

OHIO ETHICS COMMISSION

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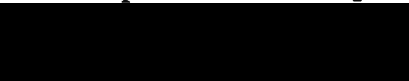
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May 10, 2002

Informal Opinion 2002-INF-0510

Lisa J. Conomy
Chief Legal Counsel
Ohio Department of Transportation



Dear Ms Conomy:

In a letter received by the Ohio Ethics Commission on November 28, 2001, you ask whether the prohibitions that the Ethics Law and related statutes impose upon the Administrator (Administrator) for the Office of Real Estate (ORE) for the Ohio Department of Transportation (ODOT) preclude a company that is owned by the Administrator's father from doing business with ODOT.

Brief Answer

As explained below, R.C. 2921.42(A)(1) and R.C. 102.03(D) and (E) prohibit the Administrator from participating, formally or informally, in ODOT's decision-making process with respect to right-of-way acquisitions if the company owned by his father receives compensation for performing work on any aspect of the acquisition. The Administrator's supervisor, and yourself as ODOT Chief Legal Counsel, must review the duties of the Administrator and determine whether his withdrawal from consideration of matters involving Weldon Acquisition is possible or desirable.

Facts

You state that ODOT promoted James J. Viau to the position of Administrator in June 1999. The Administrator's father, Joseph L. Viau, is the sole owner of Weldon Acquisition, Inc., which had contracted to negotiate right-of-way acquisitions for ODOT prior to the promotion of James J. Viau to the position of Administrator. Weldon Acquisition performed services for ODOT both directly for ODOT as a prime contractor and as a sub-contractor to a prime contractor that was hired by ODOT. You explain that ORE is comprised of a central office located in Columbus and four regional offices.

Facts—Central Office

The ORE central office is comprised of three sections. The supervisors of the three ORE central office sections report to James J. Viau. The ORE central office is responsible for all policies and procedures, technical assistance, training and quality assurance reviews related to right-of-way acquisitions. The central office staff is responsible for reviewing and approving the hiring of consultants by ORE.

Facts—Regional Offices

ORE has four regional offices, each of which, is managed by a Regional Projects Manager (RPM). The four RPM's report to James J. Viau. The regional offices are responsible for acquiring property for highway projects. The regional offices use either their in-house staff or hire consultants to secure right-of-way acquisitions. The regional offices can hire consultants either directly through personal services contracts or through a request for proposals (RFP) process.

The contracts for consultants who are hired through personal services contracts are statutorily limited to less than \$50,000 per vendor per year, but may be increased over this limit with Controlling Board approval. While only the Director of Transportation may enter into contracts for ODOT, the RPM's have been authorized to sign the Director's signature for these contracts.

Under the RFP process, the regional offices, through the RPM and staff, solicit, review, and grade technical proposals from consultants. ODOT's Consultant Selection Committee (CSC) awards contracts based upon the reviews and grades made by the RPM and regional office staff. The CSC is comprised of three individuals—two ODOT Assistant Directors and one Deputy Director. James J. Viau is not a member of the CSC. After approval by CSC, the RPM and regional office staff negotiate the terms of the contract directly with the consultants. When the terms are finalized, the RPM presents the contract to the controlling board for review and approval.

Authorizing or Securing Authorization of a Public Contract—R.C. 2921.42(A)(1)

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 of any public contract in which he, a member of his family, or any of his business associates has an interest.

The term "public official" is defined for purposes of R.C. 2921.42 in R.C. 2921.01(A) to include an elected or appointed officer or employee of any political subdivision. The Administrator for the Office of Real Estate for ODOT is therefore a "public official" for purposes of R.C. 2921.42 and subject to its prohibitions. See generally Ohio Ethics Commission Advisory Opinion No. 87-004.

The term "public contract" is defined in R.C. 2921.42(G)(1) to include the purchase or acquisition or a contract for the purchase or acquisition of property or services by or for the use of the state, or a contract for the design, construction, alteration, repair, or maintenance of any public property. ODOT's purchase of consulting services to secure right-of-way acquisitions is a public contract for purposes of R.C. 2921.42(A)(1).

