

OHIO ETHICS COMMISSION

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August 2, 2002

Informal Opinion 2002-INF-0802-4

Robert Baker, Director of Finance
City of Cleveland
Cleveland City Hall



Dear Mr. Baker:

In a letter received by the Ohio Ethics Commission on April 22, 2002, you explain that you are the Director of Finance for the City of Cleveland (City). You have asked whether you have any reporting responsibilities with respect to several investments in your IRA and 401(k) accounts. You have also asked whether you have any reporting responsibilities with respect to investments in two trusts—one in which you are the beneficiary and the other in which you are the settlor. Based on the nature of your question, it is apparent that the City has contracts with, or invests funds with, one or more of the entities in which you have investments, or in which funds in the two trusts are invested.

Brief Answer

As explained more fully below, R.C. 2921.42(A)(3) and (4) generally prohibit you from having a position of profit, or interest, in a public contract entered into by or for the use of the City. Based on the information you have provided, however, it appears that your interest in the corporations is not sufficiently definite and direct as to invoke the prohibitions of either R.C. 2921.42(A)(3) or (4). Therefore, you have no requirement to report any of your investments.

Facts

In your letter to the Ethics Commission, you explain that you are the Director of Finance for the City. You explain that you assumed that position on April 1, 2002. You state that, under the Charter and Codified Ordinances of the City, the Director of Finance has overall responsibility for the Office of Budget and Management, the Division of Accounts, the Division of Purchases and Supplies, the Division of Taxation, the Division of Assessments and Licenses, the Division of Printing, and Office of the City Treasurer. You explain that one of your responsibilities as Director of Finance is to approve almost all purchases made by the City either in your capacity as Director or as a member of the Board of Control.

You state that you are the beneficiary of a revocable trust created by your wife, and that you are the settlor of a revocable trust that you created for your wife's benefit. You state that you also have an IRA account and a 401(k) account, both with substantial assets. You state that you are not the trustee of either trust, but that you do receive monthly reports of the investment holdings of each trust and the IRA. You further state that the investments in the trusts and the IRA are handled by an institutional trustee which you describe as a major bank. You explain that the 401(k) account is invested in mutual funds, and that you do not have any knowledge of the individual securities that the mutual funds hold. You indicate that some of the holdings are in state and local government debt securities.

You ask whether you have any reporting responsibilities with respect to investments in the 401(k), IRA, or two trusts. It should be noted at the outset that a municipal director of finance is not required, by R.C. 102.02, to file an annual financial disclosure statement. The reporting requirement to which you refer is a requirement set forth in one of the exceptions to the public contract restrictions in R.C. 2921.42. Based on the nature of your question, it is apparent that the City has or may have contracts with one or more of the entities in which the funds in the two trusts, 401(k), IRA, or mutual funds are invested.

Occupying a Definite and Direct Position of Profit in, or Having an Interest in, a City Contract—R.C. 2921.42(A)(3) and (4)

The situation that you have described implicates R.C. 2921.42(A)(3) and (4), which provide that no public official shall knowingly:

- (3) During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder;
- (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 to include any employee, or elected or appointed officer, of any political subdivision. R.C. 2921.01(A). A city director of finance is a public official for purposes of R.C. 2921.42. See generally Ohio Ethics Commission Advisory Opinion No. 81-005.

The term "public contract" is defined in R.C. 2921.42(G)(1)(a) and (b) as:

- (a) The purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the

employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either;

- (b) A contract for the design, construction, alteration, repair, or maintenance of any public property.

An "interest" which is prohibited under R.C. 2921.42(A)(4) must be definite and direct, and may be either pecuniary or fiduciary in nature. See Adv. Ops. No. 81-008 and 93-001. A public official who has an ownership interest in a business is generally considered to have an "interest" in the contracts of that business for purposes of R.C. 2921.42(A)(4). See Adv. Ops. No. 92-008 and 93-001. A stockholder of a company has an ownership interest in the company and therefore has an "interest" in the company's contracts for purposes of R.C. 2921.42(A)(4). Adv. Op. No. 93-001.

A stockholder of a corporation also occupies a position of profit in the contracts of the corporation for purposes of R.C. 2921.42(A)(3). Adv. Op. No. 93-001. Even a stockholder who owns only a fractional or de minimis amount of stock will be deemed to profit from the corporation's contracts. Id.

However, the question remains whether your "interest," for purposes of R.C. 2921.42(A)(4), or the "position of profit" you would occupy, for purposes of R.C. 2921.42(A)(3), is definite and direct. If the interest or position of profit is definite and direct, the restrictions in those sections would apply to you. In that case, you could be required to report your holdings in order to meet an exception to the restrictions.¹

In this instance, you would not have a definite and direct interest, or position of profit, in a City contract with a company in which your personal funds are invested, where the funds are invested through an IRA, 401(k), or mutual funds and you do not direct the investment of your funds to any companies that have City contracts. An individual who invests money in mutual funds owns shares in the mutual fund, and has no ownership interest in the stocks purchased by the mutual fund. Likewise, a beneficiary or settlor of a revocable trust who does not direct the investment of funds of the trust in companies that have City contracts would not occupy a definite and direct position of profit in, or have a definite and direct interest in, a public contract where the political subdivision that the beneficiary or settlor serves acquires goods or services from a company in which funds of the trust are invested.

