



OHIO ETHICS COMMISSION

8 East Long Street, 10th Floor

Columbus, Ohio 43215

Telephone: (614) 466-7090

Fax: (614) 466-8368

September 13, 1996

Informal Opinion 1996-INF-0913-3

Ronald J. O'Brien
City Attorney
City of Columbus



Dear Mr. O'Brien:

You have asked whether the Ohio Ethics Law and related statutes prohibit Richard W. Sensenbrenner, who serves the City of Columbus (City) as a member of city council, from being employed by a non-profit corporation, American Municipal Power-Ohio, Inc., (AMP-Ohio) in light of the fact that the City is a member of AMP-Ohio and purchases wholesale electric power from AMP-Ohio.

As explained below, the Ohio Ethics Law and related statutes do not prohibit Mr. Sensenbrenner from being employed by AMP-Ohio as its Director of Member Programs under the facts and circumstances that have been presented to the Ethics Commission by you and Mr. Kenneth L. Hegemann, the President of AMP-Ohio. However, the Ohio Ethics Law and related statutes will place significant restrictions upon Mr. Sensenbrenner's role as a member of city council with regard to AMP-Ohio. Division (A)(1) of R.C. 2921.42 and Division (D) of R.C. 102.03 prohibit Mr. Sensenbrenner from voting, discussing, deliberating, or otherwise authorizing, or employing the authority or influence of his office, formally or informally, to secure authorization of either a renewal or modification of the current contract between the City and AMP-Ohio. Also, in order to receive compensation and reimbursement for serving as an employee of AMP-Ohio, R.C. 102.03 (E) requires that Mr. Sensenbrenner withdraw, as a member of city council, from all matters pertaining to AMP-Ohio. Furthermore, R.C. 102.04 (A) and R.C. 102.03 (A) impose restrictions on Mr. Sensenbrenner's representation of AMP-Ohio before public agencies. Finally, R.C. 102.03 (B) prohibits Mr. Sensenbrenner from disclosing confidential information that he acquired as a member of city council to AMP-Ohio or any other person or entity, and from using such information, without appropriate authorization.

You and the President of AMP-Ohio have provided the Ethics Commission with information pertaining to Mr. Sensenbrenner's employment with AMP. This information has been carefully reviewed by Ethics Commission staff in order to reach the determinations set forth below.

R.C. 2921.42 (A)(4) - Interest in a Public Contract

Your attention is directed to Division (A)(4) of Section 2921.42 of the Revised Code, which reads:

- (A) No public official shall knowingly:

- (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, in R.C. 2921.01 (A), for purposes of R.C. 2921.42 to include an elected official of a political subdivision of the state. Therefore, Mr. Sensenbrenner, as a member of city council, is a "public official" for purposes of R.C. 2921.42. Advisory Op. No. 88-004.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (G)(1)(a) 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 "the state or any of its political subdivisions, or any agency or instrumentality of either." See R.C. 2921.42 (G). The purchase of, or a contract for the purchase of, wholesale electric power from a non-profit corporation falls within this definition. Advisory Op. No. 88-008.

The Ethics Commission has held that a public official has a prohibited "interest" in a public contract if the official has a definite and direct interest of either a pecuniary or fiduciary nature in the contract. Advisory Op. No. 81-008. A determination as to whether a public official has an interest in a contract with his own political subdivision depends on the facts and circumstances of each particular situation. Advisory Ops. 84-009 and 89-008.

Mr. Sensenbrenner desires to be employed with AMP-Ohio as the Director of Membership Programs. The issue is whether Mr. Sensenbrenner would have a fiduciary or financial interest in AMP-Ohio due to his employment in this position.

The Ethics Commission has held that an employee of a business who does not have an ownership or fiduciary interest in the business is not generally deemed to have an "interest" in the contracts of his employer for purposes of R.C. 2921.42. Advisory Ops. No. 78-006 and 89-008. However, the Commission has held that an employee of a business will be deemed to have an "interest" in a public contract entered into by his employer, if any of the following circumstances apply: (1) the employee has an ownership interest in, or is a director, trustee, or officer of, his employer; (2) he takes part, as an employee, in contract negotiations; (3) his salary is based or dependent upon, or is paid from, the proceeds of the contract; (4) he receives a share of the contract's proceeds in the form of a commission or

fee; (5) his responsibilities as an employee include participation in the administration or execution of the contract or he serves in a management position with the responsibility to oversee execution or administration of the contract; (6) the establishment or operation of his employing business is dependent upon receipt of the contract; or, (7) his tenure is dependent upon his employer receiving the award of the contract. Advisory Ops. No. 89-006, 89-008, 89-011, and 91-001. See also Advisory Ops. No. 78-006, 81-008, 82-003, and 86-005.

In Advisory Opinion No. 89-011, the Ethics Commission held that a public official who was employed as a general manager of a corporation but was not a corporate officer or director, and who did not share in the profits of nor receive a commission, fee, or payment from the corporation's contracts, had an interest in the corporation's contract because her supervisory and management responsibilities included participation in the administration or execution of the contract between her political subdivision and the corporation.

