



OHIO ETHICS COMMISSION

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Informal Opinion 1996-INF-0913-2

Francis M. Hyle
Hyle and Mecklenbrg Co., L.P.A.

Dear Mr. Hyle:

Our Office received your letter, in which you ask whether the Ohio Ethics Law and related statutes preclude the Board of Trustees of Green Township from purchasing two parcels of real property in light of the fact that one parcel is owned by a township employee and the other parcel is owned by the employee's father.

You state that the township owns two parcels of real estate that are dedicated for public use as Veteran's Park. The trustees desire to purchase adjoining land to expand the park. You state that you personally contacted the adjacent landowners to see if they would be interested in selling land to the township. You have provided letters from adjacent land owners, other than the township employee's father, in which they state they are not interested in selling their land to the township.

However, you state that the father of a township firefighter owns real estate that is adjacent to the park and is interested in selling it to the township. You also state that the township employee owns land that is adjacent to his father's land and is interested in selling it to the township. The board of township trustees are offering to the employee and his father the fair market value of the land involved.

As explained below, under the facts that you have presented, the township is not precluded from purchasing the two parcels of real property in light of the fact that one parcel is owned by a township employee and the other parcel is owned by the employee's father. However, the township employee is prohibited from discussing, deliberating, or otherwise authorizing, or employing the authority or influence of his public employment with the township, formally or informally, to secure authorization of a contract for the township's purchase of his or his father's real estate. The township employee is also prohibited from using confidential information acquired by him in his official capacity in order to secure the purchase of his or his father's real estate or otherwise benefit himself or his father with the regard to the township's plans to purchase the real estate.

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

Your attention is directed to Division (A)(4) of Section 2921.42 of the Revised Code reads:

- (A) No public official shall knowingly:
 - ...
 - (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 employee of a township. Advisory op. No. 92-008. Therefore, the township firefighter, as a township employee, is a "public official who is subject to the prohibitions of R.C. 2921.42 (A)(1). However, it must be noted that the employee's father does not fall within the definition of "public official" and is not subject to the prohibitions of R.C. 2921.42 (A)(1). But see R.C. 2921.42 (A)(1) and R.C. 102.03 (D) set forth below.

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 property or services by or for the use of "the state or any of its political subdivisions, or any agency or instrumentality of either." See R.C. 2921.42 (G). The purchase of, or a contract for the purchase of, real estate by the board of township trustees for the expansion of a township park falls within this definition. Advisory Ops. No. 84-003 and 88-003. Advisory Op. 88-003.

An interest which is prohibited under R.C. 2921.42 must be definite and direct and may either be pecuniary or fiduciary. Advisory Op. No. 81-008. An individual who owns a parcel of real estate has a definite and direct interest in the purchase or acquisition of his property by the township. Advisory Op. 88-003.

Accordingly, in the instant situation, because the township employee's father is not a public official, R.C. 2921.42 (A)(4) does not prohibit him from having an interest in the profits or benefits of the township's acquisition of his real property. Therefore, the father of the township employee is not prohibited from selling his real property to the township. However, R.C. 2921.42 (A)(4) prohibits the township employee from having an interest in the profits or benefits of the township's acquisition of his real property. Therefore, the township employee is prohibited from selling his real estate to the township.

R.C. 2921.42 (C) - Exception to R.C. 2921.42 (A)(4)

Division (C) of Section 2921.42 does, however, provides an exception to the prohibition of Division (A)(4) as follows:

- (C) This section does not apply to a public contract in which a public servant, member of his family, or one of his business associates has an interest, when all of the following apply:
 - (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
 - (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of reality established prior to the public servant's becoming associated with the political subdivision of governmental agency or instrumentality involved;
 - (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;
 - (4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public servant, member of his family, or business associate, and the public servant takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

Under R.C. 2921.42 (C), all of the following must met: (1) the subject of the contract is necessary supplies or services; (2) the supplies or services are unobtainable elsewhere for the same or lower cost, or are furnished as part of a continuing course of dealing established prior to the public official's association with the public agency; (3) the treatment accorded the public agency is either preferential to or the same as that accorded other customers in similar transactions; and (4) the entire transaction is conducted at arm's length with full knowledge of the public official's interest, and the public official takes no part in any discussion or decision with respect to the contract.

The facts and circumstances of each particular situation will determine if the exception provided by R.C. 2921.42 (C) applies. Advisory Op. No. 82-007. The criteria are strictly construed against the public official, and the official bears the burden of showing that the exemption applies. Advisory Ops. No. 83-004 and 88-008.

