



OHIO ETHICS COMMISSION

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Advisory Opinion Number 93-001
January 8, 1993

Syllabus by the Commission:

- (1) For purposes of Divisions (A)(1) and (A)(4) of Section 2921.42 of the Revised Code a public official who owns stock in a corporation has an interest in the corporation's contracts unless he is able to meet all of the criteria for the exemption of Division (B) of Section 2921.42 of the Revised Code;
- (2) Division (B) of Section 2921.42 of the Revised Code provides that, in the absence of bribery or fraud, a public servant shall not be considered to have an "interest" in a contract with his own political subdivision when: (a) the public servant's interest is limited to owning or controlling shares of a corporation; (b) the amount of stock owned or controlled by the public servant does not exceed five per cent of the corporation's outstanding shares; and (c) the public servant, prior to the time the public contract was entered into, files with his political subdivision an affidavit giving his status with the organization;
- (3) For purposes of Division (A)(1) of Section 2921.42 of the Revised Code, a person whose sole relationship to a corporation is that of a stockholder is not a "business associate" of the corporation, unless the facts otherwise indicate that the official and corporation act together to pursue a common business purpose;
- (4) For purposes of Division (A)(3) of Section 2921.42 of the Revised Code, a stockholder occupies a position of profit in the corporation's contracts regardless of the size of the stockholding, and Division (A)(3) of Section 2921.42 of the Revised Code prohibits the treasurer of a state technical college from owning stock in a bank which has entered into a depository contract with the college where the contract could not have been awarded without the treasurer's approval, unless the contract was competitively bid and provided for the lowest service charges or the highest interest rates;
- (5) Division (D) of Section 102.03 of the Revised Code does not prohibit the treasurer of a state technical college from owning stock in a bank which has a depository contract with the college even though, as treasurer, he is required to perform official duties with regard to the college's decision to secure a depository contract with the bank and to exercise responsibility in matters pertaining to the college's accounts with the bank provided that he owns only a minimal amount of the bank's outstanding shares of stock such that he would not realize a substantial pecuniary benefit from the depository contract, has no other relationship with the bank, and the facts do not otherwise indicate

that his objectivity and independence of judgment could be impaired by his stockholdings.

* * * * *

You have asked whether the Ohio Ethics Law and related statutes prohibit you, as the treasurer of a state technical college, from owning stock in a financial institution if the institution enters into a depository contract with the technical college.

You state that the college is seeking to move its payroll and checking accounts from the financial institution with which it has had a depository contract for a number of years. The college fiscal office invited bids from local financial institutions interested in entering into a depository contract with the college for its payroll and checking accounts. The college desires to enter into a depository contract with the bank which submitted the proposal with the lowest service charges. Currently the college has depository contracts with a total of nine financial institutions but has no depository contracts with this bank.

You have expressed concern about the proposed depository contract between the bank and the college due to the fact that you own 100 shares of stock in the bank. You state that you purchased the stock in 1987 and the bank has a total of 39,000 shares outstanding. You also state that, if the Ethics Law and related statutes prohibit you from holding stock in the bank, you are prepared to dispose of the stock in order for the college to enter into the proposed depository contract.

Ohio's technical colleges are established pursuant to statute. See R.C. 3357.02. A technical college is organized to provide instructional programs to residents of the technical college district wherein the college is located. See R.C. 3357.01 (A). A "technical college district" is defined as a "political subdivision of the state." See R.C. 3357.01 (B). A technical college district is governed by a board of trustees; the board's members are appointed and exercise duties dictated by statute. See R.C. 3357.05. The board of trustees may select a depository for the technical college district's funds in the manner provided by R.C. Sections 135.01 to 135.21, the Uniform Depository Act. See R.C. 3357.10. Also, the board of trustees is statutorily required to elect a treasurer who is not a member of the board; the treasurer serves at the pleasure of the board. Id.

Your attention is directed to R.C. 2921.42 (A)(4) which provides:

(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 R.C. 2921.01 (A), to include any elected or appointed officer of the state or any political subdivision of the state.