In the instant situation, you and Mr. Hegemann have provided this Office with a job description of AMP-Ohio's Director of Membership Programs and AMP-Ohio's organizational chart. You and Mr. Hegemann have used the information in the job description and organizational chart to determine that stated that Mr. Sensenbrenner's employment as the Director of Membership Programs will not be dependent upon AMP-Ohio's contract with the City, and that he will not be a corporate officer or director, and that he will neither share in the profits of AMP-Ohio nor receive a commission, fee, or payment that is attributable to AMP-Ohio's contract with the City. Based upon a careful review of the job description, organizational chart, and correspondence provided by you and Mr. Hegemann, it does not appear that Mr. Sensenbrenner will have a financial or fiduciary "interest" for purposes of R.C. 2921.42 (A)(4) in AMP-Ohio's contract with the City.

However, it is noted that the job description states that the AMP-Ohio's Director of Membership Programs "[p]erforms other duties as assigned." It must be noted that R.C. 2921.42 (A)(4) may prohibit AMP-Ohio from altering Mr. Sensenbrenner's stated duties of employment while he is a member of Columbus City Council. You should contact this Office for further guidance if, after Mr. Sensenbrenner's employment with AMP-Ohio, he desires either to change his association with, or perform additional services for, AMP-Ohio. While R.C. 2921.42 (A)(4) does not bar Mr. Sensenbrenner's employment by AMP-Ohio based upon information provided by you and Mr. Hegemann, other provisions of the Ethics Law and related statutes will impose significant restrictions upon him in his role as an AMP-Ohio employee.

R.C. 2921.42 (A)(1) - Securing a Public Contract for a Business Associate

Your attention is directed to R.C. 2921.42 (A)(1), which reads:

(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.

R.C. 2921.42 (A)(1) prohibits a public official from authorizing, or using his authority or influence to secure authorization of, a public contract in which a business associate has an interest.

A public official's outside employer is considered to be his "business associate" for purposes of R.C. 2921.42 (A)(1). Advisory Ops. No. 78-006, 81-001, and 89-008. A city council member who is employed by a corporation that has a contract with the council member's city is prohibited by R. 2921.42 (A)(1) from voting, discussing, deliberating, or otherwise using his authority or influence as a city council member, either formally or informally, to secure any renewal or modification of the contract for the company with which he is employed, including the passage of necessary legislation. Advisory Op. No. 89-008.

In the instant situation, if Mr. Sensenbrenner becomes employed by AMP-Ohio, the corporation will be his "business associate" for purposes of R.C. 2921.42 (A)(1). Thus, if Mr. Sensenbrenner becomes employed by AMP-Ohio, R.C. 2921.42 (A)(1) will prohibit him from voting upon, discussing, deliberating, or otherwise using the authority or influence of his position as a member of city council, either formally or informally, to secure authorization of a renewal or modification of the contract between the City and AMP-Ohio. Advisory Ops. No. 89-008 and 89-015. See also R.C. 102.03 (D) (set forth below).

R.C. 102.03 (D) and (E)

Your attention is also directed to R.C. 102.03 (D) and (E), which read:

- (D) No public official or employee shall use or authorize the use of the authority or influence of 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 the public official or employee with respect to that person's 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 the public official or employee with respect to that person's duties.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office of a political subdivision. R.C. 102.01 (B) and (C). A member of city council is a public official for purposes of R.C. 102.03 (D) and (E). Advisory Ops. No. 88-004 and 89-008.

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. R.C. 102.01 (G). A promise of future employment and a definite and direct pecuniary benefit are considered to be a things of value under R.C. 102.03 (D). Advisory Ops. No. 82-002 and 89-005, respectively. Employment with AMP-Ohio as Director of Member Programs, the compensation that Mr. Sensenbrenner will receive from AMP-Ohio for his services, and the payments by the City to AMP-Ohio for its services, fall under the definition of "anything of value."

A thing of value is considered to be of an improper character for purposes of R.C. 102.03 (D) and (E) whenever the thing of value is secured from a party that is interested in matters before, regulated by, or doing or seeking to do business with the public agency with which the official or employee serves, or where the thing of value could impair the official's or employee's objectivity and independence of judgment with respect to his official actions and decisions for the public agency with which he serves or is employed. Advisory Ops. No. 79-002, 89-006, 90-012, and 92-009.

The Ethics Commission has explained that a public official or employee must exercise his duties without hindrance by any improper influence. Advisory Op. No. 89-010. The prohibitions imposed by R.C. 102.03 (D) and (E) serve the public interest, of effective, objective, and impartial government by preventing the creation of a situation that may impair the objectivity and independence of judgment, and therefore, the effectiveness of a public official or employee, or the political subdivision with which he serves. Advisory Ops. No. 89-014 and 90-002. The application of R.C. 102.03 (D) and (E) is dependent upon the facts and circumstances of each individual situation. Advisory Ops. No. 87-007 and 89-003.

R.C. 102.03 (D) - Use of Authority to Secure an Improper Thing of Value

The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official or employee from using the authority or influence of his official position to secure anything of value, for either himself or his business associate, if the thing of value is of an improper character. Advisory Ops. No. 89-006, 89-015, 89-016, and 90-008.

