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STATE OFFICIALS OR EMPLOYEES SELLING GOODS OR SERVICES: Ethics Commission Information Sheet # 3

I. Introduction

The Ohio Ethics Law and related statutes are found in Ohio Revised Code (R.C.) Chapter 102. and Sections 2921.42 and 2921.43. These laws generally prohibit public officials and employees from misusing their official positions for their own personal benefit or the benefit of their family members or business associates.

The Ethics Law applies to all people who serve as officials and employees for public agencies in Ohio. "Public agencies" include state departments, boards, and commissions, counties, cities, villages, townships, school districts, public colleges and universities, public libraries, port authorities, and all other public entities.

The Ohio Ethics Commission was created to administer, interpret, and assist in the enforcement of the Ethics Law for all officials in the state, except members and employees of the General Assembly and judicial officers and employees.¹ In this information sheet, the word "official" includes any person who serves a state agency, whether elected, appointed, or employed.

II. Purpose of this Information Sheet

The Ethics Commission prepared this information sheet to explain how the law applies when a state official or

employee wishes to sell goods or services to a *state* agency, including the one she serves.

The Commission has prepared a separate information sheet (Information Sheet # 2) for officials and employees of local public agencies.

III. Summary of the Law

The Ohio Ethics Law and related statutes prohibit an official from:

- Selling goods or services to the state agency she serves unless she can meet an exception to the law;
- Selling goods or services to any state agency, except through competitive bidding, unless she meets an exception to the law; and
- Using her position to get a public contract or payments from the state agency.

IV. Prohibition Against Having an Interest in a Public Contract

R.C. 2921.42(A)(4) prohibits an official from having an interest in the profits or benefits of a public contract entered into by or for the use of a public agency with which she is connected.

A public contract exists whenever a public agency buys or acquires goods or services, regardless of whether there is a

written contract.² Examples of public contracts are:

- Purchases of goods like computers, fire trucks, and paper products³;
- Purchases of services like insurance, consulting, and accounting⁴;
- Any employment, whether full time, part time, temporary or permanent; and
- Grants (because the agency acquires services by virtue of the grant).⁵

Therefore, R.C. 2921.42(A)(4) prohibits an official from selling goods or services to the public agency with which she is connected.

A person is “connected” with the agency she serves.⁶ For example, a person who works for a state department is connected with that department and all of its divisions, bureaus, and offices. Therefore, an employee of the Division of Real Estate at the Department of Commerce is prohibited from selling a computer to the Fire Marshall’s Office in the Department.

V. Stockholding Exception

There is an exception when an official is a stockholder of a company. If an official owns less than five percent of the stock in a company, and files an affidavit about her stock ownership with her public agency, she will not have a prohibited interest in any contract between the agency and the company. The exception does not apply if the official has any other connection with the company, such as employment.⁷

For example, if a state employee owns less than five percent of the stock in a car company, and she files an affidavit with the state agency disclosing her stockholding, she does not have a prohibited interest if the department by which she is employed buys a car from the company.

VI. Four-Part Exception

There is another exception. In order for the exception to apply, the public official must be able to show that she meets all four of the following requirements:

Requirement 1: The goods or services are necessary goods or services.⁸ In other words, the agency can demonstrate that it needs the goods or services the official will provide.

Requirement 2: Either the goods or services are part of a continuing course of dealing or they are unobtainable elsewhere for the same or lower cost.⁹ There are two ways the official can show that she meets this requirement.

First, the official can meet the requirement if she is supplying goods or services to the agency as part of a continuing course of dealing established before she was elected or employed. In other words, if the official had a contract to sell goods or services to the agency before she was hired, she can continue to perform that contract.¹⁰ However, if there was simply a practice of purchases, or if there are any significant changes to the contract (including cost), the official cannot meet this exception. If the official believes that she can show that she meets this requirement, she should contact the legal advisor for the public agency, or the Ethics Commission, to independently assure that the requirement can be met.

Second, the official can meet the requirement if the agency cannot get the goods or services from any other source for the same or lower cost. However, the agency *must* use some objective price comparison and must provide adequate notice to other suppliers of the same goods or services, in a fair and impartial purchasing process.¹¹ If the official provided the lowest and best bid after a fair and open competitive bid, or offered the lowest price on the goods as determined by some other fair and objective process, the official may be able to demonstrate that she meets this requirement.

Requirement 3: The treatment that the official provides to the agency is the same as, or better than, the treatment that she provides to other customers or clients in similar transactions.¹² In other words, the official must treat the agency the same as, or better than, she treats the other customers or clients of her business.

Requirement 4: The transaction is conducted at arm's length, the agency has full knowledge of the official's interest in the sale of goods or services, and the official has taken no part in the deliberations or decision with respect to the transaction.¹³ The official must first show that she did not use her unique access as an agency employee to secure the contract. Then the official must show that she has fully informed the agency that she is interested in the transaction. Finally, the official must show that she was not involved in any discussions, decisions, or votes about the contract.

