

OHIO ETHICS COMMISSION

Dr. Herb Asher, *Chair*
Merom Brachman, *Vice Chair*



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.ohio.gov

David E. Freel, *Executive Director*

November 17, 2003 Informal Opinion 2003-INF-1117-1

Larry D. DeJane, Chair
Investment Committee
Youngstown State University

Dear Mr. DeJane:

In a letter that was received by the Ohio Ethics Commission on August 14, 2003, you ask whether the Ohio Ethics Law and related statutes prohibit Youngstown State University (YSU) employees or appointed officials who serve on YSU's Investment Committee (Investment Committee) of the Finance and Facilities Committee of the Board of Trustees or the Investment Advisory Screening Committee (Screening Committee) from participating in the hire of an investment advisor. You have explained that the YSU employees and officials have a range of financial and fiduciary interests in, or business relationships with, the financial institutions that are seeking to be hired as the investment advisor.

Brief Answer

As explained below, the answer to your question depends upon the type of relationship between the YSU official or employee and the financial institutions that are seeking to be hired as the investment advisor. A YSU official or employee who has an "ordinary customer" relationship with a financial institution that is seeking to be hired as the investment advisor is not prohibited from participating in the decision to either select, or authorize contract to, the financial institution.

A YSU official or employee whose relationship with a financial institution that is seeking to be hired as the investment advisor goes beyond that of an "ordinary customer" is prohibited from: (1) profiting from the contract unless it is let by competitive bidding to the lowest and best bidder; (2) participating in the decision to select the financial institution or authorize the contract if the YSU official or employee, or his business associate, has a definite and direct fiduciary or pecuniary interest in the contract; and (3) having a definite and direct pecuniary or fiduciary interest in the contract between YSU and the institution that is hired as the investment advisor.

A YSU official or employee who owns stock in a financial institution will profit from a contract between YSU and the financial institution. If a YSU official or employee who serves on either the Selection or Investment Committees owns stock in a financial institution that desires to be hired as the investment advisor, then the contract must be let by competitive bidding to the lowest and best bidder. A YSU official or employee who owns stock in a financial institution is also be subject to other prohibitions imposed by the Ethics Law.

Depending on the specific facts and circumstances, because a YSU official or employee who is a director, officer, or employee of a financial institution may profit from a contract between YSU and the financial institution that he serves, the YSU official or employee will also be subject to other prohibitions imposed by the Ethics Law.

Facts

R.C. 3345.05(C) requires that the board of trustees of state supported universities adopt an investment policy and establish an investment committee to advise the board on its investments. R.C. 3345.05(D) enables an investment committee to hire an investment advisor. R.C. 3345.05(D) also establishes the qualifications for an investment advisor.

You state that the YSU Board of Trustees, pursuant to R.C. 3345.05, has adopted an investment policy and established an Investment Committee. The YSU Investment Committee is a subcommittee of the Finance and Facilities Committee. The YSU Finance and Facilities Committee is comprised of the entire YSU Board of Trustees. The President of YSU is a non-voting ex-officio member of the Investment Committee. YSU employees aid the Investment Committee as needed.

You state that the Investment Committee submitted requests for proposals for the hiring of an investment advisor and that fourteen financial institutions responded. A screening committee comprised of YSU employees and consultants will evaluate the proposals and recommend a list to the Investment Committee, which will select the investment advisor. The YSU Vice President for Financial Affairs serves on the screening committee.

You state that some members of the Board of Trustees, including trustees who serve on the Investment Committee, and YSU officials and employees who serve on the screening committee, have the following kinds of relationships with the financial institutions that have responded to the RFP: (1) residential and commercial mortgage loans; (2) home equity loans and lines of credit; (3) checking and savings accounts; (4) brokerage and IRA accounts; (5) stock ownership; (6) director; (7) officer; (8) trustee of investment accounts; and (8) membership on loan and nominating committees.¹

¹ Your specific questions about a board member who is a partner in a law firm that represents a financial institution and the board secretary will be addressed in a companion opinion.

Ordinary Customer Relationship

Some of the relationships that you have described are relationships that any ordinary customer might have with a financial institution. These relationships include having a residential or commercial mortgage loan, a home equity loan or line of credit, or a checking, savings, brokerage or IRA account. In Advisory Opinion No. 98-001, the Commission was asked whether a public official was prohibited from participated in matters, including the investment of public funds, that affect a financial institution with which the official has these kinds of "ordinary customer" relationships.