In the instant situation, as explained above, AMP-Ohio would be Mr. Sensenbrenner's business associate. Because Mr. Sensenbrenner would receive compensation from AMP-Ohio, he would be subject to an inherent conflict of interest if he were to participate in matters that could affect AMP-Ohio's interests after he becomes

an AMP-Ohio employee or while seeking employment. Advisory Op. No. 82-002. The promise of future employment and the compensation that he would receive for his employment could affect his decisions as a member of city council on matters pending before the City that could affect AMP-Ohio's interests. The possibility of impaired objectivity and independence of judgment exists regardless of the fact that Mr. Sensenbrenner would not perform services as an AMP-Ohio employee under the contract between the City and AMP-Ohio.

Therefore, if Mr. Sensenbrenner accepts employment as AMP-Ohio's Director of Member Programs, then R.C. 102.03 (D), as well as R.C. 2921.42 (A)(1), will prohibit him from using the authority or influence of his position to secure any future contracts for AMP-Ohio. Advisory Op. No. 89-004. R.C. 102.03 (D) will also prohibit Mr. Sensenbrenner from participating in matters that would affect the relationship between the City and AMP-Ohio under the present contract. Id. See also Advisory Op No. 86-004.

R.C. 102.03 (E) - Soliciting or Accepting an Improper Thing of Value

R.C. 102.03 (E) prohibits a public official or employee from merely soliciting or receiving an improper thing of value and does not require that he use the authority or influence of his position to secure it. Advisory Ops. No. 86-011 and 89-006.

The Ethics Commission has held that a public official or employee who holds outside private employment with a party that is interested in matters before, regulated by, or doing or seeking to do business with his political subdivision, can meet the requirements of R.C. 102.03 (E) by withdrawing from matters before his public body that would affect the financial interests of the party with which he associated. Advisory Ops. No. 89-006 (Ohio Department of Mental Health officials and employees accepting employment from colleges or universities that receive grants from ODMH), 89-008 (a member of city council being employed by a company that receives a tax abatement from the city), 89-010 (a Department of Agriculture employee selling services to a state institution that is regulated by the Department of Agriculture), and 90-002 (a Department of Agriculture employee owning and operating a plant that is regulated by the Department of Agriculture).

Therefore, R.C. 102.03 (E) prohibits Mr. Sensenbrenner from receiving compensation as an employee of AMP-Ohio unless he refrains from participation in all matters pending before the City that affect AMP-Ohio's financial interests. Advisory Op. No. 88-005 and 89-008.

R.C. 102.03 (B) - Disclosure of Confidential Information

R.C. 102.03 (B) will prohibit Mr. Sensenbrenner, as a member of city council, from disclosing confidential information to AMP-Ohio, or any other party, or from using such confidential information without authorization. No time limitation exists for this prohibition and it is effective while Mr. Sensenbrenner serves and after he leaves city council. Advisory Op. No. 88-009.

R.C. 102.04 (C) and R.C. 102.03 (A) - Restrictions Upon Representation

R.C. 102.04 (C) prohibits Mr. Sensenbrenner from receiving compensation for rendering services personally on any matter pending before any entity of the city. Advisory Op. 89-016. The exception provided by Division (D) of R.C. 102.04 is inapplicable in this situation because Mr. Sensenbrenner serves in an elective position. In addition, R.C. 102.03 (A) prohibits Mr. Sensenbrenner, while serving as a member of city council and for one year thereafter, from representing AMP-Ohio before any public agency on any matter in which he personally participated while serving on city council. Advisory Op. No. 88-008.

Conclusion

As explained below, the Ohio Ethics Law and related statutes do not prohibit Mr. Sensenbrenner from being employed by AMP-Ohio as its Director of Member Programs under the facts and circumstances that have been presented to the Ethics Commission by you and Mr. Kenneth L. Hegemann, the President of AMP-Ohio. However, the Ohio Ethics Law and related statutes place significant restrictions upon Mr. Sensenbrenner's role as a member of city council. Division (A)(1) of R.C. 2921.42 and Division (D) of R.C. 102.03 prohibit Mr. Sensenbrenner from voting, discussing, deliberating, or otherwise authorizing, or employing the authority or influence of his office, formally or informally, to secure authorization of a renewal or modification of the current contract between the City and AMP-Ohio. Also, in order to receive compensation and reimbursement for serving as an employee of AMP-Ohio, R.C. 102.03 (E) requires that Mr. Sensenbrenner withdraw, as a member of city council, from all matters pertaining to AMP-Ohio. Furthermore, R.C. 102.04 (A) and R.C. 102.03 (A) impose restrictions on Mr. Sensenbrenner's representation of AMP-Ohio before public agencies. Finally, R.C. 102.03 (B) prohibits Mr. Sensenbrenner from disclosing confidential information which he acquired as a member of city council, to AMP-Ohio, or any other person or entity, and from using such information, without appropriate authorization.

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This informal advisory opinion was approved by the Ethics Commission at its meeting on September 13, 1996. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any further questions, please feel free to contact this Office again.

Very truly yours,

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

John Rawski
Staff Attorney