



OHIO ETHICS COMMISSION

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May 9, 1996

Informal Opinion 1996-INF-0509-2

Daniel J. Clark
Alliance Holding Company

Dear Mr. Clark:

Our Office received your letter on March 28, 1996, in which you ask whether the Ohio Ethics Law and related statutes prohibit you from serving on the Board of Directors of the Cleveland Port Authority (Authority) in light of your business association with the law firm that acts as legal counsel to the Authority.

The jurisdiction of the Ohio Ethics Commission is comprised of Chapter 102. and Sections 2921.42, 2921.422, and 2921.43 of the Revised Code. These statutes generally prohibit public officials and employees from misusing their official positions for their own personal financial gain or benefit, or for the gain or benefit of family members, business associates, or others where there is otherwise a conflict of interest. The Ethics Laws and related statutes impose criminal sanctions of fines and imprisonment for their violation.

As explained below, the Ohio Ethics Law and related statutes do not prohibit you from being appointed to the Authority's board of directors based upon your stated business association with the law firm that acts as legal counsel to the Authority. However, these provisions place significant restrictions upon your actions if you are appointed to the Authority's board of directors. You are prohibited from voting upon, discussing, or otherwise using the authority or influence of your public position, either formally or informally, to secure authorization of a contract, including any new contract and a renewal or modification of the existing contract, between the Authority and the firm. In addition, you must refrain from **any** participation in all matters pending before the Authority in which a member of the firm provides legal services to the Authority. Furthermore, you may be prohibited from altering your stated association with the law firm during your service as a member of the Authority's board of directors. You should contact this Office, if, after your appointment to the Authority's board of directors, questions arise concerning your conduct in a specific situation.

You should be aware that being a "contract associate" of the law firm that acts as legal counsel to the Authority, while serving as a member of the Authority's board of directors, may raise issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. These issues do not fall under the jurisdiction of the Ethics Commission but, you should refer your question to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

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Facts

You state that you are a "contract associate" for the Climaco, Seminatore law firm. You describe your service for the law firm as being limited to performing representation work in Washington D.C. for one of its clients, Blue Cross & Blue Shield of Ohio. All of the compensation that you receive from the law firm is derived from your work for this client. Your compensation includes health care benefits and professional liability insurance. You have no office in the firm, although you have a mailbox for your mail. A partner in the law firm, Anthony Garofoli, represents the Authority as legal counsel.

R.C. 2921.42 (A)(4) - Having an Interest in a Public Contract

R.C. 2921.42 (A)(4) reads as follows:

- (A) No public official shall knowingly do any of the following:
 - (4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

The term "public official" is defined for purposes of Section 2921.42 in Section 2921.01(A) to include any appointed official or employee of any political subdivision of the state. A member of a port authority's board of directors is a public official for purposes of R.C. 2921.42. Advisory Op. No. 90-013; 1960 Att'y Gen. Op. No. 1158.

The term "public contract" is defined for purposes of Section 2921.42 in Division (E) of that Section to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of a political subdivision. The purchase, or a contract for the purchase, of a law firm's legal services by a political subdivision falls within the definition of a "public contract" for purposes of R.C. 2921.42. Advisory Ops. No. 86-004, 88-007, and 89-015.

If you are appointed to the Authority's board of directors you would become a "public official" for purposes of R.C. 2921.42 (A)(4), which will prohibit you from having an interest in a public contract between the Authority and the firm. The issue becomes whether, as a "contract associate" of the firm, you have an interest in the Authority's purchase of legal services from the firm.

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An "interest" which is prohibited by R.C. 2921.42 (A)(4) must be definite and direct, and may be pecuniary or fiduciary in nature. Advisory Ops. No. 81-003 and 81-008. The Ethics Commission has held that an employee of a firm who does not have an ownership or fiduciary interest in the firm is not generally deemed to have an "interest" in the contracts of his employer for purposes of R.C. 2921.42. Advisory Op. No. 78-006.

However, the Commission has held that an employee of a firm will be deemed to have an "interest" in a public contract entered into by his employer if any of the following circumstances apply: (1) the employee has an ownership interest in, or is a director, trustee, or officer of, his employer; (2) the employee takes part, as a firm employee, in contract negotiations; (3) the employee's salary is based or dependent upon, or is paid from, the proceeds of the contract; (4) the employee receives a share of the contract's proceeds in the form of a commission or fee; (5) the employee's responsibilities as an employee include participation in the administration or execution of the contract or he serves in a management position with the responsibility to oversee execution or administration of the contract; (6) the establishment or operation of the employing firm is dependent upon receipt of the contract; or, (7) the employee's tenure is dependent upon his employer receiving the award of the contract. Advisory Ops. No. 89-006, 89-008, 89-011, and 91-001. See also Advisory Ops. No. 78-006, 81-008, 82-003, and 86-005.

