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INFORMATION SHEET: ADVISORY OPINION NO. 2016-01 RESTRICTIONS ON PUBLIC OFFICIALS EMPLOYED BY ENTITIES THAT RECEIVE PUBLIC FINANCIAL ASSISTANCE

What is the question in the opinion?

Can a council member of a city that provides financial support to a nonprofit corporation be employed as the corporation's director?

What is the answer in the opinion?

R.C. 2921.42(A)(3) prohibits a public official from also being employed by a nonprofit or for profit corporation, company, or other entity, where the establishment or operations of the entity is dependent upon receipt of the public agency's financial assistance or the public official would otherwise profit from the award of the contract.

Whether the establishment or operation of the entity is "dependent" on a public agency's financial assistance is determined by the totality of the situation's facts and circumstances including, but not limited to: (i) the amount and nature of the financial assistance that the for profit or nonprofit corporation, company, or other entity receives from the public agency; and (ii) the proportional effect that the financial assistance has upon its operation.

Absent a showing to the contrary, if an entity receives a cumulative value of twenty-five percent or more of its funding during either a calendar or fiscal year from the financial assistance that is provided to it by a public agency, there is a rebuttable presumption that it is "dependent" on the public agency's financial assistance.

To whom do these restrictions apply?

Although the facts of this opinion use the example of a city council member serving as a director of a non-profit corporation, the conclusions of the opinion apply to all public officials and employees employed by a for profit or nonprofit corporation, company, or other entity that receives public financial assistance from his or her public agency.

What prompted this opinion?

This opinion is a restatement of several previously issued informal advisory opinions. The purpose of the opinion is to provide context, further clarification, and guidance to other similarly situated public officials and employees.

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Advisory Opinion
Number 2016-01
June 10, 2016

Restrictions on Public Officials Employed by Entities that Receive Public Financial Assistance

Syllabus by the Commission:

(1) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a public official, during his or her term of office and for one year thereafter, from profiting from a contract that was awarded by the official or his or her legislative body while he or she is a member thereof, unless the contract was competitively bid and was awarded to the entity that submitted the lowest and best bid. In the absence of competitive bidding, there is no exception to R.C. 2921.42(A)(3).

(2) For purposes of Division (A)(3) of Section 2921.42 of the Revised Code, the term "public contract" includes a public agency's provision of financial assistance, including but not limited to, grants, loans, and tax abatements, to a for profit or nonprofit corporation, company, or other entity and from which, in return, the public agency acquires desired community services, regardless of whether the financial assistance is derived from state, federal, or other moneys.

(3) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a public official from also being employed by a for profit or nonprofit corporation, company or other entity, where: (i) the establishment or operations of the for profit or nonprofit corporation, company, or other entity are dependent upon receipt of the public agency's financial assistance; (ii) the creation or continuation of the official's position of employment is dependent upon the financial assistance; (iii) monies received from the financial assistance would be used to compensate the public official or as a basis for his or her compensation; or (iv) the public official would otherwise profit from the award of the contract.

(4) For purposes of Division (A)(3) of Section 2921.42 of the Revised Code, whether the establishment or operation of a for profit or nonprofit corporation, company, or other entity is "dependent" on a public agency's financial assistance is determined by the totality of the situation's facts and circumstances including, but not limited to: (i) the amount and nature of the financial assistance that the for profit or nonprofit corporation, company, or other entity receives from the public agency; and (ii) the proportional effect that the financial assistance has upon its operation.

(5) For purposes of Division (A)(3) of Section 2921.42 of the Revised Code, absent a showing to the contrary, if a for profit or nonprofit corporation, company, or other entity receives a cumulative value of twenty-five percent or more of its funding during either a calendar or fiscal year from the financial assistance that is provided to it by a public agency, there is a rebuttable presumption that it is "dependent" on the public agency's financial assistance.

(6) The prohibition imposed by Division (A)(3) of Section 2921.42 of the Revised Code **does not** apply to a public official who serves a nonprofit corporation in an uncompensated position regardless of the amount of financial assistance that the entity receives from the public agency that he or she serves.

* * *

Issue Presented

The Ethics Commission has been asked under what circumstances a public official is prohibited from being employed by a for profit or nonprofit corporation, company, or other entity that receives financial assistance from the official's public agency. Specifically, the Commission has been asked if a council member of a city that provides financial assistance to a nonprofit corporation can also be employed as the corporation's director. For purposes of providing this opinion, the Commission assumes the following facts:

- A city council member wants to seek compensated employment as the director of a 501(c)(3) nonprofit corporation.

- The council member learned of the vacant director's position and employment opportunity through public sources.[1]
- The nonprofit corporation receives financial assistance from the city in return for community services it provides to city residents.
- The city council passes an annual ordinance to approve the financial assistance.
- The nonprofit corporation also receives financial assistance from other individuals and local businesses.

