



OHIO ETHICS COMMISSION

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February 11, 1997

Informal Opinion 1997-INF-0211-2

Cathy C. Godshall
Buckingham, Doolittle & Burroughs



Dear Ms. Godshall:

In your letter to the Ethics Commission, you have asked several questions concerning the application of the Ethics Laws and related statutes to issues arising out of a contractual relationship between the City of Barberton (City) and the Barberton Community Foundation (Foundation). The Foundation was created to provide a variety of benefits to the City's citizens. The City funded the Foundation by transferring the proceeds from the sale of the Barberton City Hospital (Hospital) to the Foundation.

As explained below, the Foundation is not a "public agency" for purposes of Chapter 102. Members of its board of trustees are not, solely as a result of their membership on the Foundation's board of trustees, officers or employees of the state or a political subdivision for purposes of the application of Chapter 102, or Section 2921.42 of the Revised Code. Members of the Foundation's board of trustees who do not otherwise hold public positions for the City, the City School District, or the City Health District, or any other public agency, are therefore not subject to the ethics-related statutes under the jurisdiction of the Ohio Ethics Commission. The relationship between the Foundation and the City, the City School District, and the City Health District, and the grants the Foundation provides to public agencies, however, are public contracts for purposes of R.C. 2921.42. A public official who holds a position or employment with the City, the City School District, and the City Health District, or any other public agency, and who concurrently wishes to serve on the Foundation's board of trustees must therefore serve in his "official capacity" as a designated representative of his political subdivision, as further described below, in order to represent his political subdivision's interests. A public official who serves in his "official capacity," is not required to recuse himself from the consideration of a grant that might benefit his public agency but is prohibited from participating in the authorization of a public contract if he, a family member, or a business associate has a definite and direct personal, pecuniary, or fiduciary interest in the public contract.

Before addressing your specific questions, the City's former relationship with the Hospital must be examined.

The Barberton City Hospital

You state that in 1949, pursuant to Section 4022 of the General Code, the City entered into an agreement with the Barberton City Hospital. See R.C. 749.02 (authorizing a municipality's city council to enter into an agreement with a not-for-profit corporation organized for charitable purposes to provide hospital services for the municipality's residents.) Under the terms of the agreement, the City provided \$900,000 to the Hospital for the construction of facilities. In consideration for providing its funding, the Hospital granted the City a permanent interest in the Hospital and its management. Under the agreement, if the Hospital was sold, then all the assets, both real and personal, of the Hospital would revert to the City. The agreement required that the mayor and president of council serve on the board of directors "by virtue of their office." The terms of the mayor and council president coincided with the terms of their respective city offices. The other board members served terms that were determined by the Hospital's board of directors. The Hospital's board of directors nominated replacement members, but city council had the authority to ratify and approve the nominees.

The 1949 agreement was supplemented several times. In 1951, the City provided an additional \$750,000 to the Hospital for construction of facilities. In May 1975, the City assisted the Hospital in issuing revenue bonds. As a result of this financing, the Hospital deeded its real property to the City, and the City leased the property back to the Hospital. On January 1, 1992, the City conveyed the Hospital property back to the Hospital as part of a bond refinancing. As part of the same bond refinancing, the Hospital leased the Hospital property to the City, and the City subleased the property back to the Hospital. As explained below, the Ethics Commission held in Advisory Opinion No. 93-012 that the relationship between the City and the Hospital was a public contract for purposes of R.C. 2921.42.

The Barberton Community Foundation

In 1996, a for-profit company purchased substantially all of the Hospital's assets, including the Hospital's real property. Under the terms of the 1949 agreement, the proceeds from the sale of the Hospital's property would have reverted to the City. But the City desired to use the proceeds from the sale to provide for the long-term education, health, safety, recreation, cultural enrichment, and welfare of its citizens. Accordingly, the City passed an Ordinance that directed the sale's proceeds to be paid to the Barberton Community Foundation instead of reverting to the City. In the November 6, 1996 general election, the City's residents voted to approve the transfer of the Hospital sale proceeds to the Foundation instead of having the Hospital's property revert to the City. The sale of the Hospital to the for-profit company closed on December 4, 1996.

The Foundation's mission is stated in its Articles of Incorporation (Articles). The Articles state that the Foundation is to operate "exclusively for the charitable, education, public health, public recreation or other public purposes by conducting or supporting activities and facilities exclusively for the benefit of the City, the City School District, the City Health District and the citizens of the City." The Foundation is to accomplish these goals by providing, through

its resources, grants for facilities and services that will lessen the burdens carried by the City, the City School District, and the City Health District. In addition to the Articles, the Foundation is governed by a Code of Regulations (Regulations).

