

OHIO ETHICS COMMISSION

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April 6, 2001

Informal Opinion 2001-INF-0406-1

Representative John E. Barnes, Jr., Chairman
Ohio Commission on African-American Males



Dear Representative Barnes:

In a letter received by the Ohio Ethics Commission on November 27, 2000, Sam Thomas, the Acting Executive Director for the Commission on African American Males, asked whether individuals are prohibited from serving as members of the Ohio Commission on African-American Males (CAAM) if they hold employment or other positions with public and private entities, throughout the State of Ohio, that may receive grants or have contracts with CAAM.

Opinion Summary

As discussed more fully below, provisions of the public contract restrictions of R.C. 2921.42 directly address your questions. A member of CAAM is prohibited from profiting from any CAAM contract, including a grant issued by CAAM, under R.C. 2921.42(A)(3). A member of CAAM is not prohibited under R.C. 2921.42(A)(4) from serving with a private or public agency that enters into a contract with CAAM so long as service with the public or private agency is one of the statutory qualifications to be appointed to CAAM, and the CAAM member does not have a personal financial or other fiduciary interest in the CAAM contract. If the CAAM member has a personal financial interest in a CAAM contract, or if he would have a fiduciary interest apart from his position with the public or private entity that qualifies him to be appointed to CAAM, then the CAAM member would have a prohibited interest in a public contract unless he can demonstrate compliance with each of the four requirements of the exception to the public contract prohibition.

Finally, R.C. 2921.42(A)(1) and the conflict of interest provision contained in R.C. 102.03(D) prohibit a member of CAAM from participating in discussions, decisions, or otherwise using his position, either formally or informally, to secure a contract, including a grant issued by CAAM, for the public or private entity he serves if he, his family members, or his business associates, has any financial or fiduciary interest in the contract.

Facts

In your letter to the Ethics Commission, you explain that R.C. 4112.12 sets forth the makeup of CAAM. R.C. 4112.12 provides that CAAM shall consist of not more than forty-one members. R.C. 4112.12 requires that the following individuals serve on CAAM: the directors (or their designees) of the department of health, development, alcohol and drug addiction services, job and family services, rehabilitation and correction, mental health, and youth services. In addition, R.C. 4112.12 provides that the governor shall appoint at least one representative of each of the following to CAAM: "the national association for the advancement of colored people; the urban league; an organization representing black elected officials; an organization representing black attorneys; the black religious community; the black business community; the nonminority business community; organized labor; at least one black medical doctor, one black elected member of a school board, and one black educator; and at least two representatives of local private industry councils."

You explain that several of the outside entities with which members of CAAM are affiliated may receive funds from CAAM, or may provide funds to CAAM. For instance, you explain that the Columbus Urban League has received funding from CAAM to provide programmatic services "that facilitate CAAM's vision." You also explain that CAAM may receive funds from the Ohio Department of Health or the Office of Criminal Justice Services.

You state that members of CAAM who represent other organizations help to provide a balanced perspective and partnerships to CAAM's operation. You also state, however, that you would like to be proactive in avoiding any situations that would create a conflict of interest.

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

The situation that you have presented to the Commission implicates sections of Ohio's public contract statute. One of those sections, R.C. 2921.42(A)(3), 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" includes any elected or appointed officer, or employee, or agent of the state or any political subdivision. R.C. 2921.01(A). The Ethics Commission has explained that members of state boards and commissions are officers for purposes of R.C. 2921.01(A) if they exercise the "sovereign power" of government. In Advisory Opinion No. 77-004, the Commission held that "[s]overeign power includes the exercise of a duty entrusted to one by virtue of statute or some other public authority, a duty that is not merely clerical, but that involves discretionary, decision-making qualities." The authority of CAAM, as codified in R.C. 4112.12(D)(4), indicates that its members have the power to exercise final, discretionary,

decision-making authority, and therefore exercise the sovereign power of government such that they are state officers for purposes of R.C. 2921.01(A). Thus, members of CAAM are subject to the restrictions 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 CAAM 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 Ohio Ethics Commission Advisory Opinions No. 89-006 and 92-014.