Division (C)(2) - Unobtainable Elsewhere for the Same or Lower Cost

Division (C)(2) of Revised Code Section 2921.42 is of particular note in this situation.

One means of meeting the criterion of R.C. 2921.42 (C)(2) is by demonstrating that the services under the public contract are being furnished as part of continuing course of dealing established prior to an individual becoming associated with the public agency. Because of the facts and circumstances stated above, the continuing course of dealing exception of R.C. 2921.42 (C)(2) is not applicable in the instant situation and need not be addressed further.

Division (C)(2) can also be met if there is an objective showing that the supplies or services that are being furnished under the contract are unobtainable elsewhere for the same or lower cost. Advisory Op. No. 83-004. As Advisory Opinion No. 84-011 states:

[T]he application of the exemption [provided in Division (C) of Section 2921.42] must be consistent with the principal underlying Section 2921.42 of the Revised Code that a public official should not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative to the governmental entity.

Thus, the crucial issue in the instant situation is whether the purchase of the employee's land is the best or only alternative for the township.

The Ethics Commission has stated that one means of demonstrating that goods or services are unobtainable elsewhere for the same or lower cost is through an open and fair competitive bidding process. Division (C)(2) does not specifically call for competitive bidding. Compare R.C. 2921.42 (A)(3) set forth below. However, the Ethics Commission has held that if a public official submits the lowest bid in response to a political subdivision's request for bids, this would indicate that the requirement of Division (C)(2) has been met. Advisory Ops. No. 86-002 and 90-003. The Commission has held that even where there is a competitive bidding process, other factors must be considered in order to determine whether the "unobtainable elsewhere" standard of R.C. 2921.42(C)(2) has been met, such as the availability and adequacy of notice to potential bidders, the openness and fairness of the bidding process, the objectivity and validity of the bid specifications, and the conditions of the market. Advisory Ops. No. 83-004, 88-001, and 90-003.

As stated above, you personally asked the other adjacent land owners, on behalf of the board of township trustees, whether they would sell their land to the township and they indicated that they had no interest in selling their land. In the instant situation, asking the other adjacent land owners whether they would be interested in selling their land to the township for park expansion is an attempt to secure available property from those owners who do not have a relationship with the township. Specifically, you have provided facts that establish that the township: (1) notified all potential owners of adjacent real estate; (2) was open and fair in the solicitation process; and (3) objectively considered all alternative means of meeting its goal to expand the park.

Therefore, the process that the township has followed objectively indicates that the township employee's property is uniquely suited to meet the needs of the township in expanding Veteran's Park due to the property's location, size, and characteristics. See Advisory Op. No. 88-003.

Despite the fact that criteria of Division (C)(2) can be met, the other three criteria of Division (C) must also be met.

Division (C)(1) - Necessary Supplies or Services

In the instant situation, the board of township trustees wishes to purchase real property to expand Veteran's Park. A board of township trustees has the discretion to acquire suitable lands for recreational purposes. R.C. 505.26 and 505.261. Therefore, it has been objectively indicated that the subject of the contract, land for a township park, is necessary for the township and the criteria of Division (C)(1) has been met.

Division (C)(3) - Treatment Accorded the Public Agency

You have stated that purchase price would be for the fair market value of the land. Therefore, it has been objectively indicated that the treatment that the township employee would accord the township would be the same as that accorded anyone else who would be interested in purchasing the employee's land.

Division (C)(4) - Arm's Length Transaction

In the instant situation, you have stated that the entire transaction has been conducted with full knowledge by the board of township trustees of the township employee's ownership of the parcel of property. You also state the employee will take no part in any discussion or decision with respect to the township's purchase of his property. Therefore, it has been objectively indicated that the proposed contract is an "arm's length transaction" and the criteria of Division (C)(4) has been met. See R.C. 2921.42 (A)(1) and R.C. 102.03 (D), set forth below.

R.C. 2921.42 (A)(1) - Use of Authority to Secure a Public Contract

Despite the fact that all the criteria of R.C. 2921.42 (C) are met so that the township employee is not prohibited by R.C. 2921.42 (A)(4) from selling his parcel of land to the board of township trustees, the employee is subject to Division (A)(1) of Section 2921.42 which provides that a public official shall not 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.

R.C. 2921.42 (A)(1) prohibits a public official from authorizing or employing the authority or influence of his office to secure authorization of a public contract in which either the public official or his family member has an interest.

As explained above, the township employee and his father have an interest in the proposed contracts for the township's purchase of their land for purposes of R.C. 2921.42. The township employee's father is a family member for purposes of R.C. 2921.42 (A)(1). Advisory Op. No. 80-001.