The Commission concluded that a public official or employee has an ordinary customer relationship with a financial institution if her business relationships with the financial institution are subject to fixed terms that are available to all other eligible customers of the financial institution, unless: (a) the public official or employee is negotiating a loan with the financial institution, or she has existing loan agreements with the financial institution on terms that vary significantly from those offered to other borrowers; (b) the total amount of the official's or employee's deposits or investments (such as certificates of deposit or individual retirement accounts) exceed the maximum amount eligible for coverage by federal deposit insurance; (c) the official or employee is employed by the financial institution or has any ownership interests in, or fiduciary relationships with, the financial institution; or (d) there is any extraordinary circumstance involved in the business relationship between the public official or employee, the public agency she serves, and/or the financial institution. Ohio Ethics Commission Advisory Opinion No. 98-001.

When the relationship of a public official to a financial institution is solely that of an ordinary customer, neither the conflict of interest restrictions contained in R.C. 102.03(D) and (E), nor the public contract restrictions set forth in R.C. 2921.42(A)(1), prohibits the official from participating in matters that affect the financial institution. Id. A copy of Advisory Opinion No. 98-001 is enclosed for your reference.

The conclusions in Advisory Opinion No. 98-001 would apply to the officials and employees of YSU. As long as the official's or employee's connections to a financial institution that is competing for the position of financial advisor are limited to the kind described in Advisory Opinion No. 98-001, and within the parameters described in that opinion, the official or employee does not profit from or have an interest in any contract entered into between YSU and the financial institution. Further, the official or employee is not prohibited from participating in the selection of an investment advisor.

Some of the relationships you have discussed are not ordinary customer relationships, and raise more significant issues under the Ethics Law and related statutes. These include stock ownership, director, officer, or employment positions, trustee of investment accounts, and membership on loan and nominating committees. The public contract restrictions, set forth in R.C. 2921.42(A)(1), (3), and (4), will apply when an official or employee has these kinds of relationships.

Public Contract Prohibitions—R.C. 2921.42(A)(1), (3), and (4)

R.C. 2921.42(A)(1), (3), and (4) provide that no public official shall knowingly:

- (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;
- . . .
- (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;
- (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 to include "any elected or appointed officer, or employee, or agent of the state. A state university is an instrumentality of the state. See R.C. 3325.01 ("state university" means a public institution of higher education which is a body politic and corporate"); Wolf v. Ohio State University Hosp., 170 Ohio State 49 (1959). Therefore, trustees, officers, and employees of YSU are "public officials" who are subject to the prohibitions imposed by R.C. 2921.42. See Ohio Ethics Commission Advisory Opinion No. 93-017 (a teacher or other educator, regardless of her duties, is a "public official" for purposes of R.C. 2921.42).

A "public contract" is defined for purposes of R.C. 2921.42 as "[t]he purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state or any of its political subdivisions, or any agency or instrumentality of either." The hiring of an investment advisor by YSU is a "public contract" for purposes of this definition.

Depending on the specific connections between a YSU official or employee and a financial institution, all of the provisions in R.C. 2921.42(A)(1), (A)(3), and (A)(4) may apply. This opinion will address the provision with the most significant impact first.

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

R.C. 2921.42(A)(3) prohibits a public official, during his public service, or for one year thereafter, from profiting from a public contract that was "authorized" by him, or by a board of which he was a member at the time of authorization, unless the public contract was let by

competitive bidding to the lowest and best bidder. There is no exception to this prohibition. See Adv. Op. No. 93-001.

A public body, commission, or board has authorized a public contract for purposes of R.C. 2921.42(A)(3) where the contract could not have been awarded without the board's approval. Adv. Op. No. 87-008. Accordingly, a public official who serves on a legislative body, commission, or board is subject to the prohibition of R.C. 2921.42(A)(3) regardless of whether he participates in discussions or votes on the public contract as a member of the public body, commission, or board. Adv. Ops. No. 88-006, 88-008, and 91-005.

As discussed above, the Investment Committee submitted requests for proposals for the hiring of an investment advisor and, after a Screening Committee comprised of YSU employees and consultants recommends a list of responding institutions to the Investment Committee, it will select an investment advisor. Thus, it is clear that the contract to hire an investment advisor cannot be awarded without the approval of the YSU officials who serve on both the Screening Committee and the Investment Committee and those officials or a board of which they are members will have "authorized" the contract for purposes of R.C. 2921.42(A)(3). R.C. 2921.42(A)(3) prohibits a YSU official or employee from profiting from a public contract if he participates in the authorization of, or serves on a board that authorizes, the contract.