Since, as explained above, you are appointed to an office of a political subdivision of the state, you fall within the definition of a "public official" for purposes of R.C. 2921.42.

The term "public contract" is defined, for purposes of R.C. 2921.42, in R.C. 2921.42 (E), to include "[t]he 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 of its political subdivisions, or any agency or instrumentality of either." The Ethics Commission has identified a political subdivision's deposit of public funds in a bank serving as a public depository as a "public contract." See Ohio Ethics Commission Advisory Opinions No. 85-007 and 92-008. See also Advisory Opinion No. 83-003. Therefore, the deposit of funds by a technical college district in a bank is a "public contract" for purposes of R.C. 2921.42.

R.C. 2921.42 (A)(4) prohibits you, as the treasurer of a technical college district, from having an "interest" in the profits or benefits of a public contract entered into by the district with which you serve. 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 public official who has an ownership interest in a business is generally considered to have an "interest" in the contracts of that business for purposes of R.C. 2921.42. See Advisory Opinions No. 80-003 and 86-005. See also Advisory Opinion No. 92-008. As a stockholder in the bank you have an ownership interest in the bank and have an "interest" in the bank's contracts for purposes of R.C. 2921.42 (A)(4). See Advisory Opinion No. 92-005. If the college enters into the proposed depository contract with the bank, then you would have an interest in a public contract with your own political subdivision for purposes of R.C. 2921.42 (A)(4). R.C. 2921.42 (A)(4) would prohibit you from owning stock in a bank that does business with the college.

However, Division (B) of Section 2921.42 of the Revised Code provides a limited exemption to the prohibition of R.C. 2921.42 (A)(4). Division (B) reads as follows:

(B) In the absence of bribery or a purpose to defraud, a public servant, member of his family, or any of his associates shall not be considered as having an interest in a public contract or the investment of public funds, when all of the following apply:

- (1) The interest of such person is limited to owning or controlling shares of the corporation, or being a creditor of the corporation or other organization, which is the contractor on the public contract involved, or which is the issuer of the security in which public funds are invested;
- (2) The shares owned or controlled by such person do not exceed five percent of the outstanding shares of the corporation, and the amount due such person as creditor does not exceed five per cent of the total indebtedness of the corporation or other organization;
- (3) Such person, prior to the time the public contract is entered into, files with the political subdivision or governmental agency or instrumentality involved, an affidavit giving his exact status in connection with the corporation or other organization.

(It is implicit from the language of Division (B) that a stockholder has an "interest" in the contracts of a corporation for purposes of R.C. 2921.42 (A). Otherwise, the exemption found in Division (B) for stockholders who own five percent or less of the outstanding shares of the corporation would have no meaning. See Dougherty v. Torrence, 2 Ohio St. 3d 69, (1982) (in interpreting a statute, effect must be given to words used, and words used must not be deleted). See also Advisory Opinion No. 89-011.) Division (B) provides that, in the absence of bribery or fraud, a public servant shall be considered as not having an interest in a public contract with his own political subdivision when all of the following elements are met: (1) the interest of the public servant is limited to owning or controlling shares of a corporation; (2) the amount owned or controlled does not exceed five per cent of the outstanding shares of the corporation; and (3) the public servant, prior to the time the public contract is entered into, files with his political subdivision an affidavit giving his status with the organization. See Advisory Opinions No. 78-001, 78-002, 89-011, and 90-005.

The Ethics Commission has held that the exemption provided by Division (B) is applicable only in a situation where a public servant's sole interest in the corporation is as a stockholder who owns five per cent or less of the corporation's outstanding shares or as a creditor who is owed five percent or less of the corporation's total indebtedness. See Advisory Opinions No. 78-001, 78-002, and 89-011. R.C. 2921.42 (B)(3) also requires that a public servant file an affidavit before the corporation and political subdivision enter into the public contract. Therefore, the exemption of Division (B) is available only when a public servant has an interest in a corporation prior to the time his political subdivision and the corporation contract; the exemption of Division (B) is not available to a public servant who acquires an ownership interest in a corporation which is, at the time he acquires the ownership interest, providing goods or services to the political subdivision with which he serves. Cf. R.C. 2921.42 (C)(2) and Advisory Opinion No. 92-004.

