

OHIO ETHICS COMMISSION

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June 23, 2000

Informal Opinion 2000-INF-0623-1

Edward J. Reese
[REDACTED]

Dear Mr. Reese:

In a letter received by the Ethics Commission on October 5, 1999, you ask about the prohibitions that the Ohio Ethics Law and related statutes impose upon you as a Mahoning County Commissioner with respect to a business venture that you have entered into. While the Commission cannot, pursuant to its statutory function of providing advice on matters within its jurisdiction, opine on matters that have already occurred, the Commission can provide you with information concerning the Ethics Law and advice concerning its application to specific future matters.

As discussed more fully below, based on the information that you have provided to the Commission, the prohibitions imposed upon you by the Ohio Ethics Law and related statutes do not preclude you from having a partnership interest in the business venture that you had already begun prior to your appointment to fill the unexpired term of a county commissioner, provided that there were no circumstances at the inception of the partnership or in the solicitation of the partnership's business that would implicate Chapter 102, or 2921.42 and 2921.43.

However, if the partnership conducts business of any kind under a county contract, or if the county is involved in any contract in which the partnership has an interest, then several provisions of the Ethics Law may prohibit you from profiting from, or holding an interest in, such a contract. You should also note that the Ethics Law and related statutes prohibit you from using your public position to secure either authorization of a public contract in which you would have an interest, or anything of value that would manifest a substantial and improper influence upon you with respect to your duties as a county commissioner. While this opinion briefly addresses the provisions that may apply under these scenarios, you should contact the Ethics Commission again if you are aware of a situation where your partnership may have an interest in a county contract, or where the county authorizes a contract in which you or the partnership may have an interest, for a specific application of the Ethics Law and related statutes to your situation.

Facts

In your letter to the Commission, you state that you left office as county commissioner on January 1, 1999. You also state that on August 26, 1999, you were appointed to fill the unexpired term of a Commissioner who resigned. You explain that during the time that you were out of office, you became a member of a partnership that developed a plan for an assisted living unit for the elderly. You further explain that Mahoning Bank provided the financing for the project through the Mahoning Valley Economic Development Corporation (MVEDC). The MVEDC, as you have stated, provides low interest loans to Youngstown investors in order to spur job growth in the city. You state that the loan committee for the program consists of the Mayor of Youngstown, and the Finance and Law Directors for the City of Youngstown. You explain that the Youngstown City Council acts on the committee recommendation and then Mahoning Bank issues an irrevocable letter of credit in the name of the city to guarantee repayment of the note to MVEDC.

In a recent telephone conversation, you clarified that you would be entitled to a share of any profits of the partnership under the partnership agreement. You also stated that you are not aware of any county involvement in the housing project.

An Advisory Opinion Addresses Only Prospective Action

At the outset, it must be noted that the Ohio Ethics Commission cannot, in an advisory opinion, address matters that have already occurred. The Commission will render an advisory opinion generally in response to a hypothetical question or a question that involves the prospective conduct of the requester. Ohio Ethics Commission Advisory Opinions No. 75-037 and 94-002. The Commission has explained that its function in rendering an advisory opinion is not a fact-finding process and it cannot, in an advisory opinion, determine whether a public official or employee has violated a criminal law. Id.

An advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes, and sets forth the standards that a public official or employee must observe to avoid violating these laws in a given set of circumstances. Adv. Ops. No. 75-037, 90-013, 92-003, and 92-015. If a question is raised with regard to activity that has already occurred, the Ethics Commission can only act through its confidential investigative authority to determine whether the facts indicate that the Ethics Law may have been violated and to refer the matter for prosecution. Adv. Ops. No. 92-003 and 94-002.

For these reasons, the Commission generally will not provide advisory opinions in response to questions that concern past activity. Therefore, the advisory guidance provided herein has no application to the initial circumstances involved in your participation in the partnership in question or the partnership's solicitation of a loan from MVEDC. Provided that there were no circumstances in the solicitation or acceptance of the MVEDC loan at its inception that would implicate Chapter 102. or 2921.42 and 2921.43, this advisory opinion will address only prospective matters and will not opine on any past actions.

Using Public Position to Solicit or Secure Something of Value—R.C. 102.03(D) and (E)

Your attention is directed to R.C. 102.03(D) and (E), which provide the following:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office 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.
- (E) No public official or employee shall solicit or accept 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, including a county. R.C. 102.01(B) and (C). As a member of a board of county commissioners, you are, therefore, a "public official or employee" subject to the prohibitions of R.C. 102.03(D) and (E). See generally Adv. Ops. No. 88-003 and 99-002.

