



OHIO ETHICS COMMISSION

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Advisory Opinion Number-92-002
January 31, 1992

Syllabus by the Commission:

(1) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a member of the Ohio Grape Industries Committee whose sister is the chief executive officer of an association from authorizing, voting, deliberating, participating in discussions, recommending, or otherwise using his authority or influence as a Committee member, formally or informally, to secure authorization of a public contract for information services between the Committee and the association;

(2) Division (A)(4) of the Revised Code prohibits a member of the Ohio Grape Industries Committee from having an interest in a public contract entered into between the Committee and the public agency by which he is employed, even if he is required by statute to serve on the Committee by virtue of his position with the public agency, unless the exception of Division (C) of Section 2921.42 can be met;

(3) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a member of the Ohio Grape Industries Committee from profiting from a public contract awarded to his employer by the Committee for the provision of services where the purchase was not competitively bid and was not the lowest and best bid;

(4) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a member of the Ohio Grape Industries Committee from voting, deliberating, participating in discussions, recommending, or otherwise using his authority or influence as a Committee member, formally or informally, to secure a contract under which the public agency with which he is employed would sell services to the Committee and under which he would, as an employee of the public agency, perform or supervise the performance of those services and be compensated.

* * * * *

You have asked whether the Ohio Ethics Laws and related statutes prohibit a member of the Ohio Grape Industries Committee (Committee) whose sister serves as the Chief Executive Officer of the Ohio Wine Producers Association (Association) from participating in discussions and voting upon matters involving the Committee's purchase of information services from the Association. You have also asked whether a Committee member who is employed as the viticulture extension specialist of the Ohio Agricultural Research and Development Center (Center) is prohibited from participating in discussions and voting upon matters involving the Committee's purchase of research services from the Center.

The Committee is a statutorily created entity within state government. See R.C. 924.51. The Committee is comprised of eight members. See 924.51 (A). The Chief of the Department of Agriculture's Division of Markets, the viticulture extension specialist of the Ohio Agriculture Research and Development Center and the Director of Agriculture (Director) or his designee are statutorily required to be members of the Committee. Id. The Director, or his designee, serves as chairman of the Committee. Id. Five other members are appointed by the Director and serve for three-year terms. Id. Three of the members who are appointed by the Director must receive the major portion of their income from the production of wine and grape products. See R.C. 924.51 (B).

The Committee is statutorily required to maintain, expand, and create markets for grapes and grape products by promoting their sale and informing the public of their uses and benefits. See R.C. 924.52 (B). The Committee is self-supporting and is funded exclusively by moneys derived from taxes levied on the sale and distribution of wines which are deposited in the Ohio Grape Industries Fund. See R.C. 924.54 (A). See also R.C. 4301.43 and 4301.432.

The Committee may conduct, and contract with others to conduct, research concerning the marketing, distribution, storage, refrigeration, processing, transportation, and production and product development of grapes and grape products. See R.C. 924.52 (A)(1). The Committee is required to expend no less than thirty and no more than seventy per cent of monies it receives from the Ohio Grape Industries Fund for this research. Id. The Committee may make, or contract for, market surveys and analyses that it determines are appropriate in order to maintain and expand present markets or create new markets for grapes and grape products, and may make, in the name of the Committee, contracts to render service in formulating and conducting plans and programs and such other contracts or agreements as the Committee considers necessary for the promotion and sale of grapes and grape products. See R.C. 924.52 (A)(3). The Committee is statutorily required to expend no less than thirty per cent and no more than seventy per cent of the monies it receives from the Ohio Grape Industries Fund for these marketing and promotional activities. Id. The Committee may also provide information concerning the handling and selling of grapes to the wholesale and retail trade, publish and distribute information relating to the grape industry to producers and others, inform the public of the uses and benefits of grapes and grape products, and propose to the Director the adoption, rescission, or amendment of administrative rules necessary to exercise its powers and duties. See R.C. 924.52 (A)(2), (4), and (5). The Committee is empowered to perform all acts and exercise powers considered reasonably necessary, proper, or advisable, to accomplish its statutory duties. See R.C. 924.52 (B)(2).

You have stated that the Committee utilizes its authority to contract with others to purchase information services from the Ohio Wine Producers Association and research services from the Ohio Agricultural Research and Development Center. The Committee could choose to conduct its own research and make its own market surveys and not contract with others for the provision of such services. See R.C. 924.52 (A)(1) and (3).

