

OHIO ETHICS COMMISSION

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April 16, 2001

Informal Opinion 2001-INF-0416

Margie A. Kampfer, Executive Director
Salem Area Chamber of Commerce



Dear Ms. Kampfer:

In a letter received by the Ethics Commission on January 26, 2000, you ask whether the Ethics Law and related statutes prohibit city and township elected officials from serving as ex-officio members of the Board of Directors of the Salem Area Chamber of Commerce (the Board).

As stated more fully below, ex-officio members of the Board generally would have a fiduciary interest in the contracts of the Board. Therefore, R.C. 2921.42(A)(4) prohibits city elected officials from serving as ex-officio members of the Board, where a public contract exists between the city and the Board, unless the elements of the official capacity exception, or each of the four requirements of R.C. 2921.42(C), as discussed in this opinion, can be met. Based on the information that you have provided to the Ethics Commission, in this specific situation, it appears that the official capacity exception cannot be met. While it may be possible for the city elected officials who would serve on the Board to meet each of the four requirements of R.C. 2921.42(C), you are cautioned that unanticipated conflicts of interest may arise for city elected officials who would serve on the Board. These conflicts of interest may have a significant impact on the ability of the Board as a whole to perform its essential or important functions.

Even where they can meet the exception provided by R.C. 2921.42(C), the city elected officials are prohibited, by R.C. 2921.42(A)(1), from authorizing, or using the authority or influence of their positions to secure authorization of, a public contract between the City and the Board where the city elected officials serve on the Board. Further, R.C. 102.03(D) prohibits city and township elected officials from using or authorizing the use of the authority or influence of their positions to secure something of value for the Chamber of Commerce. Finally, these same restrictions apply, depending upon the relationship between the township and the Chamber of Commerce, to a township trustee who wishes to serve on the Board.

Facts

In your letter to the Commission, you state that the President of the Board would like to appoint several elected officials to serve as ex-officio members of the Board. You have

identified the city mayor, city council members, and township trustees as officials who may be appointed to ex-officio board positions. These board members would not have voting privileges.

You state that the Chamber of Commerce receives money from the City of Salem for a summer concert series. You also state that the Chamber of Commerce receives services from the City Service Department during the Chamber of Commerce's annual city-wide festival.

Having an Interest in a City Contract—R.C. 2921.42(A)(4)

The question of whether city elected officials are prohibited from serving as ex-officio members on the Board implicates R.C. 2921.42(A)(4), which provides the following:

(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 or governmental agency or instrumentality with which he is connected.

The term "public official" includes any person who is elected to or employed by any political subdivision. R.C. 2921.01(A). City elected officials are "public official(s)" for purposes of R.C. 2921.42(A)(4), and are subject to the restrictions in the law. Ohio Ethics Commission Advisory Opinions No. 88-006 and 92-012. Therefore, R.C. 2921.42(A)(4) prohibits the mayor and members of city council from having an interest in any public contract entered into by, or for the use of, the City. The term "public contract" includes any purchase or acquisition of property or services by or for the use of any political subdivision, including the City. R.C. 2921.42(G)(1). The City's provision of funds to the Chamber of Commerce for a summer concert series is a public contract within this definition because the City acquires services from the Chamber of Commerce in return for the provision of funds. Likewise, the City's provision of services to the Chamber of Commerce for the Chamber of Commerce's annual city-wide festival is a public contract if the City acquires any property or services from the Chamber of Commerce in conjunction with the city-wide festival. Pursuant to R.C. 2921.42(A)(4), the mayor and members of city council are prohibited from having an interest in these contracts.

The Ethics Commission has held that an "interest" under R.C. 2921.42 must be definite and direct, and may be pecuniary or fiduciary in nature. See Adv. Ops. No. 78-005 and 81-008. The question becomes whether an ex-officio member of a board of a chamber of commerce has an interest in the contracts of that board by virtue of his or her position on that board.

In Advisory Opinion No. 81-008, the Ethics Commission concluded that a city council member who also serves as a member of the board of trustees of a nonprofit corporation that contracts with the city has an interest in the contract between the corporation and the city, and thus may not serve on the board of the nonprofit corporation absent meeting an exception to the law. The Commission, in citing the legislative committee that enacted Section 2921.42, stated:

“this dual interest creates a situation ‘in which there is a risk that private considerations may detract from serving the public interests’.” Similarly, the Commission concluded in Advisory Opinion No. 81-005 that a city official is generally prohibited by R.C. 2921.42(A)(4) from serving as an officer or a board member of an undesignated community improvement corporation, one type of nonprofit corporation, which is established by the city and receives funds distributed through the city. Advisory Opinions No. 81-005 and 81-008 are consistent with those opinions of the Commission that have concluded that members of the board of directors and officers of for-profit corporations have a fiduciary interest, and in some instances, a pecuniary interest, in the contracts of the corporation. See, e.g., Adv. Ops. No. 85-007, 85-009, 86-002, and 86-005.