The Articles provide that the Foundation is governed by a board of trustees. The board members are not compensated for their services but may be reimbursed for reasonable expenses. The City mayor and president of council serve as voting *ex officio* members of the board. The Articles name thirteen individuals as members of the board of trustees in addition to the mayor and president of council. All thirteen individuals were approved by the City Council. Two of these board members are City employees. One is the City safety director and the other is an hourly employee of the City parks department. The superintendent of the City school district is also named as a board member. These three board members do not serve as *ex officio* members. The other board members are either employees of private firms or are retired. The Articles establish the term of office for each initial board member. These terms are staggered so that the terms of roughly one third of the board members, other than the mayor and president of council, will expire each year.

The Foundation's Articles and Regulations give the City council direct involvement in the Foundation's operation. As stated above, City council approved all thirteen members of the original board of trustees who are named in the Articles. When the board members' terms end and new appointments are made to the board, City council must approve individuals who are candidates for board membership prior to their election to the board. Also, seventy-five percent of the membership of City council must approve the board's decision to expend money that is in excess of the Foundation's income in any calendar year. The Regulations provide that seventy-five percent of the membership of City council must approve the alteration, amendment, or repeal of the Regulations or the adoption of a new Code of Regulations. The Articles require that seventy-five percent of the membership of City council approve the repeal, modification, or amendment of the Articles. Furthermore, three-quarters of City council must approve the liquidation or dissolution of the Corporation and the merger, consolidation, or transfer of "substantially all the assets of the Corporation." Finally, the Articles provide that upon dissolution of the Foundation, all of its assets will revert to the City provided that the City is, at that time, a government unit, as described in the Internal Revenue Code. In such an instance the City will hold and distribute the assets exclusively for public purposes. The Ohio Ethics Commission should be consulted if changes in the Articles are contemplated that would provide board members compensation for their services or a share of the assets of the Foundation upon its dissolution.

The Application of the Ethics Laws to a "Public Agency"

You ask whether the Foundation is a "public agency." Presumably you ask this question in order to determine whether the provisions of the Ohio Ethics Law and related statutes affect the membership or activities of the Foundation.

The provisions of the Ohio Ethics Law and related statutes include prohibitions against public officials and employees misusing their official position for their own personal benefit, the benefit of their family members or business associates, or where there is otherwise a conflict of interest. R.C. 102.01 (B) defines the term "public official or employee" for purposes of Chapter 102. of the Revised Code as "any person who is elected or appointed to an office or is an employee of any public agency." R.C. 102.01 (C) defines the term "public agency" as:

[T]he general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, township, and the five state retirement systems, or any other governmental entity. "Public agency" does not include a department, division, institution, board, commission, authority, or other instrumentality of the state or a county, municipal corporation, township, or other governmental entity that functions exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes; does not expend more than ten thousand dollars per calendar year, excluding salaries and wages of employees; and whose members are uncompensated.

R.C. 2921.42 applies to any "public official" and R.C. 2921.43 applies to any public servant which, pursuant to R.C. 2921.01 (B), includes any public official, as well as any person performing *ad hoc* a governmental function, including a juror, member of a temporary commission, master, arbitrator, advisor, or consultant. R.C. 2921.01 (A) defines the term "public official" for purposes of R.C. Chapter 2921. as:

[A]ny elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and including without limitation legislators, judges, and law enforcement officers. (Emphasis added).

The Foundation is organized as nonprofit charitable corporation under the Ohio Nonprofit Corporation Act. It is not a department, division, institution, board, commission, authority, bureau or other instrumentality of the City, or any other governmental entity. The Ethics Commission has held that the Ohio Ethics Law and related statutes do not apply to persons who are members of the board of trustees of a non-profit corporation. Advisory Ops. No. 75-013 and 75-019. See also 90-002. In Advisory Opinion No. 75-013, the Ethics Commission held: "[A]lthough the activities of a non-profit corporation may be of a public nature, the corporation is not a governmental agency for purposes of Chapter 102 of the Revised Code."

Therefore, the Foundation is not a "public agency" for purposes of Chapter 102. Also, the members of the Foundation's board of trustees are not officers or employees of a political subdivision for purposes of Section 2921.42. Members of the Foundation's board of trustees who do not otherwise hold public positions or employment with the City, the City school district, or the City Health District, are not subject to the statutes under the Ethics Commission's jurisdiction that impose restrictions upon public officials and employees.

