

OHIO ETHICS COMMISSION

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March 21, 2001

Informal Opinion 2001-INF-0321

Michael S. Lucas
State Librarian
State Library of Ohio

Dear Mr. Lucas:

In a letter received by the Ohio Ethics Commission on August 21, 2000, you ask whether any provisions in the Ohio Ethics Law and related statutes would restrict a library director from serving on the State Library Board of Ohio (the Library Board) while continuing to serve as a library director.

Opinion Summary

As explained more fully below, the Ohio Ethics Law and related statutes do not prohibit a library director from serving as a member of the Library Board if the library by which he is employed does not receive grants from the Library Board. If the library by which a library director is employed receives, or intends to receive, grants from the Library Board, the library director would be prohibited from serving on the Library Board unless he could demonstrate compliance with each of the four requirements of the exception to the public contract prohibition as discussed below.

Where a library director would not be prohibited from serving as a member of the Library Board, the law prohibits the board member from participating, in any way, in any matters before the board from which he, or the library that he serves as director, would derive a definite and direct benefit.

Facts

In your letter to the Commission, you explain that the State Library of Ohio anticipates seeking Library Board nominations from the library community to forward as recommendations to the State Board of Education. You also explain that you have reason to believe that the issue may arise, in the course of seeking such nominations, as to whether a library director may serve on the Library Board while continuing to serve as a library director.

You explain that Board members are appointed by the State Board of Education pursuant to R.C. 3375.01. You state that the Library Board is responsible for the State Library of Ohio and a statewide program of development and coordination of library services, including the administration of a grant program that distributes federal funds to libraries under the Library Services and Technology Act (LSTA). You further state that the Library Board also determines public library boundaries when changes are needed or questions arise.

Application of Ethics Law and Related Statutes to Members of the State Library Board

Before addressing your question, it is first necessary to ascertain whether members of the Library Board are subject to the various provisions of the Ohio Ethics Law and related statutes that are applicable to your question.

The Ethics Commission's jurisdiction is limited to Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. See R.C. 102.02, 102.06, and 102.08. These statutes contain definitions that determine whether an individual is subject to the prohibitions imposed by the Ethics Law and related statutes. See R.C. 102.01(B) and (C), and 2921.01(A), described below.

R.C. 102.01(B) defines the term "public official or employee" for purposes of Chapter 102. of the Revised Code as "any person who is elected or appointed to an office or is an employee of any public agency" (emphasis added). R.C. 102.01(C) defines the term "public agency" as:

[T]he general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a court, city, village, township, and the five state retirement systems, or any other governmental entity. "Public agency" does not include a department, division, institution, board, commission, authority, or other governmental entity that functions exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes; does not expend more than ten thousand dollars per calendar year, excluding salaries and wages of employees; and whose members are uncompensated.

Because the Library Board is a board established within state government, it is a "public agency" under the statutory definition provided by R.C. 102.01(C). The exclusion provided by R.C. 102.01(C) need not be addressed since the Library Board expends more than ten thousand dollars per calendar year.

R.C. 2921.42 applies to any "public official." R.C. 2921.01(A) defines the term "public official" for purposes of R.C. 2921.42 as:

[A]ny elected or appointed officer, or employee, or agent of the state or any political subdivision thereof, whether in a temporary or permanent capacity, and including without limitation legislators, judges and law enforcement officers.

The Library Board is a state entity for purposes of R.C. Chapter 2921.

The issue becomes whether a member of the Library Board who is appointed by the State Board of Education and is not otherwise a public official or employee is "appointed to an office . . . of a public agency" for purposes of Chapter 102. or is an "appointed officer . . . of the state" for purposes of R.C. 2921.42 (emphasis added).

