



OHIO ETHICS COMMISSION

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February 8, 1995

Informal Opinion 1995-INF-0208-1

The Honorable Alvahn L. Mondell
Mayor, City of Salem

Dear Mayor Mondell:

In your letter to the Ethics Commission, you state that you are the Mayor of the City of Salem and are a 25% shareholder of a business that is located within the city. You ask whether the Ohio Ethics Law and related statutes prohibit you from appointing an individual who is a 25% shareholder in the same business to a position on the city utility commission. Your letter requesting an advisory opinion also asks whether the Ethics Law and related statutes would prohibit you from appointing this individual to serve as mayor's court magistrate. However, you have since withdrawn this question; accordingly, it need not be addressed.

As explained below, the Ohio Ethics Laws and related statutes do not prohibit you from appointing your business associate to an uncompensated public position.

The City of Salem is a statutory city which is governed pursuant to the provisions of Title 7 of the Ohio Revised Code. R.C. 735.03 authorizes the legislative authority of a city with the option to vest the management and operation of municipally owned public utilities in a board comprised of three members. The members of the board are appointed by the mayor with the consent of the legislative authority. See R.C. 735.03. R.C. 735.03 authorizes the legislative authority of the city to designate the compensation to be paid to the board members, their duties, powers, and whether the board members shall be required to give bond. In the instant situation, you have stated that the members of the city utility commission are not compensated for their services and receive no benefits from the city.

Your attention is first directed to Division (A)(1) of Section 2921.42 of the Revised Code, which reads as follows:

- (A) No public official shall knowingly do any of the 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.

Alvahn L. Mondell
February 8, 1995
Page 2

The pertinent elements of this provision are: (1) a public official; (2) is prohibited from authorizing, or employing the authority or influence of his office to secure authorization; (3) of any public contract; (4) in which he, a member of his family, or any of his business associates; (5) has an interest. See Ohio Ethics Commission Advisory Ops. No. 78-002, 85-015, and 92-008, respectively.

R.C. 2921.01 (A) defines the term "public official" for purposes of R.C. 2921.42 to include an elected or appointed officer, employee, or agent of the state or any political subdivision. A city mayor is a "public official" for purposes of R.C. 2921.42 (A)(1) and is subject to the provisions therein. See Advisory Op. No. 85-002.

R.C. 2921.42 does not define the term "business associates;" however, the Ethics Commission has held that a business association is created whenever persons join together to pursue a common business purpose. See Advisory Op. No. 86-002 (setting out the standard for determining the existence of a business association for purposes of R.C. 2921.42). In the instant situation, it is apparent that, since you and the individual that you wish to appoint to the city's utility commission each own 25% of the stock in the same corporation, you and the individual are joined together to pursue a common business purpose. See Crosby v. Beam, 47 Ohio St. 3d 105 (1985) (a close corporation resembles a partnership since the small number of stockholders in a close corporation depend upon each other for the corporation to succeed). See also Advisory Ops. No. 78-006, 90-008, 93-001, and R.C. 102.03 (D) (described below).

R.C. 2921.42 (G)(1) defines the term "public contract" for purposes of R.C. 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 a political subdivision. This includes the employment of an individual by a political subdivision. See also Walsh v. Bollas, 82 Ohio App. 3d 588 (Lake County 1992); Advisory Ops. No. 85-015, 86-010, 90-010, and 92-012.

An "interest" which is prohibited under R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. Advisory Op. No. 81-008. A public official has a definite and direct pecuniary interest in his or her own compensation and benefits. See generally Advisory Op. No. 92-012.

R.C. 2921.42 (A)(1) prohibits a public official from "authorizing" the employment of a business associate, or employing the "authority or influence of his office" to secure authorization of the employment of a business associate. A public official will

Alvahn L. Mondell
February 8, 1995
Page 3

be deemed to have "authorized" the employment of an individual for purposes of R.C. 2921.42 where the employment could not have been awarded without the approval of the official. See Advisory Ops. No. 90-010, 92-008, and 92-012. Accordingly, R.C. 2921.42 (A)(1) prohibits a public official from voting or participating in any decision-making process authorizing or approving a contract for public employment in which a business associate has an interest.

In the instant situation, since the position of utility commissioner is an uncompensated position, an appointment to the city utility commission would not result in your business associate having an interest in a public contract. Accordingly, R.C. 2921.42 (A)(1) does not prohibit you from appointing your business associate to the city utility commission.

The issue becomes whether R.C. 102.03 (D) prohibits you from authorizing the appointment of your business associate to the city utility commission.

R.C. 102.03 (D) reads as follows:

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.

The term "public official or employee" is defined for purposes of R.C. 102.03(D) to include any person who is elected or appointed to an office or is an employee of any public agency. See R.C. 102.01 (B) and (C). Therefore, a city mayor is a "public official or employee" who is subject to R.C. 102.03 (D).

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. 1.03, 102.01 (G). A definite and direct pecuniary benefit is a thing of value under R.C. 102.03 (D). See Advisory Ops. No. 88-004 and 91-002. The compensation that a public official receives for performing his official duties is a thing of value for purposes of R.C. 102.03 (D). See Advisory Op. No. 88-002. See also Attorney General Advisory Op. No. 91-001 (a compensated public office is a "position of profit.") However, the Ethics Commission has held that a public position that is uncompensated, except for the payment of reasonable expenses, is not a thing of value for purposes of R.C. 102.03 (D). See Advisory Ops. No. 88-002, 91-001, and 91-002.

Alvahn L. Mondell
February 8, 1995
Page 4

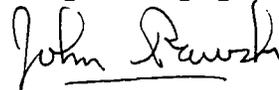
For purposes of R.C. 102.03 (D), as well as R.C. 2921.42 (A)(1), the Ethics Commission has held that a business association is created whenever persons join together to pursue a common business purpose. See Advisory Ops. No. 88-004 (shareholders in a corporation) and 90-008 (partners and employees of a law firm). Thus, the Ethics Commission has held that R.C. 102.03 (D) prohibits a public official from participating in any matter that would provide a definite and direct pecuniary benefit for a business associate, unless the official can demonstrate that, under the specific facts and circumstances, his independence of judgment in making official decisions could not be impaired by his business associate's interests. See Advisory Op. No. 88-004.

Whenever the relationship between a public official and another person is such that the official could not objectively decide a matter affecting that person, R.C. 102.03 (D) prohibits a public official or employee from using his authority or influence, formally or informally, to secure a public position for the person or otherwise act in matters affecting the person's public service. See generally Advisory Op. No. 92-012. However, in the instant situation, you have stated that the members of the city utility commission are not compensated for their services and receive no benefits. As stated above, the Ethics Commission has held that an uncompensated public office is not a thing of value for purposes of R.C. 102.03 (D). See Advisory Op. No. 88-002, 90-012, and 91-004.

In the instant situation, since the position of utility commissioner is an uncompensated position, an appointment to the city utility commission would not secure a thing of value for your business associate. Accordingly, R.C. 102.03 (D) does not prohibit you from appointing your business associate to the city utility commission.

This advisory opinion was approved by the Ethics Commission at its meeting on February 8, 1995. This opinion 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. The Commission apologizes for the delay in responding to your request, and regrets any inconvenience this delay may have caused. Please call me if you have any questions, or wish to request a formal opinion from the Commission.

Very truly yours,



John Rawski
Staff Attorney