



OHIO ETHICS COMMISSION

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Advisory Opinion Number 95 -004

May 1, 1995

Syllabus by the Commission:

Division (A)(4) of Section 2921.42 of the Revised Code prohibits an associate in a law firm from being appointed as an assistant attorney general to serve as counsel to a state university if a partner in the associate's law firm is a member of the university's board of trustees.

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In a letter directed to the Ethics Commission as Chair of the board of trustees of a state university (Board), you have asked several questions about the application of the Ohio Ethics Law and related statutes where an individual wishes to be appointed to the position of assistant attorney general to serve as counsel to the Board. In addition, the individual who wishes to be appointed to the position of an assistant attorney general to serve as counsel to the Board has submitted a request for an advisory opinion to the Ethics Commission.

In your letter, you state that the individual who wishes to be appointed is an associate in a law firm and that the revenues that he would derive from serving as counsel to the Board will be paid to the law firm. You further state that a member of the Board and a member of the Ohio Board of Regents are partners in the associate's law firm. You ask whether, in light of the circumstances described above, the prohibitions that the Ohio Ethics Law and related statutes impose upon the partners preclude this appointment from being made.

The individual who seeks appointment to the position states, in his correspondence, that the Board has no input on the selection of an assistant attorney general to serve as legal counsel to the Board. The individual also states that, under the proposed arrangement, he would render legal service to the Board and submit his billings to the Attorney General's Office for approval; upon approval by the Attorney General's Office, the billings will be forwarded to the university for payment. This advisory opinion addresses the issue in light of the facts presented in both letters.

In response to these questions, subject to the conditions discussed below, the prohibitions that the Ohio Ethics Law and related statutes impose upon the partner who is a member of the Board precludes an associate in his law firm from being appointed as an assistant attorney general to serve as counsel to the Board. It must be noted initially that the Ohio Ethics Law and related statutes impose prohibitions upon public officials and employees in order to prevent situations where a public official or employee, his family members, or business associates would personally benefit due to the position of the official or employee, or where there is otherwise a

conflict of interest between the private and public interests of the official or employee. Accordingly, the prohibitions of the Ethics Laws and related statutes that are relevant in this situation do not currently apply to the individual who desires to be appointed to the position of assistant attorney general to serve as counsel to the Board because, until he is appointed to the position, he does not hold public office or employment. However, as explained below, the law partners who serve on the state university's board of trustees and the Ohio Board of Regents are subject to the prohibitions of the Ethics Law and related statutes. Your question will first be examined in light of the relationship of the law partner who serves on the university's board of trustees.

Your attention is directed to Divisions (A)(1) and (A)(4) of Section 2921.42 of the Revised Code, which read 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;. . .

(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 to include any elected or appointed officer of the state. R.C. 2921.01(A). A member of the board of trustees of a state university is a "public official" for purposes of R.C. 2921.42. The term "public contract" is defined for purposes of R.C. 2921.42 in Division (G)(1)(a) of that section to include the purchase or acquisition, or a contract for the purchase or acquisition, of services by or for the use of the state or its agencies or instrumentalities, including the employment of an individual. The Attorney General's appointment of an assistant attorney general to provide legal services to the university is a "public contract" for purposes of R.C. 2921.42 because it is the purchase or acquisition of services by or for the use of the Attorney General's Office and the university. An "interest" which is prohibited under R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. Ohio Ethics Commission Advisory Op. No. 81-008.

Before proceeding further, the distinction between the prohibitions imposed by Divisions (A)(1) and (A)(4) must be explained.

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, the employment of a business associate. Advisory Op. No. 89-015. The Ethics Commission has held that the partners and associates in a law firm with which a public official is affiliated are his "business associates" for purposes of R.C. 2921.42 (A)(1). Id. See also Advisory Ops. No. 78-001, 83-002, and 83-008.

R.C. 2921.42 (A)(4) prohibits a public official from having an "interest" in a public contract entered into by or for the use of "the political subdivision or governmental agency or

instrumentality with which he is connected." (Emphasis added). The Ethics Commission has held that if a proposed public contract will result in a public official having a prohibited interest in the contract, then R.C. 2921.42 (A)(4) will preclude the proposed contract from being entered into unless the official removes himself from the situation that creates his interest in the proposed contract. Advisory Op. No. 92-004. In Advisory Opinion No. 78-001, the Ethics Commission explained the difference between Divisions (A)(1) and (A)(4), holding:

Division (A)(1) of Section 2921.42 of the Revised Code would prohibit a . . . "public official" . . . from knowingly authorizing or using the authority or influence of his office to secure authorization of a public contract for legal services between [his public agency] and a law firm in which he, a member of his family, or any of his business associates has an interest. Division (A)(4) of Section 2921.42 of the Revised Code would prohibit a [public official] from knowingly having an interest in the profits or benefits of a contract between [his public agency] and the law firm . . . with which he is associated.

