

OHIO ETHICS COMMISSION

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April 14, 2000

Informal Opinion 2000-INF-0414-2

Mr. Paul E. Blevins, Esq.
McCray, Muzilla, Smith & Meyers Co., L.P.A.

Dear Mr. Blevins:

In a letter received by the Ohio Ethics Commission on November 22, 1999, you asked whether the Ohio Ethics Law and related statutes would prohibit you, as a newly-elected member of City Council for the City of Elyria (City), from continuing to defend the City in a lawsuit that was assigned, by CGU Insurance Companies (CGU), to the law firm by which you are employed as an attorney.

As explained more fully below, R.C. 2921.42(A)(4) prohibits you from having an interest in the profits or benefits of a public contract entered into by or for the use of the City after you assume your position on City Council. The insurance contract between the City and CGU, and the contract between CGU and your law firm for the defense of the City in the lawsuit, are public contracts. If you were to carry out the terms of these contracts by representing the City, you would have a prohibited interest in the contracts. R.C. 2921.42(C), however, provides an exception to the prohibition of R.C. 2921.42(A)(4). If you are able to meet each of the four requirements of R.C. 2921.42(C), as discussed in this opinion, then you are not prohibited from continuing to represent the City pursuant to the contract between your law firm and CGU.

Facts

In your letter to the Commission, you state that you were sworn in as a member of Elyria City Council on December 6, 1999. You state that you and your law firm are panel counsel for CGU. CGU assigns cases to you and your firm that arise out of lawsuits brought against CGU's insureds. You state that one of CGU's insureds was the City of Elyria. You further state that, prior to your election to City Council, CGU assigned the defense of a number of cases to you and your firm in which the City of Elyria was a Defendant. With the exception of one case, all of these matters were concluded prior to your election to City Council. You state that the City of Elyria has terminated its insurance contract with CGU. After the one case you describe has been concluded, it is anticipated that your law firm will not handle any further insurance defense matters for the City of Elyria.

Paul E. Blevins, Esq.

April 14, 2000

Page 2

In the unconcluded case, the Plaintiff filed an action for wrongful death against the City of Elyria in 1996. In the lawsuit, the Plaintiff alleges that the City created and maintained a nuisance at the intersection of Gulf Road and State Route 57, which thereby caused a fatal automobile accident. You state that the City of Elyria tendered the defense of this case to CGU and CGU assigned the matter to your law firm. You further state that in 1998, when you joined the firm, this case was assigned to you and you have been lead counsel since that time. You state that you do not share in any of the profits of the firm. You further state that all of the firm's bills are paid by CGU and that the firm does not receive any money from the City of Elyria for the defense work.

On August 3, 1999, the court granted a Motion for Summary Judgment that you filed on behalf of the City, and thereby effectively terminated all claims against the City. Thereupon, the Plaintiff timely filed a Notice of Appeal from the trial court's ruling. After the Plaintiff filed her brief with the Court of Appeals on November 9, 1999, you filed a brief on behalf of the City on December 2, 1999.

Since the date you were sworn into office as a council member, no action has been taken in the case against the City. In a recent telephone conversation, you indicated that the next step in the appeal process would be the presentation of oral arguments, and that oral arguments would be scheduled for the latter part of April 2000.

Based on your current position on City Council, you have asked the Commission whether the Ethics Law and related statutes prohibit you from continuing to act as counsel for the City of Elyria.

Having an Interest in a Contract For the Use of the City—R.C. 2921.42(A)(4)

Your question implicates R.C. 2921.42(A)(4), which provides the following:

(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.

The term "public official" includes any person who is elected to, or employed by, any political subdivision. R.C. 2921.01(A). A member of city council is a "public official" for purposes of R.C. 2921.42(A)(4), and is subject to the restrictions in the law. Ohio Ethics Commission Advisory Opinions No. 89-008, 91-002, and 92-012. Therefore, R.C. 2921.42(A)(4) prohibits you, now that you are an Elyria City Council member, from having an interest in any public contract entered into by, or for the use of, the City.

The term "public contract" includes any purchase or acquisition of property or services by or for the use of any political subdivision. R.C. 2921.42(G)(1). The insurance contract between the City and CGU is a public contract for purposes of the prohibition of R.C. 2921.42(A)(4). In addition, the contract between CGU and your law firm for the defense of the lawsuit against the City is a public contract for purposes of the prohibition of R.C. 2921.42(A)(4), since that contract is the acquisition of services for the use of the City.

The Commission has concluded that R.C. 2921.42(A)(4) does not prohibit a company that employs a public official or employee from doing business with the public entity he serves, but it does prohibit the official or employee from having an interest in the public contract. A prohibited "interest" in a public contract must be definite and direct, and may be either pecuniary or fiduciary in nature. Adv. Op. No. 89-008. Your law firm has an interest in its contract with CGU for the defense of the City in the lawsuit. The question becomes whether you, as an employee of the law firm, also have an interest in the contract.