Under Ohio law, a person who holds an "office" is an "officer." See Muskingum County Democratic Executive Committee v. Burrier, 31 Ohio Op. 570 (Muskingum County 1945) (the terms "officer" and "office" are to be regarded as strictly correlative). See also Ohio Ethics Commission Advisory Opinions No. 74-007, 85-005, 92-001, and 92-007. The Ethics Commission has explained that the essential criterion that determines whether an individual holds an "office" is whether he is empowered to exercise the "sovereign power" of government. See Adv. Ops. No. 75-004, 85-005, 92-001, and 92-007. The Commission has relied upon the Ohio Supreme Court's holding in State ex rel. Landis v. Butler, 95 Ohio St. 157 (1917), that a public agency will be deemed to exercise "sovereign power" when it is created by some public authority, such as executive order, the Constitution, or statute, and, in order to perform its prescribed duties, is invested with decision-making authority that is not merely clerical but is final and discretionary, including the authority to determine the disposition of public property or incur financial obligations upon the part of the State or its political subdivisions. See Adv. Ops. No. 75-004, 77-004, 85-005, and 92-001.

Accordingly, the Commission has held that members of a public agency that functions exclusively for advisory purposes are not deemed to exercise the sovereign power of government. Additional factors that may be considered to determine that an individual holds an "office" are whether the person: (1) is appointed; (2) has a title; (3) exercises a function of government concerning the public; and (4) is not subject to a contract of employment. See Adv. Ops. No. 74-007, 75-004, and 77-004. See also Adv. Ops. No. 85-005 and 92-001.

The issue becomes whether the Library Board exercises "sovereign power." As explained above, a determination whether a public agency exercises "sovereign power" depends on whether the public agency is empowered to exercise final, discretionary decision-making authority and not merely perform clerical functions or provide non-binding advice.

The statutory authority of the Library Board is set forth in R.C. 3375.01. A review of R.C. 3375.01 clearly indicates that the Library Board exercises "sovereign power." For instance, the Board has the power to "accept, receive, administer, and expend, in accordance with the terms thereof, any moneys, materials, or other aid granted, appropriated, or made available to it for library purposes, by the United States, or any of its agencies or by any other source, public or private." R.C. 3375.01(B). The Board also has the power to "administer such funds as the general assembly may make available to it for the improvement of public library services, interlibrary cooperation, or for other library purposes." R.C. 3375.01(C). Finally, R.C. 3375.01 provides that "[b]efore entering on the duties of his appointment, each member (of the Board) shall subscribe to the official oath of office."

Therefore, the Ohio State Library Board exercises "sovereign power" since it performs discretionary, decision-making duties and has statutory and independent duties with regard to the ability to control the disposition of funds of the State and political subdivisions. Also, members of the Library Board are appointed to their position, have a title, and are not subject to a contract of employment. Therefore, a member of the Ohio State Library Board is "appointed to an office . . . of . . . [a] public agency" for purposes of Chapter 102. and is an "appointed officer . . . of the state" for purposes of R.C. 2921.42 and is subject to the restrictions of Chapter 102. and R.C. 2921.42.

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

Your question implicates R.C. 2921.42(A)(4), 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 public subdivision or governmental agency or instrumentality with which he is connected.

As stated above, a member of the Library Board is a "public official" for purposes of the prohibitions of R.C. 2921.42.

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). Thus, any contract for the purchase or acquisition of property or services by or for the use of the Library Board would be a public contract. In particular, the Ethics Commission has stated that property or services acquired by a political subdivision through the issuance of a grant would be a public contract for purposes of the prohibitions contained in R.C. 2921.42. See Adv. Ops. No. 89-006 and 92-014. Therefore, a grant issued by the Library Board to a library would be a public contract for purposes of the prohibitions of R.C. 2921.42.

The question becomes whether a library director would have an interest in a grant issued to, or other contract of, the library that employs him.