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 private business, and the benefit of a contract to that business, is a thing of value under R.C. 102.03(D). See Adv. Ops. No. 86-007 and 87-006.

Generally, R.C. 102.03(D) and (E) prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his public office or employment to secure anything of value, either for himself, or for another party, where the thing of value could impair his objectivity and independence of judgment with respect to his official actions and decisions for the agency that he serves. Adv. Ops. No. 87-009, 88-005, 92-009, and 92-019.

The Ethics Commission has held that R.C. 102.03(D) prohibits a public official from using the authority or influence of his office to secure a definite and direct thing of value for himself, or for another person, business, or entity, if the relationship between the official and that person, business, or entity, is such that the official's objectivity or independence of judgment could be impaired with regard to matters that affect the interests of that person, business, or entity. Adv. Ops. No. 88-004, 89-015, and 90-007. Whenever such a relationship exists, the Commission has concluded that the definite and direct thing of value that is secured for the other person, business, or entity will manifest a substantial and improper influence upon the official with respect to his duties. Adv. Ops. No. 89-016 and 90-004. See also Adv. Op. No. 93-003 (identifying familial, economic, or fiduciary relationships that may manifest a substantial and improper influence upon a public official or employee).

A matter that affects the personal financial interests of a public official or employee would generally be of such a character as to manifest an improper influence upon him with respect to his duties. See Adv. Ops. No. 88-004 and 90-003. However, in order for R.C. 102.03(D) to prohibit a public official or employee from participating in a matter, which would secure a thing of value for himself, the thing of value must also be of a "substantial" nature. See Adv. Ops. No. 86-011 and 92-014. The word "substantial" means "of or having substance, real, actual, true; not imaginary; of considerable worth or value; important." Adv. Op. No. 89-014 (quoting Adv. Ops. No. 75-014 and 76-005). In your situation, any pecuniary benefits that would accrue as a result of your interest in the contracts of your partnership would be substantial.

Therefore, R.C. 102.03(D) prohibits you from: (a) using public time, facilities, personnel, or resources to operate your partnership; (b) using your relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding your partnership; (c) discussing, deliberating, or taking any action, as a member of the board of county commissioners, on any matter involving your partnership; and (d) using your public position or authority in any other way to secure a benefit for your partnership. See Adv. Op. No. 96-004.

R.C. 102.03(E) prohibits a public official or employee from merely accepting or soliciting anything of value that could impair his objectivity or independence of judgment. For example, a public official is prohibited from receiving a definite and direct personal financial benefit from any matter pending before his agency, regardless of whether he has used the authority or influence of his position to secure the financial benefit. Adv. Op. No. 90-008. In some situations, the Commission has determined that the conflicts between a public official's private employment or interests and his public position are so compelling and unavoidable that R.C. 102.03(D) and (E) prohibit the public official from holding both the public position and pursuing his private business interests. Adv. Ops. No. 92-008 (a township clerk is prohibited from also holding employment with a bank that is a depository of township funds) and 92-009 (the executive director of the State Barber Board is prohibited from owning and operating a barber shop).

Based on the information that you have provided to the Commission, R.C. 102.03(E) does not prohibit you from continuing to accept your share of the partnership's income or profits from the housing projects that you described in your letter to the Commission, provided that there were no circumstances in the solicitation or acceptance of the MVEDC loan at inception that would implicate R.C. Chapter 102., or R.C. 2921.42 and 2921.43. If the situation should change such that there is any level of county involvement in the housing projects, please contact this Office for further information concerning the application of R.C. 102.03(E) to the relationship between your public and private positions and the varying interests that you would hold as a result thereof.

Public Contract Restrictions

Your question involves project funding from MVEDC, a private corporation of which several public entities are members. In a conversation with Ethics Commission staff, you explained

that no county officials are members of the loan committee of MVEDC and there is no county funding involved in the project you and your partners are pursuing. If your partnership wishes to attempt to secure funding from the county, or it sells goods or services to the county, you should be aware of the public contract restrictions.

