



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 89-008
July 20, 1989

Syllabus by the Commission:

(1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a member of city council from having a definite and direct pecuniary or fiduciary interest in a tax abatement granted by the city to a company which employs the council member;

(2) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a city council member from profiting from the award of a tax abatement authorized by city council while he is a member thereof;

(3) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code prohibit a city council member from voting, deliberating, participating in discussions, or otherwise authorizing or using the official authority or influence of his position with regard to an application for a property tax abatement submitted by a company with which he is employed;

(4) Neither Division (A)(1) of Section 2921.42 of the Revised Code nor Division (D) of Section 102.03 of the Revised Code prohibits a city council member from voting, deliberating, participating in discussions or otherwise authorizing or using the authority or influence of his position with regard to an application for a property tax abatement submitted by a company which employs a member of the officials family, if the family member has no definite and direct pecuniary or fiduciary interest in the award of the abatement and does not receive a definite and direct benefit therefrom;

(5) Neither Division (A)(1) of Section 2921.42 of the Revised Code nor Division (D) of Section 102.03 of the Revised Code prohibits a city council member who is a member of a labor organization from voting, deliberating, participating in discussions, or otherwise using the authority or influence of his position with regard to an application for a property tax abatement submitted by a company which employs members of the labor organization to which he belongs if he is not employed by the applicant company, and is not an officer, board member, or member of the negotiating team of the labor organization.

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You have asked whether the Ohio Ethics Law and related statutes prohibit various members of city council from voting or otherwise participating in a company's application for a

property tax abatement on capital expenditures to be invested at the company's manufacturing facility located within the city.

By way of history, you state that city council has sole authority to grant a tax abatement to an applicant. You state that an application for a tax abatement is formally received by city council and is referred to a standing committee of council. During the time the application is in committee, representatives of the city will negotiate with the applicant's representatives and a draft agreement will be prepared. The committee will hold a public meeting to discuss the proposal, answer questions, and make changes to the agreement. After the public meeting, the agreement and an ordinance authorizing the mayor to enter into the agreement will be submitted to the full city council for a vote. Upon an affirmative vote by council, the ordinance is signed by the mayor, who is authorized and directed by the ordinance to execute the agreement with the applicant.

You state that two members of city council are employed by the applicant company and work at the company's facility located within the city. You also state that one council member has a spouse and another council member has a child who is employed at the applicant company's facility. You further state that another council member is a dues-paying member of a labor organization which represents employees at the applicant company's facility, although the council member is not employed by the applicant company.

You have first asked whether a city council member who is employed by a company which has applied for a tax abatement may participate in council's consideration of the abatement.

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.

A member of city council is a public official for purposes of R.C. 2921.42 and is subject to its prohibitions. See R.C. 2921.01(A); Ohio Ethics Commission Advisory Opinions No. 79-005, 80-001, and 81-008.

R.C. 2921.42(E)(1) defines a "public contract" for purposes 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 a political subdivision. The Commission has held that a political subdivision's purchase or acquisition of community and economic development services, or urban renewal or revitalization services through the use of grants, loans, land reutilization programs, and other similar programs constitutes a "public contract" for purposes of R.C. 2921.42. See Advisory Opinions No. 83-005, 84-011, 85-002, and 88-006.

Similarly, the purpose of a city's grant of a tax abatement may be to promote economic and community development within the city. For example, a business or corporation may enter into an agreement with the city to develop or redevelop property within the city, construct facilities or undertake various improvements and thereby improve or maintain employment opportunities, eliminate blight, or provide other community services in consideration for the city's agreement to provide a property tax abatement for a specified number of years on the new facilities or improvements, or a portion thereof. See R.C. 5709.62; Westbrook v. Prudential Insurance Company Of America 37 Ohio St. 3d 166, 167 (1988). A company's obligations under the agreement are quite specific, and must be met before it receives the benefit of the tax abatement. It is apparent that a tax abatement which is granted by a city in exchange for a company's development or renovation of property, or the construction of facilities, is a "public contract" for purposes of R.C. 2921.42 since it is the purchase of economic or community development, or urban renewal services by the city.

