

OHIO ETHICS COMMISSION

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May 7, 1999

Informal Opinion 1999-INF-0507-2

James H. Hartung
Toledo-Lucas County Port Authority

Dear Mr. Hartung:

In your letter to the Ethics Commission, you ask about the application of the Ohio Ethics Law to a member of the board of directors of the Toledo-Lucas County Port Authority (Authority). Specifically, you ask whether the Ethics Law and related statutes preclude a private company, for which the board member is an executive officer, from utilizing the economic development services provided by the Regional Growth Partnership (RGP). RGP is a private not-for-profit corporation that assists companies to stimulate economic development in Lucas County. The Authority provides funds to RGP and participated in its creation.

As set forth below, the prohibitions imposed upon the Authority board member by the Ohio Ethics Law and related statutes do not preclude a company that he serves as an executive officer from utilizing the economic development services provided by RGP. The laws do, however, prohibit the board member from using his working relationship with board members and staff of the Authority to alter any existing relationship between the Authority and RGP in order to provide a definite and direct pecuniary benefit to the company that he serves as an executive officer. The laws also prohibit the board member from using his position on the Authority to secure benefits for the company that are selective, differential, or in disproportion to the benefits realized by other area businesses.

Facts

The Authority is organized under R.C. Chapter 4582. It is governed by a board comprised of 13 members. The Mayor of the City of Toledo and the Board of Lucas County Commissioners each appoint six members and the Mayor and the Board of Lucas County Commissioners jointly appoint one member. Board members serve without compensation. The board hires a staff that manages the Authority's operations. The Authority operates airports, a seaport, and is involved in the development of ground transportation projects and the encouragement of economic development. User and landing fees, and lease payments generate ninety-three percent of the Authority's revenue.

You state that the Authority and the Toledo Chamber of Commerce organized RGP as a private not-for-profit corporation in 1994 as a means to stimulate job creation and retention, investment, and economic development in Northwest Ohio. The Authority provides approximately \$1.45 million per year to RGP pursuant to a professional services agreement. RGP receives additional funds from the Chamber of Commerce and Columbia Gas. RGP is governed by a board of trustees that is comprised of 17 members. The Authority's board appoints 11 of RGP's 17 trustees. Some members of the Authority's board serve as members of the RGP board of trustees.

RGP assists businesses desiring to locate or expand their operations in the area. RGP provides project development planning, location data, international trade development and marketing programs, business climate improvement activities, and legislative liaison work to any business desiring these services. RGP does not charge a fee for providing this assistance. RGP has almost 60 active business clients.

One member of the Authority's board is an executive officer of Dana Commercial Credit. This board member does not serve as a RGP trustee. Dana Commercial Credit is a wholly-owned subsidiary of Dana Corporation, which is based in Toledo. Dana Corporation and Dana Commercial Credit desire to use RGP's economic development services in the same fashion as other area businesses. The executive officer of Dana Commercial Credit who serves as an Authority board member has stated that he is prepared to abstain from voting or deliberating on matters pertaining to the Authority's appropriation of money to RGP.

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

The threshold issue in your question is whether the provision of economic development services by RGP to area businesses is a "public contract."

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 members of the Authority's board 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 by which they are employed. Ohio Ethics Commission Advisory Opinion 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. Adv. 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. Adv. Ops. No. 84-001 and 96-007.

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 exists whenever a political subdivision either purchases services from a provider or acquires services as part of the contractor's responsibility under the contract. Adv. Ops. No. 91-011, 93-009, and 93-012. The Ethics Commission has held that a grant from a political subdivision to a non-profit corporation in exchange for its services falls within the definition of a public contract for purposes of R.C. 2921.42. See Adv. Op. No. 93-012 (an agreement between a city and a hospital is a public contract where the city provides \$900,000 to the hospital in exchange for a permanent interest in the hospital and its management because the city is purchasing or acquiring hospital services for the benefit of its residents). In the instant situation, for example, the Authority's funding of approximately \$1.45 million per year to RGP in return for RGP's agreement to provide economic development services for the benefit of area businesses is a "public contract" for purposes of R.C. 2921.42(A)(4).

The issue becomes whether the Authority board member who serves as an officer of Dana Commercial Credit would have a definite and direct pecuniary or fiduciary interest in the public contract between the Authority and RGP, or the provision of services by RGP, if either Dana Commercial Credit, or the Dana Corporation, use RGP's economic development services in the same fashion as other area businesses.

Use of Economic Development Services

As explained above, the relationship between the Authority and RGP is a public contract. However, the specific relationship between RGP and a business that receives its economic development services that you describe is not a public contract.