The word "profit," as used in R.C. 2921.42(A)(3), connotes a definite and direct pecuniary gain or benefit. Adv. Ops. No. 92-013 and 93-001. The position of profit that a public official occupies in the prosecution of a public contract for purposes of Division (A)(3) must be definite and direct. Adv. Op. No. 92-013.

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). A stockholder of a corporation has an ownership interest, albeit generally a non-participatory one, in the corporation. See Adv. Op. No. 93-001. Because a corporation's business transactions will definitely and directly affect a stockholder's return on his invested capital received through dividends, distribution of net assets, and from the appreciation in the value of the stock, all stockholders in a corporation—even those who own a fractional or de minimis amount of stock—will profit from the corporation's contracts for purpose of R.C. 2921.42(A)(3). Adv. Op. No. 93-001.

An officer or director of a company would occupy a position of profit in the prosecution of the contracts of the company if he receives a definite and direct benefit from the contract, such as a dividend drawn from the profits of the company.

A public official who is an employee of a company profits from the contracts between the company and the public agency he serves if: (1) the establishment or operation of the company is dependent upon the award of the public contract; (2) the creation or continuation of the public official's position with the company is dependent upon the award of the contract; (3) the proceeds from the contract would be used by the company 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.

Therefore, the restriction in R.C. 2921.42(A)(3) applies to any YSU official or employee who is a stockholder in a financial institution that has responded to the YSU RFP, and may apply to any YSU official or employee who serves as an officer, director, or employee of a financial institution that has responded to the YSU RFP. It does not appear, from the facts you have provided, that the restriction in R.C. 2921.42(A)(3) will apply to a YSU official or employee who is a trustee of investment accounts with a financial institution or a member of a loan and nominating committee for a financial institution that has responded to the YSU RFP.

Application of R.C. 2921.42(A)(3)

R.C. 2921.42(A)(3) prohibits any YSU official or employee who participates in the authorization of, or serves on a board that authorizes, the contract for an investment advisor from profiting from the contract in any of the ways described above, unless the contract was competitively bid and awarded to the financial institution who submitted the lowest and best bid.

In the instant situation, the Investment Committee did not use competitive bidding to seek interested institutions to serve as the investment advisor. Rather, the Investment Committee submitted requests for proposals. A selection process as used in connection with an RFP is not the same as competitive bidding process. See Adv. Op. No. 88-006 (distinguishing between 'competitive bidding' and a political subdivision's 'selection process' for purposes of R.C. 2921.42(A)(3)).

There are two ways for YSU to hire an investment advisor without implicating the prohibitions of R.C. 2921.42(A)(3). The first is to remove all YSU officials who profit from the contracts of the responding institutions from the Selection and Investment Committees. The second is to award the contract through competitive bidding to the lowest and best bidder instead of a selection based on requests for proposals.²

Participation in the Award of a Contract—R.C. 2921.42(A)(1)

R.C. 2921.42(A)(1) prohibits a public official from participating in the award of a public contract the public official, or a family member or business associate of the official, has either a fiduciary or pecuniary interest in the contract. Adv. Op. No. 92-002. See also R.C. 102.03(D) and (E) (a public official cannot solicit, accept, or use his position to secure anything of value, which would include a contract, for himself or his business associates); Adv. Op. No. 93-001.

² Because it is the Investment Committee, rather than the Board of Trustees, with the authority to hire an investment advisor, an individual who owns stock in a institution that is selected could continue to serve on the YSU Board of Trustees, as long as the trustee is able to comply with R.C. 2921.42(A)(1) and (A)(4) (discussed below).

The restriction of R.C. 2921.42(A)(1) applies any time a public official or employee, or any of his business associates, has an "interest" in a contract of his public agency. An "interest," for purposes of R.C. 2921.42(A)(1), is any definite and direct, pecuniary or fiduciary, interest in the contracts of the public agency.

Official's Interest

A public official who owns stock in a corporation has an interest in the corporation's contracts for purposes of R.C. 2921.42(A)(1), unless the official can meet the exception set forth in R.C. 2921.42(B). Adv. Op. No. 93-001. The requirements of Division (B) are factual determinations, and whether the exemption can be met depends upon the facts and circumstances of each individual situation. Adv. Op. 93-001.

Division (B) of R.C. 2921.42 provides that, in the absence of bribery or fraud, a public servant does not have an interest in a public contract with his own public agency when all of the following elements are met: (1) the interest of the public servant is limited to owning or controlling shares of a corporation; (2) the amount owned or controlled does not exceed five per cent of the outstanding shares of the corporation; and (3) the public servant, prior to the time the public contract is entered into, files with his political subdivision an affidavit giving his status with the organization. Adv. Ops. No. 78-002, 89-011, and 90-005.

