

OHIO ETHICS COMMISSION

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August 6, 1999

Informal Opinion 1999-INF-0806-2

Guy L. Reece, Director
Franklin County Board of Elections

Dear Director Reece:

In a letter received by the Ethics Commission on March 22, 1999, you have asked about the application of the Ethics Law to your situation. Specifically, you have asked whether the law prohibits you, as Director of the Franklin County Board of Elections, from publishing election notices in a newspaper owned by a company where you and your spouse have invested in a note issued by the company.

As explained more fully below, a creditor of a business can be considered to have an interest in the contracts of that business. The applicable public contract statute, R.C. 2921.42(A)(4), generally prohibits a county employee from having an interest in a contract for the sale of goods or services to any division of the county he serves. However, R.C. 2921.42(B) provides an exemption to this prohibition where the official's interest is limited to that of a creditor who is owed less than five per cent of the outstanding debt of the company. It appears that you meet the exemption described in R.C. 2921.42(B). In addition, R.C. 2921.42(A)(1) does not prohibit you from participating in matters that affect the newspaper because the newspaper is not your business associate.

The conflict of interest provision contained in R.C. 102.03(D) also does not prohibit you from participating in matters that affect a newspaper of which you are a creditor, where you are owed less than five per cent of the company's outstanding debt and you do not receive a definite and direct substantial benefit from the county's contracts with the newspaper. However, in order to avoid any actual or appearance of conflict of interest, you should continue to remove yourself from matters involving the newspaper. Those matters have been assigned to the Deputy Director, who should report to the Board, rather than to you, on the matters.

Facts

You have explained that you are the Director of the Franklin County Board of Elections (Board). In that role, the Board requires you to place official notices in newspapers of general circulation in the election jurisdiction.

In your letter, you stated that you and your spouse invested in a note issued by a company that owns a local newspaper. In a subsequent telephone conversation with Commission staff, you have explained that your interest is limited to being essentially a creditor of the company, and that you are likely owed less than five per cent of the outstanding debt of the company. You have stated that the newspaper has been used to publish election notices in the past, and may be used to publish such notices in the future.

Public Official Selling to Public Agency—R.C. 2921.42(A)(4)

Your question raises issues under R.C. 2921.42(A)(4), which provides that no public official shall:

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.

A "public official," for purposes of R.C. 2921.42, is defined to include any person who is "an employee . . . of the state or any political subdivision" and would include the director of a county board of elections. See generally Ohio Ethics Commission Advisory Opinion No. 87-002. The term "public contract" is defined to include any purchase or acquisition of property or services by or for the use of a public agency. R.C. 2921.42(G)(1). The purchase of newspaper notices by the county board of elections would fall within this definition of public contract.

A public official is prohibited from having an interest in contracts entered into by the political subdivision "with which he is connected." Although Section 2921.42 of the Revised Code does not define "connected," as used in the statute, the Commission has stated that common usage indicates that to be "connected" with something is to be related to, or associated with, that entity. Adv. Op. No. 87-002. An employee of the county board of elections is "connected with" not only the board of elections, but with all county agencies. Therefore, an employee of the county board of elections is prohibited from having an interest in a public contract entered into by the board of elections, or any other board, commission, bureau, division, or agency of the county.

R.C. 2921.42(A)(4) prohibits a county employee, including a director of the board of elections, from having an "interest" in the profits or benefits of public contracts entered into by any agency of the county. For purposes of R.C. 2921.42, the Commission has stated that a prohibited "interest" must be definite and direct, and may be either pecuniary or fiduciary in nature. Adv. Op. No. 88-008. A creditor of a company has an "interest" in the contracts of the debtor company for purposes of Division (A)(4) of Section 2921.42 of the Revised Code. Adv. Op. No. 89-011. If the county board of elections pays to place notices in the newspaper, then you would have an interest in

a public contract entered into by the county with which you are connected. R.C. 2921.42(A)(4) prohibits you from having an interest as a creditor in the newspaper if the county places notices in the newspaper.

Exemption Based on Limited Creditor Interest—R.C. 2921.42(B)

However, Division (B) of Section 2921.42 of the Revised Code provides that, in the absence of bribery or fraud, a public servant shall not be considered to have an "interest" in a public contract with his own political subdivision when: (1) the public servant's interest is limited to being a creditor of a corporation which is doing business with his political subdivision; (2) the amount due the public servant does not exceed five per cent of the total indebtedness of the corporation; and (3) the public servant files with the political subdivision an affidavit giving his exact status in connection with the corporation. Adv. Ops. No. 78-001 and 78-002.