Although the facts of this opinion use the example of a city council member, the conclusions of the opinion also apply to any "public official" serving the state or any of its political subdivisions. Likewise, although the example of a 501(c)(3) nonprofit corporation is used, the conclusions of the opinion also apply to any entity receiving public financial assistance including, but not limited to, for profit and nonprofit corporations, partnerships, organizations, and associations. Finally, although the example of a corporation's director is used, the conclusions of the opinion, as they pertain to the prohibitions imposed by R.C. 2921.42(A)(3), also apply to any compensated position of a for profit or nonprofit corporation, company, or other entity.

The Ethics Commission has previously addressed the issue of public officials being employed by entities that receive financial assistance from their public agencies. While this advisory opinion is a restatement of past precedent, its purpose is to provide context, guidance, and further clarification. This opinion first describes the reasons why the public contract prohibitions were enacted by the General Assembly and how the Ethics Commission, in fulfilling its statutory obligation to provide advice under the law, has interpreted these remedial provisions. It then compares and contrasts the three related public contract provisions: R.C.

2921.42(A)(1), R.C. 2921.42(A)(3), and R.C. 2921.42(A)(4). Finally, it provides guidance on how a public official or employee can simultaneously serve in his or her public capacity and also be employed by a for profit or nonprofit entity that also receives financial assistance from his or her public entity without violating the law.

Financial Assistance and the Public Contract Statute

All public officials[2] are subject to R.C. 2921.42, which restricts their conduct in matters that involve public contracts that are entered into by public agencies with which they are connected. The term "public contract" includes 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.[3]

The Ethics Commission has determined that the term "public contract" includes a public agency's provision of financial assistance, including but not limited to, grants, loans, and tax abatements, to a for profit or nonprofit corporation, company, or other entity from which, in return, the public agency acquires desired community services, regardless of whether the financial assistance is derived from state, federal, or other moneys.[4] Since 1981, the Commission has issued advisory opinions that apply R.C. 2921.42 to the connections that public officials have with corporations, both for profit and nonprofit. These opinions explain the issues that arise under the Ethics Laws whenever a public official serves as a board member or employee of either a for profit or nonprofit corporation that does business with, or receives funding from, his or her public agency.[5]

As explained below, because of the R.C. 2921.42 prohibitions, a city council member who is seeking, or holds, employment with a nonprofit corporation that receives financial assistance from his or her city is subject to restrictions that will limit his or her conduct and, under certain conditions, could prevent the official from simultaneously holding both a city office and employment with the corporation.

Legislative History of the Public Contract Statute

R.C. 2921.42 was enacted by Am. H.B. 511 of the 109th General Assembly and was effective on January 1, 1974.[6] The Committee Comment provides some insight into the intent of R.C. 2921.42, reading in part:

> This section consolidates and expands upon former prohibitions in the criminal code relating to public officials having an improper interest in certain contracts. It includes contracts for services by or for the use of public agencies or for the state and its subdivisions, and also includes a provision specifically prohibiting public officers from employing their position to broker or facilitate brokering the investment of public funds when they or their family members or associates will reap unconscionable benefits thereby.
>
> The purpose of this section is to insure that public agencies stand on at least an equal footing with others with respect to necessary business dealings. **Accordingly, the section does not prohibit public servants from all dealings in which they have some interest, no matter how remote or above-board. It prohibits only those dealings in which there is a risk that private considerations may detract from serving the public interests.** Thus, there is no violation of this section where a public servant's connection with a contracting party is as stockholder or creditor with a strictly limited stake which is fully revealed, provided there is no violation of the section when obtaining necessary supplies or services from a contractor in which a public servant has an interest, as part of a course of dealing established before the public servant assumed office, provided the transaction is at arm's length, and provided the agency's only alternatives to dealing with the contractor are to pay more or do without the supplies or service involved. (Emphasis added).

Commission's Advisory Authority

The Ethics Commission is empowered to administer, interpret, and enforce Chapter 102. and Sections 2921.42, 2921.421, and 2921.43, of the Ohio Revised Code.[7] In Advisory Opinion No. 96-001, the Commission explained the Ethics Law and its authority:

> The . . . Ohio Ethics Law and related statutes are general state criminal laws that establish a uniform standard of ethical conduct for all persons who serve as public officials and employees on the state and local levels. Advisory Ops. No. 83-004 and 89-014. These statutes create a series of inter-related prohibitions that have been expanded and enhanced to attempt to protect the general public against the potential exercise of conflicts of interest inherent in all of us who serve as public officials or employees.

The Franklin County Court of Appeals in *State v. Nipps*, 66 Ohio. App. 2d 17 (Franklin County 1979), upheld the constitutionality of the "Revolving Door" statute in addressing the defendant's vagueness argument. The Court held that:

> [I]n close situations, a former public official or employee is not required to guess whether his conduct may by prohibited, but, may request an advisory opinion from the Ohio Ethics Commission; and, reliance on such an opinion, in accordance with R.C. 102.08, is a defense to an action brought under the Ohio Ethics Act.[8]

The Ethics Commission has explained that, in the same manner as a court, its interpretation of a statute must give effect to the intent of the legislature by considering the object sought to be attained, the circumstances under which the statute was enacted, the legislative history, and the consequences of a particular construction.[9] In addition, the Commission has recognized that when a statute is designed as a remedy for a particular problem or mischief, the statutory language must be construed to advance the remedy and correct the problem.[10]

Therefore, when applying R.C. 2921.42 to a special set of circumstances, the Ethics Commission follows the public policy standards described in the Committee Comments while balancing the public duties of the official with any private considerations that may detract him or her from acting in the public interest. An advisory opinion written following these standards ensures the independence of judgment of public officials and that public funds are expended to benefit the public interest and do not benefit the private interests of those entrusted with the disbursement of tax dollars.