You have stated that you are a "contract associate" and that the service you provide to the law firm is limited to performing representation work in Washington D.C. for one of the firm's clients, Cross and Blue Shield. Your position with the law firm as "contract associate" and the services that you have stated in your letter that you perform, do not fall into the circumstances described above. As a result, you do not have an "interest" in the contract for legal services between the firm and the Authority. Accordingly, the prohibition imposed by R.C. 2921.42 (A)(4) would not preclude you from being appointed to the board of directors of the Cleveland Port Authority based upon the fact that you receive compensation from the law firm for your services as a contract associate.

However, it must be noted that R.C. 2921.42 (A)(4) may prohibit you from altering your stated association with the law firm during your service as a member of the Authority's board of directors. You should contact this Office for further guidance if, after your appointment to the Authority's board of directors, you desire either to change your association with, or perform additional services for, the law firm. Although R.C. 2921.42 (A)(4) does not bar your ability to serve on the Authority's board of directors based upon your stated relationship, other provisions of the Ethics Law and related statutes will impose significant restrictions upon your role as a board member.

R.C. 2921.42 (A)(1) - Securing a Public Contract for a Business Associate

Your attention is directed to R.C. 2921.42 (A)(1), which reads:

- (A) No public official shall knowingly do any of the following:
 - (1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

R.C. 2921.42 (A)(1) prohibits a public official from authorizing, or using his authority or influence to secure authorization of, a public contract in which a business associate has an interest. Violation of R.C. 2921.42 (A)(1) is a fourth degree felony. See R.C. 2921.42 (D); 2929.11 (B)(4) and (C)(4).

The Ethics Commission has held that a business association is created whenever persons join together to pursue a common business purpose. Advisory Op. No. 86-002. Accordingly, the Commission has held that a partner or associate in a law firm is the "business associate" of the firm and its members for purposes of R.C. 2921.42 (A)(1) Advisory Ops. No. 89-015 and 90-007. See also Advisory Op. No. 89-008 (an employee-employer relationship creates a business association).

In the instant situation, because you are a "contract associate" for the Climaco, Seminatore law firm, the firm and its individual partners and associates are your "business associates" for purposes of R.C. 2921.42 (A)(1). Thus, if you are appointed to the Authority's board of directors, then R.C. 2921.42 (A)(1) will prohibit you from voting upon, discussing, or otherwise using the authority or influence of your public position, either formally or informally, to secure authorization of a contract between the Authority and the law firm. This would include a bar on participation in any issue relating to the existing contract, a new contract, and a renewal or modification of the existing contract. Advisory Op. No. 89-015. See also R.C. 102.03 (D) (set forth below).

Divisions (D) and (E) - Securing an Improper Thing of Value

However, your attention is directed to R.C. 102.03 (D) and (E), which read:

- (D) 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 character as to manifest a substantial and improper influence upon him with respect to his duties.

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- (E) No public official or employee shall solicit or accept 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 of a political subdivision. R.C. 102.01 (B) and (C). A member of a port authority's board of directors is a public official for purposes of R.C. 102.03 (D) and (E).

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. R.C. 102.01 (G). A definite and direct pecuniary benefit is considered to be a thing of value under R.C. 102.03 (D). Advisory Ops. No. 79-008, 86-007, and 89-005. The compensation that you receive from the law firm for your services as a "contract associate" and the Authority's payments to a partner of the firm for his legal services, fall under the definition of "anything of value."

A thing of value is considered to be of an improper character for purposes of R.C. 102.03 (D) and (E) whenever the thing of value is secured from a party that is interested in matters before, regulated by, or doing or seeking to do business with the public agency with which the official or employee serves, or where the thing of value could impair the official's or employee's objectivity and independence of judgment with respect to his official actions and decisions for the public agency with which he serves or is employed. Advisory Ops. No. 79-002, 89-006, 90-012, and 92-009.

The prohibitions imposed by R.C. 102.03 (D) and (E) serve the public interest in effective, objective, and impartial government by preventing the creation of a situation that may impair the objectivity and independence of judgment, and therefore, the effectiveness of a public official or employee, or the political subdivision with which he serves. Advisory Ops. No. 89-014 and 90-002. The application of R.C. 102.03 (D) and (E) is dependent upon the facts and circumstances of each individual situation. Advisory Ops. No. 87-007 and 89-003. A violation of Division (D) or (E) is a first degree misdemeanor. See R.C. 102.99 (B), 2929.21 (B)(1) and (C)(1).

The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official or employee from using the authority or influence of his official position to secure anything of value, for either himself or his business associate, if the thing of value is of an improper character. See Advisory Ops. No. 89-006, 89-015, 89-016, and 90-008. R.C. 102.03 (E) prohibits a public official or employee from merely soliciting or receiving an improper thing of value, and does not require that he use the authority or influence of his position to secure it. Advisory Ops. No. 86-011 and 89-006.

The Ethics Commission has explained that a public official or employee must exercise his duties without hindrance by any improper influence. See Advisory Op. No. 89-010. The Ethics Commission has held that a public official who is a business associate of a law firm is prohibited from reviewing, in his official capacity, work that members of the firm have prepared. Advisory Ops. No. 90-008 and 89-016. See also Advisory Ops. No. 82-001, 83-001, and 84-004.