In your letter to the Commission, you indicated that the Chamber of Commerce has been organized as a non-profit corporation. Therefore, the members of the Board of Directors of the Chamber of Commerce have an interest in the contracts of the Board. See Adv. Op. No. 81-008. The critical question is whether this conclusion applies equally to ex-officio non-voting members of the Board.

Division (A)(4) of Section 1702.27 of the Ohio Revised Code provides that the articles or the regulations of a non-profit corporation may provide that persons occupying certain positions within or without the corporation shall be ex officio trustees, but, unless otherwise provided in the articles or the regulations, such ex officio trustees shall not be considered for quorum purposes and shall have no vote. Based on our recent telephone conversation, it appears that the city council members and the mayor would be appointed pursuant to this provision of the Ohio Revised Code. However, the fact that the mayor and city council members would not have voting privileges is not necessarily determinative of the answer to the question of whether these officials would have a fiduciary interest in the contracts of the Board.

In Advisory Opinion No. 99-004, the Commission noted that, for purposes of the Uniform Fiduciary Act, a person is a “fiduciary” if he is an officer of a public or private corporation, a public officer, or any person acting in a fiduciary capacity for any person, trust, or estate. See R.C. 1339.03(B). The Commission further noted, in that same advisory opinion, that Random House Webster’s Unabridged Dictionary defines “fiduciary” as “a person to whom property or power is entrusted for the benefit of another,” and “of, based on, or in the nature of trust and confidence, as in public affairs.” Random House Webster’s Unabridged Dictionary 714 (1997). Therefore, in order to determine whether an ex-officio board member has a fiduciary interest in the non-profit corporation’s contracts, it is necessary to examine the powers and duties of the ex-officio board member.

The Ohio Revised Code does not distinguish between ex-officio non-voting members and other board members in examining the authority of the board members, the standard of care to which they must adhere in performing their duties, or the liability that they would incur for breaching the standard of care. See R.C. 1702.30 (a trustee shall perform his duties as a trustee including his duties as a member of any committee of the trustees upon which he may serve, in good faith, in a manner he reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances).

Legal authority in other jurisdictions supports the notion that the designation of a board member as an ex-officio non-voting member, rather than as a voting member, is not determinative of the nature and degree of the authority of the board member, and thus is not determinative of whether the board member would have a fiduciary interest in a contract of the board. In Federal Election Commission v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), the United States Court of Appeals for the District of Columbia Circuit was faced with the issue of whether Congress exceeded its legislative authority when it placed its agents on the Federal Election Commission as non-voting ex-officio members. In resolving this issue, the D.C. Circuit Court stated the following:

Legislative history aside, we cannot conceive why Congress would wish or expect its officials to serve as ex officio members if not to exercise *some* influence. Even if the ex officio members were to remain completely silent during all deliberations (a rather unlikely scenario), their mere presence as agents of Congress conveys a tacit message to the other commissioners. The message may well be an entirely appropriate one—but it nevertheless has the potential to influence the other commissioners. Federal law recognizes in other contexts that non-voting participation can influence a decision-making process. For example, Fed. R. Crim. P. 24(C) states: “An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.” An alternate juror, of course, does not have a right to vote. The rationale animating this rule is that “when alternate jurors are present during the deliberations, the possible prejudice is that defendants are being tried not by a jury of 12, as is their right, but by a larger group.” United States v. Jones, 763 F.2d 518, 523 (2d Cir. 1985), cert. denied, 474 U.S. 981 (1985) (citations omitted).

Federal Election Commission v. NRA Political Victory Fund, at pp. 826-827. The Circuit Court clearly recognized that, in many instances, an ex-officio non-voting member of a board exercises influence over other board members, and, in that way, would exercise a substantial degree of authority in matters before the board. Further, a non-voting member generally is no less “necessary” to the workings of the board than are voting members. See In the Matter of Baldwin-United Corporation, 38 B.R. 802 (Bankr. S.D. Ohio 1984). Therefore, an ex-officio non-voting member of a board of a non-profit generally has a fiduciary interest in the contracts of the board.

There may be a few instances, however, where a non-voting ex-officio board member would serve on the board in solely a ceremonial capacity. This type of ceremonial capacity could exist, under the legal authority cited in the preceding paragraph, in circumstances where the non-voting ex-officio board member did not regularly attend the meetings of the board, or otherwise discuss any official business of the board with other board members, and could not act or speak on behalf of the board. In these instances, the non-voting ex-officio board member may not serve as a fiduciary to the board of the non-profit corporation.

