



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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COLUMBUS, OHIO 43215-2940
(614) 466-7090

April 7, 1988

Informal Opinion 1988-INF-0407-3

Marilyn A. Ormsbee
[REDACTED]

Dear Ms. Ormsbee:

You have asked whether the Ohio Ethics Laws and related statutes prohibit you from continuing to serve on the Bicentennial Commission and the Human Relations Commission in light of the fact that you were recently employed as an administrative aide for a city council member. You have indicated in a telephone conversation that your duties are secretarial in nature, and that you have no advisory or other responsibilities with regard to legislative or policy matters. Members of both Commissions are appointed by the mayor, with the approval of council. You have also stated that the annual budgets for both Commissions have already been passed by council.

You were appointed to the city Bicentennial Commission in 1982, and your term extends through 1988. The purpose of the Bicentennial Commission is "to plan, coordinate, promote and administrate the celebration of the 200th anniversary of the founding of Cincinnati." Ordinance No. 172-1982, §1. The Commission "shall advise council on an appropriate observation and celebration of the area's bicentennial anniversary," and is specifically empowered to perform such functions as develop themes, select symbols and logos, organize a regional fair, design and plan the construction of an appropriate landmark, encourage appropriate property development, create task forces and committees, encourage individuals, organizations, and governmental units to become involved in events, work with the Historical Society and other appropriate agencies, prepare a plan for coordinated activities by interested groups, disseminate information, commission an original history, works of art and original works, develop a multi-media presentation of the past and broadcasts for radio and television, prepare a booklet for sale at a profit to help defray costs, seek grants and other financial support, adopt rules and procedures, and recommend creation of non-profit organizations. Ordinance No. 172-1982, §§2 and 3. You have stated that the Bicentennial Commission receives its operational funds from the city, but that all of the Commission's projects and activities are funded by private moneys.

Divisions (D) and (E) of Section 102.03 of the Revised Code read as follows:

- (D) No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his 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 him with respect to his duties.

A city employee is considered to be a "public official or employee" for purposes of R.C. 102.03. See R.C. 102.01(B) and (C).

The term "anything of value" is defined for purposes of R.C. 102.03 to include money and every other thing of value. See R.C. 1.03 and 102.01(G). R.C. 102.03(D) and (E) would prohibit you from soliciting, or using your authority or influence as an administrative aide to a city council member to secure city funds or any other benefit from the city for the Bicentennial Commission. You have stated that the Commission receives only operating funds from the city and that the council has already appropriated the Commission's annual budget. However, you must refrain from soliciting or using your official position as an aide, whether formally or informally, to secure any funds, favorable treatment, or other benefit from the city for the Commission.

Your question raises the issue whether you are subject to the Ethics Law in your capacity as a board member of the Bicentennial Commission, as well as in your capacity as an employee of the council member. In Ohio Ethics Commission Advisory Opinion No. 85-005, the Commission held that a member of the Technical Advisory Committee to the Coal Development Office was not a public official or employee for purposes of R.C. Chapter 102. and R.C. 2921.42 since the Committee's role was advisory rather than to exercise the sovereign power of the state; such sovereign power was deemed to include the independent power to incur financial obligations or otherwise bind the state. See also Advisory Opinion No. 85-004. A review of the duties of the Bicentennial Commission indicates that the Commission acts primarily as an advisory, planning, and coordinating agency. The Commission receives operating funds from the city, but all of its other expenditures are funded by private moneys. Viewing the functions and powers of the Commission as a whole, it must be concluded that the Commission does not exercise the sovereign power of the city, and thus, board members of the Commission are not public officials who are subject to R.C. Chapter 102. or R.C. 2921.42 or 2921.43.

The Human Relations Commission is a non-profit corporation which has contracted with the city to provide investigative, review, and mediation services with regard to allegations of racial, religious, or ethnic discrimination. Ordinance No. 112-1965. The city appropriates moneys to pay the Human Relations Commission for these services.

Division (A)(4) of Section 2921.42 of the Revised Code reads as follows:

(A) No public official shall knowingly do any of the following:

. . .

(4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision of governmental agency or instrumentality with which he is connected.

The term "public official," as it is used in Section 2921.42, is defined in Section 2921.01(A) to include any employee of a political subdivision of the state. As a city employee, you are a "public official" who is subject to the prohibitions of R.C. 2921.42.

