



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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COLUMBUS, OHIO 43215-2940
(614) 466-7090

March 29, 1994

Informal Opinion 1994-INF-0329-1

Diana Sweeney
Cortland City Council

Dear Ms. Sweeney:

In your letter to the Ethics Commission, you state that an individual who is employed at the Cortland Savings and Banking Company (Bank) as its executive vice president and secretary treasurer was elected as the Mayor of the City of Cortland (City) in the November general election and was sworn into office on January 3, 1994. You also state that the Bank is a depository of City funds. You ask for an advisory opinion which addresses the restrictions which the Ohio Ethics Laws and related statutes will impose upon the Mayor.

Your attention is first directed to Section 2921.42 (A)(4) of the Revised Code, which provides that no public official shall knowingly:

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 in R.C. 2921.01 (A) to include any elected or appointed officer of the state or any political subdivision of the state. Accordingly, a mayor of a city is a "public official" for purposes of R.C. 2921.42 (A)(4). See Ohio Ethics Commission Advisory Op. No. 85-002.

The term "public contract" is defined for purposes of in R.C. 2921.42 in R.C. 2921.42 (G)(1) as "[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 deposit of public funds by a political subdivision in a bank serving as a public depository is a "public contract" for purposes of R.C. 2921.42. See Advisory Ops. No. 85-007 and 92-008. See also Advisory Op. No. 83-003.

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An "interest" which is prohibited by R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. See Advisory Op. No. 81-003 and 81-008. In Advisory Opinion No. 87-003, the Ethics Commission held that directors, trustees, and officers of corporations have an interest in the contracts of the corporations with which they serve. This interest is fiduciary in nature and may be pecuniary in instances where an officer receives compensation. Id. In the instant situation, the Mayor has an "interest" in the contracts of the Bank because he serves as its executive vice president and secretary treasurer. But see R.C. 135.11 set forth below.

Section 135.11 of the Revised Code provides an exception to the prohibition imposed by R.C. 2921.42 (A)(4) described above. R.C. 135.11 reads as follows:

An officer, director, stockholder, employee, or owner of any interest in a public depository receiving inactive, interim, or active deposits pursuant to sections 135.01 to 135.21, inclusive, of the Revised Code shall not be deemed to be interested, either directly or indirectly, as a result of such relationship, in the deposit of such inactive, interim, or active deposits of public moneys for the purpose of any law of this state prohibiting an officer of the state or of any subdivision from being interested in any contract of the state or of the subdivision.

R.C. 135.11 provides that an officer or employee of a bank shall not be "deemed to be interested, either directly or indirectly . . . in the deposit of . . . public moneys for the purpose of any law of this state prohibiting an officer of . . . any subdivision from being interested in any contract of . . . the subdivision." (Emphasis added.) The term "subdivision" is defined for purposes of R.C. Chapter 135. to include any municipal corporation, except one which has adopted a charter "and the charter or ordinances . . . set forth special provisions respecting the deposit or investment of its public moneys . . ." (Emphasis added.) R.C. 135.01 (L). Thus, the issue becomes whether, in the instant situation, the City is a "subdivision" for purposes of R.C. 135.11.

In this instance, the City has adopted a charter; however, this Office has been informed that neither City charter nor ordinances set forth special provisions respecting the deposit or investment of its public moneys. Provided that this is a correct statement of fact, the exception provided by R.C. 135.11 to the prohibition imposed by R.C. 2921.42 (A)(4) against a public official having an interest in a contract with his own political subdivision, is applicable in the instant situation.

Although Section 135.11 provides an exception to the prohibition of R.C. 2921.42 (A)(4), it is also important to discuss the exemption provided by Division (C) of R.C. 2921.42, particularly because of existing deposits between the City and the Bank addressed later in this opinion. R.C. 2921.42 (C) establishes four requirements which must be met before the Bank may serve as a depository of City funds. In the instant situation, Division (C)(2) is of particular note and requires that the Mayor show that the depository services which the Bank is providing for the City are being furnished as part of a continuing course of dealing established prior to the Mayor becoming associated with the City. See generally Advisory Op. No. 88-008 (addressing the issue of a director of an insurance company, which has contracts with a city, becoming a city council member). The ability to meet the requirement of Division (C)(2) by showing that the services are "unobtainable elsewhere for the same or lower cost" is not relevant to the instant situation and need not be discussed.