The Ethics Commission has held that an employee of a company is not generally considered to have an "interest" in the contracts of the company that employs him. *Id.* However, an employee who has an ownership interest in, or is a director, trustee, or officer of his employing company, is considered to have an interest in his employing company's contracts. Adv. Ops. No. 81-008 and 89-008. Further, an employee is considered to have an interest in his employer's contracts if: (1) the employee takes part in the contract negotiations; (2) his salary is based on the proceeds of the contract; (3) he receives a fee or commission on the contract; (4) his employment responsibilities include participation in the administration or execution of the contract; or (5) the employee's tenure is dependent upon his employer receiving the award of the contract. Adv. Op. No. 89-008.

While a company that employs a city council member is not generally prohibited from entering into a contract entered into by, or for the provision of services for the use of, the city, pursuant to R.C. 2921.42(A)(4), that section does prohibit the city council member from having an interest in the contract of the company. The prohibition in R.C. 2921.42(A)(4) would apply to a city council member if the city council member has an interest in the contract in any of the ways that are discussed above. If the city council member is deemed to have an "interest" in a contract by or for the use of the city, the interest is prohibited pursuant to R.C. 2921.42(A)(4). Adv. Op. No. 89-008.

In your letter, you state that you are not a partner in the law firm and that you do not share in its profits. Based upon the information that you have presented to the Commission, it appears that your salary is not based on the proceeds of the contracts, and that you do not receive a fee or commission on the contracts. You do not indicate whether you took part in the contract negotiations between your law firm and CGU or whether your tenure with the law firm is dependent upon the law firm receiving the award of the CGU contract. Regardless of the answer to these questions, the question becomes whether you have an interest in the CGU and insurance contracts by virtue of your legal representation of the City.

As stated above, the Ethics Commission has concluded that an employee has an interest in his employer's contracts if his employment responsibilities include participation in the administration or execution of the contract. The definition of the word "administration" includes "the management of any office, business, or organization; direction." Random House Webster's Unabridged Dictionary, 26 (2nd ed. 1997). "Execution" is defined as "the act or process of executing." Id. at 676. To "execute" is to carry out; to perform or do; or to transact or carry through. Id.

The defense of the City of Elyria by your law firm pursuant to a contract between CGU and your law firm is dependent on the insurance contract between CGU and the City. As discussed above, both of these contracts are public contracts. As the attorney who is responsible for performing and carrying out the contractual duty of representing the City, your employment responsibilities for the law firm include the execution of the contract between CGU and your law firm. Accordingly, you have an interest in the contract between CGU and your law firm, and, based on the fact that the contract between CGU and your law firm is dependent on the contract between the City and CGU, you have an interest in the contract between the City and CGU as well. These interests are prohibited by R.C. 2921.42(A)(4) unless all four requirements of R.C. 2921.42(C), as discussed below, can be met.

Exception to the Restriction of R.C. 2921.42(A)(4)

R.C. 2921.42(C) provides an exception to R.C. 2921.42(A)(4), as follows:

- (C) This section does not apply to a public contract in which a public official, member of his family, or one of his business associates has an interest, when all of the following apply:
 - (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
 - (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision or governmental agency or instrumentality involved;
 - (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;
 - (4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of his family, or business associate, and the public official takes no part in the deliberations

or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract. (Emphasis added).

Each of the provisions in Division (C) is a question of fact which, when applied to the circumstances of the individual case, will determine whether a particular transaction fits within the exception. Adv. Ops. No. 80-003 and 88-008. The criteria of Division (C) are strictly construed against the public official, and the official must show compliance with all four requirements in the exception. Adv. Ops. No. 83-004, 84-011, and 88-008.

Continuing Course of Dealing—R.C. 2921.42(C)(2)

Division (C)(2) contains two prongs and is of particular importance. You must be able to demonstrate either that the services that you provide for the use of the City are unobtainable elsewhere for the same or lower cost, or that the services are being furnished to the City as part of a continuing course of dealing established prior to the assumption of your position on City Council.

In your situation, you appear to meet the second prong of R.C. 2921.42(C)(2). The Commission has stated that a continuing course of dealing can be demonstrated if a public contract in which an individual has an interest exists prior to the time the individual becomes associated with the political subdivision, as an officer or employee, that entered into the public contract in question. See Adv. Op. No. 88-008. The public officer or employee is not prohibited from continuing to perform under the public contract after he becomes connected with the political subdivision so long as the terms and conditions of the public contract are not modified after he becomes connected with the political subdivision. Id.

From the facts you have disclosed, it appears that the insurance contract entered into by the City and CGU, and the contract entered into by CGU and your law firm, existed before you were elected to City Council. Further, you indicate that you had been representing the City in the lawsuit prior to taking office as a member of City Council. Thus, under the exception provided in Division (C), and assuming you meet the other criteria contained in Division (C), as discussed below, you are not prohibited, after you assume your official duties as a member of City Council, from continuing to have an interest in the profits or benefits of the public contracts between the City and CGU, and your firm and CGU, that were entered into before you assumed your official duties as a member of City Council.

