

OHIO ETHICS COMMISSION

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March 16, 2000 Informal Opinion 2000-INF-0316-2

Richard Schwartz, Esquire
Director of Law
City of Newton Falls

Dear Mr. Schwartz:

In your letter to the Ethics Commission dated July 8, 1999, you ask whether the Ohio Ethics Law and related statutes prohibit a member of the Newton Falls City Council from receiving compensation from the city council for having performed the additional duty of interim city manager while he served on city council.

As explained below, the Ethics Law and related statutes prohibits a council member from receiving compensation from the city council for performing the additional duty of interim city manager while he served as a council member.

At the outset, the Commission commends you for seeking the Commission's guidance through your request for an advisory opinion. The Commission has determined that it is constrained by the statutory provisions cited below from reaching any conclusions other than the ones in the opinion. While these statutes serve to protect the public against conflicts of interest, they occasionally dictate a difficult outcome for the public servant involved. The members of the Commission, however, wanted to communicate that they recognize the exemplary service of this council member under the circumstances you have described. Although compensation for the council member is prohibited, the council is certainly free, at its discretion, to recognize his service in some other manner.

Facts

You state that the city is a charter municipality that operates under a city manager form of government. You state that the individual who has served as city manager for the past six years retired. You state that the city council advertised for candidates to fill the position, but council was unable to find a qualified candidate. Therefore, the city council appointed a member of city council, Joe Hildack, to serve as interim city manager. Mr. Hildack served as interim city manager while city council sought a qualified candidate. The city council took this action under the auspices of Article III, Section 8, Paragraph (r) of the Newton Falls City Charter, which reads:

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[T]he City Council shall appoint any qualified individual to perform the duties of City Manager during the City Manager's temporary absence or disability. Such approval shall be given by motion, to the City Clerk. A member of Council or the Mayor, shall not be disqualified for such designation, and anything contrary in this Charter not withstanding.

In a subsequent telephone conversation, you explained that the city has hired a city manager who began his service in the fall of 1999. You state that city council has proposed compensating Mr. Hildack on an hourly basis for the service that he provided while he served as interim city manager. Currently, Mr. Hildack receives \$2,700 per year as a member of council. You state that the city charter establishes the amount of compensation received for serving as a member of council.

Having a Position of Profit in a Public Contract—R.C. 2921.42(A)(3)

Division (A)(3) of Section 2921.42 of the Revised Code provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

The term "public official" is defined for purposes of Section 2921.42 in Section 2921.01(A) to include any elected or appointed officer of a political subdivision. A member of city council is a "public official" for purposes of R.C. 2921.42 and subject to its prohibitions. Ohio Ethics Commission Advisory Opinion No. 89-008.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (G)(1)(a) of that Section, as follows:

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. (Emphasis added.)

R.C. 2921.42(G)(1)(a) does not limit the definition of the term "public contract" to a specific manner or means by which the state or a political subdivision acquires or purchases an individual's services. The Ethics Commission has held that contracts between a political subdivision and individuals for full-time, part-time, temporary, or permanent employment are all "public contracts" for purposes of R.C. 2921.42. Adv. Op. No. 90-010. See Walsh v. Bollas, 82 Ohio App. 3d 588, 591 (1992); Adv. Ops. No. 85-015, 89-005, and 89-015 (describing positions of public employment with political subdivisions as public contracts).

R.C. 2921.42(A)(3) states that a public official, during his term of office and for one year thereafter, is prohibited from "occupy[ing] any position of profit in the prosecution of a public contract," which was authorized by the legislative body upon which he serves, unless the public contract from which he would profit was let by competitive bidding to the lowest and best bidder. Adv. Ops. No. 92-013 and 93-001. For purposes of R.C. 2921.42(A)(3), the word "profit" connotes a pecuniary or financial gain or benefit. Adv. Op. No. 92-013. See also Adv. Ops. No. 88-003, 90-003, 90-005, and 92-002. The Commission has held that a public official will be deemed to profit from a public contract whenever the official receives a fee or compensation paid from, or dependent upon, the contract or whenever the official receives some other profit or benefit from the contract. Adv. Ops. No. 88-008 and 92-008.

The Ethics Commission has held that a legislative body is considered to have "authorized" a public contract if the contract could not have been awarded without the approval of the legislative body. Adv. Ops. No. 87-004 and 92-017. A public official who is a member of a legislative body is subject to the prohibition of R.C. 2921.42(A)(3) even if he does not deliberate, participate in the discussions, vote upon, or otherwise approve the contract. Adv. Ops. No. 87-008 and 90-005. See also R.C. 102.03(E), discussed below. Therefore, R.C. 2921.42(A)(3) prohibits the city council member from accepting compensation from the city council for services that he rendered as interim city manager if his appointment to the position was authorized by the city council while he was a member of the council unless the appointment was let by competitive bidding to the lowest and best bidder.

In the instant situation, the council member was not appointed by the city council as interim city manager pursuant to competitive bidding where he was the lowest and best bidder. As stated above, the advertisement by the city for a candidate to fill the position failed to attract a qualified candidate. Upon the failure to secure a qualified individual for this position, the city council appointed a member of council to perform the duties of city manager while city council continued its search for a full-time manager.

The advertisement by the city for a candidate to fill the position of full-time city manager was a selection process, but it is not competitive bidding for purposes of R.C. 2921.42(A)(3). An advertisement that offers an open opportunity for all interested parties to apply for a position of public employment may be akin, in some ways, to a competitive bidding process; however, such a selection process is not competitive bidding that can determine that the public contract was let to the lowest and best bidder for purposes of R.C. 2921.42(A)(3).

In a competitive bidding process, individuals who seek public contracts compete against one another by offering to sell a particular product, or perform a particular service, for a price that is lower than anyone else who offers to sell the identical product or service. However, applicants for employment do not generally compete on the basis of price. Applicants for a position of employment bring their knowledge and skill to the attention of the employer and compete against one another by representing themselves as the most qualified person to perform the duties of the position. In many instances, the amount of compensation that a successful applicant would receive is established prior to the posting of the advertisement and may be part of the advertisement. In the

instant situation, under Article III, Section 8 of the city charter, all salaries and wages are established by city council.

The council member was not an applicant for the position of full-time city manager. Rather, he was appointed by the city council to serve as interim city manager until a qualified candidate was found. Because the council member had not been appointed by the city council as interim city manager pursuant to competitive bidding where he was the lowest and best bidder, he cannot meet the competitive bidding requirement of R.C. 2921.42(A)(3). Accordingly, R.C. 2921.42(A)(3) prohibits the city council member from receiving compensation from the city council for having performed the additional duty of interim city manager while he served as a council member.

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

Your attention is also directed to Division (A)(4) of Section 2921.42 of the Revised Code, which provides that no public official shall knowingly:

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. 2921.42(A)(4) prohibits a public official from having an interest in a public contract entered into by or for the use of his own political subdivision. An "interest" that is prohibited under R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. Adv. Op. No. 81-008. A public official who receives compensation for employment with a political subdivision has a pecuniary interest in his contract for public employment for purposes of R.C. 2921.42(A)(4). Adv. Op. No. 91-002.

Therefore, the Ethics Commission has held that R.C. 2921.42(A)(4) prohibits a public official from receiving compensation for employment with his own political subdivision, governmental agency, or instrumentality. *Id.* Accordingly, R.C. 2921.42(A)(4), in addition to R.C. 2921.42(A)(3), prohibits the city council member from receiving compensation from the city council for having performed the additional duty of interim city manager while he served as a council member. *Cf.* Adv. Ops. No. 90-003 (R.C. 2921.42(A)(4) does not prohibit a public official from donating goods, services, or money to political subdivision provided he does not receive any pecuniary gain from the donation).

Exception to Having an Interest in a Public Contract—R.C. 2921.42(C)

Division (C) of R.C. 2921.42 provides an exception to the prohibition against a public official having an "interest" in a public contract with his own political subdivision. If a public official meets all of the criteria of Division (C), then he is not prohibited from selling goods and services to his own political subdivision. However, in this situation, the exception provided by Division (C) of R.C. 2921.42 does not enable the city council member to receive compensation for performing the additional duty of interim city manager while he served as a council member.

As explained above, Division (A)(3) of Section 2921.42 of the Revised Code prohibits the city council member from receiving compensation from the city council for having performed the additional duty of interim city manager while he served as a council member because the appointment was not awarded pursuant to competitive bidding where he was the lowest and best bidder. However, Division (C) only provides an exception to the prohibition imposed by Division (A)(4) of R.C. 2921.42, which prohibits a public official from having an "interest" in a contract with his own political subdivision. Division (C) does not provide an exception to Division (A)(3) of R.C. 2921.42 which prohibits a public official from "occupy[ing] any position of profit" in a public contract, authorized by him or by a legislative body, of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder. Adv. Ops. No. 92-002 and 93-008. Accordingly, because the exception provided by Division (C) would be inapplicable in the instant situation, it need not be addressed any further.

Soliciting or Accepting an Improper Thing of Value—R.C. 102.03(E)

Your attention is further directed to R.C. 102.03(E), which reads:

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.

A member of city council is a public official for purposes of R.C. 102.03(E) and is subject to its prohibitions. Adv. Ops. No. 88-004 and 89-008.

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. 1.03, 102.01(G); Adv. Ops. No. 82-002, 87-008, and 89-003. R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting the promise or offer of anything of value that could manifest a substantial and improper influence upon him with respect to his duties.

The Ethics Commission has held that R.C. 102.03(E) prohibits a member of a legislative body from soliciting or securing a compensated position with the public entity that he serves. Adv. Op. No. 87-008. The prohibition imposed by R.C. 102.03(E) requires that a city council member who is interested in securing a compensated position with the city first resign from the council before soliciting or accepting the position. *Id.* In the instant situation, the city council member would receive compensation from city council for having performed the additional duty of serving as interim city manager while he served as a member of city council. Therefore, R.C. 102.03(E) prohibits the city council member from receiving compensation from the city council for having performed the additional duty of interim city manager while he served as a council member.

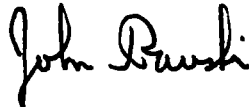
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Conclusion

As explained above, the Ethics Law and related statutes prohibits a council member from receiving compensation from the city council for performing the additional duty of interim city manager while he served as a council member.

The Ethics Commission approved this informal opinion at its meeting on March 16, 2000. 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. I apologize for the delay in responding to your request. If you have any further questions, please feel free to contact this Office again.

Sincerely,

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

John Rawski
Staff Attorney