The term "creditor" is not defined for purposes of R.C. Section 2921.42. A primary rule of statutory construction is that words used in a statute must be construed according to rules of grammar and common usage. See R.C. 1.42. Furthermore, statutes "must be construed in light of the mischief they are designed to combat." City of Mentor v. Giordano, 9 Ohio St. 2d 140, 144 (1967). Random House Webster's Unabridged Dictionary (2d ed. 1987) defines the term "creditor" as a "person or firm to whom money is due."

In the instant situation, you have entered into a promissory note, whereby the company is obligated to pay you and your wife \$5,000.00, with stated interest. As such, you are a creditor of the company as that term is commonly used. You have stated that you believe that the amount of money you are owed by the company is less than five per cent of the company's total indebtedness. The criteria necessary to meet an exemption to the prohibition imposed by R.C. 2921.42 are strictly applied against the public official, and the burden is on the official to demonstrate that he is in compliance with the exemption. See Adv. Op. No. 87-003 (addressing the exemption provided by R.C. 2921.42(C)).

If you are able to meet the requirements in R.C. 2921.42(B), you and your wife would not be considered to have an interest in any contract between the county and the newspaper. However, prior to the time that the parties enter into a contract, you must file the affidavit required in R.C. 2921.42(B)(3) with the county. If this exemption to the prohibition of R.C. 2921.42(B) cannot be met, and the county enters into a contract with the newspaper, then you would, as a creditor of the newspaper, be deemed to have an "interest" in a public contract with the county with which you are connected. See Adv. Op. No. 89-011. R.C. 2921.42(A)(4) would prohibit you from having an interest in any contract between the county and the newspaper.

Assuming that the exemption in R.C. 2921.42(B) can be established, so that you would not be considered to have an interest in a contract with the county, you are subject to other provisions of the Ohio Ethics Law and related statutes.

Authorization of a Public Contract—R.C. 2921.42(A)(1)

Your attention is next directed to Division (A)(1) of Section 2921.42 of the Revised Code, which provides that no public official shall 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.

As discussed above, as a creditor of the newspaper, you have an interest in the contracts of the newspaper for purposes of R.C. 2921.42. See Adv. Ops. No. 90-005 and 93-001. However, if you are owed less than five per cent of the outstanding debt of the company, and assuming you meet the other requirements of R.C. 2921.42(B), you would not be considered to have an interest in the contracts of the newspaper. The prohibition in R.C. 2921.42(A)(1), however, applies not only where the public official himself has an interest, but also where his business associates and family members have an interest.

The issue thus becomes whether the newspaper is your "business associate" for purposes of R.C. 2921.42(A)(1). See Adv. Op. No. 93-001. The term "business associate" is not statutorily defined for purposes of R.C. 2921.42(A)(1). However, the Ethics Commission has held that a business association exists whenever parties act together to pursue a common business purpose. See Adv. Ops. No. 86-002 and 89-015. In Advisory Opinion No. 93-001, the Ethics Commission found that a stockholder of a company, who owns a de minimis amount of stock, is not considered to be a business associate of the company. By the same measure, as a creditor of the company in question, who is owed less than five per cent of the company's outstanding debt, you are not acting with the company to pursue a common business purpose.

Therefore, in your situation, the newspaper is not your "business associate" for purposes of R.C. 2921.42(A)(1). If you meet the exemption to the prohibition, previously discussed and contained in R.C. 2921.42(A)(4), against having an interest in the proposed contract, and if you have no further business association with parties who have an interest in the contract, R.C. 2921.42(A)(1) would not prohibit you from participating in the county's decision-making process with respect to contracts with the newspaper. However, another provision of the Ethics Law, R.C. 102.03(D), may further restrict your official actions in this matter. This opinion will now turn to a discussion of R.C. 102.03(D).

Conflict of Interest Prohibition—R.C. 102.03(D)

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

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.

A "public official or employee" is defined, for purposes of R.C. 102.03, to include any person who is elected or appointed to an office or is an employee of any public agency. R.C. 102.01(B). R.C. 102.01(C) defines "public agency" to include a county. Therefore, the Director of a County Board of Elections is a public official or employee, for purposes of R.C. 102.03(D).

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. See R.C. 102.01(G). A pecuniary interest in a private business, and the impact of a contract to that business, is a thing of value under R.C. 102.03(D). See Adv. Ops. No. 86-007 and 87-006.

R.C. 102.03(D) prohibits a public official or employee from taking any action, formally or informally, to secure a thing of value if the thing of value could manifest a substantial and improper influence upon the public official or employee with respect to that person's duties. See Adv. Ops. No. 88-004 and 91-004. The Ethics Commission has held that a determination of whether a thing of value could manifest a substantial and improper influence upon a public official or employee with respect to that person's duties is dependent upon the facts and circumstances of each individual situation. See Adv. Ops. No. 87-008, 88-004, and 91-004.