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

The first statute that needs to addressed in order to determine whether a city council member also can be **employed** by a nonprofit corporation that receives financial assistance from his or her city is R.C. 2921.42(A)(3), which reads:

> No public official shall knowingly do any of the following:
>
> . . .
>
> 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.

R.C. 2921.42(A)(3) prohibits a public official, during his or her term of office and for one year thereafter, from realizing any financial advantage, gain, or benefit that definitely and directly results from a public contract authorized by him or her or by a legislative body of which he or she is a member, **unless** the contract was competitively bid **and** was awarded to the entity that submitted the lowest and best bid.[11] Without competitive bidding, there is no exception to

R.C. 2921.42(A)(3).[12] Political subdivisions typically do not provide financial assistance to nonprofit corporations through competitive bidding.

Requirement to Act Knowingly

A violation of R.C. 2921.42(A)(3) requires that the public official act "knowingly." The term is defined in R.C. 2901.22(B), which reads:

> A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. **A person has knowledge of circumstances when the person is aware that such circumstances probably exist.** When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact. (Emphasis added).

In *State v. Pinkney*, 36 Ohio St. 3d 190 (1988), the Ohio Supreme Court upheld the conviction of a public official who violated R.C. 2921.42(A)(1), which prohibits a public official from knowingly authorizing a public contract in which he or she has an interest, by signing a check authorizing payment by his public agency to an insurance agency in which he had an ownership interest.

The Ohio Supreme Court held:

> [A]ppellant in his [public] capacity signed the check authorizing payment. The evidence is overwhelming that appellant **was aware** that the instrument that he was signing was payable to his [private insurance] agency and that he would benefit financially. (Emphasis added).

The Court acknowledged that Pinkney made no attempt at deception and any personal financial benefit was minimal but explained that these factors are to be considered in sentencing and do not relate to guilt or innocence. The Court also explained that knowledge by a public official

that a certain conduct is unlawful is not a necessary element for a conviction based on actions done "knowingly" because R.C. 2921.42 is not a "specific intent" crime.

Profit and Prosecution

The words "profit" and "prosecution" are not statutorily defined for purposes of R.C. 2921.42(A)(3). In Advisory Opinion No. 92-013, by applying the principal that undefined words and terms are construed according to the rules of grammar and common usage,[13] the Commission explained that "profit" means "to obtain financial gain or other benefit."[14]

Black's Law Dictionary (5th Ed. 1979), 1099 defines "prosecute" as "[t]o follow up; to carry on an action . . . [t]o prosecute an action is not merely to commence it, but includes following it to an ultimate conclusion." Accordingly, a public official knowingly occupies a position of profit in the prosecution of a public contract when he or she is aware that he or she will realize a pecuniary advantage, gain, or benefit, which is a definite and direct result of the commencement of a public contract and any actions taken by the parties involved with the contract to follow it to an ultimate conclusion.[15]

R.C. 2921.42(A)(3)—Comparison with R.C. 2921.42(A)(1) and (A)(4)

R.C. 2921.42(A)(1)

R.C. 2921.42(A)(1) reads:

> No public official shall knowingly do any of the following:
>
> Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public official's business associates has an interest.

The Commission has explained that employing the "authority or influence" of one's position to "secure authorization of" a contract includes a much broader range of activities than "authorizing

a contract," such as recommending, deliberating or discussing, and formally or informally lobbying any public official or employee about the contract.[16] A public official **can** satisfy the conditions of R.C. 2921.42(A)(1) by recusing himself or herself from deliberating, voting upon, or otherwise authorizing the award of a contract in which he or she, a family member, or a business associate has an interest.[17] Recusal also requires that the public official not informally use his or her relationships with other officials to sway their decisions.[18]

R.C. 2921.42(A)(4)

R.C. 2921.42(A)(4) reads:

> No public official shall knowingly do any of the following:
>
> . . .
>
> 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.

The Ethics Commission has explained that, unlike R.C. 2921.42(A)(4), R.C. 2921.42(A)(3) does not require a public official to "[h]ave an interest in the profits or benefits of a public contract." Rather, R.C. 2921.42(A)(3) prohibits a public official from "occupy[ing] any position of profit in the prosecution of a public contract" which the official or his or her legislative body authorized, and which was not let by competitive bidding and to the lowest and best bidder. The Commission compared the statutory language of R.C. 2921.42(A)(3) and R.C. 2921.42(A)(4) in Advisory Opinion No. 92-013, explaining:

> The Ethics Commission has adhered to the rule of statutory construction that if a statute uses two different terms, then each term is presumed to have a different meaning. *See* Advisory Opinion No. 76-008. The General Assembly's use of the words "occupy any position of profit in the prosecution of a public contract" in R.C. 2921.42 (A)(3) specifically distinguishes a different type of situation than having "an interest in the profits or benefits of a public contract."