Because you do not have a definite and direct interest, or occupy a definite and direct position of profit, in these City contracts, the restrictions in R.C. 2921.42(A)(3) and (A)(4) do not apply to you. Consequently, there is no requirement for you to report any of your investments to the City in order to meet an exception to these restrictions.

¹ R.C. 2921.42(B) sets forth an exception to some of the restrictions in R.C. 2921.42(A). One of the requirements in the exception is that the public official who holds shares in a corporation that is doing business with his public agency file an affidavit with the agency disclosing his exact status with respect to the corporation. R.C. 2921.42(B)(3).

Use of Position to Secure Financial Benefit—R.C. 102.03(D)

You should also be aware of the restriction imposed by R.C. 102.03(D), which provides the following:

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.

The term "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 or is an employee of a city. R.C. 102.01(B) and (C). Therefore, as Director of Finance for the City, you are a public official or employee subject to the prohibitions of R.C. 102.03.

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. 102.01(G). A pecuniary interest in a private business is a thing of value under R.C. 102.03(D). See Adv. Ops. No. 86-007 and 87-006. In the situation you have described, a return on your investment as a stockholder which would result from the City's contract with a company in which your personal funds are invested is a thing of value for purposes of R.C. 102.03(D).

A matter which has a definite and direct substantial impact on the personal financial interests of a public official or employee would generally be of such a character as to manifest an improper influence upon him with respect to his duties. Adv. Ops. No. 90-003 and 2001-06. However, the prohibition of R.C. 102.03(D) will not apply in instances where the thing of value is nominal or de minimis in value. See Adv. Ops. No. 86-011 and 92-014. Therefore, where you would decide to invest your personal funds with a corporation with which the City does business, the prohibition imposed by R.C. 102.03(D) is triggered.

If you hold a de minimis percentage of the outstanding shares of stock in a company that does business with the City, your relationship as a stockholder of the company would not manifest a "substantial and improper influence" upon you for purposes of R.C. 102.03(D). You are not prohibited from authorizing City contracts with companies in which one of the trusts, the IRA, or the 401(k) owns a de minimis percentage of the outstanding stock. However, if you would realize a substantial return from a contract between your political subdivision and a corporation in which you own stock, R.C. 102.03(D) prohibits you from participating in matters that affect the corporation or otherwise misusing your public position to secure a personal benefit for yourself.

Investment of City Funds—R.C. 2921.42(A)(2) and (B)

You have asked whether you are required to disclose your investments in local government debt securities. In order to address your question, it is necessary to examine R.C. 2921.42(A)(2), which provides that no public official shall knowingly:

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.

It is important to recognize that R.C. 2921.42(A)(2) prohibits a public official from acting in certain matters where the public official has an interest in a security. R.C. 2921.42(A)(2) does not prohibit a public official from having an interest in a security in which his political subdivision has also invested public funds. Contrast R.C. 2921.42(A)(4) (discussed above) (prohibiting a public official from having an interest in a public contract). As noted above, R.C. 2921.42(B) states a limited exception to the prohibition of R.C. 2921.42(A)(2). It is not necessary, however, to examine the exception in situations where you would not authorize, or employ the authority or influence of your office to secure the investment of public funds in any security, including local government debt securities, in which you have a definite and direct interest.

You have stated, in a telephone conversation with Commission staff, that you are not involved in the investment of City funds. If you become involved in matters involving the investment of City funds in the future, and there is a question of whether you can participate as a City official in a certain investment of City funds, please contact the Ethics Commission for guidance on the manner in which you must proceed. In addition, you should contact the Ethics Commission if and when you become aware that you have investments in bonds issued by the City, as such investments may raise additional conflict of interest concerns.

Conclusion

As explained above, R.C. 2921.42(A)(3) and (4) generally prohibit you from having a position of profit, or interest, in a public contract entered into by or for the use of the City. Based on the information you have provided, however, it appears that your interest in the corporations is not sufficiently definite and direct as to invoke the prohibitions of either R.C. 2921.42(A)(3) or (4). Therefore, you have no requirement to report any of your investments.

In the future, if you take a more active role in directing your personal investments, you would have a definite and direct interest, and occupy a position of profit, in the contracts of corporations with which those investments are placed. If the investments are with corporations or organizations that have contracts with the City, then such contracts would need to be awarded pursuant to competitive bidding to the lowest and best bidder and you would need to file an

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affidavit with the legal department of the City before the contracts are approved. At that time, you should contact this office for further guidance.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on August 2, 2002. The Commission commends you for requesting guidance before any actions were taken that could be prohibited by law.

The 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 and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney