



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 88-008
October 11, 1988

Syllabus by the Commission:

- (1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a member of city council from serving as a director of an insurance company which has entered into a contract with any agency, board, department, or office of the city, unless all of the criteria for the exemption of Division (C) of Section 2921.42 are met;
- (2) The exemption of Division (C)(2) of Section 2921.42 of the Revised Code for services being furnished as part of a "continuing course of dealing" can be established where the contract existing prior to the time when the city council member becomes associated with the city is automatically renewed after the council member's election or appointment if provision for such automatic renewal is a term of the existing contract and if the contract is renewed without action of any office, department, or agency of the city. If, however, the existing contract is renewed by action of the city, modified, extended or otherwise changed after the city council member's election or appointment, he cannot meet the "continuing course of dealing" exception of Division (C)(2), even where such change is negotiated or executed by an agency of the city other than city council;
- (3) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a member of city council from serving as a director of an insurance company which has entered into a public contract approved or authorized by city council where the contract was not competitively bid and not the lowest and best bid, and where: (a) the establishment or operation of the insurance company is dependent upon receipt of the contract; (b) the creation or continuation of the official's position with the insurance company is dependent upon the award of the contract; (c) the proceeds from the contract would be used by the insurance company to compensate the official or as a basis for the official's compensation; or (d) the official would otherwise profit from the contract. The prohibition of Division (A)(3) applies for one year after the city council member leaves office, but does not apply with regard to any contract approved or authorized by city council prior to the member's election or appointment;
- (4) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a member of city council from voting, discussing, deliberating, or otherwise using his official authority or influence, formally or informally, to secure a contract between the city and an insurance company which he serves as director.

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You have asked whether the Ohio Ethics Law and related statutes would prohibit you, as a City Council member, from serving as a director of a for-profit corporation which has entered into a contract with the City. You state, by way of history, that you were recently appointed to City Council to fill a vacancy for an unexpired term. You also serve on the board of directors of an insurance corporation, which has an administrative contract with the City to provide for health benefits granted to groups of City employees under labor agreements. You further state that the contract is a continuing one which automatically renews at the end of each calendar year, unless the parties take action to terminate it. You have indicated that the current contract has been in effect since 1986, and the relationship between the parties has existed for over thirty years. Your letter adds that no material changes in the contract are anticipated, but any changes in the rates and terms of the contract, if they should occur, would be negotiated administratively, with no Council action.

Division (A)(4) of Section 2921.42 of the Revised Code reads as follows:

(A) No public official shall knowingly do any of the following: . . .

(4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

The term "public official" is defined for purposes of R.C. 2921.42 in Section 2921.01 of the Revised Code to include any elected or appointed officer of a political subdivision of the state. As a City Council member, you are, therefore, a "public official" subject to the prohibitions of Section 2921.42. See Advisory Opinions No. 86-002 and 86-009.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (E) of that section to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of any political subdivision of the state. Therefore, a contract between the City and the insurance company under which the insurance company agrees to provide health benefits for City employees is a "public contract" for purposes of R.C. 2921.42, since it is a contract for the purchase or acquisition of services by or for the use of the City. See Advisory Opinion No. 86-002.

An interest which is prohibited under Section 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. A director of a corporation is deemed to have a definite and direct fiduciary interest, and where a fee or compensation is received, a pecuniary interest, in the contracts of the corporation. See Advisory Opinions No. 81-003, 83-003, 85-007, 85-009, and 86-005. As a director of an insurance company, you have an "Interest" in the contracts of that company. In Advisory Opinion No. 87-002, the Ethics Commission held that R.C. 2921.42(A)(4) prohibits a public official connected with a political subdivision from contracting with the political subdivision as a whole and not just with the particular agency, board, or department of the political subdivision with which he serves. Therefore, R.C. 2921.42(A)(4) would prohibit you from serving as a director of an insurance company which has entered into a contract with any agency, board, department, or office of the City.

Division (C) of Section 2921.42 of the Revised Code provides an exception to the prohibition of Division (A)(4) when all of the following criteria apply:

- (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 servant'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 servant, member of his family, or business associate, and the public servant takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

The requirements of Division (C) are factual determinations, and whether a particular transaction meets the criteria of Division (C) depends upon the facts and circumstances of each individual case. See Advisory Opinion No. 78-001. These criteria are strictly applied against the public official, and the burden is on the official to demonstrate that he is in compliance with the exemption. See Advisory Opinions No. 83-004 and 84-011.

In this instance, health benefits provided to City employees as required under various labor agreements, are necessary services for the City, so that the requirement of Division (C)(1) is met. With regard to Divisions (C)(3) and (C)(4), you have stated that the treatment accorded the City by the insurance company is either preferential to, or the same as, that accorded other customers or clients of the insurance company in similar transactions, and that you have not been involved in any deliberations or decisions of the City with respect to its contract with the insurance company. You have stated that the City Solicitor has been informed of your position with the insurance company. The other members of City Council and City officials and employees who are responsible for the negotiation, execution, and administration of the contract should also be informed of your interest.

Division (C)(2) requires that the services of the insurance company are being furnished to the City as part of a continuing course of dealing established prior to your becoming associated with the City. You have stated that the current contract between the City and the insurance company was in effect prior to your appointment to City Council. This fact establishes the "continuing course of dealing" exception under Division (C)(2), since the insurance company is currently providing services to the City under a contract which was entered into prior to the time you became associated with the City. You have stated that the contract will automatically be

renewed at the end of the year unless the parties take action to terminate it. You also state that no material changes in the contract are anticipated, and that any changes in the rates and terms of the contract, if necessary, would be negotiated administratively, with no Council action. In Advisory Opinion No. 82-007, the Commission held that material changes in the agreement existing at the time of an officials appointment, including modifications, extensions, or renewals, are not within the Division (C)(2) exemption since such changes alter the original understanding of the parties. In this instance, the existing contract will automatically be renewed at the end of the year unless the parties take action to terminate it. It is assumed that this provision for automatic renewal is a term of the current contract. In light of the fact that the contract is renewable without action of the City and that the provision for automatic renewal was part of the contract existing at the time of your appointment, the automatic renewal of the contract at the end of the year will not destroy your compliance with Division (C)(2), since the understanding of the parties at the time of your appointment was that the contract would be renewed in the absence of action to the contrary, and this understanding will not have changed since your appointment.

If, however, the existing contract is, at any time, renewed by action of the City, modified, extended, or otherwise changed, then you would no longer meet the "continuing course of dealing" exception of Division (C)(2). See Advisory Opinions No. 82-007 and 84-006. This conclusion is not altered by the fact that City Council would take no action in negotiating or implementing the changes since the "continuing course of dealing" provision of Division (C)(2) does not make exception for changes in contracts that are negotiated or executed by an agency other than the interested officials agency. Of course, any new contracts entered into between the City and the insurance company after your appointment to City Council would not be part of a continuing course of dealing established before your association with the City. See Advisory Opinions No. 82-007 and 84-006.

If the City and the insurance company were to change the terms of the existing contract, or enter into a new contract, so that a "continuing course of dealing" could not be established, the criteria of Division (C)(2) may still be met if you are able to establish that the services provided by the insurance company to the City are "unobtainable elsewhere for the same or lower cost." It is essential that this requirement be demonstrated by some objective standard, such as an open and fair competitive bidding process. See Advisory Opinions No. 82-007, 83-004, and 88-001.

Competitive bidding may also be required pursuant to Division (A)(3) of Section 2921.42, which provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid.

An official or legislative body will be deemed to have authorized a public contract where the contract could not have been awarded without the public officials or legislative body's approval. See Advisory Opinion No. 87-004. Therefore, you are prohibited by R.C.

