

OHIO ETHICS COMMISSION

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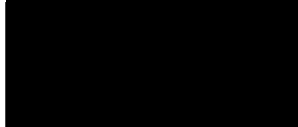
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September 7, 2001

Informal Opinion 2001-INF-0907-4

Thomas A. Teodosio
Teodosio, Manos & Ward



Dear Mr. Teodosio:

You state that you were elected to the Summit County Council in 2000. You have asked the Ethics Commission two questions about your service on the County Council. The first question that you have asked is whether the Ohio Ethics Law and related statutes prohibit you from serving on the Board of Trustees (Board) of Catholic Social Services (CSS) in light of the fact that CSS operates programs funded by the County. That question will be addressed in this opinion. You have also asked whether you may continue to accept court-appointed criminal defense cases. That question will be answered in a later opinion.

Brief Answer

As explained below, because the County funds programs operated by CSS, Division (A)(4) of R.C. 2921.42 prohibits you from serving on the Board of CSS unless you can meet the exception provided by R.C. 2921.42(C). The most important requirement of the exception is the need to objectively show that the services provided by CSS to the County are either: (a) being furnished to the County as part of a continuing course of dealing established prior to the assumption of your position on Council, or (b) unobtainable elsewhere for the same or lower cost.

If you can meet the requirements in R.C. 2921.42(C) in order to serve on the CSS Board, then Division (A)(1) of R.C. 2921.42 and Division (D) of R.C. 102.03 prohibit you from voting, discussing, deliberating, or otherwise authorizing or employing the authority or influence of your office, formally or informally, to secure authorization of a renewal or modification of the current funding arrangement between the County and CSS. Furthermore, R.C. 102.04(A) imposes restrictions on your representation of CSS before County agencies. Finally, R.C. 102.03(B) prohibits you from disclosing confidential information that you may acquire as a member of Council to CSS, or any other person or entity, and from using such information, without appropriate authorization.

R.C. 2921.42(A)(4)—Interest in a Public Contract

Your attention is first directed to Division (A)(4) of Section 2921.42 of the Revised Code, which reads:

- (A) No public official shall knowingly:

- (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.

The term "public official" is defined, in R.C. 2921.01(A), for purposes of R.C. 2921.42, to include a person who serves a political subdivision in an elected position. A person who serves a county in an elected position is a "public official" for purposes of R.C. 2921.42. Ohio Ethics Commission Advisory Opinion No. 88-003.

The term "public contract" is defined, in Division (G)(1)(a), for purposes of R.C. 2921.42, as:

The purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either.

Division (G)(1)(a) of R.C. 2921.42 does not limit the definition of the term "public contract" to a specific manner or means by which a political subdivision acquires services. It is unclear from your letter how the County funds the programs operated by CSS. The Ethics Commission has determined that a grant provided by a political subdivision to an entity that performs services in exchange for receiving the grant is a public contract for purposes of R.C. 2921.42. Adv. Op. No. 87-003. Accordingly, the County's funding of programs operated by CSS, whether by contract or grant, is a "public contract" for purposes of R.C. 2921.42.

The Ethics Commission has held that a public official has a prohibited "interest" in a public contract if the official has a definite and direct interest, of either a pecuniary or fiduciary nature, in the contract. Adv. Op. No. 89-004. As a member of the Board of CSS, you have a definite and direct fiduciary interest in the contracts entered into by CSS, including the operation of any program that is funded by the County. Adv. Ops. No. 88-008, 89-006, and 90-003. In addition, if you receive any compensation or reimbursement of expenses for your service on the CSS Board, then you have a direct pecuniary interest in the contracts entered into by CSS. Adv. Op. No. 81-008. Therefore, R.C. 2921.42(A)(4)

prohibits you from serving on the Board of CSS unless you can meet the exception provided by R.C. 2921.42(C).

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

R.C. 2921.42(C) reads 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 situation, 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 and 84-011. If you can satisfy each one of the four criteria explained below, then R.C. 2921.42(A)(4) does not prohibit you from having an interest in a public contract entered into between the County and CSS.

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

Division (C)(2) contains two prongs and is of particular importance. You must demonstrate that the services CSS will provide to the County are either: (a) being furnished to the County as part of a continuing course of dealing established prior to the assumption of your position on Council, or (b) unobtainable elsewhere for the same or lower cost.

The Ethics Commission has determined that Division (C)(2) describes a course of dealing established prior to the public official taking office. Adv. Op. No. 84-006. The Commission has explained that a continuing course of dealing can be demonstrated if a public contract in which an individual has an interest exists prior to the time the individual becomes associated with the political subdivision, as an officer or employee, that entered into the public contract in question. Adv. Op. No. 88-008. The public official is not prohibited from having an interest in a public contract after he becomes connected with the political subdivision provided the terms and conditions of the public contract are not modified after he becomes connected with the political subdivision. Id.

