

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

July 13, 2005

Informal Opinion 2005-INF-0713

David J. Held


Dear Mr. Held:

In a letter received by the Ohio Ethics Commission on March 25, 2005, you have asked whether the Ohio Ethics Law and related statutes prohibit you from simultaneously serving in two public positions. You explain that you are the Executive Director for the Stark-Tuscarawas-Wayne Joint Solid Waste Management District (District). You state that the Executive Director position with the District is a full-time, unclassified exempt position that reports directly to, and works at the pleasure of, a nine-member board of county commissioners.

You also explain that you would like to seek the part-time elective office of Mayor for the City of North Canton (City). You state that the City is a charter city that has a Mayor/Administrator/Council form of government.

Brief Answer

As explained below, because R.C. 343.01(K)(1)(a) and (c), and 343.01(K)(2), provide exceptions to the prohibitions imposed by the Ohio Ethics Law and related statutes, you are not prohibited from serving as the Mayor of the City while you also serve as the Executive Director for the District. Were it not for the exceptions in R.C. 343.01(K)(1)(a) and (c) and 343.01(K)(2), the Ethics Law would prohibit you from serving simultaneously in the two positions.

However, you must observe restrictions imposed by the Ethics Law while you serve in both public positions. For instance, you are prohibited from using either public position to secure a personal financial benefit for yourself. You are also prohibited from using either public position to secure a thing of substantial value for a family member or a business associate other than a public entity you serve.

Matters Outside the Ethics Commission's Jurisdiction—Compatibility of Public Positions

Whenever the same public official or employee desires to occupy more than one public position, the question arises whether the positions are “compatible”—that is, whether a person may simultaneously hold the two public positions. Seven criteria, which the Ethics Commission has no authority to interpret, are used to determine “compatibility.” See 1979 Att’y Gen. Op. No. 79-111. The Ethics Commission has explained that an interpretation of the restrictions imposed by the Ethics Law and related statutes (R.C. Chapter 102. and 2921.42 and 2921.43) is not the same as a determination of compatibility. Ohio Ethics Commission Advisory Opinion No. 91-002. See also 1990 Att’y Gen. Op. No. 90-037.

If you have questions regarding the compatibility of the two positions you have described, you should contact the legal advisor for the City or the District for further information and advice. This advisory opinion will apply provisions of the Ethics Law and related statutes to the potential dual service.

Restrictions Regarding Public Contracts—R. C. 2921.42

If a public official or employee desires to serve two public agencies that contract with one another for the provision of supplies or services, then the prohibitions of R.C. 2921.42 may be implicated. In some instances, the existence of such a contractual relationship may—even if the positions have already been determined to be “compatible”—create an insurmountable obstacle that will preclude an individual from serving both public agencies.

The public contract restrictions of Section 2921.42 of the Revised Code read in part:

- (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;
 - . . .
 - (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.

R.C. 2921.01(A) defines the term “public official” as any elected or appointed officer, or employee, or agent of the state or any political subdivision, which includes a statutorily created regional authority. Adv. Op. No. 89-004.

R.C. 2921.42(G)(1)(a) defines the term "public contract" as the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of any agency or instrumentality of the state or any of its political subdivisions. A public agency's expenditure of money to another public agency is a "public contract" for purposes of R.C. 2921.42(A)(4) because the proper use of the money results in the purchase or acquisition of services by or for the use of the granting public agency. See Adv. Op. No. 89-006 (concerning grants from the Ohio Department of Mental Health to fund graduate level programs at state colleges and universities). See also Adv. Ops. No. 82-004, 85-002, and 87-003.

Therefore, the expenditure of money by the District to the City, and formal contracts entered into between the District and the City are public contracts for purposes of R.C. 2921.42(A)(4). In a telephone conversation, you explained that the City receives grants from the District. It may also receive services from the District. That acquisition of services is a public contract for purposes of R.C. 2921.42(A)(4).

R.C. 2921.42(A)(4) prohibits a public official from having an interest in the profits or benefits of a public contract entered into by a political subdivision with which he is "connected." See Adv. Op. No. 89-004 (the purpose of R.C. 2921.42 is best served if the statute is interpreted as prohibiting a public official from having an interest in contracts with all political subdivisions, governmental agencies, and instrumentalities with which he is connected). An interest that is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. Adv. Ops. No. 81-008 and 89-004.

In the instant situation, as the Executive Director of the District, you would have a fiduciary interest in the contracts of the District. That interest arises because you occupy a position of trust and authority with the District. Similarly, you would occupy a position of trust and authority if you were to serve as Mayor of the City, and, likewise, you would have a fiduciary interest in the contracts of the City. Therefore, you would have prohibited fiduciary interests in any contracts between the District and the City. Absent any further information, the Ethics Law would prohibit you from serving as both the Executive Director of the District and the City.

However, R.C. 343.01(K)(1) provides two exceptions to R.C. 2921.42.

R.C. 343.01(K)(1)(c) provides that an official or employee of a regional solid waste management district shall not be considered to be directly or indirectly interested in, or improperly influenced by, the expenditure of money made by the district for the benefit of any municipal corporation forming the district of which that official or employee is also a member, officer, or employee. In addition, R.C. 343.01(K)(1)(a) provides that an official or employee of a regional solid waste management district shall not be considered to be directly or indirectly interested in a contract under R.C. Chapter 343., or R.C. Sections 307.15, or 3734.52 to 3734.575, that is entered into between the district, and any municipal corporation located within the district, of which that official or employee is also a member, officer, or employee.