The Ethics Commission has stated that an interest prohibited by R.C. 2921.42(A)(4) must be both definite and direct, and may be either pecuniary or fiduciary. Adv. Op. No. 81-008. The Commission has held that a board member of a private or public agency has a fiduciary interest in the contracts of the agency that he serves. See Adv. Ops. No. 81-003 and 99-004. The Commission has also held that an officer or chief administrative official of a corporation, whether for-profit or not-for-profit, has a fiduciary interest in the contract of the corporation. See Adv. Ops. No. 81-008, 85-009, 86-005, and 96-005. An officer or chief administrative official of a public agency would also have a fiduciary interest in the contracts of the public agency he serves for purposes of the prohibition of R.C. 2921.42(A)(4). Further, the Commission has also stated that an employee who has an ownership interest in, or is a director, trustee, or officer of, his employer, has an interest in his employer's contracts for purposes of the prohibition of R.C. 2921.42(A)(4). See Adv. Ops. No. 89-006, 89-008, and 89-011. Therefore, a

library director has an interest in the contracts of the library that employs him for purposes of R.C. 2921.42(A)(4), and would have a prohibited interest in a grant, or other contract, issued by the Library Board to the library he serves as director if he were to serve on the Library Board and as a library director.

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

If the Library Board were to issue a grant to, or enter into any contract with, the library that the Library Board member serves as director, the Library Board member must demonstrate compliance with each of the four requirements of the exception contained in R.C. 2921.42(C) in order to have an interest in the grant or other contract. R.C. 2921.42(C) provides the following:

- (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. Divisions (C)(2) and (C)(4) are of particular note. Division (C)(2) requires that the supplies or services be unobtainable elsewhere at the same or lower cost, or furnished as part of a continuing course of dealing. Division (C)(4) requires that the transaction be conducted at arm's length, that the Library Board has full knowledge of any member's interest in one of its contracts, and that the

Board member take no part in the deliberations and decision of the Board with respect to the contracts.

Unobtainable Elsewhere for the Same or Lower Cost—R.C. 2921.42(C)(2)

A member of the Library Board who would have an interest in one of its contracts could meet the requirements in R.C. 2921.42(C)(2) if he could show by some objective standard that the supplies or services provided by the public or private entity with which he is affiliated are "unobtainable elsewhere for the same or lower cost." He must be able to show, by some objective standard such as a competitive bid, or a fair and open solicitation of other vendors, that the services or supplies provided by the public or private entity with which he is affiliated are unobtainable by the Library Board for the same or lower cost. Adv. Op. No. 86-002.

With respect to grants that are provided by a political subdivision or governmental agency or instrumentality to a public or private entity with which an official of the political subdivision or governmental agency or instrumentality is connected, the Commission has stated that the "unobtainable elsewhere" requirement of R.C. 2921.42(C)(2) can be met where the official can show that all qualified and interested applicants for grants have received grants from the political subdivision or governmental agency or instrumentality and funds remain to provide a grant to the public or private entity with which the official is affiliated. See Adv. Op. No. 93-008. In a situation where the amount of each grant provided is not uniform or established by an objective formula, where the Library Board has discretion to determine the amount of grant moneys provided, and where there are many public entities competing for receipt of the grants awarded by the Library Board, as appears to be the case in the present situation, it would be difficult to meet the "unobtainable elsewhere" requirement of R.C. 2921.42(C)(2).

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

Division (C)(2) can also be met by showing a continuing course of dealing established before the public official was connected with the public entity. In Advisory Opinion No. 82-007, the Commission held that the exception "for services being furnished as part of a 'continuing course of dealing' applies only to services provided during the term of the existing contract." The contract must be a written contract, established prior to the time the official was appointed to his public position. Adv. Op. No. 88-008. The contract cannot be modified or amended after the public official assumes his public position. If the contract is renewed after the public official assumes his public position, it must be renewed in accordance with the same terms and conditions as the contract that existed prior to time the public official assumed his public position.

Therefore, in the present situation, the continuing course of dealing requirement can be met only where the grant, or other contract, in which the member of the Library Board would have an interest existed prior to the time the member was appointed to his position on the Board, and where the grant or contract will not be modified, amended or renewed on different terms or conditions after the Board member assumes his position on the Board.