In differentiating between city and township officials, and assuming that there are no contracts between the township and the Board, township officials would not be prohibited from serving on the Board. If there are any contracts between the township and the Board, the

township trustees may also have a prohibited fiduciary interest in those contracts and may likewise be required to demonstrate compliance with each of the four requirements of R.C. 2921.42(C) in order to serve on the Board.

Exception to the Restriction of R.C. 2921.42(A)(4)

R.C. 2921.42(C) provides an exception to R.C. 2921.42(A)(4), as follows:

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

Each of the provisions in Division (C) is a question of fact which, when applied to the circumstances of the individual case, will determine whether a particular transaction fits within the exception. Adv. Ops. No. 80-003 and 88-008. The criteria of Division (C) are strictly construed against the public official, and the official must show compliance with all four requirements in the exception. Adv. Ops. No. 83-004, 84-011, and 88-008.

Unobtainable Elsewhere for the Same or Lower Cost—R.C. 2921.42(C)(2)

Based on the information that you have presented to the Commission, Division (C)(2) of Revised Code Section 2921.42 is of particular note.

One means of meeting the criteria of R.C. 2921.42(C)(2) is by demonstrating that the services that the Chamber of Commerce provides to the City under the two contracts described in your letter to the Ethics Commission, or any other city contracts, are unobtainable elsewhere for

the same or lower cost. Competitive bidding, whereby the Chamber of Commerce submits the lowest bid, is one indication that this requirement has been met, but it is not determinative. Adv. Op. No. 86-002. Other factors that must be considered include the availability and adequacy of notice to potential bidders, the openness and fairness of the bidding process, and the conditions of the market. Adv. Ops. No. 83-004 and 88-001.

In this instance, competitive bidding is not an option. It is more likely that the Chamber of Commerce could demonstrate that the services that it provides to the City, by organizing the summer concert series and city-wide festival, are unique and unobtainable from another source for the same or lower cost. If the Chamber of Commerce can demonstrate that the services are unique, the city officials could show that they meet the requirement in R.C. 2921.42(C)(2).

If the "unobtainable elsewhere" exception of Division (C)(2) cannot be met, then the city elected officials must demonstrate that the services under the public contract are being furnished as part of a continuing course of dealing established prior to an individual becoming associated with the public agency.

Even if the criteria of Division (C)(2) can be met, the other three criteria of Division (C) must also be met.

Other Requirements of R.C. 2921.42(C)

In order to serve on the Board, the city elected officials must, in addition to meeting the requirements of Division (C)(2) as set forth above, meet each of the other requirements of R.C. 2921.42(C). R.C. 2921.42(C)(1) requires that the services provided by the Chamber of Commerce in return for city funds are necessary services. Division (C)(3) requires that the treatment provided to the City by the Chamber of Commerce is as good as or better than the treatment provided by the Chamber of Commerce to any other party. Finally, Division (C)(4) requires that the transaction be conducted at arm's length, that the City has full knowledge of the officials' interest in the city contracts, and that the city elected officials take no part in the deliberations and decisions of the City with respect to the contracts. See also R.C. 2921.42(A)(1), discussed below.

Official Capacity Exception to the Restriction of R.C. 2921.42(A)(4)

Where the city elected officials could not meet all of the requirements of R.C. 2921.42(C), the question becomes whether they would be able to meet the "official capacity" exception to the restriction of R.C. 2921.42(A)(4). In particular, the Ethics Commission has held that the prohibition of R.C. 2921.42(A)(4) is inapplicable to a public official of a political subdivision who serves on the board of directors of a non-profit agency that contracts with the political subdivision, if he serves on the board in his "official capacity," as a representative of the political subdivision and in order to represent the political subdivision's interests. Adv. Ops. No. 82-004, 83-010, and 84-001.

The Ethics Commission has explained that whenever a public official serves on the board of directors of a non-profit corporation in his official capacity, he continues to pursue the interests of his public entity and, therefore, "there would not be a dual interest in which private considerations would distract from his serving the public interest." Adv. Op. No. 84-001. In Advisory Opinion No. 84-001, the Ethics Commission set out four criteria that must be met in order for a public official to be deemed to serve with a non-profit corporation in his official capacity. The criteria are as follows:

1. The governmental entity must create or be a participant in the non-profit corporation;
2. Any public official or employee connected with the jurisdiction, including a council member, may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity;
3. The public official or employee must be formally instructed to represent the governmental entity and its interests; and
4. There must be no other conflict of interest on the part of the designated representative.