R.C. 2921.42(A)(4) prohibits a city council member from having an "interest" in city councils grant of a tax abatement to a company. An "interest" which is prohibited under R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. See Advisory Opinion No. 81-008. The issue is, therefore, whether a city council member would have an interest in the grant of a tax abatement to a company with which he is employed.

A determination as to whether a public official has an "interest" in a contract with his own governmental agency depends on the facts and circumstances of each particular situation. See Advisory Opinion No. 84-009. The Ethics Commission has held that an employee of a firm, who has neither an ownership interest nor a fiduciary interest as an officer of the firm, is not generally considered to have an "interest" in the contracts entered into by his employer. See Advisory Opinion No. 78-006. However, an employee who has an ownership interest in, or who is a director, trustee, or officer of his employer is considered to have an interest in his employer's contracts. See Advisory Opinions No. 78-006, 81-008, and 86-005. Furthermore, an employee is considered to have an interest in his employer's contracts if: (1) the employee takes part in contract negotiations; (2) his salary is based on the proceeds of the contract; (3) he receives a share of the contract's proceeds in the form of a commission or fee; (4) his employment responsibilities include participation in the administration or execution of the contract; or (5) where the employee's tenure is dependent upon his employer receiving the award of such contract. See Advisory Opinions No. 78-006, 82-003, 86-005, and 89-006.

Therefore, a city council member who is an employee of a company which has applied to city council for a tax abatement is subject to the prohibition of R.C. 2921.42(A)(4) if: (1) he is a director, trustee, or officer of, or has an ownership interest in, his employing company; (2) his responsibilities at his employing company include preparing, submitting, or negotiating the request for the tax abatement to the city or involve the administration or execution of the company's obligations under the tax abatement; (3) his tenure, compensation, or other benefits received from the company would be based or directly dependent upon the granting of the tax abatement; (4) the facts indicate otherwise that he would have a definite and direct pecuniary or fiduciary interest in the granting of the tax abatement as a result of his employment with the company. If the city council member is deemed to have an "interest" in the tax abatement as a

company employee, then R.C. 2921.42(A)(4) would prohibit the city and company from entering into an agreement for the tax abatement.

Division (A)(3) of Section 2921.42 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.

In this instance, city council has the sole authority to grant or deny a request for a tax abatement. A grant of a tax abatement to a company is considered to be "authorized" by city council when the abatement would not have been awarded without the city councils approval. See Advisory Opinion No. 87-004. Tax abatements are not awarded through competitive bidding. Therefore, a city council member is prohibited by R.C. 2921.42(A)(3) from profiting from the grant of a tax abatement which is approved by city council. A city council member who holds outside employment with a company that has received a tax abatement will be deemed to profit from the abatement where: (1) the establishment or continued operation of the company with which he is employed is dependent upon the grant of the abatement; (2) the creation or continuation of the council member's employment with the company is dependent upon the award of the tax abatement; or (3) he would otherwise profit from the granting of the tax abatement. See Advisory Opinions No. 87-004, 88-008, and 89-006.

Even assuming that the city council member would not have an interest in, or profit from, the tax abatement, so that the company would not be prohibited from receiving the tax abatement, the council member is also subject to Division (A)(1) of Section 2921.42, which provides:

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

(1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

A public officials outside employer is considered to be his "business associate" for purposes of R.C. 2921.42(A)(1). See Advisory Opinions No. 78-006 and 81-001. A city council member who is employed by a company which has submitted an application for a property tax abatement is prohibited by R.C. 2921.42(A)(1) from voting, discussing, deliberating, or otherwise using his authority or influence as a city council member, either formally or informally, to secure for the company with which he is employed the award of a property tax abatement, including the passage of necessary legislation.