2921.42(A)(3) from profiting from a public contract which was approved or authorized by you or by City Council, unless the contract was competitively bid and was the lowest and best bid. A public official who serves with a company which is awarded a public contract is deemed to profit from that public contract where: (1) the establishment or operation of the company with which he serves is dependent upon receipt of the contract; (2) the creation or continuation of the official's position with the company is dependent upon the award of the contract; (3) the contract moneys would be used by the company to compensate the official or as a basis for the official's compensation; or (4) he would otherwise profit from the contract. See Advisory Opinion No. 87-004. You are subject to the prohibition of Division (A)(3) regardless of whether you participated in discussions or voted on the contract as a City Council member. (See discussion of Division (A)(1) of Section 2921.42 below.) The prohibition of Division (A)(3) applies for one year after you leave public office. However, the prohibition would not apply with regard to any contract authorized or approved by City Council prior to your appointment to Council.

Assuming that all of the criteria of Division (C) of Section 2921.42 can be established and the requirements of Division (A)(3) of Section 2921.42, where applicable, can be met, so that the insurance company and the City can properly contract, the prohibitions of R.C. 2921.42(A)(1) must be observed. This provision prohibits a public official from authorizing or employing the authority or influence of his office to secure authorization of a public contract in which he or any of his business associates has an interest. Therefore, R.C. 2921.42(A)(1) would prohibit you from voting, discussing, deliberating, or otherwise using your authority or influence, formally or informally, to secure for your insurance company a contract with the City. See Advisory Opinions No. 85-009 and 88-001.

Your attention is also drawn to R.C. 102.04(C) which would prohibit you from receiving compensation from the insurance company for personally representing or personally rendering any other service in any case, proceeding, application or other matter that is before any agency, department, board, bureau, commission, or other instrumentality of the City, and R.C. 102.03(A) which would prohibit you, while in office and for one year thereafter, from representing the insurance company before any public agency on any matter in which you have personally participated as a member -of city Council. As a final matter, Division (B) of Section 102.03 prohibits you from using, or disclosing to the insurance company without appropriate authorization, confidential information acquired by you in your official capacity. You are subject to this prohibition during your term of office and after you leave office.

This advisory opinion is based on the facts presented, and is limited to questions arising under Chapter 102. and Sections 2921.42 and 292.43 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 you are so advised, that: (1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a member of city council from serving as a director of an insurance company which has entered into a contract with any agency, board, department, or office of the city, unless all of the criteria for the exemption of Division (C) of Section 2921.42 are met; (2) The exemption of Division (C)(2) of Section 2921.42 of the Revised Code for services being furnished as part of a "continuing course of dealing" can be established where the contract existing prior to the time when the city council

member becomes associated with the city is automatically renewed after the council member's election or appointment if provision for such automatic renewal is a term of the existing contract and if the contract is renewed without action of any office, department, or agency of the city. If, however, the existing contract is renewed by action of the city, modified, extended or otherwise changed after the city council member's election or appointment, he cannot meet the "continuing course of dealing" exception of Division (C)(2), even where such change is negotiated or executed by an agency of the city other than city council; (3) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a member of city council from serving as a director of an insurance company which has entered into a public contract approved or authorized by city council where the contract was not competitively bid and not the lowest and best bid, and where: (a) the establishment or operation of the insurance company is dependent upon receipt of the contract; (b) the creation or continuation of the officials position with the insurance company is dependent upon the award of the contract; (e) the proceeds from the contract would be used by the insurance company to compensate the official or as a basis for the officials compensation; or (d) the official would otherwise profit from the contract. The prohibition of Division (A)(3) applies for one year after the city council member leaves office, but does not apply with regard to any contract approved or authorized by city council prior to the member's election or appointment; and (4) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a member of city council from voting, discussing, deliberating, or otherwise using his official authority or influence, formally or informally, to secure a contract between the city and an insurance company which he serves as director.



Paul F. Ward, Chairman
Ohio Ethics Commission