



OHIO ETHICS COMMISSION

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Columbus, Ohio 43215

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May 20, 1997

Informal Opinion 1997-INF-0520-1

Fred J. Milligan, Jr.



Dear Mr. Milligan:

You have asked the Ethics Commission whether the Ohio Ethics Law and related statutes preclude the Ohio Historical Society (Society) from accepting the offer of an in-kind donation of overhead and profit from a construction firm (firm) that has a family connection with a member of the board of trustees of the Ohio Historical Foundation (Foundation).

As explained below, in the instant situation, the Ohio Ethics Law and related statutes do not prohibit the Society from accepting an offer of an in-kind donation, toward the construction of the church building at Ohio Village made by a firm with which a member of the Foundation's board of trustees is affiliated through family.

Facts

The Society is a not-for-profit corporation that is statutorily authorized to perform public functions for the state and its political subdivisions. Generally, the Society's public functions include promoting the knowledge of history and archaeology, and maintaining the archives of the state and its political subdivisions. See R.C. 149.30-149.31. In the interest of promoting historical knowledge, the Society operates a reconstructed 19th-century village that is known as Ohio Village.

You state that the Society has created a not-for-profit corporation, the Foundation, for the purpose of soliciting and receiving charitable donations that support the Society's activities. The Foundation is governed by a board of trustees whose members are appointed by the Society's board of trustees.

In the instant situation, the Foundation has been raising funds to construct a church building at Ohio Village. The proposed church building will have an educational center for orienting school classes and developing/distributing information and materials related to Ohio history. It will also interpret and present Ohio's religious history in a historic church setting.

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The Foundation had established a subcommittee of five Foundation members to act upon matters pertaining to the church. The member of the Foundation's board of trustees who is affiliated through family with the construction company that has offered an in-kind donation of overhead and profit to the Society to aid in the construction of the church building served as a member of the subcommittee. You state that the Foundation board member did not participate in any decisions relating to the proposed project either as a member of the Foundation or the subcommittee.

The Ohio Arts and Sports Facilities Commission has appropriated approximately 35% of the construction costs of the church building. This appropriation will cover the cost of constructing and equipping the educational center. Private donations will cover the balance of the construction costs. A construction firm, with whom a member of the Foundation's board of trustees is affiliated through family, has offered an in-kind donation of overhead and profit to the Society in connection with the construction of the church building. The Foundation board member's husband has a 20% ownership interest in the construction company, but is not an officer or director of the construction company. The Foundation board member has no personal ownership interest in the construction company. You state that the offer represents "a very significant donation" and that the Society will seek a waiver of competitive bidding from the Controlling Board to accommodate this proposed donation.

You ask whether the Ethics Law and related statutes prohibit the Society from accepting the firm's offer of this donation because a member of the Foundation's board of trustees is affiliated, through family, with the firm.

You state that the Society, not the Foundation, will enter into the construction contract. You also state that the Foundation's board of trustees has no authority with respect to the award or administration of the contract. Furthermore, as set forth above, you state that the Foundation board member who is affiliated, through family, with the construction firm did not participate in any decisions relating to the proposed project either as a member of the Foundation or the subcommittee.

The Application of the Ethics Laws

The threshold issue is whether members of the Foundation's board of trustees are subject to the Ohio Ethics Law and related statutes, provisions which serve to protect the public interest from conflicts of interest in public officials and employees.

The Ohio Ethics Law and related statutes include prohibitions against public officials and employees misusing their official positions for their own personal benefit, the benefit of their family members or business associates, or where there is otherwise a conflict of interest. Two provisions of law define who is subject to these prohibitions. R.C. 102.01 (B) defines the term "public official

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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.

One related statute, R.C. 2921.42 applies to any "public official" which is defined, for purposes of R.C. Chapter 2921., in R.C. 2921.01 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).

As stated above, the Foundation is organized as a nonprofit charitable corporation under the Ohio Nonprofit Corporation Act. Pursuant to the material and description you have provided, the Foundation is not a department, division, institution, board, commission, authority, bureau, or other instrumentality of the state, or a political subdivision. The Ethics Commission has generally addressed the issue whether the Ohio Ethics Laws and related statutes apply to persons who are members of the board of trustees of a non-profit corporation. Advisory Ops. No. 75-013 and 75-019. In Advisory Opinion No. 75-013, the Ethics Commission held:

The provisions of Chapter 102 of the Revised Code apply to "public officials and employees" and "persons elected or appointed to an office or employed by" an agency of the state, county, township, municipal corporation or other governmental entity. The governmental or public agencies referred to in Chapter 102 of the Revised Code are entities created by the Constitution or legislative bodies of the state, county, township, or municipal corporation.

Non-profit corporations formed under Section 1702.04 of the Revised Code can be distinguished from these public or governmental agencies in that the non-profit corporations, by virtue of Section 1702.04 of the Revised Code are created by:

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“(A) Any person, singly or jointly with others, and without regard to residence, domicile or state of incorporation, may form a corporation by signing and filing with the secretary of state articles of incorporation, . . .”