> *See Dougherty v. Torrence*, 2 Ohio St. 3d 69, 70 (1982) (effect must be given to words used in a statute); *Dungan v. Kline*, 81 Ohio St. 371, 380-81 (1910) (the presumption is that every word in a statute is designed to have effect); Advisory Opinion No. 74-001 ("it is to be assumed that the Legislature used the language contained in a statute advisedly and intelligently and expressed its intent by the use of the words found in the statute").
>
> . . .
>
> [A]n "interest" which is prohibited by Division (A)(4) must be definite and direct and may be either pecuniary or fiduciary in nature. However, the term "profit" connotes only a pecuniary or financial gain or benefit. An "interest" under Division (A)(4) thus identifies a broader prohibition than occupying a "position of profit in the prosecution of a public contract." For example, a public official may be deemed to have an "interest" in a public contract, but not "profit" from the public contract, if his interest is only fiduciary, such as serving as an uncompensated officer or trustee of a nonprofit corporation. (Emphasis in original).[19]
>
> [I]f a public official's interest in the profits and benefits of a public contract must be "definite and direct" for purposes of Division (A)(4), then the position of profit which the public official occupies in the prosecution of the public contract must also be definite and direct for purposes of Division (A)(3). *See* R.C. 2901.04(A) (Revised Code sections which define offenses or penalties shall be strictly construed against the state and liberally construed in favor of the accused). An "indirect" rather than a definite and direct standard for either Division (A)(4) or (A)(3) would effectively render it difficult for the State or political subdivisions to enter into public contracts or would bar substantial numbers of individuals from public office or employment. *See generally* Advisory Opinion No. 78-006.

A public official who has an "interest" in a public contract, **cannot** satisfy the conditions of R.C. 2921.42(A)(4) by recusing himself or herself from deliberating, voting upon, or otherwise authorizing the award of a contract.[20]

Application of R.C. 2921.42(A)(3)

As set forth above, R.C. 2921.42(A)(3) prohibits a public official, during his or her term of office and for one year thereafter, from occupying "a position of profit" in a contract that was awarded by the official or his or her legislative body while he or she is a member thereof, unless

the contract was competitively bid and was awarded to the entity that submitted the lowest and best bid. In the absence of competitive bidding, there is no exception to R.C. 2921.42(A)(3). R.C. 2921.42(A)(3) is similar to R.C. 2921.42(A)(4) in that a public official who occupies "a position of profit" in the prosecution of a public contract, **cannot** satisfy the conditions of R.C. 2921.42(A)(3) by recusing himself or herself from deliberating, voting upon, or otherwise authorizing the award of a contract to his or her private sector employer.[21] A public official who is a member of a legislative body is subject to the prohibition of Division (A)(3), even where he or she has abstained from deliberating, voting upon, or otherwise authorizing the public contract.[22]

In 1987, the Ethics Commission issued Advisory Opinion No. 87-004 that, for the first time, applied the prohibition imposed by R.C. 2921.42(A)(3). The Commission explained that, under certain circumstances, R.C. 2921.42(A)(3) can prohibit a public official, during his or her term of office and for one year after leaving office, from accepting employment with a corporation that is "dependent" upon the financial assistance that it had received from the public official's public agency.[23] In Advisory Opinion No. 88-008, the Commission determined that R.C. 2921.42(A)(3) prohibits a public official from being employed as the director or in another fiduciary position of a for profit corporation that has entered into a public contract authorized by the official or his or her legislative body, when the contract was not competitively bid, or if competitively bid, was not the lowest and best bid, **and** when:

(1) the corporation's establishment or operation is dependent upon receipt of the contract;

(2) the creation or continuation of his or her employment with the corporation is dependent upon the award of the contract;

(3) the official's compensation is dependent upon the award of the contract because the corporation uses the contract's proceeds to compensate him or her or as a basis for his or her compensation; or

(4) the official would otherwise profit from the contract.[24]

The Ethics Commission has since examined numerous situations involving public officials who are employed by nonprofit corporations and has applied the four-prong analysis set forth above. For example, in 2010, the Commission, at its meetings, approved several informal opinions to candidates for Cuyahoga County Council who were affiliated in various ways with nonprofit corporations.[25] A collective review of those opinions shows that, with respect to the first parameter of the four-prong analysis, the Commission determined that whether the establishment or operation of a nonprofit corporation is "dependent" on a particular contract or funding source is fact-specific and based on various considerations. The Commission explained that one relevant factor is the amount of funding the nonprofit receives from any particular source. Specifically, the Commission determined that if any one source provides twenty-five or more percent of the nonprofit's funding, absent a showing to the contrary, the establishment or operation of the nonprofit is "dependent" on that source of funding.