Therefore, your question raises two issues: (1) whether the Board member, for purposes of R.C. 2921.42 (A)(4), will have an "interest" in a public contract if the Attorney General makes this appointment; and (2) whether the Board, for purposes of R.C. 2921.42 (A)(1), "authorizes" the appointment of an individual who serves as an assistant attorney general to provide legal counsel to the university.

The prohibition imposed by R.C. 2921.42 (A)(4) will be addressed first.

The issue is whether, for purposes of R.C. 2921.42 (A)(4), the Board member will have an "interest" in a public contract of his associate if the Attorney General makes the proposed appointment. As stated above, R.C. 2921.42 (A)(4) prohibits a public official from having an "interest" in 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 Ethics Commission has held that to be "connected with" something is to be related to, or associated with that entity. Advisory Op. No. 87-002.

As stated above, a "public contract" includes the purchase or acquisition, or a contract for the purchase or acquisition, of services by or for the use of a the state or its agencies or instrumentalities, including the employment of an individual. Therefore, the Attorney General's appointment of an assistant attorney general to aid her in the performance of her statutory duty to provide legal counsel to a state university, is a public contract, for purposes of R.C. 2921.42 because it is the purchase or acquisition of legal services by or for the use of her Office and includes the employment of an individual.

The Board is "connected" with the provision of legal services performed by the Office of the Attorney General for purposes of R.C. 2921.42. As explained above, the Board does not enter into a public contract with an assistant attorney general to act as its legal counsel; rather, the Attorney General enters into the public contract. However, because the Attorney General is the attorney and legal adviser for all state colleges and universities, the assistant attorney general represents the Board. In addition, the university pays the billings for legal services rendered by the individual who is appointed as an assistant attorney general to serve as counsel to the Board.

As a result, the Board is "connected" with the provision of legal services performed by the Office of the Attorney General for purposes of the prohibition of R.C. 2921.42. See Opinion of the Attorney General No. 78-024 (the board of trustees of a state university may not settle a claim against the university without the concurrence of the Attorney General).

You state that the revenues earned by the assistant attorney general from serving as counsel to the Board will be paid to the law firm in which he is an associate. The distributive share of partnership profits that the Board member would derive from the revenues earned by the assistant attorney general for serving as counsel to the Board would constitute a definite and direct pecuniary interest in a public contract for purposes of R.C. 2921.42 (A)(4). Advisory Op. No. 89-015 (R.C. 2921.42 (A)(4) prohibits a city law director from receiving a share of the compensation that a law partner or associate earns for performing services under a contract with the city). See also Advisory Ops. No. 78-001, 83-002, and 86-004.

Division (C) of Section 2921.42 sets forth an exemption to the prohibition of Division (A)(4). In order to meet the exemption provided by R.C. 2921.42 (C), four requirements must be met, and a public official must demonstrate compliance with all of those requirements. Division (C)(2) is of particular note, and requires that the services that are the subject of the public contract be "unobtainable elsewhere for the same or lower cost."

Whether an individual's services are "unobtainable elsewhere for the same or lower cost" is determined by the facts and circumstances of each individual situation. Advisory Op. No. 93-008. Valid and proper considerations must determine whether an individual's services are "unobtainable elsewhere for the same or lower cost." See Advisory Ops. No. 84-002, 88-001, and 93-008. The Ethics Commission addressed the exception of Division (C)(2) in connection with the provision of legal services in Advisory Opinion No. 84-002 and held that "[i]t would be extremely difficult to demonstrate that legal services [provided by a firm in which a public official has an interest] would be 'unobtainable elsewhere for the same or lower cost'." (Emphasis added). See also Advisory Opinions No. 78-001 ("the legal services [to be provided by a law partner of a city council member] are probably obtainable elsewhere for the same or lower cost") and 90-007 ("[i]t may be difficult to demonstrate that legal services provided by the prosecuting attorney's partner would be 'unobtainable elsewhere for the same or lower cost.'").

In addition, the Board member must comply with the other provisions of R.C. 2921.42 (C). Of particular note is R.C. 2921.42 (C)(4), which requires that the transaction be conducted at arm's length, with full knowledge of the governmental agency of the public official's interest, and the public official take no part in the deliberations and decision of the governmental agency with respect to the contract. See also R.C. 2921.42 (A)(1) (discussed below).

If the burden of establishing that the individual who desires this appointment would provide legal services that are 'unobtainable elsewhere for the same or lower cost' can be met, then R.C. 2921.42 (A)(1) would prohibit the Board member from authorizing the appointment or using the authority or influence of his position to secure the appointment.