The requirements of Division (B) are factual determinations, and whether the exemption can be met depends upon the facts and circumstances of each individual situation. The Ethics Commission has held that the criteria necessary to meet an exception to the prohibition imposed by R.C. 2921.42 are strictly applied against the public official and the burden is on the official to demonstrate that he is in compliance with the exception. See Advisory Opinion No. 87-003 (addressing the exception provided by R.C. 2921.42 (C)).

In the instant situation, you have stated that: (1) your relationship with the bank is limited to owning 100 shares of stock; (2) the bank has 39,000 outstanding shares of stock; and (3) the college has not yet entered into the depository contract with the bank and you have filed an affidavit with the president of the college giving your exact status as a stockholder. The facts which you have provided indicate that you could meet the exemption of Division (B) since your interest is limited to owning .0025641 percent of the bank's total outstanding shares and you have filed an affidavit with the college prior to the college entering into the contract with the bank. However, the Ethics Commission has explained that its function in rendering advisory opinions is not a fact-finding process. See Advisory Opinions No. 75-037, 90-013, and 92-003. Thus, the Ethics Commission, in rendering its opinion, must rely on the accuracy and completeness of the facts which you have presented in your request for an advisory opinion. Id. See also R.C. 135.11 (providing exemption in Uniform Depository Act that a stockholder in a

public depository shall not be deemed to be interested in the deposit of public moneys for purposes of any law prohibiting an officer of a subdivision from being interested in any contract of the subdivision); R.C. 3357.10 (authorizing the board of trustees of a technical college to select a depository in accordance with the Uniform Depository Act); Advisory Opinions No. 85-007 and 92-008.

Division (C) of Section 2921.42 also provides an exception to the prohibition of R.C. 2921.42 (A)(4). However, while, you may be able to meet the exemption provided by Division (B) of R.C. 2921.42 you would not be able to meet the criteria necessary to meet the exception provided by Division (C). A public official must meet four criteria in order to meet the exception of Division (C). See Advisory Opinion No. 90-003. One criterion would require that, in the instant situation, the depository contract be conducted at arm's length, with the college having full knowledge of your ownership interest as a stockholder in the bank, and that you take no part in the college's deliberations or decisions with respect to the depository contract with the bank. See R.C. 2921.42 (C)(4). In light of your position as the college's treasurer, it would be impossible for you to take no part in the college's deliberations or decisions with respect to the depository contract with the bank and still discharge the duties of your position as treasurer. See R.C. 135.14, 135.15 - .20, 135.181, 135.45, and 135.46 (describing the responsibilities which are statutorily imposed upon the treasurer of a political subdivision regarding the deposit of the political subdivision's funds in a public depository pursuant to an award made under R.C. Sections 135.01 to 135.21.) See also Advisory Opinion No. 92-008 (it is impossible for a township clerk who is an employee of a public depository to withdraw from matters pertaining to her employer and still perform the duties of her office) and R.C. 2921.42 (A)(1) and (A)(3) and 102.03 (D) (discussed below).

If an exemption to the prohibition to R.C. 2921.42 (A)(4) cannot be met, then you would, as a stockholder in the bank, be deemed to have an "interest" in a contract with your own political subdivision if the bank and college contracted. Accordingly, R.C. 2921.42 (A)(4) would prohibit you from owning stock in the bank if the college entered into a depository contract with the bank. See also R.C. 2921.42 (A)(1) (set forth below) (prohibiting a public official from authorizing, or using his authority or influence to secure authorization of, a public contract in which he has an interest). However, assuming that an exemption to the prohibition of R.C. 2921.42 (A)(4) can be established so that you would not be considered to have an interest in a contract with your own political subdivision if the college enters into a depository contract with the bank, you are still subject to other provisions of the Ohio Ethics Law and related statutes. See Advisory Opinion No. 90-005 (R.C. 2921.42 (B) does not provide an exception to the prohibitions of R.C. 2921.42 (A)(1) or (A)(3)). See also Advisory Opinions No. 85-007 and 92-008.