In Ohio Ethics Commission Advisory Opinion No. 92-001, the Ethics Commission held that a member of the Ohio Grape Industries Committee is not subject to the prohibitions imposed by R.C. Chapter 102. since the Committee does not exercise "sovereign power." However, in Advisory Opinion No. 92-001, the Commission explained that the conclusion that the Committee

members are not subject to Chapter 102. was based upon the current statutory authority of the Committee, and would have to re-examined if the Committee were assigned additional statutory authority or performed additional functions beyond those prescribed by law. The Commission held, in Advisory Opinion No. 92-001, that members of the Committee are "public officials" as defined by R.C. 2921.01 (A) since the duties and authority of the Committee make the members "agents of the state," and thus subject to the statutory prohibitions imposed by R.C. 2921.42 and 2921.43. See 2921.01 (A) and (B). See also Ohio Ethics Commission Advisory Opinion No. 85-005 (a person is an agent of the state when the state has delegated the person or his public agency authority to act on the state's behalf and bind the state).

Your question concerning the Committee member whose sister serves as the Chief Executive Officer of the Association will be addressed first. You have stated that the salary of the Committee member's sister is partially derived from the proceeds of the contract between the Committee and the Association.

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

(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.

R.C. 2921.42 (A)(1) prohibits a public official from authorizing, or using the authority or influence of his office to secure authorization of, a public contract in which he, a family member, or a business associate has an interest.

As stated above, the Ethics Commission, in Advisory Opinion No. 92-001, determined that a Committee member is a "public official" for purposes of R.C. 2921.42 and subject to its prohibitions.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (E)(1) 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 the state or any state agency or instrumentality. The Committee's purchase of information services from the Association falls within the definition of a public contract for purposes of R.C. 2921.42 (A)(1) since the Committee is an agency or instrumentality of the state, see Advisory Opinion No. 92-001, and is contracting for the purchase of services necessary to advance Ohio's grape industry.

A public official's family member has been described by the Ethics Commission to include a spouse, children, whether dependent or not, parents, grandparents, grandchildren, siblings, and other persons related by blood or marriage and residing in the same household. See Advisory Opinions No. 80-001 and 90-010. The sister of the Committee member is a "member of his family" for purposes of R.C. 2921.42 (A)(1). See Advisory Opinion No. 86-010. The issue becomes whether the Committee member's sister has an "interest" in a public contract entered into between the Committee and the Association.

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 Ethics Commission has held that a mere employee of a firm who does not have an ownership or fiduciary interest in the firm is generally not deemed to have an "interest" in the contracts of her employer for purposes of R.C. 2921.42. See Advisory Opinion No. 78-006. However, the Commission has held that an employee of a firm will be deemed to have an "interest" in a public contract entered into by her employer for purposes of R.C. 2921.42, if any of the following circumstances apply: (1) the employee has an ownership interest in, or is a director, trustee, or officer of, her employer; (2) she takes part, as a firm employee, in contract negotiations or the application process; (3) her salary is based or dependent upon, or is paid from, the proceeds of the contract; (4) she receives a share of the contract's proceeds in the form of a commission or fee; (5) her responsibilities as an employee include participation in the administration or execution of the contract or she has the responsibility to oversee execution or administration of the contract; (6) the employing agency receives most or all of its funding from the contract, such that the establishment or operation of her employing agency is dependent upon receipt of the contract; or, (7) the creation or continuation of her employment is dependent upon her employer receiving the award of the contract. See Advisory Opinions No. 89-006, 89-008, 89-011, and 91-001. See also Advisory Opinions No. 78-006, 81-008, 82-003, and 86-005.

In the instant situation, the Committee member's sister serves as the Association's Chief Executive Officer and her salary is partially derived from the proceeds of the contract between the Committee and the Association. Accordingly, she would be deemed to have an "interest" in a contract between the Committee and the Association. Therefore, R.C. 2921.42 (A)(1) prohibits the Committee member from authorizing, voting, deliberating, participating in discussions, recommending, or otherwise using his authority or influence as a Committee member, formally or informally, to secure authorization of, a contract for information services between the Wine Producers Association and the Ohio Grape Industries Committee. See Advisory Opinion No. 88-007. R.C. 2921.42 (A)(1) would also prohibit the Committee member from participating to approve payments to the Association. See Advisory Opinion No. 90-005.

You have also asked whether a Committee member who is employed as the viticulture extension specialist (Specialist) of the Ohio Agricultural Research and Development Center is prohibited from participating in discussions and voting upon matters involving the Committee's purchase of research services from the Center.

As described above, Division (A)(1) of Section 2921.42 of the Revised Code prohibits a public official from authorizing, or using the authority or influence of his office to secure authorization of, a public contract in which he or a business associate has an interest; however, it is first necessary to examine the prohibition imposed by Division (A)(4) of Section 2921.42 of the Revised Code, which 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 Committee's purchase of research services from the Center is a public contract for purposes of R.C. 2921.42. The Specialist is prohibited by R.C. 2921.42 (A)(4) from having an "interest" in the profits or benefits of a public contract entered into by or for the use of the Committee. The issue becomes whether he has an "interest" in a contract entered into between the Committee and the Center.