Unlike a direct grant, loan, or tax abatement from a political subdivision to a business as a means of acquiring community and economic development services, the provision of services that you describe flow from RGP to the businesses and does not establish a reciprocal agreement for the return of property or services to RGP or the Authority. While the Authority's establishment and funding of RGP aids area businesses and serves a strong public purpose, the businesses, and their owners and officers, that receive non-monetary aid from RGP cannot be said to have a definite and direct interest in the public contract between the Authority and RGP. It is also true that the businesses within the geographical area served by the Authority benefit in a broad and general manner from RGP's aid. However, even those businesses that do not receive economic development services benefit from the potential improvement of the overall business

climate. For purposes of R.C. 2921.42(A)(4) then, these broad and general services provided to the business community by RGP, do not create a definite and direct pecuniary or fiduciary interest, for the businesses or their owners and officers, in a public contract with the Authority.

In the instant situation, the prohibition imposed upon the Authority board member by R.C. 2921.42(A)(4) does not preclude Dana Corporation, or Dana Commercial Credit, from utilizing the economic development services provided by RGP.

Conflicts of Interest—R.C. 102.03(D) and (E)

Although the public contract prohibitions of R.C. 2921.42 do not apply to your question, there are conflict of interest provisions that must be examined to fully answer your question. Divisions (D) and (E) of R.C. 102.03 read:

- (D) 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.
- (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 the public official or employee with respect to that person's duties.

The term "public official or employee" is defined, for purposes of R.C. 102.03(D) and (E), to include "any person who is elected or appointed to an office or is an employee or any public agency." R.C. 102.01(B). A member of the Authority is, therefore, a "public official or employee" for purposes of R.C. 102.03. Adv. Op. No. 90-013.

The term "anything of value" has been defined, for purposes of R.C. 102.03(D), to include money, goods, and any other thing of value. R.C. 1.03; R.C. 102.01(G). You have stated that Dana Corporation and Dana Commercial Credit would be competitively disadvantaged if they were not able to receive RGP's assistance. Thus, the aid that RGP provides to area businesses has economic value to the businesses, and accordingly, RGP's aid is a thing of value for purposes of R.C. 102.03(D) and (E).

Generally, R.C. 102.03(D) and (E) prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his public office or employment to secure anything of value, either for himself, or for another party, where the thing of value could impair his objectivity and independence of judgment with respect to his official actions and decisions for the agency that he serves. Adv. Ops. No. 87-009, 88-005, 92-009, and 92-019.

The Ethics Commission has held that R.C. 102.03(D) prohibits a public official from using the authority or influence of his office to secure a definite and direct thing of value for himself, or for another person, business, or entity, if the relationship between the official and that person, business, or entity, is such that the official's objectivity or independence of judgment could be impaired with regard to matters that affect the interests of that person, business, or entity. Adv. Ops. No. 88-004, 89-015, and 90-007. Whenever such a relationship exists, the Commission has concluded that the definite and direct thing of value that is secured for the other person, business, or entity will manifest a substantial and improper influence upon the official with respect to his duties. Adv. Op. No. 89-016 and 90-004. See also Adv. Op. No. 93-003 (identifying familial, economic, or fiduciary relationships that may manifest a substantial and improper influence upon a public official or employee).

R.C. 102.03(E) prohibits a public official or employee from merely accepting or soliciting anything of value that could impair his objectivity or independence of judgment. For example, a public official is prohibited from receiving a definite and direct personal financial benefit from any matter pending before his agency, regardless of whether he has used the authority or influence of his position to secure the financial benefit. Adv. Op. No. 90-008. In some situations, the Commission has determined that the conflicts between a public official's private employment or interests and his public position are so compelling and unavoidable that R.C. 102.03(D) and (E) prohibit the public official from holding both the public position and private interests. Adv. Ops. No. 92-008 (a township clerk is prohibited from also holding employment with a bank that is a depository of township funds) and 92-009 (the executive director of the State Barber Board is prohibited from owning and operating a barber shop).

As stated above, RGP provides free assistance to any area business upon request. You state that Dana Corporation and Dana Commercial Credit desire to use RGP's economic development services in the same fashion as other area businesses.

The issue is whether the economic benefit that the Dana Corporation and Dana Commercial Credit would receive through assistance from RGP is of such a character as to manifest a substantial and improper influence upon the Board member with respect to his official duties because of the Authority's establishment and funding of RGP.

Use of Economic Development Services

In Advisory Opinion No. 89-008, the Ethics Commission held that R.C. 102.03(D) prohibited a city council member from participating in the award of a tax abatement to his private outside employer. In that opinion, the Commission held:

An employer holds a position of power and authority over the hiring, compensation, discipline, and termination of its employees. A city council member who is in the position of making an official decision regarding the pecuniary interests of his private employer would have an inherent conflict of interest impairing the council member's objectivity and independence of judgment.

