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David E. Freel
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August 12, 2010

Informal Opinion 2010-INF-0812-4

James Levin, Artistic Director
Ingenuity Festival



Dear Mr. Levin:

On July 14, 2010, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you are a candidate for a seat on the newly created Cuyahoga County (county) Council (council). You explained that you are the Artistic Director of the Cleveland Festival of Art and Technology, a 501(c)(3) organization, which is known as IngenuityFest.

You explained that since 2008 IngenuityFest has received funding from Cuyahoga Arts and Culture (CAC), which is a regional arts and cultural district established by the county commissioners pursuant to R.C. Chapter 3381. R.C. 3318.02 provides that a regional arts and cultural district is a political subdivision of the state. You state that in the past three years, IngenuityFest has received approximately \$110,000 annually from the Panel which is approximately 11% of IngenuityFest's operating budget.

You have asked whether, in light of the funding that IngenuityFest receives from CAC, the Ohio Ethics Law and related statutes would prohibit you from simultaneously serving as a member of the county council and as the Artistic Director of IngenuityFest.

Brief Answer

The public contract provisions in the Ethics Law prevent those individuals who are responsible for making public purchases and expending public funds from profiting or benefiting from those purchases or expenditures, and from acting to secure such profits or benefits for themselves or closely related parties.

As explained below, within the facts you have presented, you would not occupy a position of profit, in grant funds provided by CAC to IngenuityFest. Therefore, R.C. 2921.42(A)(3) will not prohibit you from holding both positions. Other restrictions contained within R.C. 2921.42, however, will apply to these contracts.

If IngenuityFest continues to receive grant funds from CAC, R.C. 2921.42(A)(4) would prohibit you from serving as a member of county council and Artistic Director of IngenuityFest *unless* you can meet the exception in R.C. 2921.42(C). As discussed below, based on the service IngenuityFest provides to the county, you may be able to meet this exception. Please note that even if you meet the exception, and can serve in both positions, R.C. 2921.42(A)(1) and 102.03(D) would prohibit you from actively using your position by voting, discussing, deliberating, formally or informally lobbying, or otherwise participating, as a member of the council, on matters that affect IngenuityFest. R.C. 102.04(C) also prohibits you, as part of your compensated employment at IngenuityFest, from representing, advocating, or performing any other services for IngenuityFest on any matter that is before any agency of the county.

Profiting from a Public Contract—R.C. 2921.42(A)(3)

If you were to be elected to county council, you would be a “public official” subject to the public contract restrictions in R.C. 2921.42. See R.C. 2921.01(A) (any elected officer of any political subdivision, including a county, is a “public official”). R.C. 2921.42(A)(3) states that no “public official” shall knowingly:

During the public official’s term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by the public official or by a legislative body, commission, or board of which the public official was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

A public contract includes any purchase or acquisition of goods or services by the county. R.C. 2921.42(I)(1)(a). When a public agency sponsors grants, loans, land reutilization programs, tax abatements, and other similar programs, and acquires community improvement services in return, the grants, loans, and other programs are “public contracts” regardless of whether they are funded through state, federal, or other moneys. See, e.g., Ohio Ethics Commission Advisory Opinions No. 2009-06, 2001-02, 92-014, and 87-004; *State v. Lordi* (2000), 140 Ohio App.3d 561, 569, discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001). Therefore, the grant that IngenuityFest receives from CAC is a public contract.

The restriction in R.C. 2921.42(A)(3) applies to contracts that are authorized by a public official or a board of which he is a member, regardless of whether the official participated in the board’s authorization. A public contract is considered to be authorized by an official or legislative body if the contract could not have been awarded without the approval of the official, the public position in which he serves, or the legislative board of which he is a member. Adv. Ops. No. 87-

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004 and 92-014. Therefore, if you were to serve on county council, this restriction will apply to any contract authorized by the council while you are a member, regardless of whether you abstain from the council's consideration of the contract. Adv. Op. No. 87-008.

While the grant that IngenuityFest receives from CAC *is* a public contract, CAC is a political subdivision that exists separate and apart from the county council. The contracts and grants of CAC are authorized by officials or employees of CAC, rather than by the governing board of the county. Therefore, the prohibition in R.C. 2921.42(A)(3) will not apply to grants that IngenuityFest receives from CAC and need not be addressed further. But see R.C. 2921.42(A)(4) (discussed below).

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

If elected to county council, you will also be subject to R.C. 2921.42(A)(4), which states that no public official shall knowingly:

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 the public official is connected.