The Ethics Commission has held that the exemption of R.C. 2921.42 (C)(2) for services being furnished as a "continuing course of dealing" can be established where the contract existing prior to the time the public official becomes associated with the political subdivision is automatically renewed after the public official takes office if automatic renewal is a term of the existing contract and such renewal does not require action by any office, department, or agency of the political subdivision. See Advisory Op. No. 88-008. However, if the renewal of the contract requires action by the political subdivision, or if the contract is modified or otherwise changed after the public official takes office, then he cannot meet the "continuing course of dealing" exception of R.C. 2921.42 (C)(2), even where such renewal or change is negotiated or executed by an agency of the political subdivision other than the one which the public official serves. Id.

Division (C)(4) requires that the transaction between the Bank and the City be at arm's length, with the City having full knowledge of the Mayor's interest in the Bank's contracts and that the Mayor take no part in the deliberations and decisions of the City with respect to the contract. See also R.C. 2921.42 (A)(1) (discussed below). Division (C)(1) requires that the City reasonably and objectively demonstrate that the services provided by the Bank are necessary for the City. Division (C)(3) requires that the treatment accorded the City by the Bank is preferential to, or the same as, that accorded to the Bank's other customers or clients.

However, the exceptions provided by R.C. 135.11 and Division (C) of R.C. 2921.42 do not apply to the prohibition of R.C. 2921.42 (A)(1), which provides that no public official shall knowingly:

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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 official position, to secure authorization of, a public contract in which he or any of his business associates has an interest.

The Ethics Commission has held that a public official's private employer is his "business associate" for purposes of R.C. 2921.42. See Advisory Ops. No. 78-006, 89-008, 92-002, and 92-008. A bank which is the depository of public funds has a definite and direct pecuniary interest in the deposit of the public funds. See Advisory Op. No. 92-008. Therefore, the Bank is the Mayor's "business associate" for purposes of R.C. 2921.42 (A)(1).

The Ethics Commission has held that a public official will be deemed to have "authorized" a public contract for purposes of R.C. 2921.42 where the public contract could not have been awarded without the approval of the public official. See Advisory Ops. No. 87-004, 88-008, 90-010, 91-007, and 92-012. See also R.C. 2921.42 (A)(3) described below). R.C. 2921.42 (A)(1) prohibits a public official from approving matters or otherwise participating in decisions which would affect the ability of his business associate to enter into a public contract, the terms of the contract, enforcement of the contract, performance of the contract, and payments under the contract. See Advisory Op. No. 89-010 and 92-008. This prohibition includes any action in a decision-making process which involves the award, funding, or supervision of a public contract in which a business associate would have an interest. Some types of prohibited actions would include participation in an initial decision to award a public contract, the authorization or approval of payments for services rendered under the public contract, and matters arising after a contract is awarded, such as a revision, alteration, or modification in the terms of the original contract, a renewal of the contract, enforcement of the contract, or supervision of the performance of the contract.

The duties of the City's mayor are set forth in the City Charter. Specifically, Division (E) of Section 4.04 of the Charter of the City of Cortland reads in pertinent part:

The Mayor shall:

. . .

Unless otherwise provided by ordinance, execute on behalf of the Municipality all authorized contracts, conveyances, evidences of indebtedness, and all other such instruments to which the Municipality is a party, and shall, where required, attach thereto the Official Seal of his office, . . . (Emphasis added.)

It is apparent from this charter provision that, unless otherwise provided by ordinance, the Mayor is required to execute public contracts in which the City is a party. Since as explained above, a public official will be deemed to have "authorized" a public contract for purposes of R.C. 2921.42 where the public contract could not have been awarded without the public official's approval, the Mayor's execution of a public contract for the deposit of City funds in a public depository is "authorization" for purposes of R.C. 2921.42. See Advisory Op. No. 92-008. You have stated that the duty of the Mayor to execute a contract for the deposit of public funds in a public depository has never been altered by ordinance.

Accordingly, R.C. 2921.42 (A)(1) prohibits the Mayor from authorizing the deposit of City funds, or discussing, recommending, or otherwise using his authority or influence as Mayor, formally or informally, to secure the deposit of City funds with the Bank. See Advisory Op. No. 92-008 (R.C. 2921.42 (A)(1) prohibits a township trustee, who is also a member of the board of directors of a bank that is a township depository, from authorizing, or using his authority or influence to secure, the deposit of township funds with the bank he serves, or otherwise performing any of the duties of township trustee that would affect the financial interests of the bank he serves).

Also, your attention is directed to Division (D) of Section 102.03 of the Revised Code which provides:

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.

The term "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office of a city, and thus includes a city mayor. See R.C. 102.01 (B) and (C). See Advisory Op. No. 85-002..