Full Knowledge and No Participation—R.C. 2921.42(C)(4)

Division (C)(4) requires that the transaction be conducted at arm's length, that the Library Board has full knowledge of its member's interest in any contract of the Library Board, and that the Board member take no part in the deliberations and decision of the Library Board with respect to the Library Board's acquisition of services from the public or private entity with which the Board member is affiliated. See also R.C. 2921.42(A)(1) (discussed below).

Division (C)(4) has three distinct components, each of which must be satisfied. First, the transaction must be conducted at arm's length. The manner in which the library with which the Library Board member is affiliated conducts business with the Board must be similar to the manner in which the library conducts business with other entities, and the terms and conditions of the grant, or other contracts, under which the library provides property or services to the Board must be similar to the terms and conditions of standard grants or contracts for the provision of similar property and services. Second, the Library Board must have full knowledge of its member's interest in any Board contract. Third, the Library Board member cannot take any part in the decisions of the Board with respect to the contract in which he has an interest. Division (C)(4) would prohibit the Board member from voting, discussing, deliberating, or using his position, in any way, with respect to any Board contract in which he has an interest. See also R.C. 2921.42(A)(1).

Other Requirements of R.C. 2921.42(C)

Where the Library Board member who has an interest in a Board contract can meet the requirements imposed by Divisions (C)(2) and (C)(4), he must, in addition, comply with the other provisions of R.C. 2921.42(C). R.C. 2921.42(C)(1) requires that the services and supplies are necessary purchases for the Library Board. Division (C)(3) requires that the treatment provided by the library, with which the Library Board member is affiliated, to the Board, is as good as, or better than, the treatment provided by the library to its other clients or customers in similar transactions. If all of the requirements of R.C. 2921.42(C), as discussed in this opinion, are met, the provisions of R.C. 2921.42(A)(4) do not apply to a Library Board contract in which a member of the Board has an interest.

Profiting From a Board Contract—R.C. 2921.42(A)(3)

Where the Library Board member can meet each of the four requirements of R.C. 2921.42(C), such that he would not be prohibited from having an interest in a Board contract, he must also comply with R.C. 2921.42(A)(3) which 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.

As explained above, a member of the Library Board is a "public official" subject to the prohibitions of R.C. 2921.42. As also explained above, a grant issued by the Library Board to a library is a public contract for purposes of the prohibitions of R.C. 2921.42.

A public contract is considered to be authorized by an official or board if the contract could not have been awarded without the approval of the official, the public position in which he serves, or the board of which he is a member. See Adv. Op. No. 87-004.

R.C. 2921.42(A)(3) speaks not in terms of an "interest" in a public contract, but in terms of "occupy(ing) any position of profit in the prosecution of a public contract." Therefore, it is necessary to examine whether a director of a library would profit from a contract issued by the Library Board to the library that he serves.

A Library Board member who also serves as a director of a library which is a recipient of a grant from the Board will be deemed to profit from that grant, where: (1) the establishment or operation of the library that he serves is dependent upon receipt of the grant; (2) the creation or continuation of the official's position with the recipient is dependent upon the award of the grant; (3) the grant funds would be used by the recipient to compensate the library director or as a basis for the library director's compensation; or (4) the library director would otherwise profit from the award of the grant. See Adv. Ops. No. 87-004 and 88-008. The exception provided by R.C. 2921.42(C) does not apply to R.C. 2921.42(A)(3). Therefore, in order for a director of a library that has an existing grant from the Library Board to serve as a member of the Library Board, it must be clear that he does not occupy a position of profit in the Library Board grant in any of the ways described.

Representing the Library Before the State Library Board—R.C. 102.04(A)

The Library Board member must also adhere to the following restriction imposed by R.C. 102.04(A):

Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

R.C. 102.04(A) prohibits a member of the Library Board from receiving compensation from any party except the Library Board for representing the interests of any person before the General Assembly, the Library Board, or any other agency of the state. See Adv. Ops. No. 78-007 and 90-012. Under no circumstances may a member of the Library Board receive compensation for representing any person, including the library that he serves as director, before the Library Board. See Adv. Op. No. 89-016. There is no exception to this prohibition. Id.

