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INFORMATION SHEET: ADVISORY OPINION NO. 2009-05
STOCKHOLDER OCCUPYING A POSITION OF PROFIT

What is the question addressed in the opinion?

Does a public official who owns stock in a publicly traded corporation “occupy a position of profit” in the prosecution of corporation’s contracts with the public agency he or she serves in violation of R.C. 2921.42(A)(3)?

What is the answer in the opinion?

The official does not occupy a position of profit in the prosecution of a corporation’s contract if the official’s relationship to the corporation is limited to owning less than **one percent** of the corporation’s outstanding stock and the corporation does not exist solely or largely to service the agency he or she serves. An official would occupy a position of profit in a corporation’s contract if: (1) the official owns more than one percent of the corporation’s stock; (2) the official has some financial or fiduciary relationship to the corporation, such as board member or employee; or (3) the corporation is a closely held corporation with a limited number of stockholders.

To whom does this opinion apply?

The conclusions in this draft apply to all individuals who are elected or appointed to, or employed by, any public agency, including but not limited to any state agency, county, city, township, school district, public library, and regional authority, regardless of whether the person is: (1) compensated or uncompensated; (2) serving full time or part time; or (3) serving in a temporary or permanent position.

When did the conclusions in this opinion become effective?

The opinion became effective when rendered by the Commission at its meeting on September 23, 2009.

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ADVISORY OPINION NO. 2009-05 IS ATTACHED.**

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Advisory Opinion
Number 2009-05
September 23, 2009

Syllabus by the Commission:

- (1) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a public official from occupying a position of profit in the prosecution of a public contract that he or she authorized or that was authorized by a public board on which he or she serves unless the contract was competitively bid and awarded to the lowest and best bidder;
- (2) A public official who owns less than one percent of the outstanding stock of a publicly traded corporation and has no other connection to the corporation does not occupy a position of profit in the prosecution of the corporation's contracts with the public agency he or she serves unless the corporation exists solely or largely to serve the agency and a majority of its contracts are with the agency, as described herein (Advisory Opinion No. 93-001, syllabus paragraph 4 and related analysis on pages 9 through 11, concluding that a stockholder occupies a position of profit in the corporation's contracts regardless of the size of the stockholding, **overruled**).

* * *

In this opinion, the Commission is reviewing its conclusion in Advisory Opinion No. 93-001 regarding whether a public official or employee who owns less than one percent of the outstanding stock in a publicly traded corporation occupies a position of profit in the corporation's contracts. A publicly traded corporation is one that offers its registered securities for sale to the general public, usually through a stock exchange.

A public official can own stock directly, or through an investment account managed by an investment advisor. Even where the investments in this account are selected and managed by an investment advisor, the official or employee ultimately controls the investment account. The official or employee can, if he or she chooses, direct investment activity within the account, and

can close the account. Therefore, the restrictions discussed in this advisory opinion apply whether the official owns stock directly or through an investment account.

Occupying a Position of Profit—R.C. 2921.42(A)(3)

R.C. 2921.42(A)(3) is the provision relevant to the question before the Commission. R.C. 2921.42(A)(3) provides 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 official**" is "any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity." R.C. 292.01(A) Therefore, a "public official or employee" subject to R.C. 102.03(D) and (E) includes any person who is elected or appointed to, or employed by, any public agency, including but not limited to any state agency, county, city, township, school district, public library, and regional authority. The restrictions apply regardless of whether the official or employee is serving in a position that is: (1) compensated or uncompensated; (2) full-time or part-time; or (3) temporary or permanent.

A "**public contract**" includes any "purchase or acquisition," or contract for the purchase or acquisition, of goods or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either. R.C. 2921.42(I)(1)(a). A purchase is a public contract regardless of whether it is competitively bid, formalized, or preserved in writing. Ohio Ethics Commission Advisory Opinion No. 87-002. Examples of public contracts include purchases of: (1) goods like computers, fire trucks, and paper products; and (2) services like insurance, consulting, and accounting. Adv. Ops. No. 82-007, 84-013, 84-014, 87-002, 92-017, and 97-004. A public contract can also include a grant or loan from a public agency to a corporation if a public agency receives services in return for the grant or loan. Adv. Op. No. 87-003.¹

If a public official or employee participates, in any way, in the **authorization** of any public contract of the agency, including voting, signature, recommendation, review, advice, or supervision of agency staff related to the contract authorization, he or she is prohibited from occupying a "position of profit" in the prosecution of the contract. Adv. Op. No. 92-013. This restriction also applies if the official or employee served on a board or body at the time it authorized the contract, even if the official or employee did not participate in the board's action. An official or employee is prohibited from occupying a position of profit in these contracts while during his or her public service and for one year after leaving public service.

