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June 29, 2010 Informal Opinion 2010-INF-0629-2

Michael J. Piepsny, Executive Director
Cleveland Tenants Organization

Dear Mr. Piepsny:

On February 11, 2010, the Ohio Ethics Commission received your letter requesting an advisory opinion. You stated that you are a candidate for a seat on the newly created Cuyahoga County (county) Council (council). You asked whether you may simultaneously serve on the council and as the Executive Director of the Cleveland Tenants Organization (CTO), a 503(c)(3) non-profit organization, which has contracts with several county agencies.

Brief Answer

The public contract provisions in the Ethics Law prevent those individuals who are responsible for making public purchases and expending public funds from profiting or benefiting from those purchases or expenditures, and from acting to secure such profits or benefits for themselves or closely related parties.

As explained below, you would occupy a position of profit in the contracts between the county and CTO. Therefore, R.C. 2921.42(A)(3) will prohibit you from holding both positions when it becomes necessary for county council to act on any renewal or new award of contracts to CTO. Once the existing contracts have ended, you will be required to step down from one of the two positions if CTO wishes to continue to provide services to the county.

If you serve in both positions during the terms of the existing contracts, you will be prohibited from: (1) authorizing, or taking any formal or informal action to secure, any contracts or other things of value for CTO; (2) performing services for CTO on any matter that is before any agency of the county; and (3) representing CTO before any public agency on any matter in which you participated as an official of the county.

Facts

In your letter and supporting documents you provided later, you explained that CTO receives seventy-one percent of its funding from public sources, including political subdivisions within the county, and twenty-one percent from private sources. According to the CTO projected 2010 budget document that you provided to the Commission, the two largest grants or contracts to CTO both come from Cuyahoga County agencies. Approximately forty percent of CTO's total 2010 funding comes from its contracts with the county.

You stated that the county Department of Development has a contract with CTO to provide landlord/tenant counseling to county residents. You also stated that CTO partners as a "sub-contractee" with the county Board of Health to provide outreach to tenants regarding home health hazards. Finally, according to the proposed budget document, CTO receives twenty-eight percent of its 2010 budget from Cuyahoga County Office of Homeless Services to provide services under the Homeless Prevention and Rapid Rehousing Program.

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

Because there are contracts between the county and CTO, the public contract restrictions in R.C. 2921.42 would apply to you if you were to be elected to county council. R.C. 2921.42(A)(3) states that no "public official" shall knowingly:

During the public official's term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by the public official or by a legislative body, commission, or board of which the public official was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

R.C. 2921.01(A) (any elected officer of any political subdivision, including a county, is a "public official").

A public contract includes any purchase or acquisition of goods or services by the county. R.C. 2921.42(I)(1)(a). The county's acquisition of services for its citizens from CTO through CTO's relationship with the county Office of Homeless Services, Department of Development, and Board of Health are public contracts. See generally Ohio Ethics Commission Advisory Opinion No. 81-008.

A public contract is considered to be authorized by an official or legislative body if the contract could not have been awarded without the approval of the official, the public position in which he serves, or the legislative body of which he is a member. Adv. Op. No. 87-004. Therefore, if you were to serve on county council, this restriction will apply to any contract authorized by the council while you are a member, regardless of whether you abstain from the council's consideration of the contract. Adv. Op. No. 87-008.

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 his legislative body, while he is a member thereof, unless the contract was competitively bid and was awarded to the party that submitted the lowest and best bid. In the absence of competitive bidding, there is no exception to R.C. 2921.42(A)(3). Adv. Op. No. 92-014.

The prohibition of R.C. 2921.42(A)(3) will apply whenever a public official realizes a financial advantage, gain, or benefit that is a definite and direct result of a public contract authorized by him or by a legislative body of which he is a member, if the contract was not competitively bid and awarded to the lowest and best bidder. Adv. Op. No. 89-006. A public official will be deemed to profit from a contract awarded to his employer where: (1) the establishment or operation of his employer is dependent upon receipt of the contract; (2) the creation or continuation of the official's position with his employer is dependent upon the award of the contract; (3) monies received from the contract would be used by his employer to compensate the employee or as a basis for the official's compensation; or (4) the employee would otherwise profit from the award of the contract. Adv. Ops. No. 87-004 and 88-008.

As set forth above, you are the CTO Executive Director. Applying the facts you have described to the factors above, it is apparent that the operations of the organization are dependent upon the county contracts. If you were elected to county council, you would occupy a definite and direct position of profit in CTO's contracts with the county.

You would not be prohibited from serving as a member of county council during the terms of the CTO contracts in existence at the time you are sworn in to the office. Adv. Op. No. 88-008 (the prohibition in R.C. 2921.42(A)(3) does not apply to any contract approved or authorized by a public agency prior to an official's election to the governing board of the agency). However, if the current CTO contracts are renewed by the county council, or new contracts are awarded to CTO, R.C. 2921.42(A)(3) would prohibit you from serving both the county and CTO at the same time. If CTO were to continue to receive funding from the county after you are a council member, you would be required, before the council made any decisions regarding the funding, to step down from one of the two positions in order to avoid a violation of R.C. 2921.42(A)(3).

There are a number of other prohibitions that would apply to you if you were to serve on the county council while also serving as Executive Director of CTO.