Division (A)(1) of R.C. 2921.42 provides that no public official shall knowingly:

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. (Emphasis added.)

A public official is prohibited, by R.C. 2921.42 (A)(1), from authorizing, or using his official position to secure authorization of, a public contract in which he, a member of his family, or any of his business associates has an interest. See also R.C. 2921.42 (C)(4), as explained above.

If you are able to meet an exemption to the prohibition against having an interest in a public contract with your own political subdivision, then you would not be considered to have an interest in the depository contract for purposes of R.C. 2921.42 (A)(1); the issue thus becomes whether a bank in which you own stock is your "business associate" for purposes of R.C. 2921.42 (A)(1). See Advisory Opinion No. 92-008 (the exemption provided by R.C. 135.11 does not extend to a public official's business associate).

The term "business associate" is not statutorily defined for purposes of R.C. 2921.42 (A)(1). The Ethics Commission has held that a business associate relationship exists whenever parties act together to pursue a common business purpose. See Advisory Opinions No. 78-006 (an employer is a business associate of an employee), 84-013 (a firm is a business associate of an agent or representative), and 85-004 (business partners are business associates). Thus, the issue becomes whether a person whose sole relationship to a corporation is that of a stockholder acts with the corporation to pursue a common business purpose.

The Ohio Supreme Court has held that a person who owns stock in a corporation owns intangible property which is comprised of various relationships which are determined by the terms of the stock certificate, the articles and regulations of the corporation, and the statutes and common law of the state of incorporation. See Millar v. Mountcastle, 161 Ohio St. 409 (1954). The Court went on to explain at pages 418-19:

[T]hese relationships may include one or more of the following, at least where, as in the instant case, common shares are concerned:

1. The right to vote.
2. The right to participate in dividends.
3. The right to participate in any distribution of net assets upon a reduction of capital or upon dissolution or liquidation.
4. The right to inspect the corporate books.
5. The right to subscribe for additional shares offered by the corporation.
6. The right to bring a shareholder's derivative suit.
7. The duty to pay the corporation the amount of consideration for which the shares were authorized to be issued.

Also, the Ohio Supreme Court has held that a stockholder does not have an independent cause of action where a third party has committed wrongful actions directed towards the corporation. See Adair v. Wozniak, 23 Ohio St. 3d 174 (1986). Furthermore, a stockholder of a corporation has no ownership interest in the corporation's property. See City of Lorain v. Gel-Pak, Inc., 20 Ohio App. 3d 378 (Lorain County 1984).

The Ohio Constitution provides limited liability for stockholders of private corporations for the obligations of the corporate entity. Section 3, Article XIII of the Ohio Constitution reads in pertinent part:

Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her.

Thus, no shareholder of a corporation may be held personally liable for the obligations of the corporation. See Squire v. Kitzerow, 5 Ohio Op. 204 (M.C. Cleveland 1936). The Ohio Supreme Court explained that there is a logical need for the shareholders of private corporations to be insulated from corporate debts since a private corporation's purpose is to accumulate capital so that the stockholders who contribute the capital may receive a return on the investment of their capital and generally, the shareholders will neither participate in the management of the corporation nor be employed by the corporation. See South High Development, Ltd. v. Weiner, Lippe & Cromley Co., L.P.A., 4 Ohio St. 3d 1 (1983). Courts will not impose liability upon a stockholder of the corporation absent a showing that the corporation has been used as a cloak for fraud or illegality. See Wakefield v. First Bank Natl. Assn., 62 Ohio App. 3d 737 (Cuyahoga County 1989).