Thus, although the activities and functions of a non-profit corporation may be of a public nature, the [non-profit] corporation is not a governmental agency for purposes of Chapter 102 of the Revised Code.

The prohibitions of Chapter 102 of the Revised Code, therefore, do not apply to persons participating through non-profit corporations in services to their community.

Based upon the information you have provided, in the instant situation, because the Foundation is not an entity created by the Constitution, or a legislative body of the state, county, township, or municipal corporation, it is not a “public agency” for purposes of Chapter 102.

Public Contract and Supplemental Compensation Provisions

The Ethics Commission is empowered to administer, interpret, and enforce Sections 2921.42 and 2921.43 of the Revised Code, as well as R.C. Chapter 102.02. R.C. 2921.01 (A) and (B) include definitions that determine whether an individual is subject to the prohibitions imposed by Sections 2921.42 and 2921.43 of the Revised Code. Since these statutory definitions differ from the definitions in Chapter 102., an individual may be subject to some, but not all, of the prohibitions imposed by the statutes under the Ethics Commission's jurisdiction. Advisory Op. No. 93-013.

The members of the Foundation's board of trustees are appointed by the Society's board of trustees, thus, they are not officers or employees of the state or a political subdivision for purposes of Section 2921.42.

R.C. 2921.01 also includes "agents" of the state, as well as officers and employees, within the definition of "public official" for purposes of R.C. 2921.42. The issue remains, therefore, whether a member of the Foundation is an "agent" of the state and subject to the prohibitions imposed by R.C. 2921.42.

The Ethics Commission has held that an individual is an "agent" of the state when the state has empowered him, or the entity with which he serves, to act on the state's behalf, and to bind the state. Advisory Op. No. 92-001. As described above, the Society formed the Foundation to solicit and receive charitable donations that are used to support the Society's activities. In the instant situation, you state that the Society, not the Foundation, has the authority to award and administer the contract and operate the proposed facility. This is an important distinction in the authority of

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the Society. Thus, it cannot be said that the Foundation's duties are functions that empower the Foundation to act on behalf of, or bind, the state. Therefore, a member of the Foundation's board of trustees is not an "agent" of the state who is subject to Section 2921.42 of the Revised Code.

R.C. 2921.43 also falls within the Ethics Law, and this statute applies to "public servants." R.C. 2921.43 (A) prohibits a public servant from accepting compensation, other than allowed by law, to perform his official duties. R.C. 2921.43 (A) also prohibits a person, which is defined in R.C. 1.59 to include an individual, corporation, partnership, association, or other similar entity, from promising or giving to a public servant any compensation, other than allowed by law, to perform any act in his public capacity or generally perform the duties of his public position. Advisory Ops. No. 89-012, 89-013, 89-014, and 90-001.

R.C. 2921.01 (B) defines the term "public servant," as used in R.C. 2921.43, to include: any public official as defined in R.C. 2921.01 (A); any candidate for public office; and "[a]ny person performing ad hoc a governmental function, including without limitation a juror, member of a temporary commission, master, arbitrator, advisor, or consultant."

It is conceivable that a member of the Foundation's board of trustees would, under some limited circumstances, perform ad hoc governmental functions in supporting the statutorily authorized public functions of the Ohio Historical Society and, thus, may be considered a "public servant" for purposes of R.C. 2921.43. However, in the circumstances you describe, the prohibitions imposed by R.C. 2921.43 are not at issue and the application of R.C. 2921.43 need not be addressed.

Conclusion

Accordingly, under the circumstances you have presented, members of the Foundation's board of trustees, who do not otherwise hold public positions or employment with the state or its political subdivisions, are not subject to the statutes under the Ethics Commission's jurisdiction that impose restrictions upon public officials and employees. In the instant situation, the Ohio Ethics Law and related statutes do not prohibit the Society from accepting an offer of an in-kind donation toward the construction of the church building at Ohio Village, made by a firm with which a member of the Foundation's board of trustees is affiliated through family.

It should be noted, however, that a member of the Foundation's board of trustees, who is otherwise a public official or employee, is subject to the provisions of Chapter 102. and Section 2921.42 of the Revised Code due to his position as a public official or employee, but not due to his membership on the Foundation's board of trustees.

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Finally, the Ethics Commission, in addressing a similar issue regarding jurisdiction in Advisory Opinion No. 85-005, cautioned members of the Technical Advisory Committee to the Coal Development Office that even though they are not subject to Chapter 102. or Section 2921.42, their participation in matters that could advance their private interests or the interests of the institutions that they privately served could create an appearance of impropriety. In addition, as a corporation not-for-profit, Foundation trustees are governed by their fiduciary duties to the Foundation and restrictions upon conflicts of interest for not-for-profit corporations. R.C. 1702.30 and 1701.301; see also related Internal Revenue provisions. In this instance, the decision of the Foundation board member not to participate in any decisions relating to the proposed project is commendable and aids in the removal of appearances of favoritism or impropriety.

This informal advisory opinion was approved by the Ethics Commission at its meeting on May 20, 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.

Sincerely,


John Rawski
Staff Attorney