Other Requirements of R.C. 2921.42(C)

If you can meet the criterion of Division (C)(2), you must, in addition, comply with the other provisions of R.C. 2921.42(C). R.C. 2921.42(C)(1) requires that the insurance purchased by the City, and the services that you provide as a result of that insurance contract, are necessary. Division (C)(3) requires that the treatment provided to the City by the insurance company and your law firm is as good as or better than the services provided by CGU and your law firm to their other clients or customers. Finally, Division (C)(4) requires that the transaction be conducted at arm's length, that the City has full knowledge of your interest in the contracts, and

that you take no part in the deliberations and decision of the City with respect to the contracts. Therefore, in order to demonstrate compliance with Division (C)(4), you would need to show that you did not participate in any discussions of the contracts by City Council or other City officials and employees.

Assuming you can satisfy each one of these four criteria, R.C. 2921.42(A)(4) does not prohibit you from having an interest in the contract between the City and CGU or the contract between CGU and your law firm. If you can establish that you meet the requirements of the exception set forth in R.C. 2921.42(C), you would not be prohibited from continuing to represent the City in the pending lawsuit, even though you are now a council member.

Other Provisions of the Ethics Law

You should also be aware that other provisions of the Ethics Law and related statutes may restrict your ability to take certain actions as a member of City Council. For instance, R.C. 2921.42(A)(1) prohibits you from authorizing, or employing the authority or influence of your office to secure authorization of any public contract in which you, a member of your family, or any of your business associates has an interest. Therefore, if the City should consider reestablishing its insurance relationship with CGU, while your law firm continues to be panel counsel for CGU, you would be prohibited from participating, in any way, in the discussion or decision making on the issue. You should also note that, if the contract between CGU and the City is renewed, you would be prohibited from providing services under that contract, or profiting from the contract in any other way. See Adv. Op. No. 88-008 (A public contract that is renewed after a public official takes office does not establish a "continuing course of dealing" between the public agency and the official. In order to meet the requirement of R.C. 2921.42(C)(2), the official would have to show that the services he provided were "unobtainable elsewhere" for the same or lower cost.). Next, R.C. 2921.42(A)(3) prohibits you from occupying a position of profit in the prosecution of a public contract authorized by you or City Council while you are a member of City Council and within one year of the date you leave your position on City Council.

R.C. 102.03(D) prohibits you from using or authorizing the use of the authority or influence of your office 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 you with respect to your duties. R.C. 102.03(D) would prohibit you, for example, from participating in any way, as a city council member, in matters that affect the lawsuit in which you are representing the City. For example, if a settlement is proposed, you, as a council member, are prohibited from voting, participating in any discussions, deliberations, or recommendations, or taking any other action, formally or informally, in matters pertaining to the settlement. You would also be prohibited from taking any action, formally or informally, to secure any payment or other thing of value for CGU or your law firm.

Finally, R.C. 102.04(C) prohibits you from receiving compensation for representing any person on any matter before your own public agency. There is one exemption, set forth in R.C. 102.04(D), but the exemption does not apply to an elected official. Therefore, you would be

Paul E. Blevins, Esq.

April 14, 2000

Page 7

prohibited from representing the interests of CGU before the City. If it becomes necessary for a matter related to the pending lawsuit to be presented before City Council, the board of the City on which you serve, you would be prohibited from receiving compensation from CGU or any other party for performing that representation. See generally Adv. Op. No. 93-004.

If you have any questions regarding the application of these, or any other provisions of the Ethics Law and related statutes, to a specific matter or situation, please contact this Office again for further information.

Conclusion

As explained above, R.C. 2921.42(A)(4) prohibits you from having an interest in the profits or benefits of a public contract entered into by or for the use of the City after you assume your position on City Council. The insurance contract between the City and CGU, and the contract between CGU and your law firm for the defense of the City in the lawsuit, are public contracts. If you were to carry out the terms of these contracts by representing the City, you would have a prohibited interest in the contracts. R.C. 2921.42(C) provides an exception to the prohibition of R.C. 2921.42(A)(4), however. If you are able to meet each of the four requirements of R.C. 2921.42(C), as discussed in this opinion, then you are not prohibited from continuing to represent the City pursuant to the contract between your law firm and CGU.

You should also note that the situation for which you seek an advisory opinion may also raise issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. Issues concerning the professional conduct of attorneys under the Code of Professional Responsibility are not within the jurisdiction of the Ethics Commission. You may wish to contact the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court for guidance concerning the application of provisions contained in the Code of Professional Responsibility to the situation you have presented.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 14, 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. If you have any questions or desire additional information, please contact this Office again.

Sincerely,



Timothy L. Gates
Staff Attorney

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