Section 102.03 of the Revised Code would also prohibit a city council member from participating in a request for a tax abatement submitted by his outside employer. Division (D) of Section 102.03 of the Revised Code provides:

(D) No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his duties.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office of a city, and thus includes a member of city council. See R.C. 102.01(B) and (C). A member of city council is, therefore, subject to the prohibitions of R.C. 102.03(D). See Advisory Opinions No. 76-005, 79-008, 80-007, and 88-004.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. See R.C. 102.03(G). A definite and particular pecuniary benefit is considered to be anything of value under R.C. 102.03(D). See Advisory Opinions No. 79-008, 85-006, 88-004, and 89-005. A diminution in the amount of property tax imposed upon the applicant company's manufacturing facility located within the city would provide a definite and direct pecuniary benefit to the company. Therefore, a tax abatement falls within the definition of "anything of value."

R.C. 102.03(D) prohibits a public official from using the authority or influence of his office to secure anything of value for himself, or for another person, business, or other entity if the relationship between the public official and that person, business, or entity is such that the official's objectivity or independence of judgment could be impaired with regard to matters that affect the interests of that party. See Advisory Opinions No. 88-004, 88-005, and 89-005. An employer holds a position of power and authority over the hiring, compensation, discipline, and termination of its employees. A city council member who is in the position of making an official decision regarding the pecuniary interests of his private employer would have an inherent conflict of interest impairing the council member's objectivity and independence of judgment. See Advisory Opinions No. 80-003 and 88-005. Therefore, a tax abatement for a council member's private employer is a thing of value that is of such character as to manifest a substantial and improper influence upon him with respect to his duties. R.C. 102.03(D), as well as R.C. 2921.42(A)(1) would prohibit a city council member from voting, deliberating, participating in discussions, or otherwise using his official position, either formally or informally, with regard to an application for a property tax abatement submitted by the company with which he is employed.

You have also asked whether a council member who has a spouse or child employed at the applicant company, but is not employed there himself, may vote or otherwise participate in the company's application for a property tax abatement. As set forth above, a public official is prohibited by R.C. 2921.42(A)(1) from authorizing or using the authority or influence of his office to secure authorization of a public contract in which a member of his family has an interest. For purposes of R.C. 2921.42, a family member includes a spouse, children, whether dependent or not, parents, grandparents, grandchildren, siblings, and other persons who are related by blood or marriage and residing in the same household. See Advisory Opinions No. 80-001, 81-004, and 89-005. As explained above, an employee of a company who has neither an ownership or other financial interest, nor a fiduciary interest in the company and who is not involved in the preparation, submission, or negotiation of the company's request for a tax

abatement, or in the execution or administration of the tax abatement, is not considered to be interested in the tax abatement of his employer. If, however, a member of the officials family is interested in the tax abatement granted to his company, then R.C. 2921.42(A)(1) would prohibit the city council member from participating in the discussions or vote to award the tax abatement.

R.C. 102.03(D) would also prohibit a city council member from participating in consideration of a company's application for a tax abatement where the council member's spouse or child is employed by the company and would receive a definite and direct benefit from the tax abatement. See generally Advisory Opinions No. 79-008, 84-010, and 85-011. The issue remains whether R.C. 102.03(D) would prohibit a city council member from participating in councils consideration of a tax abatement for the employer of a family member in instances where the family member has no direct interest in the tax abatement. In Advisory Opinion No. 88-005, the Commission considered whether a member of a city planning commission was prohibited by R.C. 102.03(D) from participating in a zoning change affecting the interests of a community improvement corporation where his daughter worked at a bank and was supervised by a person who was the bank's executive vice-president and who also served as the president of the CIC. The Ethics Commission held that, "the relationship between the planning commission member and the president of the community improvement corporation is so remote that the president's interest in the zoning change would not be of such character as to manifest a substantial and improper influence upon the planning commission member." See generally Advisory Opinion No. 85-006. Similarly, R.C. 102.03(D) would not, in this instance, prohibit a city council member from participating in councils decision to award a tax abatement to a company which employs his spouse or child, unless the spouse or child would derive a definite benefit from the tax abatement.