Therefore, R.C. 2921.42 (A)(1) prohibits the township employee from discussing, deliberating, or otherwise authorizing, or employing the authority or influence of his public employment with the township, formally or informally, to secure authorization of, a contract for the purchase of either his or his father's real estate by the township. R.C. 2921.42 (A)(1) also prohibits the township employee from using his authority or influence over other township officials or employees to secure authorization of a contract for the purchase of either his or his father's real estate by the township. Advisory Op. No. 88-003.

R.C. 102.03 (D) - Securing An Improper Things of Value

Division (D) of Section 102.03 of the Revised Code provides:

No public official or employee shall use or authorize the use of the authority or influence of 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 the public official or employee with respect to that person's duties.

R.C. 102.01 (B) defines a "public official or employee" for purposes of R.C. Chapter 102. as any person who is appointed to an office or is an employee of any public agency. R.C.

102.01 (C) defines the term "public agency" to include any political subdivision of the state. A township employee is a public official or employee for purposes of Chapter 102. and subject to the provisions therein. Advisory Op. No. 92-008.

R.C. 1.03 defines the term "anything of value" for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 102.01(G). A definite pecuniary benefit to a person is considered to be a thing of value under R.C. 102.03 (D) and (E). Advisory Ops. No. 85-006, 85-011 and 86-007. Payments received by an individual for property acquired by a political subdivision fall within the definition of "anything of value." Advisory Op. No. 88-003.

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 a family member, if the thing of value is of an improper character. Advisory Ops. No. 88-003 and 90-010, respectively. A thing of value is considered to be of an improper character for purposes of R.C. 102.03 (D) 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. 89-006, 90-012, and 92-009.

Therefore, R.C. 102.03 (D), as well as R.C. 2921.42 (A)(1), prohibits the township employee from discussing, deliberating, or otherwise authorizing, or employing the authority or influence of his public employment with the township, formally or informally, to secure authorization of, a contract for the purchase of his or his father's real estate by the township, and from using his authority or influence over other township officials or employees to secure authorization of the proposed public contracts for the township's purchase of the parcels of land owned by him and his father. Advisory Op. No. 88-003.

R.C. 2921.42 (A)(3) - Position of Profit in a Public Contract

R.C. 2921.42 (A)(3) reads:

(A) No public official shall knowingly do any of the following:

....

(3) 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, unless the contract was let by competitive bidding to the lowest and best bidder.

R.C. 2921.42 (A)(3) imposes a prohibition upon public officials who are authorized to acquire property or who serve on boards or commissions that are so authorized. In Advisory Opinion No. 88-003, the Ethics Commission held that a public official who is subject to R.C. 2921.42 (A)(3) is prohibited from profiting from the acquisition of property authorized by his board or commission, where such acquisition is not made pursuant to competitive bidding, or is acquired after competitive bidding but is not the lowest and best bid.

In the instant situation, the township employee is a firefighter and is neither authorized to acquire property nor serves on a board or commission that is so authorized. Accordingly, the competitive bidding requirement of R.C. 2921.42 (A)(3) is not applicable in the instant situation and need not be addressed further.

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

As a final matter, Division (B) of R.C. 102.03 reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that 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.

Therefore, the township employee is prohibited from disclosing confidential information which he acquired in his public position and from using such information, without appropriate authorization, in order to otherwise benefit himself with regard to the township's plans to acquire real estate. Advisory Op. No. 88-003.

Conclusion

As explained above, under the facts that you have presented, the township is not precluded from purchasing the two parcels of real property in light of the fact that one parcel is owned by a township employee and the other parcel is owned by the employee's father. However, the township employee is prohibited from discussing, deliberating, or otherwise authorizing, or employing the authority or influence of his public employment with the township, formally or informally, to secure authorization of a contract for the township's purchase of his or his father's real estate. The township employee is also prohibited from using confidential information acquired by him in his official capacity in order to secure the purchase of his or his father's real estate or otherwise benefit himself or his father with the regard to the township's plans to purchase the real estate.

It must be noted that in addressing the requirements imposed by the Ohio Ethics Law and related statutes, the Ethics Commission's function in rendering advisory opinions is not a fact-finding process. Advisory Ops. No. 75-037, 90-013, and 92-003. An advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes and sets forth the standards and criteria which must be observed in order to avoid a violation of the law. Advisory Op. No. 90-013. An advisory opinion cannot determine whether certain facts exist, but must rely on the accuracy and completeness of the facts presented in the request for an opinion. However, an advisory opinion can explain the application of the Ethics Law and related statutes to a given set of circumstances. Id.

This informal advisory opinion was approved by the Ethics Commission at its meeting on September 13, 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