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

In the situation that you have presented to the Ethics Commission, the members of CAAM would be prohibited from profiting from any contract, including a grant, awarded by CAAM. For instance, if a member of CAAM has an ownership interest in a private corporation that enters into a contract with CAAM, the member of CAAM would occupy a position of profit in that contract. Also, if a member of CAAM is an employee of a public or private entity, the member of CAAM would occupy a position of profit in a grant or other contract awarded to that entity where: (1) the establishment or continued operation of the public or private entity with which he is employed is dependent upon the grant or other contract; (2) the creation or continuation of the CAAM member's employment with the public or private entity is dependent upon the award of the grant or other contract; or (3) he would otherwise profit from the grant or other contract. See Adv. Ops. No. 87-004, 88-008, and 89-006. The member of CAAM would be prohibited from profiting from the contract unless it is awarded pursuant to competitive bidding to the lowest and best bidder. On the other hand, if a member of CAAM solely occupies a position of trust in a public entity that enters into a contract with CAAM, such that the member of CAAM solely holds a fiduciary interest in the CAAM contract, the member of CAAM would not occupy a position of profit in the contract. See Adv. Op. No. 92-013 (the term "profit" connotes only a pecuniary or financial gain or benefit).

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

The situation that you have presented to the Ethics Commission also 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.

As stated above, a member of CAAM is a public official for purposes of the prohibitions of R.C. 2921.42. As also stated above, any contract, including a grant, for the purchase or acquisition of property or services by or for the use of CAAM would be a public contract. R.C. 2921.42(A)(4) would prohibit a member of CAAM from having an interest in any public contract entered in by, or for the use of, CAAM. 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.

You have stated that CAAM has the authority to grant funds or contract with agencies so that the agencies can implement programs and provide services that further CAAM's vision. R.C. 2921.42(A)(4) prohibits a member of CAAM from having a financial or fiduciary interest in any public contract, such as a grant, entered into by or for the use of CAAM. A member of CAAM who occupies a position of trust and authority with a private or public entity would have a fiduciary interest in the contracts of that entity. See Adv. Ops. No. 94-001 (a member of a board of a private non-profit corporation has a fiduciary interest in the contracts of the non-profit corporation) and 99-004 (a member of a school board has a fiduciary interest in the contracts of the school board). An individual who has an ownership interest in a for-profit corporation or organization would have a financial interest in the contracts of that for-profit corporation or organization. Also, an employee of a private or public entity would have an interest in his employer's contracts where: (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. Unless, as discussed below, an exception to the prohibition of R.C. 2921.42(A)(4) applies, a member of CAAM would be prohibited from having a fiduciary or financial interest in a corporation, agency, or other entity that receives a grant from CAAM, or with which CAAM has a contractual relationship.

Limited Exception Based on the Statutorily Mandated Composition of CAAM

In the situation that you have presented, several members of CAAM are required to be appointed to positions on CAAM by virtue of their affiliations with other public or private entities. For instance, the statute creating CAAM provides that the governor is to appoint at least one representative from the urban league to CAAM. See R.C. 4112.12. It would be likely that CAAM and the urban league would serve the interests of a similar population and share many common goals, and that the two entities may have contractual relationships and other ties that would facilitate the realization of their common goals. Further, it is clear that the legislature, in enacting the statute that provides for the makeup of CAAM, was aware that the different entities could serve the same population and have common interests. The legislature was likely aware of the potential for two entities to combine efforts, through formal contractual relationships or otherwise, to achieve shared objectives.