For purposes of the public contract restrictions, a "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 Commission has stated that a political subdivision's award of a grant for community development or urban revitalization services is a public contract. See Adv. Ops. No. 83-005, 84-011, 85-002, and 95-007. The loan your partnership has received from MVEDC is a public contract because the public entities that are members of MVEDC are acquiring redevelopment services through the issuance of the loan. The City of Youngstown's interest is indicated by the role played by the city mayor, law director, and finance director, and by the fact that the city issues an irrevocable letter of credit to guarantee repayment of the loan.

There are three considerations within the public contract law of which you should be aware: (1) profiting from a public contract; (2) having an interest in a public contract; and (3) securing authorization of a public contract. This opinion will discuss all three of these considerations.

Profiting From Public Contracts—R.C. 2921.42(A)(3)

Your attention is first directed to R.C. 2921.42(A)(3), which provides that no public official shall knowingly:

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" is defined in R.C. 2921.01(A) for purposes of R.C. 2921.42 to include any elected or appointed officer of any political subdivision of the state. A member of a board of county commissioners is a "public official" for purposes of R.C. 2921.42. See Adv. Ops. No. 80-006, 87-002, and 99-002. A public contract is considered to be authorized by an official or board if the contract could not have been awarded without the approval of the official, the public position in which he serves, or the board of which he is a member. See Adv. Op. No. 87-004.

R.C. 2921.42(A)(3) prohibits a public official, during his term of office and for one year thereafter, from profiting from a contract that was awarded by him or his board, unless the contract was competitively bid and was awarded to the party that submitted the lowest and best bid. In the situation that you have presented to the Commission, you are a member of a partnership, and you would profit from any contract awarded to your partnership, or under which your partnership performed services. See Adv. Ops. No. 78-006, 81-008, and 92-006.

R.C. 2921.42(A)(3) prohibits you, as a member of the board of county commissioners, from profiting from any contract authorized by you or the board of county commissioners that is not awarded pursuant to competitive bidding to the lowest and best bidder. You should note that you are bound by this prohibition regardless of whether you deliberate, vote upon, or otherwise authorize, the contract.

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

Assuming that any county contract in which you would have an interest would be competitively bid, such that R.C. 2921.42(A)(3) would not prohibit you from profiting from the contract, you should also be aware of the prohibition of R.C. 2921.42(A)(4). R.C. 2921.42(A)(4) 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 he is connected.

As discussed above, a member of a county board of commissioners is a “public official” for purposes of R.C. 2921.42. Therefore, you are also subject to the prohibition of R.C. 2921.42(A)(4). The county’s acquisition of services or property from your partnership would be a public contract, as would a grant or loan from the county to your partnership.

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. 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. Therefore, you would have a prohibited interest in the county’s acquisition of property or services from the partnership of which you are a member, unless you can demonstrate compliance with each of the four requirements of the exception to R.C. 2921.42(A)(4).

Exception to the Prohibition of R.C. 2921.42(A)(4)—R.C. 2921.42(C)

R.C. 2921.42(C) provides the following exception to the prohibition of R.C. 2921.42(A)(4):

- (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 exception. Adv. Ops. No. 83-004, 84-011, and 88-008. Divisions (C)(2) and (C)(4) are of particular note. Division (C)(2) requires that the supplies or services be unobtainable elsewhere at the same or lower cost, or furnished as part of a continuing course of dealing. Division (C)(4) requires that the transaction be conducted at arm's length, that the county has full knowledge of your interest in the partnership, and that you take no part in the deliberations and decisions of the board of county commissioners with respect to the contracts.

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

You can meet the requirements in R.C. 2921.42(C)(2) if you can show by some objective standard that the supplies or services provided by the partnership 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 or supplies provided by your business are unobtainable by the county for the same or lower cost. See Adv. Op. No. 86-002. As stated above, R.C. 2921.42(A)(3) requires that any contracts between the county and the partnership are competitively bid. While a competitive bidding process may provide evidence that a supply or service is unobtainable elsewhere for the same or lower cost, other factors must be considered, such as the availability and adequacy of notice to potential suppliers, the openness and fairness of the bidding process, and the conditions of the market. Adv. Ops. No. 83-004 and 88-001.

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

Division (C)(2) can also be met by showing a continuing course of dealing established before the public official was connected with the public entity. In Advisory Opinion No. 82-007, the Commission held that the exception “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.