A public official who is a member of a board of trustees, an officer, or a director of a business has a definite and direct fiduciary interest in the contracts of that business for purposes of R.C. 2921.42(A)(1). Adv. Ops. No. 78-006 and 88-008. The public official may also have a pecuniary interest in the business's contracts if he is compensated for his services. A public official who serves as a member of a board with authority to make significant decisions that affect the company may also have a fiduciary interest in the contracts of the company.

An employee of a company does not generally have a definite and direct interest in the contracts of the company. However, the employee does have a definite and direct interest in the contracts of his company if: (1) he has an ownership interest in, or is a director, trustee, or officer of the company; (2) he takes part in contract negotiations; (3) his salary is based on the proceeds of the contract; (4) he receives a share of the contract proceeds in the form of a commission or fee; (5) his employment responsibilities include participation in the administration or execution of the contract; or (5) his tenure is dependent upon his employer receiving the contract. See Adv. Op. No. 89-008.

Therefore, a YSU official or employee has a definite and direct, pecuniary or fiduciary interest in the contracts of a financial institution that has responded to the RFP if the official or employee: (1) holds more than five percent of the stock in the financial institution or cannot otherwise meet the exception in R.C. 2921.42(B); (2) is an officer or director of the financial institution; or (3) is a member of a board or committee with authority to make significant decisions that affect the financial institution. A YSU official or employee may have a definite and direct interest in the contracts of a financial institution that has responded to the RFP if he is

employed by the financial institution within any of the other parameters discussed above. It does not appear that a YSU official or employee who is a trustee of investment accounts with a financial institution that has responded to the RFP has an interest in the contracts of the financial institution.

Business Associate's Interest

A business association exists whenever parties act together to pursue a common business purpose. Adv. Ops. No. 78-006. The Ethics Commission has explained that a person whose sole relationship to a corporation is that of a limited stockholder is not a "business associate" of the official for purposes of R.C. 2921.42(A)(1). However, where a corporate stockholder also holds a position as the corporation's director, officer, agent, representative, employee, or some other significant role where he is capable of affecting a corporation's management or operation, the corporation is his "business associate" for purposes of R.C. 2921.42(A)(1). Adv. Op. No. 93-001. If a public official who is a stockholder of a company can meet the exception in R.C. 2921.42(B), such that he will not be considered to have a personal interest in the contracts of the company, the company is not his business associate.

A public official who is an officer or director of a private company is acting together with the company to pursue a common business purpose and the company is the public official's business associate. Adv. Op. No. 87-003. A public official who is serving on a board of a private company where the board has the authority to make significant decisions that affect the interests of the company has a business association with the company. A company by which a public official is employed is also the public official's business associate. Adv. Op. No. 89-008.

Thus, any financial institution that a YSU official serves as a director, officer, member of loan or nominating committee, or employee, is a "business associate" of the official for purposes of R.C. 2921.42(A)(1).

Application of Restriction

R.C. 2921.42(A)(1) prohibits YSU official or employee who has an interest in the contracts of a financial institution, or for whom an financial institution if his business associate, from participating, in any way, formally or informally, in the award of a public contract to that financial institution to serve as investment advisor for YSU. Members of the Selection and Investment Committees who are stockholders of financial institutions that are seeking the contract, and have no other nexus to the financial institution, must meet the exception provided by R.C. 2921.42(B) in order to participate in the selection and award of the contract.

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

R.C. 2921.42 (A)(4) prohibits the YSU officials from having an "interest" in the profits or benefits of any public contract entered into by the Investment Committee. The same tests of

“interest,” as used in R.C. 2921.42(A)(1) (described above), apply to “interest,” as used in R.C. 2921.42(A)(4).

Therefore, a YSU official or employee has a definite and direct, pecuniary or fiduciary interest in the contracts of a financial institution that has responded to the RFP if the official or employee: (1) holds more than five percent of the stock in the financial institution or cannot otherwise meet the exception in R.C. 2921.42(B); (2) is an officer or director of the financial institution; or (3) is a member of a board or committee with authority to make significant decisions that affect the financial institution. A YSU official or employee may have a definite and direct interest in the contracts of a financial institution that has responded to the RFP if he is employed by the financial institution within any of the other parameters discussed above. It does not appear that a YSU official or employee who is a trustee of investment accounts with a financial institution that has responded to the RFP has an interest in the contracts of the financial institution.

