



OHIO ETHICS COMMISSION

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June 30, 1997

Informal Opinion 1997-INF-0630-2

Michele Willis, P.E.
Chief, Division of Water
Ohio Department of Natural Resources

Dear Ms. Willis:

You have requested an advisory opinion addressing the restrictions that the Ohio Ethics Law and related statutes impose upon you in light of the fact that your husband is employed by a firm that does business with your state agency.

As explained below, you are prohibited from participating in matters involving public contracts that are entered into between your state agency and the firm that employs your husband where your husband has an interest in the contracts or would derive a personal pecuniary benefit from the contracts. However, if your husband would not have an interest in the contracts or derive a personal pecuniary benefit from the contracts, then you are not prohibited from participating in matters involving public contracts entered into between your state agency and the firm that employs your husband.

Facts

You state that you are employed by the Ohio Department of Natural Resources (ODNR) as Chief of the Division of Water. You state that your husband is an engineer and was offered, and accepted, employment with Dodson-Stilson Associates, Inc. (Dodson), an engineering firm. At the time that Dodson offered, and your husband accepted, the employment, Dodson was under contract with ODNR to perform services on a project, Buckeye Lake Dam Phase III. You state that, as ODNR's Chief of the Division of Water, you are directly involved in the Buckeye Lake Dam Phase III project.

You state that when your husband accepted Dodson's offer of employment, he and A. James Siebert, III, Dodson's President, agreed that your husband would not perform any activities, as an employee of Dodson, on any contract conducted for or administered by ODNR while you serve as Chief of the Division of Water. You have stated that your husband's relationship with Dodson is as an employee, and that he is not a shareholder or partner of, and has no ownership interest in, Dodson.

R.C. 2921.42 (A)(1) - Securing a Public Contract in which a Family Member has an Interest

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. (Emphasis added.)

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R.C. 2921.42 (A)(1) prohibits a public official from authorizing, or using the authority or influence of his office to secure authorization of, a public contract in which he, a family member, or a business associate has an interest. As ODNR's Chief of the Division of Water, you are a "public official" who is subject to the prohibitions of R.C. 2921.42. R.C. 2921.01(A); see generally Adv. Op. No. 84-007.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (G)(1) of that section, which reads:

- (1) "Public contract" means any of the following:
 - (a) The purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either;
 - (b) A contract for the design, construction, alteration, repair, or maintenance of any public property.

The contract between ODNR and Dodson for engineering services on the Buckeye Lake Dam Phase III project is the purchase of services by a state agency, and, therefore, a "public contract" for purposes of R.C. 2921.42. See generally Adv. Ops. No. 85-004 and 85-010.

The Ethics Commission has stated that a public official's spouse is a member of the official's family for purposes of Section 2921.42(A)(1). Adv. Ops. No. 80-001, 85-015, and 92-017. Your husband is, therefore, a member of your family for purposes of R.C. 2921.42(A)(1).

R.C. 2921.42(A)(1) prohibits you from authorizing, or using the authority or influence of your position to secure authorization of, a public contract in which your husband has an "interest". The issue becomes whether your husband would have an "interest" in a public contract entered into between ODNR and the firm by which he is employed.

An "interest," for purposes of R.C. 2921.42, must be definite and direct, and may be either pecuniary or fiduciary in nature. Adv. Ops. No. 81-008 and 92-002. The Ethics Commission has held that a employee of a firm is generally not deemed to have an "interest" in the contracts of his employer for purposes of R.C. 2921.42. Adv. Ops. No. 78-006 and 89-008. 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, for purposes of R.C. 2921.42, if any of the following circumstances apply:

- (1) The employee has an ownership interest in, or is a director, trustee, officer, or other fiduciary of, his employer;
- (2) The employee takes part in contract negotiations or the bid or proposal process;

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- (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 include participation in the administration or execution of the contract or he has the responsibility to oversee execution or administration of the contract;
- (6) The firm receives most or all of its funding from the contract, such that the establishment or operation of the firm is dependent upon receipt of the contract;
- (7) The creation or continuation of his employment is dependent upon the firm receiving the award of the contract.

Adv. Ops. No. 89-006, 89-008, and 91-001.

If your husband would have an interest under any the enumerated circumstances set forth above in the public contract awarded by ODNR to his employing firm, R.C. 2921.42(A)(1) would prohibit you from authorizing, or using the authority or influence of your position to secure authorization of, the public contract to Dodson. You would be prohibited from participating in any part of ODNR's decision-making process authorizing or approving the contract. Adv. Op. No. 92-012. You would also be prohibited from exercising the power and influence inherent in the position and prestige of your position as the Chief of the Division of Water to affect ODNR's decision-making process regarding the contract, even if you abstain from participating in official proceedings. Id. For example, you would be prohibited from discussing, recommending, using your authority or influence over other ODNR officials and employees, preparing bid specifications, or otherwise participating, formally or informally, in ODNR's award of the public contract to Dodson. Id. In a situation where ODNR has awarded a contract to Dodson in which your husband has an "interest," you would be prohibited from participating in any matter or decision that would affect the performance, continuation, implementation, supervision, enforcement, renewal, modification, or terms and conditions of, and funding and payments under, the contract. Id. However, if your husband would not have an "interest" in the public contracts of the firm, as described above, then R.C. 2921.42 would not prohibit you from participating in matters involving a public contract between ODNR and Dodson.