In establishing the twenty-five or more percent threshold as a relevant factor, the Commission examined the effects of a strict application of the term "position of profit" where, under such analysis, **any** profit, without considering the nature of the official's connection to the corporation as demonstrated by the percentage of the financial aid that his or her political subdivision provides to the corporation, would be prohibited under the statute. The Commission recognized that good public policy should establish standards to protect the public interest while also considering the totality of the situation's facts and circumstances.

After reviewing the twenty-five percent or more threshold and the effects of applying a strict application to the term "position of profit," the Commission determined that a strict application could be detrimental to the public interest by preventing a nonprofit corporation from providing necessary services to the public, even when the official has, because of the prohibitions imposed by R.C. 2921.42(A)(1) and R.C. 102.03(D), not discussed, recommended, or voted on providing the financial aid to the nonprofit.

For example, Attorney General Opinion No. 73-043 addressed R.C. 2919.10, which is a predecessor statute of R.C. 2921.42(A)(3). In that opinion, the Attorney General opined that an employee of a nonprofit corporation that had a contract with the City of Marietta for its hospital and medical insurance was prohibited from becoming a member of that city's council. Attorney General Opinion No. 73-043 reads, in part:

> [W]e are dealing with an individual who is merely an agent of a nonprofit corporation doing business with the city. He has no control over said corporation and ostensibly no financial interest in contracts between the city and his employer. As stipulated in the request for this Opinion, he receives a fixed salary with no commission allowances for additional sales made in the course of his employment.
>
> It cannot be said, however, that he has no interest in the contracts between his employer and the municipality with which he seeks public office. As a member of the municipal council, he will be in a position to approve or disapprove insurance matters involving his employer-insurance company and the municipality, and he will have an interest in perpetuating the contractual relationship between the city and his employer. That interest results from the fact that his salary from the insurance company may be influenced at least indirectly, on the company's continued dealing with the municipality.

Establishing a cumulative amount of twenty-five percent or more as the point where there is a rebuttable presumption that an entity is "dependent" on the public agency's financial assistance, balances the public duties of the official with any private considerations that may

detract him or her from serving the public interest. This standard recognizes the Committee Comments to R.C. 2921.42, which state that "the section does not prohibit public servants from all dealings in which they have some interest, no matter how remote or above-board. It prohibits only those dealings in which there is a risk that private considerations may detract from serving the public interests."[26]

However, other factors may determine that a corporation is "dependent" on a public source of financial assistance **even if** it provides less than twenty-five percent of the corporation's funding. For example:

- A corporation receives less than twenty-five percent of its funding from the city in the present calendar or fiscal year because other sources have provided it with one-time funding. However, in previous years the corporation has received more than twenty-five percent of its funding from the city.

- A corporation receives less than twenty-five percent of its funding from the city but operates on a small budget and has few funding sources. Accordingly, it is disproportionally affected by the city's financial assistance than a corporation with a large budget and many funding sources.

- A corporation receives less than twenty-five percent of its funding from the city but depends on a regularly provided specific annual amount of funding from the city for its continued operation. Accordingly, it is disproportionally affected by the city's funding than a corporation that receives one-time funding from the city for a particular purpose.

Other factors may also suggest that an organization is "dependent" on a public agency for its funding. A public official who seeks employment with a corporation that receives financial assistance from his or her public agency should make an inquiry to learn all the pertinent facts[27] and may request guidance and advice from the Ethics Commission prior to accepting employment with the corporation.[28]

Thus, the Commission determines that, for purposes of R.C. 2921.42(A)(3), whether the establishment or operation of a for profit or nonprofit corporation, company, or other entity is "dependent" on a public agency's financial assistance is determined by the totality of the situation's facts and circumstances including, but not limited to: (1) the amount and nature of the financial assistance; and (2) the proportional effect the financial assistance has on its operation. Absent a showing to the contrary, if a company or organization receives a cumulative value of twenty-five percent or more of its funding during either a calendar or fiscal year from a public agency, there is a rebuttable presumption that the company or organization is "dependent" on the public agency's financial assistance.

If a public official cannot satisfy the requirements of R.C. 2921.42(A)(3), then no other Ethics Law provision would need to be addressed, because he or she could not simultaneously be employed by the corporation and serve on city council. However, when the requirements of R.C. 2921.42(A)(3) are met, then other Ethics Law restrictions will also apply and, if exceptions are not met, could prohibit such employment. The prohibitions of R.C. 2921.42(A)(3) do not apply to a public official who serves an entity in an uncompensated position regardless of the amount of financial assistance that the entity receives from the city that he or she serves.[29]

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

A city council member who can show that he or she will not occupy a position of profit in the contract between the city and the corporation as a result of his or her employment with the corporation is also subject to R.C. 2921.42(A)(4), which, as explained above, prohibits a public official from having any definite and direct, financial or fiduciary[30] interest in the contracts of his or her political subdivision.[31] The prohibitions of R.C. 2921.42(A)(4) apply to a public official

who serves a nonprofit corporation as a compensated employee **or** as an uncompensated board member.

