



OHIO ETHICS COMMISSION

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COLUMBUS 43215

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Advisory Opinion

No.: 79-004

June 21, 1979

Syllabus by the Commission:

- 1) Division (A) (1) of Section 2921.42 of the Revised Code prohibits a member of a state commission from knowingly participating in discussions, voting, or otherwise using the authority or influence of his office to secure approval of an application in which the corporation with which he serves as an officer and employee is a participant.
- 2) Division (A) (2) of Section 2921.42 of the Revised Code prohibits a member of a state commission from knowingly participating in discussions, voting, or otherwise using the authority or influence of his office to secure the investment or use of public funds to guarantee any mortgage in which the corporation with which he serves as an officer and employee is a participant.
- 3) Division (A) (4) of Section 2921.42 of the Revised Code prohibits a member of a state commission, who is an officer of a corporation which has applied to participate in a commission program, from knowingly having an interest in the profits or benefits of a public contract entered into by or for the use of the commission with which he serves.

In your request for an Ohio Ethics Commission Advisory Opinion, you asked: 1) whether the Ohio Ethics Law and related statutes would prohibit a member of the Ohio Development Financing Commission (hereinafter ODFC), who is an officer and employee of a lender which has applied to participate in an ODFC financial assistance program, from participating in ODFC discussions or voting to approve the application; and 2) whether the Ohio Ethics Law and related statutes would prohibit the ODFC from approving an application to participate in an ODFC financial assistance program from a lender which has as an officer and employee a member of the ODFC.

You stated, by way of history, that a member of the ODFC is an officer and employee of a lender which has applied to participate in one of the ODFC's financial assistance programs, a guaranteed loan under Section 122.451 of the Revised Code. You stated further that the transaction in question is not within the person's area of responsibility with the lender. The statutes creating the ODFC, Section 122.40 et seq. of the Revised Code, establish two mechanisms by which

the ODFC may assist in the financing of industrial and commercial development projects in Ohio. Under Section 122.43 of the Revised Code, the direct loan program, both the ODFC and the lender institution loan money to the borrower in separate transactions. Under Section 122.451 of the Revised Code, the guaranteed loan program, the lender makes a direct loan to the borrower and the ODFC guarantees the loan up to ninety per cent.

Division (A) of Section 2921.42 of the Revised Code provides, in pertinent part:

- "(A) No public official shall knowingly do any of following:
- (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;
 - (2) Authorize, or employ the authority or influence of his office to secure the investment of public funds in any share, bond, mortgage, or other security, with respect to which he, a member of his family, or any of his business associates either has an interest, is an underwriter, or receives any brokerage, origination, or servicing fees;
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 - (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."

A member of the ODFC is a "public official" as that term is defined in Division (A) of Section 2921.01 and used in Section 2921.42 of the Revised Code. The term "public contract" is defined in Division (E) of Section 2921.42 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 any of its political subdivisions, or any agency or instrumentality of either." In Ohio Ethics Commission Advisory Opinion No. 78-003, the Commission concluded that a guaranteed loan arrangement under Chapter 1724. of the Revised Code is a "public contract" for purposes of Section 2921.42 of the Revised Code. An ODFC loan guarantee under Section 122.451 of the Revised Code is sufficiently similar to the transaction in Advisory Opinion No. 78-003 to constitute a "public contract."

Thus, under the facts of the instant case, Division (A)(1) of Section 2921.42 of the Revised Code would prohibit a member of the ODFC from knowingly authorizing, voting, or otherwise using the authority or influence of his office to secure approval of a public contract in

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

Division (A) (2) of Section 2921.42 of the Revised Code would prohibit a member of the ODFC from knowingly authorizing, voting, or using the authority or influence of his office to secure approval of the investment of public funds in any share, bond, mortgage, or other security with respect to which he, a member of his family, or any of his business associates has an interest. The Commission believes that a loan guarantee under Section 122.451 of the Revised Code, which requires that the ODFC pledge moneys in its mortgage insurance fund, would constitute the "investment" of public funds for purposes of this provision.

In addition, Division (A) (4) of Section 2921.42 of the Revised Code would prohibit the ODFC member from knowingly having an interest in the profits or benefits of a public contract entered into by or for the use of the ODFC. Prior Ohio Ethics Commission opinions and court decisions indicate that although an employee is not generally considered to be "interested" in the contracts of his employer, an officer of a corporation is considered to have such an interest. The exemption and exception of Division (B) and (C) of Section 2921.42 of the Revised Code do not apply in the instant case.

Section 122.40 of the Revised Code, the statute creating the ODFC, provides, in pertinent part:

"An officer, director, stockholder, employee, or owner of any interest in a financial institution and who is a member of the Ohio development financing commission shall not be deemed to be interested either directly or indirectly by reason of such relationship with the financial institution, in any loan made by the commission in connection with which such financial institution has pursuant to section 122.43 of the Revised Code loaned any part of the forty per cent of the total of the money required by division (C) of that section to be obtained from one or more financial institutions."

Section 122.40 of the Revised Code appears to exempt members of the ODFC from the application of Section 2921.42 for direct loans under Section 122.43 of the Revised Code. However, in the instant case, the transaction would be a guaranteed loan under Section 122.451, to which the exemption does not appear to apply. It is not clear why this exemption is limited to direct loan transactions under Section 122.43 and does not include guaranteed loan transactions under Section 122.451, particularly since: 1) Section 122.40 requires that the ODFC include persons with "knowledge and experience in industrial and commercial financing," and 2) there appears to be no reason to distinguish between the two types of financing insofar as they raise the possibility of a potential conflict of interest under Section 2921.42 of the Revised Code. However, our review of the legislative history indicates that the legislature reenacted Section

122.40 and enacted Section 122.451 in 1965, and has amended Section 122.40 twice and Section 122.451 three times since 1965, from which we must assume that the legislature has had several opportunities to amend Section 122.40 to include Section 122.451 in the exemption discussed above, but has not done so. Thus, ODFC approval of the guaranteed loan application in the instant case would appear to render the ODFC member who is an officer of the participating lender in violation of Division (A) (4) of Section 2921.42 of the Revised Code, because the ODFC member would have an interest in a public contract involving both the ODFC and the lending institution with which he serves.

The conclusions of this advisory opinion are based on an examination of the facts as you have presented them. The Ohio Ethics Commission cautions that its advisory opinions may be relied upon only with respect to questions arising under Chapter 102. and Section 2921.42 of the Revised Code, and do not address possible violations of other laws or rules.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: 1) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a member of the ODFC from knowingly participating in discussions, voting, or otherwise using the authority or influence of his office to secure approval of an ODFC financial assistance program in which the lending institution with which he serves as an officer and employee is a participant; 2) Division (A) (2) of Section 2921.42 of the Revised Code prohibits a member of the ODFC from knowingly participating in discussions, voting, or otherwise using the authority or influence of his office to secure the investment or use of public funds to guarantee any mortgage in which the lending institution with which he serves as an officer and employee is a participant; and 3) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a member of the ODFC, who is an officer of a lender which has applied to participate in an ODFC financial interest program under Section 122.451 of the Revised Code, from knowingly having an interest in a public contract, including an ODFC guaranteed loan.

Mary K. Lazarus

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