R.C. 102.03 (D) - Use of Authority to Secure an Improper Thing of Value

Your attention is also directed to R.C. 102.03 (D), which reads:

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.

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A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is employed by a public agency. R.C. 102.01 (B) and (C). As ODNR's Chief of the Division of Water, you are a "public official or employee" who is subject to the prohibitions of R.C. 102.03 (D). See generally Adv. Op. No. 84-007.

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). Payments from ODNR to Dodson for engineering services fall within the definition of anything of value. See generally Adv. Ops. No. 83-007, 83-013, and 83-014.

The Ethics Commission has explained that a public official or employee must exercise her duties without hindrance by any improper influence. Adv. Op. No. 89-010. The prohibition imposed by R.C. 102.03 (D) serves 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 of a public official or employee, and therefore, the effectiveness of the public agency with which she serves. Adv. Ops. No. 89-014 and 90-002. The application of R.C. 102.03 (D) is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 87-007 and 89-003.

The Ethics Commission explained, in Advisory Opinion No. 92-010, that R.C. 102.03 (D) prohibits a public official or employee from participating, formally or informally, in any matter that directly affects the private pecuniary interests of the spouse of the official or employee because, in such circumstances, the public servant's objectivity and independence of judgment could be impaired. See also Adv. Ops. No. 90-004, 91-004, and 92-012. In any situation where your husband would receive a definite and direct pecuniary benefit from a contract between ODNR and Dodson, R.C. 102.03 (D) would prohibit you from participating in matters involving the determination of need for the engineering services, disputes concerning a purchase, modifications and alterations of the contractual provisions, payments under the contract or payments for the purchases, and any other matter relative to Dodson's contract to provide engineering services to ODNR.

R.C. 102.03 (D) does not, however, generally prohibit you from participating in matters that affect the employer of your spouse in situations where your spouse would not have a definite and direct interest in the matter. In Advisory Opinion No. 89-008, the Commission held that R.C. 102.03 (D) would prohibit a city council member from participating in consideration of a tax abatement sought by a company that employed her husband or spouse where the council member's spouse or child would receive a definite and direct benefit from the tax abatement. Advisory Opinion No. 89-008 went on to conclude, however, that R.C. 102.03 (D) would not prohibit a city council member from participating in council's consideration of a tax abatement from the employer of a family member in instances where the family member has no direct interest in the tax abatement. See Adv. Ops. No. 88-005 and 91-004. R.C. 102.03 (D), therefore, would not prohibit you from participating in ODNR's decision to award future contracts to Dodson, participating in matters involving ODNR's contract with Dodson to provide engineering services for the Buckeye Lake Dam Phase III project, or participating in other matters affecting your spouse's employer if your spouse would not derive a definite benefit from the matter. Adv. Ops. No. 88-005 and 89-008.

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Therefore, 102.03 (D), as well as R.C. 2921.42 (A)(1), prohibit you from participating in matters affecting the interests of the firm that employs your husband where your husband has an interest in the matters or would derive a personal pecuniary benefit from the matters, as explained above. However, if your husband does not have a direct interest in, and would not derive a personal pecuniary benefit from decisions on, matters affecting the interests of his employer, then R.C. 102.03 (D) would not prohibit you from participating in matters affecting the interests of the company that employs your spouse.

R.C. 102.03 (B) - Disclosing or Using Confidential Information

As a final matter, your attention is directed toward Division (B) of Section 102.03 of the Revised Code, which reads as follows:

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.

R.C. 102.03 (B) prohibits you from using or disclosing confidential information to your husband, or any other party, without appropriate authorization. If you become aware of any confidential information that affects the interests of your spouse or his employer, then R.C. 102.03(B) prohibits you from disclosing any of the information to your husband or his employer. No time limit exists for the prohibition of R.C. 102.03(B), and it is effective while you are in public service and thereafter. Adv. Op. No. 88-009.

Conclusion

As explained above, you are prohibited from participating in matters involving public contracts entered into between your state agency and the firm that employs your husband where your husband has an interest in the contracts or would derive a personal pecuniary benefit from the contracts. However, if your husband would not have an interest in the contracts, or derive a personal pecuniary benefit from the contracts, then you are not prohibited from participating in matters involving public contracts entered into between your state agency and the firm that employs your husband.

As a final matter, it must be noted that the agreement between your husband and Dodson's President, A. James Siebert, III, that your husband would not perform any activities, as an employee of Dodson, on any contract conducted for or administered by ODNR while you served as Chief of the Division of Water is commendable, and aids in the removal of appearances of favoritism or impropriety.

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This informal advisory opinion was approved by the Ethics Commission at its meeting on June 30, 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

CC: Kyme Rennick, Deputy Director, Ohio Department of Natural Resources
Stephen W. Meagher, Chief Counsel, Ohio Department of Natural Resources
A. James Siebert, III, Dodson-Stilson Associates, Inc.