The Ethics Commission has defined "member of his family," for purposes of R.C. 2921.42(A)(1), to include a public official's spouse, children, whether dependent or not, parents, grandparents, grandchildren, and siblings. The term also includes other persons related by blood or marriage and residing in the same household. Adv. Ops. No. 80-001 and 90-010. The Administrator's father is a member of his family for purposes of R.C. 2921.42(A)(1).

The Ethics Commission has determined that, for purposes of the prohibition of R.C. 2921.42, an interest must be definite and direct. Adv. Op. No. 81-008. As the sole owner of Weldon Acquisition, the Administrator's father, Joseph L. Viau, would have a definite and direct interest in a contract entered into between ODOT and Weldon Acquisition for the purchase of consulting services to secure right-of-way acquisitions.

The Ethics Commission has determined that a public official will be deemed to have "authorized" a public contract, for purposes of R.C. 2921.42, where the contract could not have been awarded without the approval of the public official or the public position that the official holds. Adv. Ops. No. 87-004, 88-008, and 92-012. Accordingly, R.C. 2921.42(A)(1) prohibits a public official from discussing, making recommendations, or otherwise taking any formal or informal action on any part of his public agency's decision-making process with respect to the continuation, implementation, or terms and conditions of a contract in which a member of his family has an interest. Adv. Ops. No. 89-005 and 90-010.

Furthermore, the Ethics Commission has determined that R.C. 2921.42(A)(1) prohibits a public official from using "the authority or influence of his office" by exercising the power and influence inherent in the position and prestige of his public office or employment, either formally or informally, to affect the decision-making process of other public officials or employees regarding the continuation, implementation, or terms and conditions of a contract in which his family member has an interest even if the official abstains from participating in official proceedings. Adv. Ops. No. 90-012 and 97-004.

Application of R.C. 2921.42(A)(1) to the Administrator

As set forth above, the ORE central office is responsible for all policies and procedures, technical assistance, training and quality assurance reviews related to right-of-way acquisitions. The four ORE regional offices are responsible for acquiring property for highway projects. The supervisors of the three ORE central office sections and the RPM's report to James J. Viau.

As explained above, because the Administrator's father, Joseph L. Viau, is the sole owner of Weldon Acquisition, he would have a definite and direct interest in a contract entered into between ODOT and Weldon Acquisition for the purchase of consulting services to secure right-of-way acquisitions. As also explained above, the Ethics Commission has determined that R.C. 2921.42(A)(1) prohibits a public official from discussing, making recommendations, or otherwise taking any formal or informal action on any part of his public agency's decision-making process with respect to the continuation, implementation, or terms and conditions of a contract in which a member of his family has an interest.

Therefore, in the instant situation, R.C. 2921.42(A)(1) prohibits the Administrator from participating, formally or informally, in ODOT's decision-making process to select a company to perform consulting services for right-of-way acquisitions if Weldon Acquisition, the company owned by the Administrator's father, is interested in performing the consulting services. The prohibition imposed by R.C. 2921.42(A)(1), in addition, would prohibit the Administrator from acting on any issue involving a right-of-way acquisition if his father's company has performed consulting services on the acquisition. The prohibition imposed upon the Administrator, James J. Viau, by R.C. 2921.42(A)(1) would prohibit the Administrator from supervising the three ORE Central office sections and the RPM's who report to him in any matters related to issues affecting right-of-way acquisitions if Weldon Acquisition supplied consulting services on the acquisitions.

Soliciting and Using Public Position to Secure Anything of Value—R.C. 102.03(D) and (E)

Your question also implicates R.C. 102.03(D) and (E), which provides:

- (D) 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.
- (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 or is an employee of any public agency. R.C. 102.01(B). An ODOT employee falls within the definition of "public official or employee" for purposes of R.C. 102.03 and is subject to the prohibitions imposed by Divisions (D) and (E). R.C. 102.01(B) and (C).

