

OHIO ETHICS COMMISSION

Santiago Feliciano, Jr.
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Website: <http://www.ethics.state.oh.us>

January 21, 2000

Informal Opinion 2000-INF-0121-2

F. W. Knecht III

Dear Mr. Knecht:

In a letter received by the Ohio Ethics Commission on September 3, 1999, you asked whether the Ohio Ethics Law and related statutes prohibit your company from selling gift and award items to a university at which you have been recently appointed to the board of trustees.

As explained more fully below, where the purchases of gifts and award items are authorized by the university board of trustees, the Ohio Ethics Law prohibits you from selling the items to the university, except through competitive bidding where your company submitted the best and lowest bid. Regardless of whether the board of trustees authorizes the purchases, you are prohibited from selling gift and award items to the university, unless you can meet the four-part exception set forth in R.C. 2921.42(C). Finally, if you meet the exception in order to sell gift and award items to the university, you are prohibited from using your public position, in any way, to authorize or otherwise secure purchases of gift and award items, by the university, from your company.

Facts

In your letter to the Commission, you explained that the Governor has recently appointed you to the board of trustees of Youngstown State University. You state that you are also Chairman, Chief Executive Officer, and majority owner of Wendell August Forge, Inc. You state that Wendell August Forge was established in 1923 and is the only operating forge in the country that produces handmade items from pewter, bronze, aluminum, and other metals. You further state that Wendell August Forge has been considered by many as a single source supplier of such items.

For the past twenty years, the university has purchased custom gift items, custom awards, and regular stock gift items and awards from Wendell August Forge. Wendell August Forge also sells gift and award items to several university-affiliated entities, such as the Penguin Club, Alumni Association, and the Youngstown State University Foundation. The university purchases Wendell August Forge's products on an item-by-item basis, and there is no standing contract or blanket purchase order covering such purchases. You state that university purchases from Wendell August Forge are not competitively bid, but the cost to the university for the purchased items is less than or equal to the cost Wendell August Forge charges to other customers in similar transactions.

Occupying a Position of Profit in University Contracts—R.C. 2921.42(A)(3)

The first statute that is relevant to your question is Division (A)(3) of Section 2921.42 which provides that no public official or employee shall:

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 of the state. R.C. 2921.01(A). A member of the board of trustees of a state university is a "public official" for purposes of R.C. 2921.42, and is subject to the restrictions in the law. 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 any political subdivision. R.C. 2921.42(G)(1). The university's purchase of any goods, including gift and award items, falls within the definition of "public contract" for purposes of R.C. 2921.42(A)(4).

A contract is considered to be "authorized" by a public official, employee, or entity when the contract could not have been awarded without the approval of the individual, the position the individual holds, or the board on which the individual serves. Adv. Op. No. 87-004. R.C. 2921.42(A)(3) prohibits a university trustee from occupying a position of profit in the award of any university contracts, that are not competitively bid and awarded to the lowest and best bidder, if he authorized the contracts, or they were authorized by the board of trustees, even if he abstained from the authorization. Adv. Op. No. 90-005. See also 1971 Op. Att'y Gen 71-020 (holding that a Youngstown State University trustee was prohibited, by the statute that preceded R.C. 2921.42, from having an interest in the lease of real property to the university, even if he abstained from the vote of the trustees on the transaction.)

The Ethics Commission has held that the position of profit which a public official occupies in the prosecution of a public contract for purposes of Division (A)(3) must be definite and direct. See Adv. Op. No. 92-013. A public official occupies a position of profit in a public contract when he will realize a pecuniary advantage, gain, or benefit, which is a definite and direct result of the public contract. See Adv. Ops. No. 92-013 and 92-017.

The Ethics Commission has held that a person with an ownership interest in a business occupies a position of profit in the contracts of the business for purposes of R.C. 2921.42 (A)(3). Adv. Ops. No. 90-003 and 93-001. As the Chairman, Chief Executive Officer, and majority stockholder of Wendell August Forge, you occupy a position of profit in the contracts of Wendell August Forge. Although you have noted that the total purchases from the university are generally not of a significant value (approximately \$12,000 in 1998), it must be noted that R.C. 2921.42 (A)(3) provides no amount of profit under which its prohibition will not apply.

R.C. 3356.04 provides that the board of trustees of the university may make and enter into all contracts and agreements necessary or incidental to the operation of such university. As

the majority owner of Wendell August Forge, you would profit from any contracts between Wendell August Forge and the university. If these contracts are not competitively bid, you would be prohibited from selling goods or services to the University under any contracts that are approved by the board of trustees, even if you abstain from the board's vote to authorize the contracts.