It appears from your letter that the funding of CSS by the County Council to operate programs within the County existed prior to the time you assumed public office as a member of Council. Therefore, from the facts that you have described, you may be able to show a continuing course of dealing for purposes of Division (C)(2). However, if the conditions of the County funding are modified in any manner after you assume office, or if the funding agreement between the County and CSS is subject to renewal, then the continuing course of dealing prong of Division (C)(2) cannot be met and, as explained below, it would be necessary to meet the exception of Division (C)(2) by the prong that requires an objective showing that the supplies or services that CSS is furnishing to the County are unobtainable elsewhere for the same or lower cost.

Unobtainable Elsewhere—Division (C)(2)

If the continuing course of dealing exception does not apply, then you must demonstrate compliance under the other prong R.C. 2921.42(C)(2)—that the services CSS will supply to the County are “unobtainable elsewhere for the same or lower cost.” In Ohio Ethics Commission Advisory Opinion No. 83-004, the Commission stated that the requirement that the goods or services be “unobtainable elsewhere for the same or lower cost” must be demonstrated by some objective standard. As stated in Advisory Opinion No. 84-011:

The criterion that the goods or services be “unobtainable for the same or lower cost” requires that a public official or employee be at a disadvantage when attempting to do business with his governmental entity, and that an equally qualified applicant who is not a [public official] must receive preference.

If, however, a trustee of an entity can objectively show that the services his entity provides are unique or not available elsewhere, for the same or lower cost, then he may meet the requirement of Division (C)(2). Adv. Op. No. 87-003. In order to meet the requirement in R.C. 2921.42(C)(2), you would have to demonstrate, by some objective standard, that the services provided by CSS are unique, and that no other entity could perform the same services for the same or lower cost. If the services are obtainable elsewhere for the same or lower cost, you will be unable to comply with the exception in R.C. 2921.42(C). If you are unable to show compliance with the exception in R.C. 2921.42(C), you are prohibited from serving on the Board of CSS if it will receive funding from the County while you are serving on the Board of CSS.

Other Requirements of R.C. 2921.42(C)

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 services to be provided by CSS are necessary services for the County. Division (C)(3) requires that the treatment provided by CSS to the County be as good as or better than the services that CSS would provide to other entities. Finally, Division (C)(4) requires that the transaction be conducted at arm's length, that the County Council have full knowledge of your interest as a member of the CSS Board and that you take no part in the deliberations and decisions to secure County funding for CSS. See also R.C. 2921.42(A)(1), set forth below.

R.C. 2921.42 (A)(3) - Position of Profit in a Public Contract

If you receive compensation or expenses for your service on the CSS Board, then the prohibition imposed by R.C. 2921.42(A)(3) will apply. R.C. 2921.42(A)(3) 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.

In Advisory Opinion No. 92-013, the Ethics Commission held that an "interest" that is prohibited by R.C. 2921.42(A)(4) may be either pecuniary or fiduciary in nature, but that the word "profit" in R.C. 2921.42(A)(3) connotes only a pecuniary gain or benefit. See also Adv. Op. No. 93-001. The Commission explained in Advisory Opinion No. 92-013:

"[f]or example, a public official may be deemed to have an "interest" in a public contract, but not "profit" from the public contract, if his interest is only fiduciary, such as serving as an uncompensated officer or trustee of a nonprofit corporation."

If CSS either compensates or reimburses you for your service on its Board, your "interest" in the contract between CSS and the County Council would be both pecuniary and fiduciary for purposes of R.C. 2921.42.

The Ethics Commission has held that, for purposes of R.C. 2921.42(A)(3), a public official is deemed to profit from a public contract where: (1) the establishment or operation of the entity with which he serves is dependent upon the award of the public contract; (2) the creation or continuation of the public official's position with the entity with which he serves is dependent upon the award of the contract; (3) the proceeds from the contract would be used by the entity to compensate the official or serve as a basis for the official's compensation; or (4) he would otherwise profit from the contract. Adv. Ops. No. 87-004 and 88-008.

The Ethics Commission has held that a public official will be deemed to have authorized a public contract, for purposes of R.C. 2921.42(A)(3), where the contract could not have been awarded without the approval of either the official, the position that the official holds, or the legislative body, commission, or board of which he is a member. Adv. Ops. No. 88-003, and 88-008. If the public contract between CSS and the County could not have been entered into without the approval of the County Council and you are compensated by CSS for your services as a Board member, then R.C. 2921.42(A)(3) prohibits you from serving on the Board of CSS unless the contract between CSS and the County was competitively bid and CSS submitted the lowest and best bid.

R.C. 2921.42(A)(1)—Authorizing a Public Contract in Which You Have an Interest

Assuming that the criteria of R.C. 2921.42(C) can be met permitting you to serve on the CSS Board when the County Council provides funds to CSS, you are subject to Division (A)(1) of Section 2921.42, which provides that a public official shall not 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.

R.C. 2921.42(A)(1) prohibits a public official from authorizing or employing the authority or influence of his office to secure authorization of a public contract in which the public official has an interest.