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 definite and direct pecuniary

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benefit is considered to be a thing of value under R.C. 102.03 (D) and (E). See Advisory Ops. No. 79-008, 85-006, 88-004, and 89-005. The deposit of city funds in a public depository is a thing of value for purposes of R.C. 102.03 (D) and (E). See generally Advisory Op. No. 92-008.

The Ethics Commission has consistently held that R.C. 102.03 (D) prohibits a public official or employee from using the authority or influence of his office to secure anything of value for himself, or for another person or entity if the relationship between the official and that person or entity could impair the official's objectivity and independence of judgment with regard to matters that affect that party. See Advisory Ops. No. 88-004, 88-005, 89-005, 91-001, 91-004, and 92-008. The Commission has held that R.C. 102.03 (D) prohibits a public official or employee from participating in matters which would secure a thing of value for himself in his outside private employment. See Advisory Op. No. 80-003. Also, the Commission has held that R.C. 102.03 (D) prohibits a public official or employee from participating in matters which would secure a thing of value for his outside private employer, holding in Advisory Opinion No. 89-008:

An employer holds a position of power and authority over the hiring, compensation, discipline, and termination of its employees. A [public official] who is in the position of making an official decision regarding the pecuniary interests of his private employer would have an inherent conflict of interest impairing the [public official's] objectivity and independence of judgment. (Emphasis added.)

See also Advisory Ops. No. 88-005 and 92-008.

In the instant situation, R.C. 102.03 (D), as well as R.C. 2921.42 (A)(1), prohibits the Mayor from authorizing the deposit of City funds, or discussing, recommending, or otherwise using his authority or influence as City Mayor, formally or informally, to secure the deposit of City funds with the Bank. See Advisory Op. No. 92-008 (R.C. 102.03 (D) prohibits a township trustee, who is also a member of the board of directors of a bank that is a township depository, from authorizing, or using his authority or influence to secure, the deposit of township funds with the bank he serves, or otherwise performing any of the duties of township trustee that would affect the financial interests of the bank he serves).

Furthermore, the Mayor is subject to Division (A)(3) of Section 2921.42 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.

It is important to note that R.C. 2921.42 (A)(3) does not speak in terms of a public official having an "interest" in a public contract, but rather prohibits a public official from "occupy[ing] any position of profit in the prosecution of a public contract," under specific circumstances. See Advisory Op. No. 92-013 (explaining the distinction between an "interest" and a "position of profit" in a public contract). Therefore, R.C. 135.11, which states that a bank officer or employee will not be deemed to be "interested" in the deposit of moneys in a public depository, does not provide an exemption to the prohibition of Division (A)(3) of R.C. Section 2921.42. See Advisory Op. No. 92-008. See also Advisory Ops. No. 85-007 and 88-005. Furthermore, Division (C) of R.C. Section 2921.42 does not provide an exemption to the prohibition of Division (A)(3) of R.C. Section 2921.42. See Advisory Op. No. 92-002.

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 authorized by him, unless the contract was competitively bid and his was the lowest and best bid. As explained above, a public official will be deemed to have "authorized" a public contract for purposes of R.C. 2921.42 where the public contract could not have been awarded without the public official's approval.

The Ethics Commission has held that a public official will be deemed to profit from a public contract which is awarded to the company which employs him, 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 Ops. No. 87-004, 88-008, 92-002, and 92-008. Accordingly, R.C. 2921.42 (A)(3) prohibits the Mayor from profiting, as described above, from any deposit of City funds in the Bank unless the deposits are made pursuant to competitive bidding and are awarded to the bank that will pay the highest interest rate, as provided by the Uniform Depository Act. See, e.g., R.C. 135.07.

It must be stressed that the charter provision which requires the Mayor to execute, on behalf of the City, all authorized contracts cannot provide an exemption to the prohibitions imposed by R.C. 2921.42 (A)(1) and (A)(3), and R.C. 102.03 (D) described above. The Ethics Commission has held that the Ohio Ethics Laws and related statutes are state criminal statutes which impose a uniform standard upon all public officials and employees throughout the state and prevails over the provisions of a city charter or ordinance. Advisory Ops. No. 83-004 and 86-002. See also Advisory Op. No. 89-014.

Therefore, the prohibitions imposed by R.C. 2921.42.(A)(1) and (A)(3), and R.C. 102.03 (D) effectively preclude the City from using the Bank as a public depository since such deposits cannot be made without the action of the Mayor even if the deposits are made pursuant to competitive bidding and the Bank pays the highest interest rate. See generally Advisory Ops. No. 90-010 and 92-008. However, as explained above, these prohibitions affect neither contracts entered into between the City and the bank which pre-existed the Mayor taking office nor automatic renewals of the contracts where automatic renewal is a term of the existing contract and such renewal does not require action by any office, department, or agency of the City.