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

If the university trustees do not authorize the contracts, or the university should chose to competitively bid the contracts, you should also be aware of R.C. 2921.42(A)(4), which provides that no public official shall knowingly do any of the following:

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 Ethics Commission has held that an "interest" under R.C. 2921.42 must be definite and direct, and may be pecuniary or fiduciary in nature. See Adv. Ops. No. 78-005 and 81-008. An individual who holds an ownership interest in a business has a pecuniary interest in the contracts of the business for purposes of R.C. 2921.42. See Adv. Ops. No. 78-006, 81-008, and 92-006. An individual who is an officer or board member of a business has a fiduciary interest in the contracts of the business for purposes of R.C. 2921.42. Adv. Op. No. 85-004. See also Adv. Op. No. 85-002 (a person who is a partner in a business has an interest in the contracts of the business for purposes of R.C. 2921.42). Therefore, R.C. 2921.42(A)(4) prohibits a public official who is the owner of a company from having an interest in the sale of goods or services from the company he owns to the public agency he serves. See also 1971 Op. Att'y Gen 71-020 (holding that a Youngstown State University trustee was prohibited, by the statute that preceded R.C. 2921.42, from having an interest in the lease of real property to the university).

In the instant situation, the university and affiliated entities purchase gift and award items from a company that you own. These purchases by the university and affiliated entities are "public contract[s]" as the term is statutorily defined in R.C. 2921.42(G)(1). As the Chairman, Chief Executive Officer, and majority owner of Wendell August Forge, you would have a definite and direct, pecuniary and fiduciary interest in the contracts of Wendell August Forge. Therefore, R.C. 2921.42(A)(4) prohibits your company from selling gifts and awards to the university and affiliated entities.

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 case, 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.

Unobtainable Elsewhere for the Same or Lower Cost—R.C. 2921.42(C)(2)

Division (C)(2) requires that the supplies or services be unobtainable elsewhere at the same or lower cost. In order for your company to have an interest in a contract entered into by or for the use of the university, the university must be able to show by some objective standard that the supplies or services that your company is providing are “unobtainable elsewhere for the same or lower cost.” You must be able to show, by some objective standard such as a competitive bid, or a fair and open solicitation of other vendors, that the services and/or supplies provided by your company are unobtainable by the University for the same or lower cost. Adv. Op. No. 86-002. See also R.C. 2921.42(A)(3) (discussed above). 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.

Under the circumstances you have presented, you indicate that the contracts are not awarded through competitive bidding. Therefore, in order to meet the requirement of the first prong of R.C. 2921.42(C)(2), you would be required to show that the gift and award items are unobtainable elsewhere.

You have stated that the university purchases custom gifts and awards from your company and also purchases items from your company's regular stock. You have stated that certain awards were designed by your company, and are specially handcrafted each year that the awards are given. You have also stated that Wendell August Forge is the only operating forge in the country that produces certain handmade items.

Your assertion that some of these gifts and awards are custom designed and specially handcrafted, and that Wendell August Forge is the only forge that produces certain handmade items, may be indications that the requirement in R.C. 2921.42(C)(2) is met. However, you would need to provide some objective demonstration that these gift and award items are unique and that the University cannot obtain the gift and award items from another supplier or manufacturer. By contrast, it may be more difficult to show that those items purchased from your company's regular stock are unobtainable elsewhere at the same or lower price.

Continuing Course of Dealing—R.C. 2921.42(C)(2)

Note that Division (C)(2) can also be met by showing a continuing course of dealing established before the public official was connected with the public employer. In Advisory Opinion No. 82-007, the Commission held that the exemption "for services being furnished as part of a 'continuing course of dealing' applies only to services provided during the term of the existing contract." The contract must be a written contract, established prior to the time the official was appointed to his public position. Adv. Op. No. 88-008.

In your case, you indicate that the university has purchased gift and award items from your company for the past twenty years. You further indicate, however, that the sales and/or services are not based on written contracts between your company and the university. Therefore, you will not be able to continue to provide sales and/or services to the university under the continuing course of dealing exception.

Other Requirements of R.C. 2921.42(C)

Even if you can meet the criterion of Division (C)(2), you must, in addition, comply with the other provisions of R.C. 2921.42(C). R.C. 2921.42(C)(1) requires that the university reasonably and objectively demonstrate that the gift and award items are necessary for the university. Adv. Op. No. 94-002. Next, Division (C)(3) requires that the treatment provided by your company to the university is as good as or better than the services provided by your company to its other clients or customers. Finally, Division (C)(4) requires that the transaction be conducted at arm's length, that the university has full knowledge of your interest, and that you take no part in the deliberations and decision of the university with respect to the contract. See also R.C. 2921.42(A)(1) (discussed below). If you can satisfy each one of these four criteria, R.C. 2921.42(A)(4) does not prohibit you from having an interest in a contract between your company and the university.