A person who is employed as a corporation's director and is compensated for his or her service, has both a fiduciary and financial interest in the corporation's contracts.[32] R.C. 2921.42(A)(4) would prohibit the council member from being employed as the corporation's director unless he or she can show that he or she meets an exception provided by R.C. 2921.42(C).[33]

Exception—R.C. 2921.42(C)

In order to meet the R.C. 2921.42(C) exception, the city council member must show that he or she satisfies four requirements. The application of each of the four requirements depends on all of the facts and circumstances.[34] The burden is on the city council member to show that he or she meets all four prongs of the exception.[35]

Requirement 1: The services that the corporation provides to the city are necessary.[36]

This requirement would be met by a showing that the appropriate city officials have determined that the corporation's community services are necessary to fulfill a need for its residents.

Requirement 2: The services that the corporation provides are under a "continuing course of dealing" or are "unobtainable elsewhere for the same or lower cost."[37]

A "continuing course of dealing" is a contract that existed *prior to* the time that the public official assumed his or her public position.[38] The "continuing course of dealing" could not apply to this situation because the council member is seeking compensated employment with a nonprofit corporation that already receives financial assistance from the city.

Therefore, he or she must be able to show that the services that the corporation provides to the city are "unobtainable elsewhere for the same or lower cost."[39] This requirement would be met by a showing that there are a limited number of organizations available in the area that provide the services and that the corporation is uniquely suited to provide the services.[40]

Requirement 3: The treatment the corporation will accord to the city must be either "preferential to or the same as that accorded other customers or clients in similar transactions."[41]

Requirement 4: The entire transaction must be conducted at arm's length, the city must have full knowledge of the council member's interest in the corporation's contracts, and he or she can take no part in voting or otherwise influencing decisions regarding the city's financial assistance to the corporation.[42]

While the exception to R.C. 2921.42(A)(4) may allow a public official to be employed as an officer of a corporation that receives financial assistance from his or her political subdivision, other Ethics Laws will limit his or her participation in matters affecting the corporation.

Prohibition Against Participation—R.C. 2921.42(A)(1) and R.C. 102.03(D)

The Ethics Commission has explained that R.C. 2921.42(A)(1) and R.C. 102.03(D) prohibit a public official from participating in matters that would affect the interests of a for profit or nonprofit corporation, company, or other entity with which he or she holds employment.[43] As explained above, R.C. 2921.42(A)(1) prohibits a public official from authorizing or using the authority or influence of his or her public position to secure authorization of a public contract in which he or she has either a financial or fiduciary interest.[44]

The general conflict of interest prohibition statute, R.C. 102.03(D), reads:

> 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.

R.C. 102.03(D) prohibits a public official from participating in matters that will benefit an entity with whom he or she has a financial or fiduciary relationship because the relationship may impair his or her objectivity and independence of judgment.[45] A for profit or nonprofit corporation, company, or other entity that receives financial assistance from a city has a definite and direct financial interest in a favorable decision from the city.[46]

Therefore, R.C. 2921.42(A)(1) and R.C. 102.03(D) prohibit a city council member who serves a for profit or nonprofit corporation, company, or other entity in either an uncompensated position or as an employee from participating, formally or informally, in considering, recommending, or voting to authorize an ordinance to provide financial assistance to the entity.[47] This would include seeking additional financial assistance for the entity or altering the terms and conditions of an ordinance that has already been authorized.[48]

Other Requirements

R.C. 102.03(A)(1) prohibits the council member, during his or her term of office and for one year thereafter, from representing the corporation or any other party, regardless of whether he or she receives compensation for his or her services, before the city or any other public agency within the state on any matter in which he or she personally participated as a council member.[49]

Also, R.C. 102.04(C) prohibits the council member from receiving compensation from the corporation for personally rendering services on its behalf in any matter pending before

council and any other city agency. There is an exception to this prohibition in R.C. 102.04(D), but it does not apply to a person holding an elected office.[50]

Finally, R.C. 102.03(B) prohibits the council member from disclosing to the corporation's personnel or using, without appropriate authorization, any confidential information he or she acquires from serving on council.[51] He or she is prohibited from disclosing or using confidential information to benefit the corporation even if he or she does not personally benefit from the disclosure or use. There is no time limit for this prohibition, and it will apply to the council member during and after his or her service, as long as the information is confidential.