Therefore, so long as there are no other conflicts of interest apart from those that would arise solely as a result of serving in both positions, a member of CAAM is not prohibited from also serving as a fiduciary to a public or private agency that has a contractual relationship with CAAM

where his service with that public or private entity qualifies him, under the statutory provision setting forth the composition of CAAM, for membership on CAAM. For instance, while the individual could serve in both positions based on the statutorily mandated composition of CAAM, the individual would be prohibited, by R.C. 2921.42(A)(4), from having a definite and direct financial interest in a CAAM grant or any other public contract entered into by, or for the use of, CAAM. You should note, however, that a CAAM member would not generally be prohibited from receiving compensation from a public or private entity for his service with that entity, where the entity receives a grant or has some other contractual relationship with CAAM, unless the CAAM member would have a definite and direct financial interest in the CAAM contract, such as receiving a salary based on the contract, as discussed above.

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

If a member of CAAM has a financial interest in a CAAM grant, or any other CAAM contract, or if the CAAM member is otherwise unable to meet the exception described above, the member would be required to meet the exception contained in R.C. 2921.42(C) in order to have an interest in a CAAM 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 CAAM has full knowledge of any member's interest in one of its contracts, and that the member of CAAM take no part in the deliberations and decisions of CAAM with respect to the contracts.

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

A member of CAAM who has an interest in one of its contracts can meet the requirements in R.C. 2921.42(C)(2) if he can 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 CAAM for the same or lower cost. Adv. Op. No. 86-002. As stated above, R.C. 2921.42(A)(3) requires that any contracts between CAAM and a public or private entity with which a member of CAAM is affiliated, and from whose contracts the member of CAAM would profit, are competitively bid. While a competitive bidding process may provide evidence that a supply or service is unobtainable elsewhere for the same or lower cost, other factors must be considered, such as the availability and adequacy of notice to potential suppliers, the openness and fairness of the bidding process, and the conditions of the market. Adv. Ops. No. 83-004 and 88-001.

With respect to grants that are provided by CAAM to public or private entities with which members of CAAM are affiliated, the "unobtainable elsewhere" requirement of R.C. 2921.42(C)(2) can be met in one of two ways. First, the member of CAAM can meet the requirement in R.C. 2921.42(C)(2) if he can show that all qualified and interested applicants for CAAM grants have received grants from CAAM and funds remain to provide grants to those public and private entities with which the member of CAAM is affiliated. See Adv. Op. No. 93-008. Second, the CAAM member can demonstrate compliance with R.C. 2921.42(C)(2) where CAAM accepts applications for grants on an ongoing first-come, first-served basis, in a fair and open application process in which all interested and qualified applicants receive funding, and where there has historically been enough money to fund all qualified grant applications. Adv. Op. No. 2001-02.

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. Therefore, the continuing course of dealing requirement can be met where the contract in which the member of CAAM has a financial interest existed prior to the time the member was appointed to his position on CAAM, and where

the contract has not been modified or renewed (unless the renewal is pursuant to the terms of the original contract) since the member became associated with CAAM.

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 CAAM has full knowledge of its member's interest in any CAAM contracts, and that the member of CAAM take no part in the deliberations and decisions of CAAM with respect to CAAM's acquisition of property or services from the public or private entity with which the member of CAAM 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 public or private entity with which the member of CAAM is affiliated conducts business with CAAM must be similar to the manner in which the public or private entity conducts business with other entities, and the terms and conditions of the contracts under which the public or private entity provides property or services to CAAM must be similar to the terms and conditions of standard contracts for the provision of similar property and services. Second, CAAM must have full knowledge of its member's interest in any CAAM contract. Third, and most importantly, the member of CAAM cannot take any part in the decisions of CAAM with respect to the contracts in which he has an interest. As discussed below, the member of CAAM cannot vote, discuss, deliberate, or use his position, in any way, with respect to any contract in which he has an interest, and that is entered into by, or for the use of, CAAM. See also R.C. 2921.42(A)(1).