If the fact that you and your wife are creditors of the newspaper could impair your objectivity and independence of judgment, and thus manifest a substantial and improper influence upon you with regard to matters affecting the newspaper, then R.C. 102.03(D) would prohibit you from participating in the county's contracts with the newspaper. See Adv. Ops. No. 88-004 and 91-004.

A matter that affects the personal financial interests of a public official or employee would generally be of such a character as to manifest an improper influence upon him with respect to his duties. See Adv. Ops. No. 88-004 and 90-003. However, in order for R.C. 102.03(D) to prohibit a public official or employee from participating in a matter that would secure a thing of value for himself, the thing of value must also be of a "substantial" nature. See Adv. Ops. No. 86-011 and 92-014. The word "substantial" means "of or having substance, real, actual, true; not imaginary; of considerable worth or value; important." Adv. Op. No. 89-014 (quoting Adv. Ops. No. 75-014 and 76-005). While R.C. 102.03(D), unlike R.C. 2921.42(B), does not provide a definite amount under which a public official or employee who is a creditor of a corporation would not be subject to its prohibitions, the Ethics Commission has explained that the prohibition of R.C. 102.03(D) will not apply in instances where the thing of value is nominal or de minimis in value. See Adv. Op. No. 92-014.

Your relationship with the newspaper, as a creditor, would manifest a "substantial and improper influence" for purposes of R.C. 102.03(D) if the facts and circumstances establish that you would realize a significant financial return from a contract between the newspaper and the county, or where the facts would otherwise indicate that the interest of a creditor is of an improper and substantial character. If the interest of a creditor is such that you would be impaired in your ability to make decisions about the newspaper that is your debtor, R.C. 102.03(D) would prohibit you from participating in any matter with respect to contracts with the newspaper.

As discussed above, you have stated that you have entered into a promissory note, whereby the company is obligated to pay you and your wife \$5,000.00, with stated interest. As such, you are a creditor of the company as that term is commonly used. You have stated that you believe that the amount of money you are owed by the company is less than five per cent of the company's total indebtedness. As a creditor of the newspaper, you may benefit from the overall financial health of the company. For example, the company may be able to repay the obligation in a more expeditious manner. However, where you are owed less than five per cent of the outstanding debt of the company, at the financial level you have stated in your facts, it cannot be said that any benefit you may receive would result from the placement of county ads with the newspaper. In the situation you have set forth, any benefit that may accrue to you cannot be considered definite, direct, or substantial and R.C. 102.03(D) does not prohibit you from participating in matters that affect a newspaper of which you are a creditor. If, however, there were other factors that suggest that you would receive a definite and direct substantial benefit from county contracts with the newspaper, R.C. 102.03(D) would prohibit you from participating in those matters.

It must be emphasized that a public official's or employee's participation in any matter that would secure a thing of value for a company of which he is a creditor can create the appearance of impropriety even if it is not prohibited by R.C. 102.03(D) or other provisions of the Ethics Laws. See Adv. Op. No. 86-003. You have stated that as soon as you realized the potential for a conflict, you removed yourself from the decisions affecting the newspaper. You have also stated that you will not be a part of the decision-making process with respect to the newspaper until your interest is removed, and that responsibility for the newspaper has been assigned to the Deputy Director. The Commission recognizes your desire to avoid any appearance of impropriety and, as long as the Deputy Director continues to handle matters that affect the newspaper, and reports to the Board of Elections, rather than to you, on those matters, you will avoid a situation that may present an actual conflict, or the appearance of a conflict.

Conclusion

As explained above, a creditor of a business can be considered to have an interest in the contracts of that business. The applicable public contract statute, R.C. 2921.42(A)(4), generally prohibits a county employee from having an interest in a contract for the sale of goods or services to any division of the county he serves. However, R.C. 2921.42(B) provides an exemption to this prohibition where the official's interest is limited to that of a creditor who is owed less than five per cent of the outstanding debt of the company. It appears that you meet the exemption described in R.C. 2921.42(B). R.C. 2921.42(A)(1) does not prohibit you from participating in matters that affect the newspaper because the newspaper is not your business associate. In addition, R.C. 102.03(D) does not prohibit you from participating in matters that affect a newspaper of which you are a creditor, where you are owed less than five per cent of the company's outstanding debt and you do not receive a definite and direct substantial benefit from the county's contracts with the newspaper. However, in order to avoid any actual or appearance of conflict of interest, you should continue to remove yourself from matters involving the newspaper. Those matters have been assigned to the Deputy Director, who should report to the Board, rather than to you, on the matters.

Guy L. Reece
August 6, 1999
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This informal advisory opinion was approved by the Ethics Commission at its meeting on August 6, 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 questions, please feel free to contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer A. Hardin". The signature is written in a cursive style with a large, looping initial "J".

Jennifer A. Hardin
Chief Advisory Attorney