Full Knowledge and No Participation—R.C. 2921.42(C)(4)

Division (C)(4) requires that the transaction be conducted at arm’s length, that the county has full knowledge of your interest in the partnership, and that you take no part in the deliberations and decisions of the board of county commissioners with respect to the county’s acquisition of supplies or services from the partnership of which you are a member. See also R.C. 2921.42(A)(1) (discussed below).

Division (C)(4) has three distinct components, all of which must be satisfied. First, the transaction must be conducted at arm’s length. The manner in which the partnership conducts business with the county must be similar to the manner in which the partnership conducts business with other entities, and the terms and conditions of any contracts under which the partnership provides services or supplies to the county must be similar to the terms and conditions of standard contracts for similar supplies or services. Second, the county must have full knowledge of your interest in the partnership. Third, you cannot take any part in the decisions of the county with respect to the contracts. As discussed below, you cannot vote, discuss, deliberate, or use your position, in any way, with respect to any contract in which you have an interest, and that is entered into by, or for the use of, the county. See also R.C. 2921.42(A)(1).

Other Requirements of R.C. 2921.42(C)

Where you can meet the requirements imposed by Divisions (C)(2) and (C)(4), you must, in addition, comply with the other provisions of R.C. 2921.42(C). R.C. 2921.42(C)(1) requires that the services and supplies are necessary purchases for the county. Division (C)(3) requires that the treatment provided by the partnership to the county is as good as, or better than, the treatment provided by the partnership to its other clients or customers. If all of the requirements of R.C. 2921.42(C), as discussed in this opinion, are met, the provisions of R.C. 2921.42(A)(4) do not apply to a county contract in which you have an interest. As noted above, however, you would still be subject to the prohibition of R.C. 2921.42(A)(3), and the exception contained in R.C. 2921.42(C) does not apply to R.C. 2921.42(A)(3).

Securing Authorization of Public Contracts—R.C. 2921.42(A)(1)

Assuming that any county contracts in which you would profit are competitively bid such that R.C. 2921.42(A)(3) does not prohibit you from profiting from the contracts, and assuming that you can meet each of the four requirements of R.C. 2921.42(C) such that R.C. 2921.42(A)(4) does not prohibit you from having an interest in any county contracts, 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 discussed above, you have an interest in the contracts of the partnership of which you are a member. Therefore, you are prohibited from voting, discussing, deliberating, formally or informally lobbying, or otherwise using your authority or influence as a public official to secure any public contract for the partnership. See Adv. Op. No. 89-008. See also 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 should be aware that R.C. 2921.42(A)(1) applies to any public contract in which you would have an interest, and not merely county contracts. Therefore, R.C. 2921.42(A)(1) applies to the city's acquisition of property or services from your partnership. R.C. 2921.42(A)(1) prohibits you from using your position on the board of county commissioners to secure city, county, and any other public, contracts. You are prohibited, for example, from recommending your partnership's services or products, discussing your partnership's contracts with other county officials or employees, or discussing any payments made from the county to your partnership.

Conclusion

As discussed above, based on the information that you have provided to the Commission, the prohibitions imposed upon you by the Ohio Ethics Law and related statutes do not preclude you from having a partnership interest in the business venture that you had already begun prior to your appointment to fill the unexpired term of a county commissioner, provided that there were no circumstances at the inception of the partnership or in the solicitation of the partnership's business that would implicate Chapter 102. or 2921.42 and 2921.43.

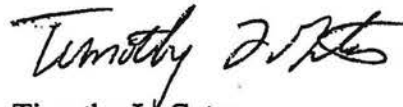
However, if the partnership conducts business of any kind under a county contract, or if the county is involved in any contract in which the partnership has an interest, then several provisions of the Ethics Law may prohibit you from profiting from, or holding an interest in, such a contract. You should also note that the Ethics Law and related statutes prohibit you from using your public position to secure either authorization of a public contract in which you would have an interest, or anything of value that would manifest a substantial and improper influence upon you with respect to your duties as a county commissioner. While this opinion briefly addresses the provisions that may apply under these scenarios, you should contact the Ethics Commission again if you are aware of a situation where your partnership may have an interest in

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a county contract, or where the county authorizes a contract in which you or the partnership may have an interest, for a specific application of the Ethics Law and related statutes to your situation.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on June 23, 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. If you have any questions or desire additional information, please contact this Office again.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Timothy L. Gates". The signature is written in a cursive style with a large initial "T" and a stylized "G".

Timothy L. Gates
Staff Attorney