The application of the restrictions of R.C. 102.03(D) and (E) are dependent upon the facts and circumstances of each situation. Adv. Ops. No. 85-006 and 88-004.

In the instant situation, the Authority's establishment and funding of RGP enables RGP to provide free economic development assistance to area businesses. The assistance that Dana Corporation and Dana Commercial Credit seek from RGP is a general uniform benefit that is available to any area business upon request.

While it is acknowledged that the businesses within the geographical area served by the Authority benefit in a broad and general manner from the Authority's funding of RGP by receiving aid from RGP, the participation of an Authority board member, who is an officer of a business that receives aid from RGP, in matters before the Authority that affect the general funding of RGP does not result in a definite and direct pecuniary benefit for the business or its owners and officers for purposes of R.C. 102.03(D). In the instant situation, any benefit that the Dana Corporation or Dana Commercial Credit receives is a general and uniform benefit that is available to all area businesses.

Therefore, the assistance that RGP would provide to Dana Corporation and Dana Commercial Credit is not of such a character as to manifest a substantial and improper influence upon the Authority board member with respect to his duties, provided that the board member follows the restrictions further described below. Accordingly, the prohibitions imposed upon the Authority board member by R.C. 102.03(D) and (E) do not preclude a company that he serves as an executive officer from utilizing the economic development services provided by RGP.

Participation in Funding Decisions

The issue becomes whether the board member may participate in the Authority's decisions affecting the funding of RGP if the Dana Corporation or Dana Commercial Credit utilize the economic development services provided by RGP.

In Advisory Opinion No. 90-004, the Ethics Commission addressed the issue of a city council member participating in decisions that affected the funding of the municipal court if his wife served the court as a judge. In that opinion, the Commission held that in order for R.C. 102.03(D) to prohibit a public official from participating in funding decisions that affect the financial interests of a person or entity in a close familial, economic, or fiduciary relationship, the funding decision must result in a definite and direct financial benefit for the person or entity. See also Adv. Op. No. 89-002. In Advisory Opinion No. 90-004, the Commission held:

While it is possible that a municipal court judge's workload may be eased and the functioning of her court expedited by a generous appropriation of funds from the legislative authority, city council's appropriation to the municipal court for necessary accommodations, personnel, and supplies will not provide a definite and direct, personal pecuniary benefit to the judge.

As stated above, the Authority's funding of RGP enables RGP to provide a general uniform benefit of economic development assistance to area businesses without cost to the businesses. Because funding to RGP benefits area businesses in a broad and general manner, the Authority's funding of RGP does not result in a definite and direct financial benefit to the Dana Corporation or Dana Commercial Credit. R.C. 102.03(D) does not prohibit the Authority Board member from voting, discussing, participating in deliberations, or otherwise using his official authority to secure funding for RGP from the Authority.

Use of Position to Secure Selective, Differential, or Disproportional Benefits

However, it must be noted that R.C. 102.03(D) prohibits the Authority board member from using the authority or influence of his public position with regard to any matter that would alter the present relationship between the Authority and RGP in order to provide a definite and direct pecuniary benefit to the Dana Corporation or Dana Commercial Credit. The Ethics Commission has recognized that a public official or employee will develop working relationships by cooperating with other public officials and employees while performing his official duties. R.C. 102.03(D) prohibits a public official or employee who engages in private outside employment or business activity from using relationships developed while performing his public duties to secure a favorable decision or action by other public officials or employees regarding his private interests or the interests of his outside employer. Adv. Op. No. 96-004.

A person appointed to the board of a city-county port authority has access to other city and county officials and employees which is unique to that enjoyed by officers of other business who do not serve in public office. Thus, R.C. 102.03(D) prohibits the board member from using his unique position and access, as an Authority board member, and his working relationship with other Authority board members and staff, to affect their decisions to secure benefits for his outside employer that are selective, differential, or in disproportion to the benefits that are realized by other area businesses, even if he abstains from voting or otherwise participating in the Authority's decision. Adv. Op. No. 92-013.

Conclusion

As discussed above, the prohibitions imposed upon the Authority board member by the Ohio Ethics Law and related statutes do not preclude a company that he serves as an executive officer from utilizing the economic development services provided by RGP. The laws do, however, prohibit the board member from using his working relationship with board members and staff of the Authority to alter any existing relationship between the Authority and RGP in order to provide a definite and direct pecuniary benefit to the company that he serves as an executive officer. The laws also prohibit the board member from using his position on the Authority to secure benefits for the company that are selective, differential, or in disproportion to the benefits realized by other area businesses.

James H. Hartung
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This informal advisory opinion was approved by the Ethics Commission at its meeting on May 7, 1999. 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