You ask whether the Ethics Law prohibits the Foundation from contracting with private firms if any of the members of the Foundation's board have a pecuniary or fiduciary interest in the firm.

As explained above, the provisions of the Ohio Ethics Law and related statutes include prohibitions against public officials and employees misusing their official position for their own personal benefit, the benefit of their family members or business associates, or where there is otherwise a conflict of interest. Accordingly, the provisions of the Ethics Law and related statutes do not apply to members of the Foundation's board of trustees who do not hold public office or employment. Please note that even though the provisions of Ohio's Ethics Law do not apply to members of the Foundation's Board who do not otherwise serve in public positions, this does not preclude the Foundation from adopting conflict of interest protections, which do not conflict with state law, or otherwise operating under appropriate standards for a non-profit organization.

You ask whether the relationship between the Foundation and the City, City School District, and City Health District constitutes a "public contract" for purposes of R.C. 2921.42.

Restrictions Imposed by R.C. 2921.42 (A)(4)

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

(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.

R.C. 2921.01 (A) defines the term "public official" for purpose of R.C. 2921.42 as any elected or appointed officer, employee, or agent of any political subdivision of the state. In the instant situation, the City's mayor, president of council, safety service director, parks department employee, and the superintendent of the City School District are "public officials" for purposes of R.C. 2921.42.

R.C. 2921.42 (A)(4) prohibits a public official from having an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision with which they serve or are employed. Advisory Op. No. 89-008. An interest that is prohibited under R.C. 2921.42 (A)(4) must be definite and direct and may be either pecuniary or fiduciary. Advisory Ops. No. 78-005 and 81-003. A member of the board of directors of a non-profit corporation has a definite and direct fiduciary interest in the corporation's contracts. Advisory Ops. No. 81-008 and 93-012.

R.C. 2921.42 (G)(1)(a) defines the term "public contract" as 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 or any of its agencies or instrumentalities. A public contract is created whenever a political subdivision either purchases services from a provider or acquires services as part of the contractor's responsibility under the contract. Advisory Ops. No. 91-011, 93-009, and 93-012.

Official Capacity

As stated above, the Ethics Commission held in Advisory Opinion No. 93-012 that the agreement between the City and the Hospital was a public contract for purposes of R.C. 2921.42. In that opinion, the Commission held:

[T]he agreement between the city and the hospital is a "public contract" for purposes of R.C. 2921.42 since, by initially providing \$900,000 to the hospital in exchange for a permanent interest in the hospital and its management, serving as issuer of the hospital's bonds, and sub-leasing property to the hospital, the city is purchasing or acquiring hospital services for the benefit of its residents.

But the Commission held in Advisory Opinion No. 93-013, that "R.C. 2921.42 (A)(4) does not prohibit the Mayor and President of Council from serving on the Hospital's board of directors in their 'official capacity' to represent the city's interest in the hospital and its management."

In the instant situation, the relationship between the Foundation and the City, the City School District, and City Health District is a public contract for purposes of R.C. 2921.42. As explained above, the City's provision of the proceeds from the sale of the Hospital to the Foundation made the establishment of the Foundation possible. The City, the City School District, and City Health District will acquire, from the Foundation, facilities and services that will benefit the City's citizens. Also, the City has direct involvement in the Foundation's operation because the Mayor and President of Council serve as voting *ex officio* members of the Foundation's board of trustees and the City council must, by a three-quarters percent majority, approve changes in the Articles, the liquidation or dissolution of the Corporation, and the merger, consolidation, or transfer of "substantially all the assets" of the Corporation. Finally, upon dissolution of the Foundation, all its assets will revert to the City if the City is, at that time, a government unit as described in the Internal Revenue Code. Accordingly, the relationship between the City and the Foundation is a "public contract" for purposes of R.C. 2921.42.

The issue becomes whether the public officials who serve on the Foundation's board of trustees have a prohibited interest in a public contract for purposes of R.C. 2921.42 (A)(4).

At first glance, it would appear that all of the public officials who serve as members of the Foundation's board of trustees would have a prohibited interest in a public contract with their respective political subdivision for purposes of R.C. 2921.42 (A)(4). However, the Ethics Commission has held that the prohibition of R.C. 2921.42 (A)(4) does not apply to a public official

of a political subdivision who serves on the board of directors of a non-profit agency that contracts with the political subdivision, provided that he serves on the board in his "official capacity" as a designated representative of his political subdivision, in order to represent his political subdivision's interests. Advisory Ops. No. 82-004, and 93-012. See also Advisory Op. No. 92-002.