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 definite and direct, pecuniary benefit to the financial interests of an individual, business, or entity, either private or public, is considered to be a thing of value under R.C. 102.03(D) and (E). See Adv. Ops. No. 88-005 and 89-008.

R.C. 102.03(D) and (E) prohibits a public official or employee from soliciting or taking any action, formally or informally, to secure a thing of value if the thing of value could manifest a substantial and improper influence upon the public official or employee with respect to that person's duties. Adv. Ops. No. 88-004 and 91-004. The Ethics Commission has held that a determination of whether a thing of value could manifest a substantial and improper influence upon a public official or employee with respect to that person's duties is dependent upon the facts and circumstances of each individual situation. Adv. Op. No. 87-008.

The Commission has stated that a matter that affects the personal financial interests of a family member 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. Adv. Ops. No. 89-008, 91-004, and 92-012. However, in order for R.C. 102.03(D) and (E) to prohibit a public official or employee from participating in a matter, which would secure a thing of value for a family member, 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).

Application of R.C. 102.03(D) and (E) to the Administrator

In the instant situation, the pecuniary benefits that would accrue to the Administrator's father through his ownership of Weldon Acquisition as a result of a contract with ODOT to supply consulting services for right-of-way acquisitions would be substantial. Therefore, R.C. 102.03(D), as well as R.C. 2921.42(A)(1), prohibits the Administrator from participating in any matter before ODOT from which his father would receive a definite and direct pecuniary benefit. R.C. 102.03(E) also prohibits the Administrator from soliciting a definite and direct pecuniary benefit for his father.

Withdrawal From Matters Involving a Conflict

The Ethics Commission has explained that whenever R.C. 102.03(D) or R.C. 2921.42(A)(1) prohibits a public official from participating in a matter, the official may withdraw from the matter that would create the conflict. See Adv. Ops. No. 89-010 and 90-010, respectively. In such an instance, the matter creating the conflict must be resolved by an individual who is superior to, and a check upon the actions of, the official who faces the conflict. Adv. Op. No. 90-010. The public official's withdrawal must not, however, interfere with performance of his duties, and must be approved by the appropriate officials at his employing agency. Adv. Ops. No. 89-010 and 90-010.

The application of this precedent is relevant in the instant situation. The Administrator's supervisor, and yourself as ODOT Chief Legal Counsel, must review the duties of the Administrator and determine that he is capable of withdrawing from consideration of matters involving Weldon Acquisition whenever it either seeks a contract with ODOT or supplies consulting services. In this regard, the language of the Ethics Commission in Advisory Opinion No. 89-010 is pertinent:

An employee of an administrative department of the state owes his responsibility to the exercise of the public trust by performing the tasks assigned to him by his employing agency. This duty must not be impaired by a public employee's concern for his own personal interests. . . . There may be instances where a state agency is willing to accommodate the personal interests of its employees . . . [however] [t]he state agency's determination whether such action is possible or desirable is a matter within the discretion of the affected agency.

See also Adv. Ops. No. 90-002 and 96-004.

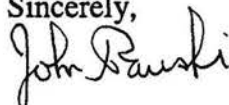
Conclusion

As explained above, R.C. 2921.42(A)(1) and R.C. 102.03(D) prohibit the Administrator from participating, formally or informally, in ODOT's decision-making process with respect to right-of-way acquisitions if the company owned by his father receives compensation for performing work on any aspect of the acquisition. The Administrator's supervisor, and yourself as ODOT Chief Legal Counsel, must review the duties of the Administrator and determine whether his withdrawal from consideration of matters involving Weldon Acquisition is possible or desirable.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on May 10, 2002. The Commission commends you for requesting guidance before taking any actions that could be prohibited by law.

This informal advisory opinion represents the views of the undersigned, 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 further questions or desire additional information, please contact this Office again.

Sincerely,



John Rawski
Staff Attorney