Using Position to Authorize University Contracts—R.C. 2921.42(A)(1)

Assuming that you do not have a prohibited interest in the contracts between the university and your company, and do not occupy a position of profit in the prosecution of the contract, such that the company would be prohibited from doing business with the university, you are also subject to R.C. 2921.42(A)(1), which provides that no public official shall knowingly:

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.

As the majority owner of Wendell August Forge, you would have an interest in any contract between Wendell August Forge and the university. Accordingly, you are prohibited from voting, discussing, deliberating, formally or informally lobbying, or otherwise using your authority or influence as a trustee to secure the contract for your company. Adv. Op. No. 90-003. See also R.C. 2921.42(A)(3) (discussed above) and R.C. 102.03(D) (prohibiting a public official or employee from using his public position to secure anything of value that could impair his objectivity). You are prohibited, for example, from recommending your company's products, discussing your company's contracts with other university trustees, officials or employees, or discussing payments made from the university to your company.

Using Public Position to Benefit Your Company—R.C. 102.03(D)

Section 102.03(D) of the Revised Code also prohibits you from using your public position in any way to secure university purchases from your company. R.C. 102.03(D) provides:

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.

A "public official or employee" is defined, for purposes of R.C. 102.03, to include any person who is elected or appointed to an office of, or employed by, any public agency of the state. R.C. 102.01(B) and (C). A state university is a public agency as that term is defined in R.C. 102.01(C). See Adv. Op. No. 77-005. The question becomes whether a trustee of Youngstown State University is appointed to an office.

The Ethics Commission has explained that the essential criterion which determines whether an individual holds an "office" is whether he is empowered to exercise the "sovereign power" of government. See Adv. Ops. No. 75-004, 85-005, 92-001, and 92-007. The Commission has relied upon the Ohio Supreme Court's holding in State ex rel. Landis v. Butler, 95 Ohio St. 157 (1917) that a public agency will be deemed to exercise "sovereign power" when

it is created by some public authority, such as executive order, the Constitution, or statute, and, in order to perform its prescribed duties, is invested with decision-making authority which is not merely clerical but is final and discretionary, including the authority to determine the disposition of public property or incur financial obligations upon the part of the State or its political subdivisions. See Adv. Ops No. 75-004, 77-004, 85-005, and 92-001. Additional factors which may be considered to determine that an individual holds an "office" are whether the person: (1) is appointed; (2) has a title; (3) exercises a function of government concerning the public; and (4) is not subject to a contract of employment. See Adv. Ops. No. 74-007, 75-004, 77-004, 85-005, and 92-001.

Based on the statutorily defined powers and duties of a member of the board of trustees of Youngstown State University, it is apparent that such a trustee exercises sovereign power. Trustees have the power to employ, fix the compensation of, and remove the president and such number of professors, teachers, and other employees as may be deemed necessary. R.C. 3356.03. The trustees also have the broad power to do "all things necessary for the creation, proper maintenance, and successful continuous operation of the university." Id. Thus, a trustee of Youngstown State University is appointed to an office and, as such, is within the purview of R.C. 102.03(D).

The term "anything of value" is defined to include money and every other thing of value. R.C. 102.01(G) and 1.03. It includes any definite and direct pecuniary benefit, such as a payment for goods or services. Adv. Op. No. 90-003. R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his office to secure anything of value for any person, business, or other entity, if the relationship between the official and that person or other entity is such that the official's objectivity or independence of judgment could be impaired with respect to matters that affect the interests of that party. Adv. Op. No. 89-008. In your case, R.C. 102.03(D) prohibits you from using your position on the board of trustees, in any way, to secure the purchase of goods or services, by the university, from your company.

Conclusion

As explained above, where the purchases of gifts and award items are authorized by the university board of trustees, the Ohio Ethics Law prohibits you from selling the items to the university, except through competitive bidding where your company submitted the best and lowest bid. Regardless of whether the board of trustees authorizes the purchases, you are prohibited from selling gift and award items to the university, unless you can meet the four-part exception set forth in R.C. 2921.42(C). Finally, if you meet the exception in order to sell gift and award items to the university, you are prohibited from using your public position, in any way, to authorize or otherwise secure purchases of gift and award items, by the university, from your company.

F. W. Knecht III
January 21, 2000
Page 8

The Ethics Commission approved this informal advisory opinion at its meeting on January 21, 2000. 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. The Commission commends your timely request for advice and encourages public servants to seek advice from the Commission before they act. If you have any further questions, please feel free to contact this Office again.

Sincerely,

A handwritten signature in cursive script that reads "Timothy L. Gates".

Timothy L. Gates
Staff Attorney