¹ Although not relevant to this question, a public contract also includes employment by a public agency.

The Commission has explained that a public official occupies a “**position of profit**” in the prosecution of a public contract when he or she receives some financial gain or benefit that is definitely and directly related to the carrying out and completion of a contract that he or she authorized or that was authorized by a board of which he or she is a member. Adv. Ops. No. 92-013 and 93-001. In Advisory Opinion No. 93-001, the Ethics Commission concluded:

[A] person with an ownership interest in a business occupies a position of profit in the contracts of the business for purposes of R.C. 2921.42 (A)(3). [Citations omitted.] A stockholder of a corporation has an ownership interest, albeit generally a non-participatory one, in the corporation. . . . [A] stockholder has the right to participate in the corporation’s dividends and in any distribution of net assets upon a reduction of capital or upon dissolution or liquidation. The profitability of a corporation’s business transactions will definitely and directly affect a stockholder’s return on his invested capital received through dividends, distribution of net assets, and from the appreciation in the value of the stock. Thus, it is apparent that a stockholder occupies a position of profit in the corporation’s contracts. [Citation omitted.] Furthermore, it must be noted that . . . Division (A)(3) provides no amount of profit under which its prohibition will not apply. [Citation omitted.] Thus, a stockholder who owns only a fractional or de minimis amount of stock will be deemed to profit from the corporation’s contracts.

While it may be true that a stockholder of a publicly traded corporation benefits from any contracts of the corporation, through dividends and increases in the value of the stock, a prohibited position of profit in the prosecution of a specific contract depends upon the nature of person’s interest in the company. Where a public official owns less than one percent of the stock in a publicly traded corporation, and has no other financial or fiduciary connection to the corporation, his or her profit from the investment cannot be definitely and directly linked to the performance of any of the individual contracts of the corporation.

Therefore, in most situations, where a public official owns less than one percent of the outstanding stock of a publicly traded corporation and has no other connection to the corporation, he or she is not considered to occupy a position of profit in the prosecution of the agency’s contracts with the corporation. A public official would be considered to occupy a position of profit in a contract between his or her agency and a corporation in which he or she is a shareholder, *regardless of how many shares the official owns*, if the corporation exists solely or largely to serve the interests of the public agency with which the official or employee is connected and a majority of its contracts are with the agency. For example, if a company’s only client is a public agency, an official of the agency who is a stockholder of the company would occupy a position of profit in the prosecution of the company’s contracts regardless of the number of shares he or she owns.

A public official who owns stock in a corporation doing business with his or her public agency would also be considered to occupy a position of profit in the prosecution of the corporation's contracts with the agency, regardless of whether the official authorizes the contract, if: (1) the official owns more than one percent of the outstanding stock in the corporation; or (2) the official has some financial or fiduciary relationship to the corporation (such as board member, trustee, employee, contractor, or officer) in addition to holding stock. The official or employee would also be considered to occupy a position of profit in the prosecution of a public contract between the public agency he or she serves and a *closely held* corporation with a limited number of stockholders, regardless of the number of shares or percentage of ownership interest the official or employee has in the corporation.²

In this opinion, the Commission overrules the holding in Advisory Opinion No. 93-001 (syllabus paragraph 4 and related analysis on pages 9 through 11) that a stockholder in a publicly traded corporation occupies a position of profit in the corporation's contracts with his or her public agency regardless of the number of shares the official owns or controls. However, the Commission expressly affirms the other holdings in Advisory Opinion No. 93-001.

Public Contract Law and Stockholdings—R.C. 2921.42(A)

In Advisory Opinion No. 93-001, the Commission concluded that a public official who is a stockholder in a corporation has a prohibited interest in any contracts between the corporation and the public agency he or she serves. R.C. 2921.42(A)(4); Adv. Op. No. 93-001. R.C. 2921.42(A)(1) prohibits a public official from authorizing any contracts in which the official or his business associate has an interest. A corporation may be the business associate of its stockholders. *Id.*

However, R.C. 2921.42(B) contains an exception to both of these restrictions for a public official who owns a small amount of stock in a corporation that is doing business with his or her public agency. R.C. 2921.42(B) provides that, in the absence of bribery or a purpose to defraud, a public official who is a stockholder in a corporation is not considered to "have an interest" in any public contract with his or her public agency if:

- (1) The official has no connection to the corporation other than stockholding;
- (2) The shares owned or controlled by the official do not exceed five per cent of the outstanding shares of the corporation; and
- (3) The official files, with the public agency, an affidavit giving his or her exact status in connection with the corporation.