Application of Exception

Based on the information you have provided to the Ethics Commission, there are contracts between the District and the City. However, as stated above, any expenditure of funds by either public entity for the acquisition of services from the other public entity is a public contract.

R.C. 2921.42(A)(4) would generally prohibit you from serving as an official of a municipal corporation that receives funds from a public agency with which you are employed. However, because of the exceptions in R.C. 343.01(K)(1)(a) and (c), you would not be considered to have an interest in the expenditure of funds from, and contracts entered into between, the District and the City.

Other Ethics Law Requirements

R.C. 2921.42(A)(1) prohibits a public official from authorizing, or using his position to secure authorization of, a public contract in which he, a family member, or a business associate has an interest. If you were to serve as Mayor of the City, the City would be your business associate for purposes of R.C. 2921.42(A)(1). See Adv. Op. No. 89-006. Therefore, R.C. 2921.42(A)(1) would generally prohibit an employee of a District, who also serves as a City official, from participating in the authorization of public contracts from the District to the City.

Further, R.C. 102.03(D) prohibits a public official or employee from using or authorizing the use of the authority or influence of his public position to secure anything of value if the thing of value is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. R.C. 102.03(D) prohibits a public official from participating in any matter that would provide a definite and direct pecuniary benefit to an entity that he serves as an officer or employee. Adv. Ops. No. 89-006, 90-012, and 92-004. R.C. 102.03(D) also prohibits a public official or employee from participating in matters before his public agency that will secure a definite and direct pecuniary benefit for either his private or public outside employer. See Adv. Ops. No. 89-008 and 91-006, respectively.

However, as set forth above, R.C. 343.01(K)(1)(c) provides that an employee or official of a regional solid waste management district shall not be considered to be improperly influenced by the expenditure of money made by the district for the benefit of any municipal corporation within the district of which that member is also a member, officer, or employee. In addition, R.C. 343.01(K)(2) provides that a city is not considered a business associate, for purposes of R.C. 2921.42, of a person who is concurrently an employee of a solid waste district and an officer of a city that is included within the district. R.C. 343.01(K)(2) provides that a person in those concurrent positions "may participate fully in deliberations concerning and vote on or otherwise participate in the approval or disapproval of any contract or expenditure of funds."

Therefore, in the instant situation, because of the exceptions in R.C. 343.01(K)(1) and (2), you are not prohibited from participating in matters before the District that would affect the District's expenditure of funds to, and contracts with, the City even if you are elected to the position of the City Mayor.

It must be stressed, however, that R.C. 343.01(K)(1)(a) and (c), and 343.01(K)(2), provide exceptions to the Ethics Law and related statutes "only to the extent that any interest or influence could arise from his public office or employment with the political subdivision" that receives the expenditure of money, or the award of a contract from the district for the benefit of any city within the district of which the district employee is also a member, officer, or employee. R.C. 343.01(K)(3) specifically provides:

Nothing in (K)(1) or (2) of this section shall be construed to exempt any . . . officer of employee . . . of a solid waste management district from a conflict of interest arising because of a personal or private business interest.

It is clear that the General Assembly has crafted an exception to the Ohio Ethics Law that will allow public officials and employees to simultaneously serve with a solid waste management district and a city within the solid waste management district, and fully participate in matters that affect the public agencies they serve. However, the General Assembly has left intact the prohibitions in the Ohio Ethics Law and related statutes that will apply to conflicts of interest that arise outside of the person's public office or employment. For example, an employee of a district is prohibited from using his public position to secure a personal financial benefit. An employee of a district is also prohibited from using his public position to secure a thing of substantial value for a family member or a business associate. You should be aware that these prohibitions apply to you in both of the public positions that you have described.

Revolving Door Restrictions—R.C. 102.03(A)

Division (A) of Section 102.03 of the Revised Code, the "revolving door" restriction of the Ethics Law, prohibits a public official or employee from representing a client, employer, or any person before any public agency on any matter in which he has personally participated as a public official or employee. Division (A) of Section 102.03 would, therefore, prohibit a public official or employee who serves in two public positions from representing one public agency before the other public agency on any matter in which he personally participated as a public official or employee of the other agency. See Adv. Op. No. 91-006. In the situation you have described, you are prohibited from representing the City before any public agency on any matter in which you personally participated as the Executive Director of the District. Similarly, you are prohibited from representing the District before any public agency on any matter in which you personally participate as the Mayor for the City.

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Conclusion

As explained above, because R.C. 343.01(K)(1)(a) and (c), and 343.01(K)(2), provide exceptions to the prohibitions imposed by the Ohio Ethics Law and related statutes, you are not prohibited from serving as the Mayor of the City while you also serve as the Executive Director for the District. However, you must observe restrictions imposed by the Ethics Law while you serve in both public positions. For instance, you are prohibited from using either public position to secure a personal financial benefit for yourself. You are also prohibited from using either public position to secure a thing of substantial value for a family member or a business associate other than a public entity you serve.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on July 11, 2005. The Commission commends you for requesting guidance before taking any actions that could be prohibited by law.

The opinion is based on the facts presented. It 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