In the instant situation, as explained above, the law firm is your business associate. Because you receive compensation from the law firm, you would be subject to an inherent conflict of interest if, after your appointment to the Authority's board of directors, you participate in matters that could affect the firm's interests. The fees and benefits that you receive for your service to the law firm as a "contract associate" could affect your decisions as a member of the Authority's board of directors on matters pending before the Authority in which the partner of the firm is providing legal services. The possibility of impaired objectivity and independence of judgment exists regardless of the fact that you do not perform services as a "contract associate" for the law firm in matters affecting the Authority.

Therefore, if you are appointed to the Authority's board of directors, then R.C. 102.03 (D), as well as R.C. 2921.42 (A)(1), will prohibit you from using the authority or influence of your position to secure any future contracts for the law firm. Advisory Op. No. 89-004. R.C. 102.03 (D) will also prohibit you from participating in matters where the firm will represent the Authority under the present contract. Id. See also Advisory Op. No. 86-004.

R.C. 102.03 (E) prohibits you from receiving compensation for your services to the law firm as a "contract associate" unless you refrain from participation in all matters pending before the Authority in which a member of the firm provides legal services to the Authority. See Advisory Ops. No. 86-004, 87-004, 89-010, 89-006, and 90-008. The Ethics Commission has held that a public official or employee who holds outside private employment with a party that is interested in matters before, regulated by, or doing or seeking to do business with his political subdivision, can however meet the requirements of R.C. 102.03 (E) by withdrawing from matters before his public body that would affect the financial interests of the party with which he associated. Advisory Ops. No. 89-006 (Ohio Department of Mental Health officials and employees accepting employment from colleges or universities that receive grants from ODMH), 89-008 (a member of city council being employed by a company that receives a tax abatement from the city), 89-010 (a Department of Agriculture employee selling services to a state institution that is regulated by the Department of Agriculture), and 90-002 (a Department of Agriculture employee owning and operating a plant that is regulated by the Department of Agriculture).

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Therefore, R.C. 102.03 (E) prohibits you from receiving compensation for your services to the law firm as a "contract associate" unless you refrain from participation in all matters pending before the Authority in which a member of the firm provides legal services to the Authority.

R.C. 102.03 (B) - Disclosure of Confidential Information

R.C. 102.03 (B) will prohibit you, as a member of the Authority's board of directors, from disclosing confidential information to the law firm, or any other party, or from using such confidential information without authorization. No time limitation exists for this prohibition and it is effective while you serve and after you leave the Authority's board of directors. Advisory Op. No. 88-009. A violation of R.C. 102.03 (B) is a first degree misdemeanor. See R.C. 102.99 (B), 2929.21 (B)(1) and (C)(1).

R.C. 102.04 (C) - Representation Before Other City Entities

Furthermore, you should note that R.C. 102.04 (C) prohibits you from receiving compensation for rendering services personally on any matter pending before any entity of the city. Advisory Op. 89-016. Under your current arrangement with the firm as a "contract associate," the prohibition imposed by R.C. 102.04 (C) will have no application because you do not render any services for the law firm within the city. However, the prohibitions of R.C. 102.04 (C) could affect you if you altered your association with the law firm during your service as a member of the Authority's board of directors. You should contact this Office for further guidance if, after your appointment to the Authority's board of directors, you desire either to change your association with, or perform additional services for, the law firm. A violation of R.C. 102.04 (C) is a first degree misdemeanor. See R.C. 102.99 (B), 2929.21 (B)(1) and (C)(1).

It must be stressed, that being a "contract associate" of the law firm that acts as legal counsel to the Authority, while serving as a member of the Authority's board of directors, may raise issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. As stated above, these issues do not fall under the jurisdiction of the Ethics Commission but should be referred to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

Conclusion

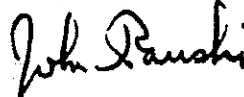
The Ohio Ethics Law and related statutes do not prohibit you from being appointed to the Authority's board of directors based upon your stated business association with the law firm that acts as legal counsel to the Authority. However, these provisions place significant restrictions upon your role if you are appointed to the Authority's board of directors. You are prohibited from voting upon, discussing, or otherwise using the authority or influence of your public position, either formally or informally, to secure authorization of

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a contract, including any new contract and a renewal or modification of the existing contract, between the Authority and the firm. In addition, you must refrain from participation in all matters pending before the Authority in which a member of the firm provides legal services to the Authority.

This informal advisory opinion was approved by the Ethics Commission at its meeting on May 9, 1996. The opinion is based on the facts presented and is limited to questions arising under Chapter 102, and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any further questions, please feel free to contact this Office again.

Very truly yours,



John Rawski
Staff Attorney

xc: Michael White, Mayor, City of Cleveland
Sterling Glover, Chairman, Cleveland Port Authority