contract. Second, Division (B) of Section 102.04 and Division (A)(5) of Section 2921.42 of the Revised Code require that a contract between the park manager's private company and the Department be competitively bid, regardless of the amount. Although a \$150 threshold appears in Division (A)(5) of Section 2921.42 of the Revised Code, no similar threshold is provided in Division (B) of Section 102.04 of the Revised Code. Third, Division (A)(4) of Section 2921.42 of the Revised Code prohibits the park manager from having an interest in a contract with the Department. Thus, if the park manager is the successful bidder, he must resign his position prior to entering the contract with the Department (See: Advisory Opinion No. 79-009), unless he satisfies the requirements of Division (C) of Section 2921.42 of the Revised Code. These requirements apply to the park manager, regardless of the procedures of the Department of Administrative Services concerning contracts for the procurement of labor or services.

This advisory opinion is based upon the facts presented, and is limited to questions arising under Chapter 102. and Section 2921.42 of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised that: (1) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a park manager employed by the Department of Natural Resources from authorizing or otherwise using the authority or influence of his office to secure approval of a contract between the Department and his private company to provide machine repair and maintenance services in his park and elsewhere in the state park system; (2) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a park manager employed by the Department of Natural Resources from having an interest in a contract with the Department to provide machine repair and maintenance services in his park and elsewhere in the state park system, unless the requirements of Division (C) are satisfied; and (3) Division (A)(5) of Section 2921.42 and Division (B) of Section 102.04 of the Revised Code prohibit a park manager employed by the Department of Natural Resources from contracting with the Department to provide machine repair and maintenance services in his park and elsewhere in the state park system, except through competitive bidding.


Richard D. Jackson, Chairman
OHIO ETHICS COMMISSION