R.C. 2921.42(A)(4) prohibits a public official from having any definite and direct, pecuniary or fiduciary, interest in the contracts of his agency. Adv. Ops. No. 78-005 and 81-003. An officer, chief administrative official, or member of the board of an organization has a fiduciary interest in the contracts of the organization. Adv. Ops. No. 92-004 and 96-005. A person who serves as a chief administrative official of an organization, and is compensated for his service, also has a financial interest in the contracts of the organization. Adv. Op. No. 81-008.

R.C. 2921.42(A)(4) prohibits you from having an interest in the contracts entered into by or for the use of any political subdivision with which you are "connected." As a county council member, you will be connected with the county and any political subdivision or governmental agency or instrumentality which is either created by or funded through the county.

With respect to CAC, it must be determined whether you would be considered "connected" with CAC. The board of commissioners (and presumably the county council) appoints the members of the CAC board and CAC is funded through a county tax levy. Therefore, even though CAC is a separate political subdivision, the members of the county council will be considered "connected" with CAC. Adv. Op. No. 89-004. R.C. 2921.42(A)(4) will prohibit you, if you are elected to county council, from having an interest in any grant that IngenuityFest receives from CAC.

Therefore, if you were to simultaneously serve on the county council and as the Artistic Director of IngenuityFest, you would have a **prohibited interest** in any grant that IngenuityFest receives from CAC. R.C. 2921.42(A)(4) would prohibit you from simultaneously serving as a

member of the county council and as the Artistic Director of IngenuityFest, **unless you can objectively demonstrate that you meet an exception to the law contained in R.C. 2921.42(C).**

Exception—R.C. 2921.42(C)

R.C. 2921.42(C) provides that R.C. 2921.42(A)(4) does not apply to a public contract in which a public official has an interest when all four requirements in the exception can be met. The criteria are strictly construed against the public official who must show compliance with them. Adv. Ops. No. 83-004 and 84-011. The Ethics Commission has explained that the application of the (C) exception must be consistent with the underlying principle in R.C. 2921.42: “[A] public official should not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity.” (Emphasis added). Id. All four requirements in R.C. 2921.42(C) must be met, and they are:

- (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 the public official’s 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.

Necessary Services—R.C. 2921.42(C)(1)

Provided that a grant that IngenuityFest receives from CAC is awarded and administered by CAC to carry out its mandate and purpose, as established by statutes, charter, ordinances, or resolutions of the county, then the services the county acquires through the grants would be considered necessary. Adv. Ops. No. 85-002, 88-006, and 2001-02. In such a situation, you would be able to meet the requirement in R.C. 2921.42(C)(1).

Continuing Course of Dealing or Unobtainable Elsewhere—R.C. 2921.42(C)(2)

R.C. 2921.42(C)(2) requires that the service provided to the county by IngenuityFest are either “unobtainable elsewhere for the same or lower cost,” or are furnished as part of a “continuing course of dealing” established before you became associated with the county.

Continuing Course of Dealing

For purposes of R.C. 2921.42(C)(2), a continuing course of dealing is a contractual agreement between the parties that existed *prior to* the time that the official assumed public office. Adv. Ops. No. 82-007, 84-006, and 88-008. You are not yet a county official and IngenuityFest already has grant relationship with CAC. Therefore, if you were to be elected to county council, you will meet the “continuing course of dealing” requirement in Division (C)(2) regarding a grant that is in place at the time you are sworn in to office.

If the original grant terms between IngenuityFest and CAC provide for automatic renewal, without any action by CAC or any changes to the terms or conditions of the grant after the current terms expires, then the automatic renewal would be considered part of a “continuing course of dealing.” Adv. Op. No. 88-008. If, however, a renewal requires CAC to act, or there is any revision or change in the grant terms, then the resulting agreement is considered a new public contract, and accordingly it is not considered part of a “continuing course of dealing” for purposes of R.C. 2921.42(C)(2). *Id.*

If a renewal of the grant cannot be deemed part of a “continuing course of dealing,” then you would be required to demonstrate that CAC cannot acquire the services provided by IngenuityFest in return for the grant from other sources for the same or lower cost.

Unobtainable Elsewhere for the Same or Lower Cost

The requirement that the goods or services be “unobtainable elsewhere for the same or lower cost” must be demonstrated by an objective standard. As stated in Advisory Opinion No. 84-011:

The criterion that the goods or services be “unobtainable for the same or lower cost” requires that a public official or employee be at a disadvantage when attempting to do business with his governmental entity, and that an equally qualified applicant who is not a [public official] must receive preference.

In order to meet the requirement in R.C. 2921.42(C)(2), you would have to demonstrate, objectively, that the services provided by IngenuityFest in return for the grant are unique, and that no other source could perform the same service for the same or lower cost.