² A closely held corporation is one with few stockholders whose corporate shares are not traded on a securities market. *Crosby v. Beam* (1989), 47 Ohio St.3d 105, 107.

Provided that the official or employee can show that his or her interest in a corporation is limited to holding stock, and he or she owns five percent or less of the outstanding shares of the corporation, the official or employee can meet the exception in R.C. 2921.42(B) by filing the affidavit described. The affidavit should disclose the official's or employee's "exact status" as a stockholder of the corporation and should be filed with the chief executive officer or legal counsel for the public agency. Adv. Op. No. 93-001. The official or employee is not required to file the affidavit with the Ethics Commission.

If the official or employee meets the exception in R.C. 2921.42(B) and files the required affidavit, he or she would not have an interest in a contract between his or her public agency and the corporation. Adv. Op. No. 93-001. Further, if the official or employee meets the exception and files the affidavit, R.C. 2921.42(A)(1) does not apply to him or her, and he or she is not prohibited from authorizing or participating in the authorization of any contracts between the public agency and a corporation of which he or she is a stockholder who owns less than five percent of the outstanding stock. Adv. Op. No. 93-001.

Where a public official's relationship to a corporation is limited solely to owning stock in the corporation, it cannot be said that the official and the corporation act together to pursue a common business purpose. Therefore, if a public official owns five percent or less of the outstanding stock in a publicly traded corporation, the corporation is not the official's business associate *unless*: (1) he or she serves the corporation as a director, officer, agent or representative, employee, or partner; (2) he or she otherwise participates in the corporation's management or operation; or (3) other unusual facts suggest a business association. *Id.*

Financial Disclosure

The Ethics Law requires certain public officials and employees, including state, city, and county elected officials and candidates, and high-ranking state employees, to complete annual financial disclosure statements. R.C. 102.02. Among other requirements, filers must disclose sources of income received in the preceding calendar year and investments held in the preceding calendar year that are valued at over one thousand dollars. R.C. 102.02(A)(2)(a) and 102.022(A) (income) and R.C. 102.02(A)(3) (investments).

Depending on the public position the individual holds, the threshold for disclosure of sources of income varies. Most public officials and employees are required to disclose all sources of income, regardless of the amount of income received from the source. R.C. 102.02(A)(2)(a). However, trustees of state colleges and universities, and officials of local political subdivisions who receive less than sixteen thousand dollars per year for their public service, are required to disclose sources of income from which they have received more than five hundred dollars during the year.

A public official or employee who is required to file a financial disclosure statement for a particular calendar year must disclose a corporation in which he or she is a stockholder as a source of income, regardless of the amount of stock he or she owns, if the corporation has paid

the official or employee more than the threshold amount in dividends or other earnings during that calendar year. The official or employee is also required to disclose, as an investment interest, the name of any corporation transacting business in Ohio in which the official or employee owns stock valued at over one thousand dollars regardless of the specific number of shares the person owns and whether he or she owns the stock directly or through a managed investment account. R.C. 102.02(A)(3).

Conclusion

This advisory opinion is based on the facts described in the opinion. 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.

Therefore, it is the opinion of the Ohio Ethics Commission, and the Commission advises all public officials and employees that: Division (A)(3) of Section 2921.42 prohibits a public official from occupying a position of profit in the prosecution of a public contract that he or she authorized or that was authorized by a public board on which he or she serves unless the contract was competitively bid and awarded to the lowest and best bidder. However, a public official who owns less than one percent of the outstanding stock of a publicly traded corporation and has no other connection to the corporation does not occupy a position of profit in the prosecution of the corporation's contracts with the public agency he or she serves unless the corporation exists solely or largely to serve the agency and a majority of its contracts are with the agency , as described in this opinion(Advisory Opinion No. 93-001, syllabus paragraph 4 and related analysis on pages 9 through 11, concluding that a stockholder occupies a position of profit in the corporation's contracts regardless of the size of the stockholding, **overruled**).

By my signature below, I certify that Advisory Opinion No. 2009-05 was rendered by the Ohio Ethics Commission at it meeting on September 23, 2009.



Ben Rose, Chair
Ohio Ethics Commission