As explained above, you would have an interest in a public contract between the County and CSS for purposes of R.C. 2921.42. Therefore, R.C. 2921.42(A)(1) prohibits you from voting, discussing, deliberating, or otherwise authorizing, or employing the authority or

influence of your office, formally or informally, to secure authorization of a renewal or modification of the current funding arrangement between the County and CSS.

Use of Authority to Secure a Thing of Value—R.C. 102.03(D)

You must also adhere to the prohibitions imposed by R.C. 102.03(D), which reads as follows:

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 an elected officer of a political subdivision. R.C. 102.01(B) and (C). An elected county official is, therefore, subject to the prohibitions of R.C. 102.03(D) and (E). Adv. Op. No. 88-003.

The term "anything of value" is defined in R.C. 1.03 to include money and every other thing of value. R.C. 102.01(G). A definite pecuniary benefit to a person or a business is considered to be a thing of value under R.C. 102.03(D). Adv. Ops. No. 85-006, 85-011 and 86-007. The funding received by an organization from a political subdivision is within the definition of "anything of value" for purposes of R.C. 102.03(D).

A thing of value is considered to be of an improper character for purposes of R.C. 102.03(D) and (E) where it is secured from a party that is interested in matters before, regulated by, or doing or seeking to do business with the public agency with which the official or employee serves, or where the thing of value could otherwise impair the official's or employee's objectivity and independence of judgment with respect to his official actions and decisions for the public agency with which he serves or is employed. Adv. Ops. No. 87-006, 87-009, and 92-009. The Ethics Commission has determined that R.C. 102.03(D) prohibits a public official from participating in any matter that would provide a benefit to an organization that he serves in a fiduciary capacity, such as trustee. Adv. Ops. No. 89-005, 90-012, and 92-004. Therefore, R.C. 102.03(D), as well as R.C. 2921.42(A)(1), would prohibit you from participating in matters before the County Council that affect the financial interests of CSS.

R.C. 102.04(C)—Compensated Representation Before County Agencies

Your attention is also directed to R.C. 102.04(C), which reads:

Except as provided in division (D) of this section, no person who is elected or appointed to an office of or employed by a county, township, municipal

corporation, or any other governmental entity, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which he is an officer or employee.

R.C. 102.04(C) prohibits a county official or employee from receiving, directly or indirectly, compensation, except from the agency with which he serves, for personally rendering any service in any matter before any agency, department, board, bureau, commission, or other instrumentality of the county of which he is an officer or employee, excluding the courts. See R.C. 102.01(A) (defining the term "compensation," for purposes of R.C. 102.04, as "money, thing of value, or financial benefit").

Division (D) of Section 102.04 of the Revised Code provides an exception to the prohibition of R.C. 102.04(C) for county employees and officials who are appointed to a non-elective office. In the instant situation, however, you serve in an elected position and the exception provided by Division (D) is inapplicable and need not be addressed further. Therefore, R.C. 102.04(C) prohibits you from receiving compensation from CSS for personally representing CSS or personally rendering any service in any case, proceeding, application, or other matter that is before the County Council, or any department, division, institution, instrumentality, board, commission, or bureau of the County, excluding the courts.

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

Finally, R.C. 102.03(B) prohibits you from disclosing or using confidential information, which you have acquired as a County Council member, to CSS or any other person or entity, and from using such information without appropriate authorization. Adv. Op. No. 89-006. This prohibition has no time limit, and applies to you during your public service and after you leave your public position.

Conclusion

As explained above, because the County funds programs operated by CSS, Division (A)(4) of R.C. 2921.42 prohibits you from serving on the Board of CSS unless you can meet the exception provided by R.C. 2921.42(C). The most important requirement of the exception is the need to objectively show that the services provided by CSS to the County are either: (a) being furnished to the County as part of a continuing course of dealing established prior to the assumption of your position on Council, or (b) unobtainable elsewhere for the same or lower cost.

Thomas A. Teodosio

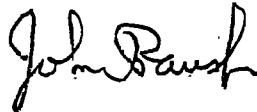
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If you can meet the requirements in R.C. 2921.42(C) in order to serve on the CSS Board, then Division (A)(1) of R.C. 2921.42 and Division (D) of R.C. 102.03 prohibit you from voting, discussing, deliberating, or otherwise authorizing or employing the authority or influence of your office, formally or informally, to secure authorization of a renewal or modification of the current funding arrangement between the County and CSS. Furthermore, R.C. 102.04(A) imposes restrictions on your representation of CSS before County agencies. Finally, R.C. 102.03(B) prohibits you from disclosing confidential information that you may acquire as a member of Council to CSS, or any other person or entity, and from using such information, without appropriate authorization.

The Ethics Commission approved this informal advisory opinion at its meeting on September 7, 2001. The opinion is based upon 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 further questions, please feel free to contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "John Rawski". The signature is fluid and cursive, written over a light background.

John Rawski
Staff Attorney