Division (D) of Section 102.04 does provide an exception to the prohibitions of Division (A) that would be available to a Library Board member who wished to render services on matters pending before agencies other than the Library Board. In order to meet this exception, the Library Board member would be required to file the statement described in R.C. 102.04(D) with the Ohio Ethics Commission, the Library Board, and the agency before which the matter is pending. The required statement must contain a declaration that the Library Board member disqualifies himself for a period of two years from any participation as a member of the Library Board in any matter involving any public official or employee of the agency before which the present matter is pending. The two-year period runs from the date of the most recently filed statement regarding the agency before which the matter was pending. See generally Adv. Op. No. 93-010.

Securing a Definite and Direct Benefit for the Library—R.C. 102.03(D)

Finally, where the Library Board member is not prohibited by the Ethics Law and related statutes from also serving as director of a library, the Board member must adhere to the restrictions imposed by R.C. 102.03(D), which provides the following:

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.

As explained above, a member of the Library Board is a "public official or employee" as defined by R.C. 102.01(B), and, as such, is subject to the prohibitions of R.C. 102.03.

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 definite and direct, pecuniary benefit to the financial interests of an individual, business, or entity, either private or public, is considered to be a thing of value under R.C. 102.03(D). See Adv. Ops. No. 88-004, 88-005, and 89-008. See also Adv. Ops. No. 79-008, 85-006, 85-011, and 86-007.

R.C. 102.03(D) does not speak in terms of a public official's or employee's "interest" but rather 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.

The Commission has stated that R.C. 102.03(D) generally prohibits a public official from participating in any matters that would directly affect his outside employer's interests. See, e.g.,

Adv. Op. No. 88-005. In Advisory Opinion No. 89-008, the Commission further explained this prohibition as follows:

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.

Therefore, a member of the Library Board is prohibited from using his position to secure a pecuniary benefit for the library that he serves as director. In particular, the Board member would be prohibited from: (a) using his relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding the library; (b) discussing, deliberating, or taking any action, as a member of the Library Board, on any matter involving the library; and (c) using his public position or authority in any other way to secure a benefit for the library. See Adv. Op. No. 96-004.

Restrictions Outside of the Ohio Ethics Law and Related Statutes

The Ohio Ethics Commission has the authority to issue advisory opinions applying the provisions of R.C. Chapter 102., R.C. 2921.42, 2921.421, and 2921.43, to particular situations. See R.C. 102.08. You should be aware that provisions of law outside of the Ethics Law and related statutes may place general restrictions on the ability of certain individuals to serve on the State Library Board. You referred to one such provision in your letter to the Commission. As you noted, R.C. 3375.01 provides that "[n]o one is eligible to membership on the state library board who is or has been for a year previous to his appointment a member of the state board of education." Further, "[a] member of the state library board shall not during his term of office be a member of the board of library trustees for any library in any subdivision in the state." *Id.* It should be noted that in enacting these restrictions, the General Assembly may have drawn a prohibition on specific officials serving on the State Library Board to meet possible concerns of conflict of interest and/or appearances of impropriety. If you have questions pertaining to these, or any other general limitations or restrictions, outside of those contained in the Ethics Law, on the ability of certain individuals to be appointed to positions on the State Library Board, please contact the legal advisor for the Library Board.

Conclusion

As stated above, the Ohio Ethics Law and related statutes do not prohibit a library director from serving as a member of the Library Board if the library by which he is employed does not receive grants from the Library Board. If the library by which a library director is employed receives, or intends to receive, grants from the Library Board, the library director would be prohibited from serving on the Library Board unless he could demonstrate compliance with each of the four requirements of the exception to the public contract prohibition as discussed below.

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Where a library director would not be prohibited from serving as a member of the Library Board, the law prohibits the board member from participating, in any way, in any matters before the board from which he, or the library that he serves as director, would derive a definite and direct benefit.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on February 23, 2001. 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

Cc: Robert K. Lang
Assistant Attorney General