VII. Using Public Position to Secure a Public Contract

The Ethics Law also prohibits the official from using the authority or influence of her public position, in any way, to get an agency contract, or payments for goods or services from the public agency to her or her business.¹⁴ The official is prohibited from discussing her contract with other officials or employees of the same agency.

Similarly, R.C. 102.03(D) prohibits an official from using her public position to secure a thing of value for herself.¹⁵ The money that an official would receive from the sale of goods or services to the agency would be a thing of value. Therefore, the official is prohibited from using her position to get payments from the agency.

VIII. Occupying a Position of Profit in a Contract

An official who authorizes contracts, or is a member of any board or committee that authorizes contracts, is also subject to R.C. 2921.42(A)(3). This section prohibits an official from occupying a position of profit in a contract if the contract is authorized by the official, or by a body, committee, or board of which she sits, unless the contract is competitively bid and awarded to the lowest and best bidder.

A public contract has been authorized by an official, body, board, or commission where the contract could not have been awarded without the approval of the board or official, the position in which the official serves, or the public entity with which she serves.¹⁶

If a board for an agency will authorize or approve a contract, a member of the board would be prohibited from receiving any profit from the contract unless the contract is competitively bid and

awarded to the lowest and best bidder.¹⁷ This is true even if the board member does not participate in the board's approval or authorization of the contract.¹⁸

IX. Sales to Other State Agencies

R.C. 102.04(B) provides that a state official or employee is prohibited from selling goods or services to any state agency, except through competitive bidding.¹⁹ For example, a person employed by a state department is prohibited from selling a computer to another state agency, unless the contract is competitively bid.

There is an exception to this prohibition. However, the exception does not apply to elected state officers.²⁰ Other state officials and employees may sell goods or services to state agencies other than the one they serve if they complete, sign, and file the statement described in R.C. 102.04(D). In that statement, the official must disclose:

- Her name and home address;
- The name and mailing address of the state agency with which she serves;
- The name and mailing address of the state agency to which she wishes to sell goods or services; and
- A brief description of the goods or services that she wishes to sell.²¹

The statement also includes a declaration that the official disqualifies herself for two years from any participation as a state official in any matter involving any official or employee of the state agency to which she will sell goods or services.²²

The state official is required to file the statement with:

- The state agency she serves;

- The state agency to which she wishes to sell goods or services; and
- The Ohio Ethics Commission.²³

X. Other Considerations

Any official who wishes to sell goods or services to her public agency should ask her supervisor, or legal counsel for the public agency, whether the public agency has any additional policies or rules regarding this matter. (A public agency cannot create a policy or rule that is less restrictive than the prohibitions described above. However, an agency may have a policy or rule that is more restrictive than the Ethics Law.)

XI. Penalties

The Ethics Law and related statutes are criminal laws. If a person is convicted of violating an ethics law, that person may receive a jail sentence and/or have a fine levied against her.

Most of the ethics laws discussed in this information sheet (R.C. 2921.42(A)(4) and R.C. 102.03(D)) are first-degree misdemeanors, with a maximum penalty of six months in prison and/or a \$1000 fine. One of the laws discussed (R.C. 2921.42(A)(1)) is a fourth-degree felony, with a maximum penalty of eighteen months in prison and/or a \$5000 fine.

XII. Conclusion

Please contact the Ethics Commission if you have questions about this information sheet or the Ohio Ethics Laws. This information sheet is not an advisory opinion, and is not intended to provide advice on specific facts. Copies of the Commission's formal advisory opinions can be obtained from: Ohio Ethics Commission,

William Green Building, 30 West Spring Street, L3, Columbus Ohio, 432315-2256; telephone (614) 466-7090, and on the Commission's Web site: www.ethics.ohio.gov.

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Endnotes:

¹ The ethics agency with jurisdiction over ethics issues related to members and employees of the General Assembly is the Joint Legislative Ethics Committee. The ethics agency with jurisdiction over ethics issues related to judicial officers and employees is the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

² RC. 2921.42(G)(1).

³ Ohio Ethics Commission Advisory Opinions No. 84-013 (computers), 87-002 (paper and cleaning supplies), and 84-014 (fire equipment).

⁴ [Adv. Ops. No. 82-007](#) (accounting services), [92-017](#) (insurance services) and [97-004](#) (employment).

⁵ [Adv. Op. No. 87-003](#).

⁶ [Adv. Op. No. 93-004](#).

⁷ [Adv. Op. No. 93-001](#).

⁸ R.C. 2921.42(C)(1).

⁹ R.C. 2921.42(C)(2).

¹⁰ [Adv. Op. No. 88-008](#).

¹¹ [Adv. Op. No. 90-003](#).

¹² R.C. 2921.42(C)(3).

¹³ R.C. 2921.42(C)(4).

¹⁴ R.C. 2921.42(A)(1).

¹⁵ R.C. 102.03(D).

¹⁶ [Adv. Op. No. 2001-02](#).

¹⁷ [Adv. Op. No. 90-005](#)

¹⁸ *Id.*

¹⁹ [Adv. Op. No. 89-010](#).

²⁰ R.C. 102.04(D).

²¹ R.C. 102.04(D)(1).

²² R.C. 102.04(D)(2).

²³ *Id.*