An officer or board member of a public agency is deemed to have an interest in the public agency's contracts. See generally Advisory Opinion No. 81-005. However, as stated above, an employee of an agency is not deemed to have an interest in the contracts of his employer unless certain circumstances apply. This determination applies to an employee of a public agency as well as an employee of a private entity. See Advisory Opinions No. 82-003 and 89-006.

You have stated that, in the instant situation, the Specialist would, as part of his duties as a Center employee, either personally perform or supervise the research conducted at the Center pursuant to the contract with the Committee, and that it is the responsibility of the Specialist to make proposals to the Committee that the Center perform research projects. Furthermore, the Specialist will be partially compensated from the proceeds of the contract between the Center and the Committee. Therefore, the Specialist would have a prohibited "interest" in the contract between the Committee and the Center under the criteria set forth above, because his responsibilities as a Center employee would include participation in the administration or execution of the contract or serving in a management position with the responsibility to oversee execution or administration of the contract and his salary would be partially paid from the proceeds of the contract.

The prohibition imposed by R.C. 2921.42 (A)(4) is not affected by the fact that R.C. 924.51 requires the Specialist to serve as a Committee member. It is recognized that R.C. 924.51 mandates that the Specialist serve as a Committee member; however, nowhere in R.C. Chapter 924. or elsewhere is it mandated that the Committee contract with the Center to provide research services. In fact, the Committee could, under its statutory authority, choose to conduct its own research rather than to contract with others. See R.C. 924.52.

The Ethics Commission has recognized an "official capacity" exception to the prohibition of R.C. 2921.42 (A)(4) in instances where a public official of an agency that awards a contract or grant to another agency also serves with the recipient agency in his official capacity as a representative of the awarding agency's interests. For example, in Advisory Opinion No. 83-010, the Commission held that a city council member is not prohibited from serving on the board of a community development corporation that sells goods or services to the city if the council member serves on the board in his official capacity, stating that the official designation by the city requiring the council member to serve on the board of the corporation in his official capacity as a council member was "sufficient to demonstrate that the public official does not have a prohibited personal interest in the public contract." Also, the Commission held, in Advisory Opinion No. 84-001, that R.C. 2921.42 does not prohibit a city officer or employee from serving

in his official capacity on the board of a nonprofit corporation which provides contract paramedic services to the city since he was "designated by the municipal government to represent its interests on the board," and, thus, "there would not be a dual interest in which private considerations would distract from his serving the public interest." See also Advisory Opinion No. 82-004.

The "official capacity" exception would apply only where a Committee member served with an organization, which is awarded a contract from the Committee, in his official capacity with, and in order to represent the interests of, the Committee. See Advisory Opinions No. 83-010 and 84-001 (setting forth the criteria that must be met before the "official capacity" exception will apply). However, in the instant situation, the facts are reversed. A member of the Committee, which is the public agency purchasing the services, does not serve with the Center, the supplier of the services, by virtue of his position with, or as a representative of, the Committee. The viticulture specialist of the Ohio Agriculture Research and Development Center serves on the Ohio Grape Industries Committee by virtue of his position with the Center; he does not serve with the Center in his capacity as a Committee member or to represent the interests of the Committee. Therefore, the "official capacity" exception to the prohibition imposed by R.C. 2921.42 (A)(4) does not apply in this instance.

It is apparent that the Specialist would have a conflict of interest in a situation where the Center is interested in being awarded a contract from the Committee. Unlike a public official who serves with a recipient agency in his "official capacity" as a representative of the awarding agency, the Committee member does not serve with the Center in order to represent and serve the Committee's interests. Accordingly, the Committee member's interest in a contract between the Committee and the Center would not be that of the Committee but would be either his own personal interest or the interest of the Center with which he is employed.

Division (C) of Section 2921.42 does, however, provide an exception to the prohibition of Division (A)(4), and may permit the viticulture extension agent to have an interest in a contract awarded by the Committee if all of the following 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 servant.

Advisory Opinion No. 87-003 summarizes the criteria of Division (C) as follows:

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. 84-011 and 83-004.

It is particularly important that the requirement of Division (C)(2) that the services be "unobtainable elsewhere for the same or lower cost" be demonstrated by some objective standard. See Advisory Opinion No. 83-004. As stated in Advisory Opinion No. 84-011:

[A] public official should not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity. . . . The criterion that the goods or services be "unobtainable for the same or lower cost" requires that a public official or employee be at a disadvantage when attempting to do business with his governmental entity, and that an equally qualified applicant who is not a [public official] must receive preference. (Emphasis in original.)