Adv. Op. No. 84-001. See also Adv. Ops. No. 82-004, 83-010, and 88-005.

It does not appear, based on the information that you have provided, that the official capacity exception can be met in the situation you have described.

Securing Authorization of a Board Contract—R.C. 2921.42(A)(1)

Even where the city elected officials could demonstrate compliance with each of the four requirements of the exception of R.C. 2921.42(C), such that the city elected officials would not be prohibited from serving as members of the Board, the city elected officials are also subject to R.C. 2921.42(A)(1), which provides:

- (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.

As discussed above, an ex-officio member of the board of directors of a non-profit corporation generally has an interest in the contracts of that corporation. Therefore, the city elected officials are prohibited from voting, discussing, deliberating, formally or informally

lobbying, or otherwise using their authority or influence as city officials to secure city contracts, or any provision of city funds, for the Chamber of Commerce. Adv. Op. No. 89-008.

Using Authority or Influence of Office to Secure a Benefit—R.C. 102.03(D)

Section 102.03(D) of the Revised Code also prohibits the city elected officials from using their city positions to secure a contract or other benefit for the Chamber of Commerce. R.C. 102.03(D) provides:

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.

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, or employed by, any department, division, institution, board, commission, authority, bureau or other instrumentality of a city. R.C. 102.01(B) and (C). Adv. Op. No. 90-003. The mayor and members of city council are, therefore, "public official(s) or employee(s)" subject to the prohibitions of R.C. 102.03(D). See Adv. Op. No. 96-001.

The term "anything of value" is defined to include money and every other thing of value. R.C. 102.01(G) and 1.03. It includes any definite and direct pecuniary benefit, such as a payment for goods or services. Adv. Op. No. 90-003. R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his office to secure anything of value for any person, business, or other entity, if the relationship between the official and that person or other entity is such that the official's objectivity or independence of judgment could be impaired with respect to matters that affect the interests of that party. Adv. Op. No. 89-008. The Commission has stated that R.C. 102.03(D) prohibits a public official from participating in any matter that would provide a benefit to an organization which he serves as an officer or board member. See Adv. Ops. No. 89-005 and 94-001. Therefore, R.C. 102.03(D), as well as R.C. 2921.42(A)(1), prohibit the mayor and members of city council from voting, deliberating, participating in discussions, or otherwise using their positions, either formally or informally, to secure anything of value for the Chamber of Commerce. Id.

Application of the Public Contract Prohibitions to Township-Elected Officials

You have not indicated whether there are any contracts between the township and the Board. If there are any such contracts, the above provisions would apply to the question of whether the township trustees are prohibited from serving as ex-officio members of the Board. In addition, you should be aware that R.C. 102.03(D) prohibits the township trustees from securing something of value for the Chamber of Commerce regardless of whether there are any contracts between the township and the Board. Please contact this Office for further information if you have any questions regarding the application of any of the provisions of the Ethics Law and related statutes to the township trustees' service on the Board.

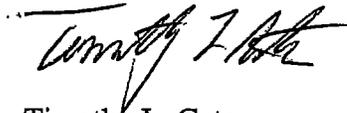
Conclusion

As stated above, ex-officio members of the Board generally would have a fiduciary interest in the contracts of the Board. Therefore, R.C. 2921.42(A)(4) prohibits city elected officials from serving as ex-officio members of the Board, where a public contract exists between the city and the Board, unless the elements of the official capacity exception, or each of the four requirements of R.C. 2921.42(C), as discussed in this opinion, can be met. Based on the information that you have provided to the Ethics Commission, in this specific situation, it appears that the official capacity exception cannot be met. While it may be possible for the city elected officials who would serve on the Board to meet each of the four requirements of R.C. 2921.42(C), you are cautioned that unanticipated conflict of interest may arise for city elected officials who would serve on the Board. These conflicts of interest may have a significant impact on the ability of the Board as a whole to perform its essential or important functions.

Even where they can meet the exception provided by R.C. 2921.42(C), the city elected officials are prohibited, by R.C. 2921.42(A)(1), from authorizing, or using the authority or influence of their positions to secure authorization of, a public contract between the City and the Board where the city elected officials serve on the Board. Further, R.C. 102.03(D) prohibits city and township elected officials from using or authorizing the use of the authority or influence of their positions to secure something of value for the Chamber of Commerce. Finally, these same restrictions apply, depending upon the relationship between the township and the Chamber of Commerce, to a township trustee who wishes to serve on the Board.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 6, 2001. 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 questions or desire additional information, please contact this Office again.

Sincerely,



Timothy L. Gates
Staff Attorney