The Ethics Commission has held that a legislative body, commission, or board will be deemed to have authorized a public contract, for purposes of R.C. 2921.42, where the contract

could not have been awarded without the official's or board's approval. See Advisory Ops. No. 87-004, 88-003, and 88-008. Thus, the method by which an assistant attorney general is appointed to serve as counsel to the Board must be examined.

You have stated that the Attorney General will appoint the individual to the position of assistant attorney general. As stated above, the attorney who desires to be appointed as an assistant attorney general stresses that the Board has no input in this selection process. The Attorney General is the "Chief law office for the state and all its departments." R.C. 109.02. The Attorney General is the attorney and legal adviser for each state college and university. R.C. 3345.15. See also R.C. 109.02 ("no state officer, board, or head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law."). The Attorney General is empowered to appoint assistant attorneys general and special counsel. See R.C. 109.03 and R.C. 109.07, respectively.

Therefore, because the Attorney General is the appointing authority for the assistant attorney general who serves as counsel to the Board, the Attorney General, for purposes of R.C. 2921.42 (A)(1), "authorizes" the appointment of an individual who serves as an assistant attorney general to provide legal counsel to the university. Accordingly, since the Board is not the appointing authority for the assistant attorney general who serves as counsel to the Board, this prohibition which is imposed by R.C. 2921.42 (A)(1) upon the Board member does not preclude the Attorney General from making this appointment.

However, R.C. 2921.42 (A)(1), in addition to prohibiting a public official from authorizing a contract in which a business associate has an interest, prohibits a public official from employing the "authority or influence of his office" to secure authorization of a public contract in which a business associate has an interest. The words "authority or influence" are not defined for purposes of R.C. 2921.42. It is a primary rule of statutory construction that words used in a statute that are not defined must be construed according to rules of grammar and common usage. R.C. 1.42. The word "authority" is defined in Webster's New World Dictionary of the American Language as "power or influence resulting from knowledge, prestige, etc." Webster's New World Dictionary of the American Language 94 (2d College ed. 1970). The word "influence" is defined as "the power of persons . . . to affect others, seen only in its effects" and "the ability of a person . . . to produce effects indirectly by means of power based on . . . high position." Webster's New World Dictionary of the American Language 722 (2d College ed. 1970). The General Assembly's use of the words "authority or influence" in R.C. 2921.42 (A)(1) specifically characterize a broader range of activity than that described by the word "authorize." Dougherty v. Torrence, 2 Ohio St. 3d 69, 70 (1982) (effect must be given to words used in a statute); Dungan v. Kline, 81 Ohio St. 371, 380-81 (1910) (the presumption is that every word in a statute is designed to have effect). See also Advisory Ops. No. 74-001 and 94-002.

Therefore, R.C. 2921.42 (A)(1), by prohibiting a public official from employing the "authority or influence of his office," also prohibits the Board member from exercising the power and influence inherent in his position. R.C. 2921.42 (A)(1) prohibits the Board member from any formal or informal participation with the Attorney General's Office regarding matters that would affect the award, funding, performance, enforcement, supervision, or payment of a public contract in which his business associate would have an interest. This prohibition includes, but is

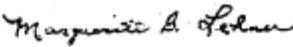
not limited to, lobbying, discussing, recommending, or otherwise using the authority or influence of his office, either formally or informally, in matters affecting the appointment of his business associate to the position of assistant attorney general to serve as counsel to the Board. R.C. 102.03 (D) also prohibits a public official from using the authority or influence of his office to secure anything of value that is of an improper character and prohibits an official from participating, in any way, in a matter from which his business associate would receive a definite and direct personal pecuniary benefit. See Advisory Ops. No. 89-008 and 89-015.

You have also stated that a member of the Ohio Board of Regents is a law partner in the law firm in which the individual who is the subject of this opinion is an associate. The Ohio Board of Regents is a statutorily created board with the responsibility to oversee higher education within the state. See generally R.C. 3333.04. It would be superfluous to examine the proposed appointment in light of the relationship of the law partner who serves on the Board of Regents because the restrictions discussed above prohibit the appointment. However, it must be stressed that the Ohio Ethics Law and related statutes would prohibit the law partner who is a member of the Board of Regents from any formal or informal participation with the Attorney General's Office regarding matters that would affect the award, funding, performance, enforcement, supervision, or payment of a public contract in which the associate would have an interest. Advisory Ops. No. 89-008 and 89-015.

You should also be aware that the contemplated appointment may raise issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. These issues are not within the Ethics Commission's jurisdiction but should be referred to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

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: Division (A)(4) of Section 2921.42 of the Revised Code prohibits an associate in a law firm from being appointed as an assistant attorney general to serve as counsel to a state university if a partner in the associate's law firm is a member of the university's board of trustees.



Marguerite B. Lechner, Chair
Ohio Ethics Commission