The term "public contract," as used in Section 2921.42, is defined in Division (E) of that section to include "the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of" any political subdivision. A

contract between the city and the Human Relations Commission for investigative and mediation services would be a "public contract" for purposes of R.C. 2921.42. As explained in Advisory Opinion No. 87-002, a public official who is connected with a political subdivision is prohibited from having an interest in a public contract entered into by his own agency, department, office, board, and by every other office, department, board, or agency of the political subdivision.

An interest which is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. See Advisory Opinion No. 81-008. A board member or an officer of a nonprofit corporation is deemed to have an interest in the contracts of the corporation. Therefore, you are, as an employee of the city, prohibited by R.C. 2921.42 from serving as a board member of a nonprofit corporation which has contracted to provide services to any department, board, office, or agency of the city. R.C. 2921.42(A)(4) would prohibit you from serving as a member of the Board of the Human Relations Commission.

Division (C) of Section 2921.42 does, however, provide an exception to the prohibition of Division (A)(4), and reads as follows:

- (C) This section does not apply to a public contract in which a public servant, 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 servant's become 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 as arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public servant, member of his family, or business associate, and the public servant takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

The requirements of Division (C) are factual determinations, and whether a particular transaction meets the criteria of Division (C) depends upon the facts and circumstances of each individual case. See Advisory Opinion No. 78-001. These criteria are strictly applied against the public official, and the burden is on the official to demonstrate that he is in compliance with the exemption. See Advisory Opinions No. 84-011 and 83-004.

A public official may not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity. See Advisory Opinion No. 84-011.

Division (C)(2) of Section 2921.42 requires that the services under the contract be unobtainable elsewhere for the same or lower cost or are being furnished to the governmental agency as part of a continuing course of dealing established prior to the public servant's becoming associated with the governmental agency involved. In this instance, you were appointed to the Human Relations Commission six years ago, and the City and Commission entered into a contractual relationship before you were employed as a public official. However, the continuing course of dealing exception applies only to services being provided during the term of the contract which existed at the time of the individual's appointment to his public position. See Advisory Opinions No. 82-007 and 87-003. Material changes in the existing contract, such as modifications, extensions, and renewals would not be within the exemption. See Advisory Opinion No. 82-007. You will not qualify for the continuing course of dealing exception if there is any material change in the contract between the city and the Human Relations Commission after your appointment as an administrative aide.

The exemption in Division (C)(2) of Section 2921.42 may be satisfied, however, if you can establish, as a factual matter, that the services of the Human Relations Commission "are unobtainable elsewhere for the same or lower cost." The requirement that the goods or services are "unobtainable elsewhere for the same or lower cost" must be demonstrated by some objective standard. See Advisory Opinion No. 83-004. 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, you can objectively show that the services the Human Services Commission provides are unique or not available elsewhere, you may meet the requirement of Division (C)(2). See Advisory Opinion No. 87-003.

Assuming that the criteria of Division (C) can be established so that you may properly serve as a board member of the Human Relations Commission and as an administrative aide, you must observe the prohibition of Division (A)(1) of Section 2921.42 of the Revised Code. Division (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 from voting upon, discussing, or otherwise using your authority or influence as a council member's administrative aide to secure a contract between the city and the Human Relations Commission.

This conduct would also be prohibited by R.C. 102.03(D) and (E), which, as set forth above, prohibit a public official or employee, including a city employee, see R.C. 102.01(B) and (C), from soliciting, or using the authority or influence of his office or employment to secure anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. You would be

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prohibited by R.C. 102.03(D) and (E) from soliciting or using your official authority or influence as an administrative aide to a council member to secure a city contract or other benefit from the city for the Human Relations Commission.

You have stated that you are being considered for reappointment to the Human Relations Commission for a one-year term. As noted above, appointments to the Commission are made by the Mayor, with the approval of the city council. The council member by whom you are employed should abstain from participating in council's approval of your appointment to the Commission.

This informal staff opinion was approved by the Ethics Commission at its meeting on April 7, 1988. It is based on the facts presented and 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. You may also wish to contact the city law director for a determination whether the positions you seek to hold are compatible. If you have any questions, please contact me.

Sincerely,



Melissa A. Warheit
Executive Director

MAW:pg