A YSU official or employee is prohibited from having an interest in a contract between an financial institution and YSU unless he can meet the exception set forth in R.C. 2921.42(C), which provides:

- (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 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 a YSU official to have an interest in a contract entered into by or for the use of YSU, the official must be able to show by some objective standard that the services provided by the institution that is selected as the investment advisor are “unobtainable elsewhere 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 interested institutions, the openness and fairness of the selection process, and the conditions of the market. Adv. Ops. No. 83-004 and 88-001.³

Other Requirements of R.C. 2921.42(C)

Even if a YSU official can meet the criterion of Division (C)(2), the other provisions of R.C. 2921.42(C) must be met. R.C. 2921.42(C)(1) requires an objective showing that the hiring of an investment advisor is necessary for the university. Adv. Op. No. 94-002. Next, Division (C)(3) requires that the treatment provided by the institution that is selected to serve as the investment advisor is as good as or better than the services provided by the institution to its other clients or customers. These factual determinations are generally left to the public agency, rather than the Commission.

Finally, Division (C)(4) requires that the transaction be conducted at arm’s length, that YSU has full knowledge of the interest of its officials in the contract, and that YSU officials with an interest in the contract take no part in the deliberations and decision of YSU with respect to the contract. See also R.C. 2921.42(A)(1) (discussed above). If each one of these four criteria can be met, then R.C. 2921.42(A)(4) does not prohibit YSU officials from having an interest in a contract between YSU and the institution that is selected to serve as the investment advisor and the university.

However, it must be stressed that, unlike Division (B) of R.C. 2921.42, Division (C) does not provide an exception to the prohibition against participation imposed by R.C. 2921.42(A)(1).

If the exemption provided by Division (C) to the prohibition to R.C. 2921.42(A)(4) cannot be met, then YSU cannot award a contract to a financial institution in which a YSU

³ R.C. 2921.42(C)(2) can also be met by showing a continuing course of dealing established before the official is connected with the agency. However, the facts that you have provided indicate that this requirement cannot be met.

official serves as a member of the board of trustees, officer, or director because that person would have a prohibited "interest" in the financial institution's contracts. The same prohibition would also apply to a stockholder of a financial institution who does not meet the exception provided by R.C. 2921.42(B).⁴

Conclusion

As explained above, the answer to your question depends upon the type of relationship between the YSU official or employee and the financial institutions that are seeking to be hired as the investment advisor. A YSU official or employee who has an "ordinary customer" relationship with a financial institution that is seeking to be hired as the investment advisor is not prohibited from participating in the decision to either select, or authorize contract to, the financial institution.

A YSU official or employee whose relationship with a financial institution that is seeking to be hired as the investment advisor goes beyond that of an "ordinary customer" is prohibited from: (1) profiting from the contract unless it is let by competitive bidding to the lowest and best bidder; (2) participating in the decision to select the financial institution or authorize the contract if the YSU official or employee, or his business associate, has a definite and direct fiduciary or pecuniary interest in the contract; and (3) having a definite and direct pecuniary or fiduciary interest in the contract between YSU and the institution that is hired as the investment advisor.

A YSU official or employee who owns stock in a financial institution will profit from a contract between YSU and the financial institution. If a YSU official or employee who serves on either the Selection or Investment Committees owns stock in a financial institution that desires to be hired as the investment advisor, then the contract must be let by competitive bidding to the lowest and best bidder. A YSU official or employee who owns stock in a financial institution is also be subject to other prohibitions imposed by the Ethics Law.

Depending on the specific facts and circumstances, because a YSU official or employee who is a director, officer, or employee of a financial institution may profit from a contract between YSU and the financial institution that he serves, the YSU official or employee will also be subject to other prohibitions imposed by the Ethics Law.


The Ohio Ethics Commission approved this informal advisory opinion at its meeting on November 14, 2003. The Commission commends Youngstown State University for requesting guidance before any actions that could be prohibited by the Ethics Law were taken.

⁴ R.C. 135.11 also provides an exception to R.C. 2921.42(A)(4). However, the exception provided by R.C. 135.11 applies only to situations where the contract between the public agency and the institution is for the deposit of public funds with the institution. Therefore, the exception does not apply to your question.

Larry D. DeJane
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The opinion is 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 questions or desire additional information, please contact this Office again.

Sincerely,

A handwritten signature in cursive script that reads "John Rawski".

John Rawski
Staff Attorney

Enclosure: Advisory Opinions No. 93-001 and 98-001