Your final question concerns the ability of a city council member to participate in the company's application for a tax abatement where the council member belongs to a labor organization which represents employees at the applicant company's facility, but where the council member is not employed by that company. The Ethics Commission has determined that a member of a labor organization does not have an "interest" in the contracts entered into between the organization and an agency, for purposes of R.C. 2921.42, where he is not employed by that agency, and is not an officer, board member, or member of the negotiating team of the labor organization. See Advisory Opinion No. 89-005. Furthermore, the relationship between a member of a labor organization and the organization is deemed not to be that of "business associates," and, therefore, the prohibition of R.C. 2921.42(A)(1) does not apply. Id. The Commission has also held that, for purposes of R.C. Section 102.03, mere membership in a labor organization does not, as a general matter, create such a conflict of interest that a public official or employee who is a member of the organization would be prohibited from participating in matters affecting the interests of the organization unless: (1) he is an officer, board member, or employee of the organization; (2) he has assumed a particular responsibility in the organization with regard to that subject matter; (3) the matter would affect his personal, pecuniary interests; or (4) the facts otherwise indicate that membership in the organization could impair the officials objectivity or independence of judgment. Id. Therefore, R.C. 2921.42(A)(1) and R.C. 102.03(D) do not prohibit a city council member from voting, deliberating, participating in discussions or otherwise using his official authority or influence with regard to a company's application for a tax abatement where the council member belongs to a labor organization which represents

employees at the applicant company's facility but is not employed by that company, and is not an officer, board member, or member of the negotiating team of the employee organization.

Your attention is also drawn to R.C. 102.04(C), which would prohibit a city council member from receiving compensation for representing a company on an application for a tax abatement before council or another city agency, and R.C. 102.03(A), which prohibits a city council member from representing a company before any public agency on any matter in which he personally participated as a council member.

As a final matter, Division (B) of Section 102.03 reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

A city council member is prohibited from disclosing confidential information to a company which has applied for the grant of a tax abatement, a family member, a labor organization to which he belongs, or any other party, or using such confidential information, without appropriate authorization. No time limitation exists for this prohibition, and it is effective while the individual serves with city council and after he leaves office. See Advisory Opinion No. 88-009.

This advisory opinion is based on the facts presented and 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 you are so advised, that: (1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a member of city council from having a definite and direct pecuniary or fiduciary interest in a tax abatement granted by the city to a company which employs the council member; (2) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a city council member from profiting from the award of a tax abatement authorized by city council while he is a member thereof; (3) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code prohibit a city council member from voting, deliberating, participating in discussions, or otherwise authorizing or using the official authority or influence of his position with regard to an application for a property tax abatement submitted by a company with which he is employed; (4) Neither Division (A)(1) of Section 2921.42 of the Revised Code nor Division (D) of Section 102.03 of the Revised Code prohibits a city council member from voting, deliberating, participating in discussions or otherwise authorizing or using the authority or influence of his position with regard to an application for a property tax abatement submitted by a company which employs a member of the officials family, if the family member has no definite and direct pecuniary or fiduciary interest in the award of the abatement and does not receive a definite and

direct benefit therefrom; (5) Neither Division (A)(1) of Section 2921.42 of the Revised Code nor Division (D) of Section 102.03 of the Revised Code prohibits a city council member who is a member of a labor organization from voting, deliberating, participating in discussions, or otherwise using the authority or influence of his position with regard to an application for a property tax abatement submitted by a company which employs members of the labor organization to which he belongs if he is not employed by the applicant company, and is not an officer, board member, or member of the negotiating team of the labor organization.


Richard D. Jackson, Chairman
Ohio Ethics Commission