Conclusion

Limited to questions arising under Chapter 102 and Sections 2921.42 and 2921.43 of the Revised Code, it is the opinion of the Ohio Ethics Commission, and the Commission advises, that: (1) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a public official, during his or her term of office and for one year thereafter, from profiting from a contract that was awarded by the official or his or her legislative body while he or she is a member thereof, unless the contract was competitively bid and was awarded to the entity that submitted the lowest and best bid. In the absence of competitive bidding, there is no exception to R.C. 2921.42(A)(3); (2) For purposes of Division (A)(3) of Section 2921.42 of the Revised Code, the term "public contract" includes a public agency's provision of financial assistance, including but not limited to, grants, loans, and tax abatements, to a for profit or nonprofit corporation, company, or other entity and from which, in return, the public agency acquires desired community services, regardless of whether the financial assistance is derived from state, federal, or other moneys; (3) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a public official from also

being employed by a for profit or nonprofit corporation, company or other entity, where: (ii) the establishment or operations of the for profit or nonprofit corporation, company, or other entity are dependent upon receipt of the public agency's financial assistance; (ii) the creation or continuation of the official's position of employment is dependent upon the financial assistance; (iii) monies received from the financial assistance would be used to compensate the public official or as a basis for his or her compensation; or (iv) the public official would otherwise profit from the award of the contract; (4) For purposes of Division (A)(3) of Section 2921.42 of the Revised Code, whether the establishment or operation of a for profit or nonprofit corporation, company, or other entity are "dependent" on a public agency's financial assistance is determined by the totality of the situation's facts and circumstances including, but not limited to: (1) the amount and nature of the financial assistance that the for profit or nonprofit corporation, company, or other entity receives from the public agency; and (2) the proportional effect that the financial assistance has upon its operation; (5) For purposes of Division (A)(3) of Section 2921.42 of the Revised Code, absent a showing to the contrary, if a for profit or nonprofit corporation, company, or other entity receives a cumulative value of twenty-five percent or more of its funding during either a calendar or fiscal year from the financial assistance that is provided to it by a public agency, there is a rebuttable presumption that it is "dependent" on the public agency's financial assistance; and (6) The prohibition imposed by Division (A)(3) of Section 2921.42 of the Revised Code **does not** apply to a public official who serves a nonprofit corporation in an uncompensated position regardless of the amount of financial assistance that the entity receives from the public agency that he or she serves.

Merom Brachman

Merom Brachman, Chairman
Ohio Ethics Commission

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's Web site: www.ethics.ohio.gov.

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[1] Additional issues would be raised if a nonprofit corporation that receives financial assistance from a public agency approaches a public official currently serving in an office of that agency with an offer of future employment. *See* R.C. 102.03(E) and (F); R.C. 1.03 (a promise of future employment is a thing of value).
[2] *See* R.C. 2921.01(A) ("public official" means any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and includes, but is not limited to, legislators, judges, and law enforcement officers).
[3] R.C. 2921.42(I)(1).
[4] Ohio Ethics Commission Advisory Opinions No. 2009-06, 2001-02, 92-014, 87-004, and 82-004; *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).
[5] *See* Adv. Ops. No. 88-008, 87-004, 87-003, 81-008, and 81-003.
[6] R.C. 2921.42 incorporates elements of earlier public contract restrictions from three predecessor statutes: R.C. 2919.08, 2919.09, and 2919.10. The current Ethics Law was enacted by the General Assembly in Am. Sub. H.B. 55 and became effective on January 1, 1974. The Ethics Commission was given the authority to issue advisory opinions interpreting R.C. 2921.42 by Am. H.B. 1040 of the 111th General Assembly, which became effective on August 27, 1976, but enforcement was left to local prosecutors. The Ethics Commission was given the authority to investigate possible violations of R.C. 2921.42 by Am. Sub. H.B. 300 of the 116th General Assembly, which became effective on September 17, 1986.
[7] *See* R.C. 102.02, 102.06, and 102.08.
[8] *Nipps*, at 22.
[9] *See* Adv. Op. No. 89-001. *See also* R.C. 1.49.
[10] *See* Adv. Op. No. 94-003; *See also The Iroquois Co. v. Meyer*, 80 Ohio St. 676 (1909).
[11] *See* Adv. Op. No. 88-008 (the prohibition of R.C. 2921.42(A)(3) does not apply to any public contract approved or authorized by a legislative body **prior** to the official's election or appointment).
[12] *See* Adv. Ops. No. 92-017 and 92-013. *See also* 2008 Ohio Atty.Gen.Op. No. 2008-023 (a public body may not dispense with competitive bidding for a particular transaction when the competitive bidding requirement is statutorily mandated).
[13] *See* R.C. 1.42 (a primary rule of statutory construction is that words used in a statute that are not defined must be construed according to rules of grammar and common usage).
[14] The word "profit" is defined as "to obtain financial gain or other benefit" *The New Lexicon Webster's Dictionary of the English Language* 798 (1988 Edition).
[15] Adv. Ops. No. 92-013 and 92-017.
[16] Adv. Op. No. 2010-03.
[17] *See* Adv. Op. No. 80-001 (a city council can accept a contract in which a council member's brother has an interest provided that the council member withdraws from all discussion and refrains from voting or otherwise using his authority or influence to secure the approval of the contract).
[18] *See* Adv. Op. No 92-102 (a council member is prohibited from informally using the prestige of his or her office to secure, renew, modify, or renegotiate a family member's individual contract of public employment with the city).