The question remains whether it is possible for the Mayor to withdraw from matters pertaining to the award of contracts in order to enable the City to use the Bank as a public depository. Specifically, it has been asked whether the City's director of finance may exercise responsibility with regard to the City using the Bank as a public depository if the Mayor withdraws from matters pertaining to the authorization of the contract.

The Ethics Commission has held that, in certain circumstances, a public official or employee may withdraw from consideration of matters which would pose a conflict of interest due to the provisions of R.C. 102.03 and 2921.42. See Advisory Ops. No. 89-006, 90-002, 92-004, and 92-008. There may be instances where a public official may delegate responsibility to a subordinate, with review of the subordinate's action by an official or entity independent of, or superior to, the official with the conflict of interest, or empower an authority who is independent of, or superior to, the official with the conflict of interest to approve the matter, if such transfer of authority is permitted under relevant statutes. See Advisory Ops. No. 92-004 and 92-008. However, the Commission has held that such a withdrawal may not interfere with the official's or employee's performance of his duties. Id.

As described above, the Cortland City Charter mandates that the Mayor "execute on behalf of the Municipality all authorized contracts . . ." Cortland City Charter, Article IV, Section 4.04, Division (E). In addition, the Cortland City Charter empowers the Mayor to "appoint and remove all directors of departments and all subordinate officers and employees in the departments, . . ." Cortland City Charter, Article IV, Section 4.04, Division (F). It is crucial to note that the Mayor is empowered to appoint and remove the directors of the City departments, including the City's director of finance.

The City's director of finance is the head of the department of finance and is appointed by the Mayor with the confirmation of council. See Cortland City Charter, Article V, Section 5.02. The duties of the City's director of finance are set out in Article V, Section 5.04 of the Cortland City Charter, which provides:

The Director of Finance shall have charge of the administration of fiscal affairs of the Municipality and the jurisdiction in such matters shall extend over all departments, commissions, boards, and over all officers and employees of the Municipality. He shall serve over all officers and employees of the Municipality. He shall serve as financial advisor to the commissions of the Municipality. He shall have authority and responsibility to examine and audit the accounts of all officers, employees, boards, and commissions of the Municipality. He shall have such other duties and powers as are given by law to the City Auditor and City Treasurer of a city which are not inconsistent with the provisions of this Charter. He shall assist the Mayor in the preparation of estimates, budgets, and appropriations; report to Council monthly or more often as required by Council concerning the financial affairs of the Municipality. He shall perform such other duties as the Mayor or Council may impose.

It is apparent that the Cortland City Charter does not enable the director of finance to execute contracts with public depositories; as explained above, the Cortland City Charter imposes the duty to execute contracts with the Mayor.

Therefore, in the instant situation, because the Mayor is an independent elected office holder and is ultimately responsible for performing the duties of his office, as they are described by charter provision, the Mayor could not withdraw from performing official actions with regard to the City's use of the Bank as a public depository and transfer his authority to an individual over which he is the appointing authority. See Advisory Op. No. 92-004.

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The Mayor is also subject to R.C. 102.03 (B) which prohibits a public official or employee from using or disclosing confidential information which the official or employee acquired in the course of his official duties without appropriate authorization. Therefore, the Mayor is prohibited from disclosing to Bank directors, management, employees, or anyone else, any confidential information acquired by him in the course of his official duties as Mayor without appropriate authorization. See Advisory Op. No. 92-008.

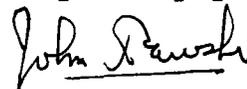
Furthermore, R.C. 102.04 (C) prohibits a person who is elected, or appointed, to an elective municipal office from receiving compensation from a private employer for rendering personal services on a matter pending before any agency, department, board bureau, commission, or other instrumentality of the municipality. See Advisory Ops. No. 78-002 and 89-016. The exception provided by Division (D) of R.C. 102.04 is not applicable in this situation.

Finally, R.C. 102.03 (A) prohibits a public official or employee from representing his private employer during his term of office and for one year after leaving public service before any public agency on any matter in which he personally participated as a public official or employee. See Advisory Op. No. 78-002.

This informal advisory opinion was approved by the Ethics Commission at its meeting on March 29, 1994. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules.

I apologize for the delay in responding to your request and sincerely regret any inconvenience this delay may have caused. Please call me if you have any questions, or wish to request a formal opinion from the Commission.

Very truly yours,



John Rawski
Staff Attorney

cc:
Dennis E. Linville
Fran Moyer