Therefore, it is apparent that a stockholder has only a limited relation with a corporation, and in most instances purchases stock in a corporation, not with any desire to manage or control the corporation or its property, but only in order to receive a return on his capital. Thus, provided that 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. However, it must be emphasized that a stockholder is a "business associate" of a corporation for purposes of R.C. 2921.42 (A)(1) if he serves the corporation as a director, officer, agent or representative, employee, or partner, if he is capable of affecting the corporation's management or operation, or if the facts otherwise so indicate. See Crosby v. Beam, 47 Ohio St. 3d 105 (1989) (a close corporation resembles a partnership since the small number of stockholders in a close corporation depend upon each other for the corporation to succeed) and South High Development, Ltd. v. Weiner, Lippe & Cromley Co., L.P.A., (an attorney-shareholder of a legal professional association is personally liable for the obligations of the association since he has direct contact with running the corporation). See also Advisory Opinions No. 78-006, 84-013, 85-004, and R.C. 102.03 (D) (described below).

In the instant situation, you are a mere stockholder and own a de minimis amount of stock; accordingly, the bank is not your "business associate" for purposes of R.C. 2921.42 (A)(1) and R.C. 2921.42 (A)(1) does not prohibit you from performing your official duties regarding the college's decision to select the bank to be the depository for its payroll and checking accounts, or

from entering into the depository contract with the approval of the board of trustees. But see R.C. 102.03 (D) (described below).

Your attention is also directed to R.C. 2921.42 (A)(3), 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.

R.C. 2921.42 (A)(3) does not require that a public official "[h]ave an interest in the profits or benefits of a public contract," but prohibits a public official from "occupy[ing] any position of profit in the prosecution of a public contract," under specific circumstances. See Advisory Opinion No. 92-013. Therefore, the exemption provided by Division (B) to the prohibition against a public official having an "interest" in a contract with his own political subdivision does not provide an exemption to the prohibition imposed by Division (A)(3) of Section 2921.42. See Advisory Opinion No. 90-005. See also Advisory Opinion No. 92-008. Thus, the issue becomes whether you would "occupy a position of profit" in a depository contract between the college and the bank in which you own stock.

The Ethics Commission has held that the position of profit which a public official occupies in the prosecution of a public contract for purposes of Division (A)(3) must be definite and direct. See Advisory Opinion No. 92-013. A public official occupies a position of profit in a public contract when he will realize a pecuniary advantage, gain, or benefit, which is a definite and direct result of the public contract. See Advisory Opinions No. 92-013 and 92-017.

The Ethics Commission has held that 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). See Advisory Opinion No. 90-003. A stockholder of a corporation has an ownership interest, albeit generally a non-participatory one, in the corporation. As explained above, 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. See also R.C. 102.03 (D) (described below). Furthermore, it must be noted that R.C. 2921.42 (B) does not except profits under a certain amount from the prohibition of Division (A)(3), and Division (A)(3) provides no amount of profit under which its prohibition will not apply. See Advisory Opinion No. 90-005. Thus, a stockholder who owns only a fractional or de minimis amount of stock will be deemed to profit from the corporation's contracts.

A public official is considered to have "authorized" a public contract for purposes of R.C. 2921.42 (A)(3) where the public contract could not have been awarded without the public

official's approval. See Advisory Opinions No. 87-004, 92-008, and 92-012. As discussed above, you participate, as the college treasurer, in the college's award of depository contracts and the administration of those deposits. See Advisory Opinion No. 92-008. If the depository contract is awarded to the bank and could not have been awarded to the bank without your approval, then R.C. 2921.42 (A)(3) would prohibit you from owning stock in the bank, unless the contract was competitively bid and was the lowest and best bid. In the instant situation, you have stated that the college fiscal office invited bids from local financial institutions interested in entering into a depository contract with the college for its payroll and checking accounts and the bank in which you own stock submitted the proposal with the lowest service charges. R.C. 2921.42 (A)(3) would also require, where applicable, that a depository contract be competitively bid and awarded to the bank that will pay the highest interest rate, as provided by the Uniform Depository Act. See generally Advisory Opinion No. 92-008 and R.C. 135.07.

Your attention is also directed to R.C. 102.03 (D) which reads as follows:

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 or is an employee of any public agency. R.C. 102.01 (C) defines "public agency" to include any institution, board or instrumentality of the state or any other governmental entity. Thus, as treasurer of a technical college you fall within the definition of "public official or employee" for purposes of R.C. 102.03, and are, therefore, subject to the prohibitions of that Section.