Having an Interest in a County Contract

R.C. 2921.42(A)(4) states 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 the public official is connected.

R.C. 2921.42 would prohibit you from having a definite and direct, pecuniary or fiduciary, interest in the contracts of the county. Adv. Ops. No. 78-005 and 81-003. If you were to simultaneously serve on the county Council and as the Executive Director of CTO, you would have a prohibited interest in the contracts between the county and CTO. Adv. Op. No. 81-008.

There is an exception to this prohibition. R.C. 2921.42(C). The four requirements of the exception are factual determinations, strictly applied against the official involved, who must demonstrate that he meets the elements. Adv. Ops. No. 83-004 and 84-011. Whether a particular transaction meets the criteria of Division (C) depends upon the facts and circumstances of each individual situation. Adv. Op. No. 78-001.

With respect to the existing contracts between CTO and the county, you will be able to meet the requirements of the exception for those existing contracts. See R.C. 2921.42(C)(2) and Adv. Op. No. 88-008. In other words, if you were elected to county council, you could serve as both a member of council and CTO Executive Director during the terms of the existing contracts without a prohibited interest in those contracts under R.C. 2921.42(A)(4). Because R.C. 2921.42(A)(3) prohibits you from continuing to serve in both positions if the current contracts are renewed by the county council, or new contracts are entered into, it is unnecessary to examine the prohibition in R.C. 2921.42(A)(4), and its exception, with respect to future contracts.

Participating in Matters Affecting CTO

R.C. 2921.42(A)(1) states 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 has an interest. This provision would prohibit you, if you serve as a county council member and as CTO Executive Director, from voting upon, discussing, or otherwise using your authority or influence to secure, any allocation of county funds to CTO. You would be prohibited, for example, from recommending CTO to any county agency.

R.C. 102.03(D) would prohibit you from using or authorizing the use of the authority or influence of your office to secure anything of value if the thing of value is of such a character as to manifest a substantial and improper influence upon you with respect to your duties. R.C. 102.03(E) would prohibit you from soliciting anything of value if the thing of value is of such a character as to manifest a substantial and improper influence upon you with respect to your duties. The Ethics Commission has determined that R.C. 102.03(D) and (E) prohibit a public official from participating in any matter that would provide a benefit to an organization that he serves in a fiduciary capacity and from soliciting any benefit to an organization he serves in a fiduciary capacity. See Adv. Ops. No. 89-005, 90-012, and 92-004.

In the situation you have described, the funding that CTO receives from the county is a thing of value. While you serve as the Executive Director of CTO, the funding that CTO receives from the county could manifest a substantial and improper influence upon you in matters before the county council involving CTO. Adv. Op. No. 87-006.

Therefore, R.C. 102.03(D) and (E) would prohibit you, while you serve as CTO Executive Director, from participating as a member of county council in matters before the council that affect the interests of CTO. You would be prohibited from participating in the voting, discussion of council, and any other formal action by council involving these matters. In addition, you are prohibited from participating in such matters informally by discussing such matters with other Council members and engaging in formal or informal lobbying on behalf of CTO.

Performing Services for or Representing CTO

You should also be aware that R.C. 102.04(C) prohibits you, as a member of county Council from receiving compensation from CTO for performing any services for it on a matter pending before any instrumentality of the county, including the county Office of Homeless Services, Department of Development, and Board of Health. Adv. Op. No. 90-008. There is an exception to this prohibition, but it would not apply to you as an elected official. R.C. 102.04(D). You receive compensation from CTO for the services you provide as Executive Director. Therefore, in your role as Executive Director, you would be prohibited from discussing CTO's contracts with any county official or employee, and from interacting with county offices regarding any of the services that CTO provides to the county.

If it is necessary for a CTO employee to act as the contact person with the county on county contracts and funding, it must be someone other than you. If your job duties as the Executive Director of CTO require that you represent its interests before county agencies or otherwise provide services on matters before county agencies, it would be impossible for you to engage in those job duties and comply with R.C. 102.04(C) while you serve on county council.

Additionally, R.C. 102.03(A)(1) prohibits you from representing CTO, before any public agency, not just the county, on any matter in which you personally participated as a public official. Adv. Op. No. 89-008. Unlike R.C. 102.04(C), which prohibits you from receiving compensation to perform services, R.C. 102.03(A)(1) prohibits you from representing any person on certain matters regardless of whether you receive compensation. Adv. Op. No. 91-006.

Conclusion

The public contract provisions in the Ethics Law prevent those individuals who are responsible for making public purchases and expending public funds from profiting or benefiting from those purchases or expenditures, and from acting to secure such profits or benefits for themselves or closely related parties.

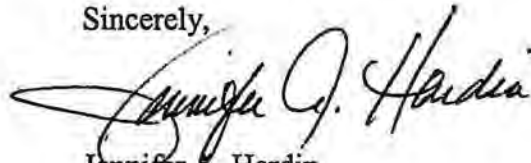
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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on June 29, 2010. The opinion is based on the facts presented. It is limited to questions arising under Chapter 102, and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer A. Hardin". The signature is written in a cursive style with a large, sweeping initial "J".

Jennifer A. Hardin
Chief Advisory Attorney