The Ethics Commission has held that, in some rare instances, an organization to which a public official has an employment or fiduciary relationship may be uniquely qualified to provide

services to agencies with which the official is connected. Adv. Op. No. 88-001. You can meet these requirements where either: (1) all qualified and interested applicants for CAC grants have received grants and funds remain to provide grants to IngenuityFest; or (2) CAC accepts applications for grants on an ongoing first-come, first-served basis, in a fair and open application process in which all interested and qualified applicants receive funding, and where there has historically been enough money to fund all qualified grant applications. See Adv. Op. No. 93-008 and 2001-02. The purpose of this requirement is to require a demonstration that grant funds are distributed fairly, without the official's public position influencing decision makers.

Same or Better Treatment—R.C. 2921.42(C)(3)

The third requirement, R.C. 2921.42(C)(3), is that IngenuityFest treats CAC either better than or the same as it would treat other customers or clients in similar transaction. In situations where the contract involves grant programs, the Ethics Commission has explained that grant recipients have no "customers or clients in similar transactions." Adv. Ops. No. 84-011 and 2001-02. Therefore, you can meet this part of the exception for the CAC grant.

Arm's Length Transaction—R.C. 2921.42(C)(4)

Finally, R.C. 2921.42(C)(4) requires that the entire transaction is conducted at arm's length, that the county and CAC have full knowledge that you have an interest in grants awarded to IngenuityFest, and that you take no part in the county's or CAC's decisions regarding the grant. For example, R.C. 2921.42(C)(4) would prohibit you from discussing the IngenuityFest grant with the County Executive.

In an arm's length transaction: (1) both IngenuityFest and CAC act voluntarily, without compulsion or duress; (2) the transaction occurs in an open market; and (3) both IngenuityFest and CAC act in their own self-interest. *Walters v. Knox Cty. Bd. of Rev.* (1989), 47 Ohio St.3d 23, 25. With respect to the criteria set forth in Division (C)(4), the Ethics Commission has held that, if the public agency's procedure for determining whether to finance a particular project, notifying prospective funding recipients, and selecting qualified projects are fair and objective with no preference given to organizations connected with public officials or employees, it will significantly help a public official to demonstrate compliance. Adv. Op. No. 84-011.

Summary of R.C. 2921.42(C) Exception

If you are unable to meet *all* of the four requirements in R.C. 2921.42(C), then R.C. 2921.42(A)(4) prohibits you from simultaneously serving as a member of the county council and as the Artistic Director of IngenuityFest. Based on the facts you have presented, you may be able to meet all four parts of this exception. If you are able to meet all four parts of the exception in R.C. 2921.42(C), then you would not have an unlawful interest in the grant that IngenuityFest receives from CAC. However, you must comply with other provisions of the Ethics Law that will limit your conduct.

Other Requirements

R.C. 2921.42(A)(1), a felony provision, states that a public official shall not knowingly authorize or employ the authority or influence of his office to secure authorization of any public contract in which he has an interest. This provision would prohibit you, as a county council member, from voting upon, discussing, or otherwise using your authority or influence to secure, any allocation of public funds to IngenuityFest. You would be prohibited, for example, from recommending IngenuityFest to any county agency or any other public agency, including the County Executive.

R.C. 102.03(D) would prohibit you from using or authorizing the use of the authority or influence of your office to secure anything of value if the thing of value is of such a character as to manifest a substantial and improper influence upon you with respect to your duties. R.C. 102.03(E) would prohibit you from soliciting anything of value if the thing of value is of such a character as to manifest a substantial and improper influence upon you with respect to your duties. The Ethics Commission has held that R.C. 102.03(D) and (E) prohibit a public official from participating in any matter that would provide a benefit to an organization that he serves in a fiduciary capacity and from soliciting any benefit to an organization he serves in a fiduciary capacity. See Adv. Ops. No. 89-005, 90-012, and 92-004.

Therefore, R.C. 102.03(D) and (E) would prohibit you from participating in matters before county council that affect the interests of IngenuityFest. You would be prohibited from participating in county council votes or discussion, and any other formal action by council, involving these matters. In addition, you are prohibited from participating in such matters informally by discussing them with other council members, or with the County Executive, and engaging in formal or informal lobbying on behalf of IngenuityFest.

Further, the Commission delineated the specific application of R.C. 102.03(D) to outside employment issues. Some of the restrictions will apply to you if you are elected to county council and continue to serve as Artistic Director of IngenuityFest. Specifically, you will be prohibited from lending the stature inherent in your public position to the promotion or advocacy of a matter for IngenuityFest. Adv. Op. No. 2008-02. If IngenuityFest has expressed a position on a matter that is before council, even if IngenuityFest is not a party to the matter, you will be prohibited from participating in council's discussion, consideration, or actions on the matter. *Id.* You would also be prohibited from discussing matters on which IngenuityFest has expressed a position with any county officials or employees, including the County Executive. IngenuityFest has expressed a position on a matter where its board votes or makes a determination on a matter, directs staff to lobby or speak on its behalf on the matter, or otherwise makes its position on the matter known through communications by the board or the staff of the organization.