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. 102.01 (G). A pecuniary interest in a private business is a thing of value under R.C. 102.03 (D). See Advisory Opinions No. 86-007 and 87-006. In the instant situation, a return on your investment of capital as a stockholder which would result from the college's contract with the bank is a thing of value for purposes of R.C. 102.03 (D).

R.C. 102.03 (D) does not speak in terms of either a public official's or employee's "interest" or "position of profit" but rather prohibits him from taking any action, formally or informally, to secure a thing of value if the thing of value could manifest a substantial and improper influence upon him with respect to his duties. See Advisory Opinions No. 88-004 and 91-004. The Ethics Commission has held that a determination of whether a thing of value could manifest a substantial and improper influence upon a public official or employee with respect to his duties is dependent upon the facts and circumstances of each individual situation. See Advisory Opinions No. 87-008, 88-004, and 91-004.

In the instant situation, while the college's board of trustees has the statutory authority to select a depository for the technical college district's funds in the manner provided by R.C. Sections 135.01 to 135.21, see R.C. 3357.10, it is apparent that, you would, as treasurer, perform

or supervise matters pertaining to the college's funds held in the college's accounts with the bank and could be asked by the trustees for advice in aiding them in their initial selection of a depository. See Advisory Opinion No. 92-008 (explaining the duties ascribed to a political subdivision's treasurer by the Uniform Depository Act). See also R.C. 135.01 (M). Therefore, in order for you to participate as the college treasurer in any matter affecting the bank in which you own stock, the facts and circumstances must demonstrate that your objectivity and independence of judgment as a public official could not be impaired by your ownership of stock in the bank. See Advisory Opinions No. 88-004 and 91-004. If your ownership of stock in the bank could impair your objectivity and independence of judgment and thus manifest a substantial and improper influence upon you with regard to matters affecting the bank, then R.C. 102.03 (D) would prohibit you from continuing to own stock in the bank if the college entered into the proposed depository contract with the bank. Id.

A matter which affects the personal financial interests of a public official or employee would generally be of such a character as to manifest an improper influence upon him with respect to his duties. See Advisory Opinions No. 88-004 and 90-003. However, in order for R.C. 102.03 (D) to prohibit a public official or employee from participating in a matter which would secure a thing of value for himself, the thing of value must also be of a "substantial" nature. See Advisory Opinions No. 86-003, 86-011, and 92-014. The word "substantial" means "of or having substance, real, actual, true, not imaginary; of considerable worth or value; important." Advisory Opinion No. 89-014 (quoting Advisory Opinions No. 75-014 and 76-005). While R.C. 102.03 (D), unlike R.C. 2921.42 (B), does not provide a definite amount under which a public official or employee who is a stockholder would not be subject to its prohibitions, the Ethics Commission has explained that the prohibition of R.C. 102.03 (D) will not apply in instances where the thing of value is nominal or de minimis in value. See Advisory Opinions No. 86-011 and 92-014. However, the Commission warned that even if a thing of value is nominal or de minimis, a quantity of de minimis or nominal items could have a substantial cumulative value for the recipient if their receipt extends over time. See Advisory Opinions No. 86-003, 89-014, and 92-014.

The issue becomes whether, in the instant situation, the return on your investment of capital as a stockholder which would result from the college's contract with the bank is a "substantial" thing of value for purposes of R.C. 102.03 (D).

As explained above, as a stockholder you do profit from the bank's contracts; however, in the instant situation, since you own .0025641 percent of the bank's total outstanding shares, it cannot be said that the return on your investment, either from appreciation in the stock's value or in the form of dividends which would result from the college's depository contract with the bank, would be "substantial" for purposes of R.C. 102.03 (D). Since you own a diminutive percentage of the bank's outstanding shares of stock, the amount of personal pecuniary benefit which would specifically result from the college's depository contact with the bank would be so negligible that such pecuniary benefit can be considered de minimis for purposes of R.C. 102.03 (D).