[19] *See* Adv. Ops. No. 88-003, 88-006, 89-006, 89-008, 90-003, 90-005, 91-011, and 92-002 (these advisory opinions applied Divisions (A)(3) and (A)(4) to specific facts and circumstances in which an public official was determined to have a financial "interest" in the profits or benefits of a public contract for purposes of Division (A)(4) **and** to "profit" from the public contract for purposes of Division (A)(3)).
[20] Adv. Op. No. 89-008.
[21] Adv. Ops. No. 87-008 and 92-013.
[22] *Id*.
[23] *See also* Adv. Ops. No. 92-002, 89-008, 89-006, and 88-008.
[24] Adv. Ops. No. 89-008, 88-008, and 87-004.
[25] *See* Informal Advisory Opinions to Chip Joseph August 12, 2010; David G. Lambert August 12, 2010; James Levin August 12, 2010; Donald J. McTigue August 12, 2010; Michael J. Piepsny June 29, 1010; Christopher S. Ronayne August 12, 2010.
[26] Committee Comments Am. H.B. 511, 109th Gen. A. (eff. January 1, 1974).
[27] *See* R.C. 2901.22(B); *Pinkney* at 197.
[28] *See Nipps* at 22.
[29] *See* Adv. Op. No. 92-017 (the word "profit" in R.C. 2921.42 (A)(3) connotes **only** a financial benefit, but an "interest" in a public contract for purposes of R.C. 2921.42 (A)(1) and (A)(4) may be **either** financial or fiduciary).
[30] The term "fiduciary" is defined in *Black's Law Dictionary* as "[a] person having a duty, created by his or her undertaking, to act primarily for another's benefit in matters connected with such undertaking." *Black's Law Dictionary* 563 (1979); *See* Adv. Ops. No. 96-005 and 92-004 (a trustee, board member, or officer of an organization is a "fiduciary" of the organization).
[31] Adv. Ops. No. 92-017, 81-003, and 78-005.
[32] Adv. Ops. No. 81-008 and 81-003.
[33] Adv. Op. No. 87-003. *See also* R.C. 2921.42(B) and (D) (exceptions to the prohibition of R.C. 2921.42(A)(4) apply to limited stockholdings and residential property loans) and Adv. Op. No. 84-001 (a public official can serve on the board of a nonprofit corporation with which his or her public agency has a contract in his or her "official capacity" as the agency's appointed representative). These exceptions are not applicable to the facts in this opinion.
[34] Adv. Ops. No. 82-007 and 80-003.
[35] Adv. Op. No. 84-011.
[36] R.C. 2921.42(C)(1).
[37] R.C. 2921.42(C)(2).
[38] Adv. Ops. No. 84-006 and 82-007.
[39] Adv. Op. No. 92-008.
[40] *See* Adv. Op. No. 84-006 (the services that the public agency seeks to acquire should be readily at hand and presumably costs increase as the distance increases).
[41] R.C. 2921.42(C)(3). *See* Adv. Op. No. 84-011.
[42] R.C. 2921.42(C)(4). In an arm's length transaction: (1) both parties act voluntarily, without compulsion or duress; (2) the transaction occurs in an open market; and (3) both parties act in their own self-interest. *Walters v. Knox Cty. Bd. of Rev.* (1989), 47 Ohio St.3d 23, 25. An "open market" is a market in which any buyer or seller can trade, and the prices and product availability are determined by free competition. *Mildred Hine Trust v. Buster*, Franklin App. No. 07AP-277, 2007-Ohio-6999, ¶ 21.
[43] Adv. Op. No. 89-008.
[44] Adv. Op. No. 92-004.
[45] *See* Adv. Op. No. 90-012 (R.C. 102.03(D) prohibits a public official who serves as an officer or board member of a professional organization from participating in any matter on which the organization has taken a position or which would directly benefit the organization's interests). *But see*, R.C. 102.03(J) (providing an exception to the R.C. 102.03(D) prohibitions for a "mere member" of a non-profit corporation who has not assumed a particular responsibility in the corporation with respect to the matter that is before his or her public agency).
[46] Adv. Ops. No. 90-013, 89-006, and 87-006. *See also* Adv. Ops. No. 2011-04 and 76-005 (it is unnecessary that the thing of value actually has a substantial and improper influence on the official provided that it is of such a character that it **could** have such influences).

[47] Adv. Ops. No. 90-012 and 89-005. *But see* Adv. Ops. No. Adv. Ops. No. 2001-05, 84-010, 84-001, and 83-010 (a public official who serves in his or her "official capacity" on a nonprofit corporation's board to represent the interests of his or her public agency **is not** prohibited from participating in matters before his or her public agency that affect the corporation). *See also* 1991 Ohio Atty.Gen.Op. No. 91-007 (stating that the Ethics Commission's "official capacity" exception is "eminently reasonable and a valid statement of general ethical principles governing participation by public servants in the affairs of nonprofit corporations."

[48] *See* Adv. Op. No. 2009-06.

[49] Adv. Op. No. 86-001.

[50] Adv. Ops. No. 2007-03 and 96-002.

[51] Adv. Op. No. 88-009.