Other specific restrictions are enumerated in Advisory Opinion No. 96-004 and 2008-02. For example, you are prohibited from using public time, facilities, personnel, or other resources in conducting IngenuityFest's business. See also R.C. 2921.41 (theft in office). Copies of these opinions are enclosed for your use.

R.C. 102.04(C) will prohibit you, as a member of county council, from receiving compensation from IngenuityFest for performing services on matters pending before any instrumentality of the county.¹ You are compensated for your service as the Artistic Director of IngenuityFest. Therefore, in the course of your job duties with IngenuityFest, you would be prohibited from discussing IngenuityFest's interests with any county official or employee, and from making telephone calls, sending e-mails, letters or otherwise interacting with county offices regarding any services provided by IngenuityFest. R.C. 102.04(C) also prohibits you from performing services, on behalf of IngenuityFest, on matters that are before any agency of the county.

If it is necessary for an officer or employee of IngenuityFest to perform services on matters that will be before a county agency, it must someone other than you. If your job duties as Artistic Director require that you work on matters that will be before any county agencies, then it would be impossible for you to engage in those job duties and comply with R.C. 102.04(C) while you serve on county council.

Additionally, R.C. 102.03(A)(1) prohibits you from representing IngenuityFest before any public agency, including but not limited to the county, on any matter in which you personally participated as a public official. Adv. Op. No. 89-008. Unlike R.C. 102.04(C), which prohibits you from receiving compensation to perform services, R.C. 102.03(A)(1) prohibits you from representing any person on certain matters regardless of whether you receive compensation for your services. Adv. Op. No. 91-006. This prohibition applies to you during your public service and for one year after your public service.

Therefore, if you participated in a matter as a member of county council, and were later asked to represent IngenuityFest or any other entity except the county on any matter before any public agency, such as a state department, municipality, or regional authority, R.C. 102.03(A)(1) would prohibit you from engaging in those activities.

Finally, if you were to be elected to county council, then R.C. 102.03(B) will prohibit you from disclosing or using, without appropriate authorization, any confidential information you acquired during that service. You will be prohibited from disclosing or using the information even if you do not personally benefit from the disclosure or use. There is no time limit for this prohibition, and it will apply to you during and after your service, as long as the information is confidential. Ad. Op. No. 89-006.

Conclusion

The Commission advises that, if you continue to serve as the Artistic Director for IngenuityFest after being elected to county council, you should exercise extreme caution to make sure you are complying with all of the requirements in the law discussed in this opinion. Failure to comply with these restrictions can result in consequences for the county as well as criminal

¹ There is an exception to this prohibition, but it would not apply to you as an elected official. See R.C. 102.04(D)

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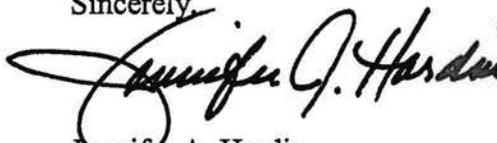
penalties for you. For example, if you were unable to show that you meet the exception in R.C. 2921.42(C) regarding the grant from CAC to IngenuityFest, the contract would be void and unenforceable. R.C. 2921.42(H). You should seek assistance from the Ethics Commission if you have any questions about your ability to comply with the law after elected to county council.

As explained above, within the facts you have presented, you would not occupy a position of profit, in grant funds provided by CAC to IngenuityFest. Therefore, R.C. 2921.42(A)(3) will not prohibit you from holding both positions. Other restrictions contained within R.C. 2921.42, however, will apply to these contracts.

If IngenuityFest continues to receive grant funds from CAC, R.C. 2921.42(A)(4) would prohibit you from serving as a member of county council and Artistic Director of IngenuityFest *unless* you can meet the exception in R.C. 2921.42(C). As discussed below, based on the service IngenuityFest provides to the county, you may be able to meet this exception. Please note that even if you meet the exception, and can serve in both positions, R.C. 2921.42(A)(1) and 102.03(D) would prohibit you from actively using your position by voting, discussing, deliberating, formally or informally lobbying, or otherwise participating, as a member of the council, on matters that affect IngenuityFest. R.C. 102.04(C) also prohibits you, as part of your compensated employment at IngenuityFest, from representing, advocating, or performing any other services for IngenuityFest on any matter that is before any agency of the county.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on August 10, 2010. 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

Enclosures: Advisory Opinion No. 96-004 and 2008-02