Also, in determining whether your relationship as a stockholder in a bank could manifest a substantial and improper influence upon you with respect to your duties which would concern the bank, it must be recognized that: (1) the bank submitted the proposal with the lowest service

charges; (2) the proposed depository contract is limited to the college's payroll and checking accounts; and (3) the bank would be one of nine financial institutions having depository contracts with the college. Under the circumstances you have presented, your relationship as a stockholder of the bank would not manifest a "substantial and improper influence" for purposes of R.C. 102.03 (D). However, a different conclusion could occur in other instances where the facts and circumstances establish that a stockholder would realize a substantial return from a contract between his political subdivision and a corporation in which he owns stock or where the facts would otherwise indicate that the stock is of an improper and substantial character. See Advisory Opinions No. 88-004 (an official or employee who owns stock in a closely held corporation could face impaired objectivity if he participated in matters affecting another shareholder) and 91-004 (an official or employee who owns stock in a bank is prohibited from participating in matters affecting the interests of a bank customer where the bank would also have a direct or contingent interest). Furthermore, it must be emphasized that a public official's or employee's participation in a matter which would secure of a thing of a value for a company in which he owns stock could create the appearance of impropriety even if it is not prohibited by R.C. 102.03 (D) or other provisions of the Ethics Laws. See Advisory Opinion No. 86-003.

Finally, your attention is directed to R.C. 102.03 (B), which provides:

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.

R.C. 102.03 (B) prohibits a public official or employee from using or disclosing, without proper authorization, confidential information acquired in the course of his official duties to any party. R.C. 102.03 (B) prohibits you from disclosing to the bank in which you are a shareholder any information which would provide it with an advantage over other banks seeking to enter into a depository contract with the college or in its dealings with the college. No time limit exists for the prohibition of R.C. 102.03 (B), and it is effective while you hold the position of college treasurer and after. See Advisory Opinion No. 88-009.

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) For purposes of Divisions (A)(1) and (A)(4) of Section 2921.42 of the Revised Code a public official who owns stock in a corporation has an interest in the corporation's contracts unless he is able to meet all of the criteria for the exemption of Division (B) of Section 2921.42 of the Revised Code; (2) Division (B) of Section 2921.42 of the Revised Code provides that, in the absence of bribery or fraud, a public servant shall not be considered to have an "interest" in a contract with his own political subdivision when: (a) the public servant's interest is limited to

owning or controlling shares of a corporation; (b) the amount of stock owned or controlled by the public servant does not exceed five per cent of the corporation's outstanding shares; and (c) the public servant, prior to the time the public contract was entered into, files with his political subdivision an affidavit giving his status with the organization; (3) For purposes of Division (A)(1) of Section 2921.42 of the Revised Code, a person whose sole relationship to a corporation is that of a stockholder is not a "business associate" of the corporation, unless the facts otherwise indicate that the official and corporation act together to pursue a common business purpose; (4) For purposes of Division (A)(3) of Section 2921.42 of the Revised Code, a stockholder occupies a position of profit in the corporation's contracts regardless of the size of the stockholding, and Division (A)(3) of Section 2921.42 of the Revised Code prohibits the treasurer of a state technical college from owning stock in a bank which has entered into a depository contract with the college where the contract could not have been awarded without the treasurer's approval, unless the contract was competitively bid and provided for the lowest service charges or the highest interest rates; and (5) Division (D) of Section 102.03 of the Revised Code does not prohibit the treasurer of a state technical college from owning stock in a bank which has a depository contract with the college even though, as treasurer, he is required to perform official duties with regard to the college's decision to secure a depository contract with the bank and to exercise responsibility in matters pertaining to the college's accounts with the bank provided that he owns only a minimal amount of the bank's outstanding shares of stock such that he would not realize a substantial pecuniary benefit from the depository contract, has no other relationship with the bank, and the facts do not otherwise indicate that his objectivity and independence of judgment could be impaired by his stockholdings.


Dr. Jack Paul DeSario, Chair
Ohio Ethics Commission