If it can be objectively shown that the Center's services are "unobtainable elsewhere for the same or lower cost," the Specialist may meet the requirement of Division (C)(2). See Advisory Opinions No. 87-003 and 88-007. See also R.C. 2921.42 (A)(3), described below. An open and fair competitive bidding process under which the Center submits the lowest bid is one way in which this requirement may be met. See Advisory Opinions No. 83-004, 86-002, and 88-001.

Division (C)(4) must also be met before the exemption of Division (C) can be established. The Committee's award of a contract to the Center for research services must be conducted at arm's length, the Committee must know of the Specialist's interest or the interest of the Center, and the Specialist may take no part in the Committee's deliberations or decisions with respect to the contract. See also R.C. 2921.42 (A)(1) (discussed below).

Your attention is also drawn to Division (A)(3) of Section 2921.42, which provides:

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

(3) 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.

A public contract is considered to be authorized by an official or board if the contract could not have been awarded without the approval of the official or board. See Advisory Opinion No. 87-004.

R.C. 2921.42 (A)(3) prohibits a public official, during his term of office and for one year thereafter, from profiting from a contract which was awarded by his board, unless the contract was competitively bid and was the lowest and best bid. The Ethics Commission has held that a public official will be deemed to profit from a public contract which is awarded to his employer, where: (1) the establishment or operation of his employing organization is dependent upon receipt of the contract; (2) the creation or continuation of the public official's position with his employer is dependent upon the award of the contract; (3) the contract proceeds would be used by his employer to compensate the public official or as a basis for his compensation; or (4) the public official would otherwise profit from the award of the contract. See Advisory Opinions No. 87-004 and 88-008.

In the instant situation, as stated above, the Specialist would be paid from the proceeds of the contract between the Committee and the Center. Therefore, R.C. 2921.42 (A)(3) prohibits the Specialist from receiving proceeds from the contract awarded to the Center from the Committee for the provision of research services, unless the contract is competitively bid and is the lowest and best bid. Again, the fact that the Specialist is required by statute to serve on the Committee is immaterial. The Specialist is subject to the prohibition of R.C. 2921.42 (A)(3), even though he may have abstained as a Committee member from participating in consideration or award of the contract from which he would profit. See Advisory Opinion No. 88-008. See also R.C. 2921.42 (A)(1) described below. The exception of Division (C) does not apply to the prohibition imposed by Division (A)(3). See generally Advisory Opinion No. 88-008.

Assuming that the criteria of Division (C) can be established and the requirement of R.C. 2921.42 (A)(3) can be met, so that the Committee may contract with the Center for research services, the Specialist must observe the prohibition of R.C. 2921.42 (A)(1). As described above, R.C. 2921.42 (A)(1) prohibits a public official from participating to secure the authorization of a public contract in which he or a business associate has an interest. Those in an employer-employee relationship are considered to be "business associates" for purposes of R.C. 2921.42. See Advisory Opinion No. 78-006. Therefore, the Center is the Specialist's "business associate" for purposes of R.C. 2921.42. Also, as explained above, the Specialist would himself have an "interest" in the contract between the Committee and the Center where the Specialist would, as part of his duties as a Center employee, either personally perform or supervise research conducted at the Center pursuant to the contract with the Committee and be partially compensated from the proceeds of the contract. Therefore, R.C. 2921.42 (A)(1) prohibits the Specialist from voting upon, discussing, recommending, or otherwise using his authority or influence as a Committee member to secure, a contract for the Center. He should refrain from making proposals to the Committee that the Center perform research projects. See also R.C. 2921.42 (C)(4) (set forth above).

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a member of the Ohio Grape Industries Committee whose sister is the chief executive officer of an association from authorizing, voting, deliberating, participating in discussions, recommending, or otherwise using his authority or influence as a Committee member, formally or informally, to secure authorization of a public contract for information services between the Committee and the association; (2) Division (A)(4) of the Revised Code prohibits a member of the Ohio Grape Industries Committee from having an interest in a public contract entered into between the Committee and the public agency by which he is employed, even if he is required by statute to serve on the Committee by virtue of his position with the public agency, unless the exception of Division (C) of Section 2921.42 can be met; (3) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a member of the Ohio Grape Industries Committee from profiting from a public contract awarded to his employer by the Committee for the provision of services where the purchase was not competitively bid and was not the lowest and best bid; and (4) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a member of the Ohio Grape Industries Committee from voting, deliberating, participating in discussions, recommending, or otherwise using his authority or influence as a Committee member, formally or informally, to secure a contract under which the public agency with which he is employed would sell services to the Committee and under which he would, as an employee of the public agency, perform or supervise the performance of those services and be compensated.


Marguerite B. Lehner, Chair
Ohio Ethics Commission