The Ethics Commission has explained that whenever a public official serves on the board of directors of a non-profit corporation in his official capacity, "there would not be a dual interest in which private considerations would distract from his serving the public interest." Advisory Op. No. 84-001. In Advisory Opinion No. 84-001, the Commission established four criteria that must be met in order for a public official to be deemed to serve in his official capacity:

- (1) the governmental entity must create or be a participant in the non-profit corporation;
- (2) any public official or employee connected with the jurisdiction . . . may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity;
- (3) the public official or employee must be formally instructed to represent the governmental entity and its interests;
- (4) there must be no other conflict of interest on the part of the designated representative.

See also Att'y Gen. Ops. No. 91-007 and 96-007.

In the instant situation, the City participated in the Foundation's creation. Also, the requirement in the Articles that the Mayor and President of Council serve as *ex officio* members of the Foundation's board evidences a desire that they represent the City's interest in the Foundation and its management. Accordingly, R.C. 2921.42 (A)(4) would not prohibit the Mayor and the President of Council from serving on the Foundation's board of trustees, provided that they are: (1) designated to represent the City; (2) formally instructed to represent the City and its interests; and (3) not otherwise subject to a conflict of interest. See Advisory Op. No. 93-012 (holding that the Mayor and the President of Council served the Barberton City Hospital in their "official capacity").

In order for the City safety director, the employee of the City parks department, and the superintendent of the City school district to serve the Foundation, they must do so in their "official capacity." The appropriate authority of their respective political subdivision must designate them to represent their political subdivision and formally instruct them to represent their political subdivision and its interests. Also, they must not otherwise be subject to a conflict of interest.

You ask whether the City safety director, the employee of the City parks department, and the superintendent of the City school district must recuse themselves from the consideration of a grant from the Foundation that might benefit their public agency.

As stated above, when a public official serves in his "official capacity," the official has been designated by the appropriate authority of his political subdivision to represent his political subdivision and its interests. The Ethics Commission held in Advisory Opinion No. 84-001 that under such circumstances, "there would not be a dual interest in which private considerations [of the official] would distract from his serving the public interest." Accordingly, a public official who serves in his "official capacity," is not required to recuse himself from the consideration of a grant that might benefit his public agency. In the instant situation, all of the public officials who serve the City, the City School District, and the City Health District must serve in their "official capacity." In this capacity, they are designated representatives of their respective public agencies and are obliged to serve their public agency's interests when they participate in consideration of a grant from the Foundation that might benefit their public agency.

However, it must be stressed that 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 he, a family member, or a business associate has an interest. R.C. 2921.42 (A)(1) prohibits all public officials, including those who serve on the board of a corporation in their "official capacity," from participating in the authorization of a public contract if they, their family members, or business associates have a definite and direct personal, pecuniary or fiduciary interest in the public contract. For example, in the instant situation, the employee who works for the City parks department is not prohibited from participating in the consideration of a grant from the Foundation that might benefit the park department, however, he would be prohibited from participating in the award of the grant to the parks department if he knew that the grant would fund the parks department's purchase of services from a company that was owned by a family member.

Conclusion

Therefore, as explained above, the Foundation is not a "public agency" for purposes of Chapter 102. Also, the members of its board of trustees are not officers or employees of the state or a political subdivision for purposes of Section 2921.42. The members of the Foundation's board of trustees who do not serve the City, the City School District, or the City Health District are not subject to the statutes under the Ethics Commission's jurisdiction. The relationship between the Foundation and the City, the City School District, and the City Health District and the grants that the Foundation provides to public agencies are public contracts for purposes of R.C. 2921.42. A public official of the City, the City School District, and City Health District who serves on the Foundation's board of trustees must serve in his "official capacity" as a representative of his political subdivision in order to represent his political subdivision's interests. A public official who serves in his "official capacity," is not required to recuse himself from the consideration of a grant that might benefit his public agency, but is prohibited from participating in the authorization of a public contract if he, a family member, or a business associate has a definite and direct personal, pecuniary or fiduciary interest in the public contract.

Cathy C. Godshall
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This informal advisory opinion was approved by the Ethics Commission at its meeting on February 11, 1997. 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,

A handwritten signature in cursive script that reads "John Rawski".

John Rawski
Staff Attorney