Other Requirements of R.C. 2921.42(C)

Where the member of CAAM who has a financial interest in a CAAM 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 CAAM. Division (C)(3) requires that the treatment provided by the public or private entity, with which the member of CAAM is affiliated, to CAAM is as good as, or better than, the treatment provided by the public or private entity to its other clients or customers. 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 CAAM contract in which a member of CAAM has an interest. As noted above, however, the member of CAAM would still be subject to the prohibition of R.C. 2921.42(A)(3), and the exception contained in R.C. 2921.42(C) does not apply to R.C. 2921.42(A)(3).

Voting on Contracts Affecting an Outside Interest—R.C. 2921.42(A)(1) and R.C. 102.03(D)

The situation that you have presented to the Ethics Commission also implicates provisions of the Ethics Law that deal with participation in matters in which a public official has a definite and direct financial or fiduciary interest. In particular, R.C. 2921.42(A)(1) provides that no public official shall knowingly:

Authorize, or employ the authority or influence of his office to secure authorization or any public contract in which he, a member of his family, or any of his business associates has an interest.

As stated above, a member of CAAM is a "public official" for purposes of the prohibitions of R.C. 2921.42. Also, as discussed above, a member of CAAM would have a fiduciary interest in a contract between CAAM and a public or private entity in which the member occupies a position of trust and authority.

R.C. 2921.42(A)(1) would prohibit a member of CAAM from voting, discussing, deliberating, or using his position, in any way, with respect to any contract in which he, his family member, or his business associate, has a financial or fiduciary interest, and that is entered into by, or for the use of, CAAM. Even if R.C. 2921.42(A)(4) does not prohibit a member of CAAM from being employed with a public or private entity that receives grants or contracts from CAAM, R.C. 2921.42(A)(1) would prohibit the CAAM member from participating in the consideration or award of the grant or contract to that entity. A public official's employer is considered his business associate for purposes of R.C. 2921.42(A)(4). See Adv. Op. No. 89-008. A public or private entity that receives a grant or contract from CAAM clearly has a definite and direct interest in that grant or contract, even where the CAAM member does not, either because of the statutorily mandated composition of CAAM or because he meets the exception in R.C. 2921.42(C).

R.C. 102.03(D) is also relevant to the present discussion. R.C. 102.03(D) 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.

For purposes of Chapter 102. of the Revised Code, "public official or employee" is defined as "any person who is elected or appointed to an office or is an employee of any public agency." R.C. 102.01(B). As used in the definition of "public official or employee," "public agency" includes the general assembly, all courts, any department, division, institution, board commission, authority, bureau or other instrumentality of the state. R.C. 102.01(C). "Public agency" does not include a department, division, institution, board, commission, authority, or other instrumentality of the state that functions exclusively for cultural, educational, historical humanitarian, advisory, or research purposes, that does not expend more than ten thousand dollars per calendar year, excluding salaries and wages of employees, and whose members are uncompensated. Id. As stated above, the members of CAAM exercise final, discretionary, decision-making authority, and, therefore, CAAM is a "public agency" as that term is used in the definition of "public official or employee." Also, the members of CAAM are state officers, as stated above, and are therefore "appointed to an office . . . of a public agency" and subject to the prohibitions of R.C. Chapter 102., including the prohibition of R.C. 102.03(D). See Muskingum

County Democratic Executive Committee v. Burrier, 31 Ohio Op. 570 (Muskingum County 1945) ("the terms 'officer' and 'office' are paronymous, and in their original and proper sense, are to be regarded as strictly correlative").

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 or fiduciary interest in a public or private entity, and the benefit of a contract to that entity, 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) does not speak in terms of a public official's or employee's "interest" or "position of profit," 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.

A matter that affects the personal financial or fiduciary 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, which would secure a thing of value for himself or the entity in which he has a fiduciary interest, 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). In the situation that you described, the pecuniary or fiduciary benefits that would accrue as a result of a member of CAAM's interest in the contracts of the public or private entity with which he is affiliated would be substantial.

Therefore, R.C. 102.03(D) prohibits a member of CAAM 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 entity with which he is affiliated; (c) discussing, deliberating, or taking any action, as a member of CAAM, on any matter involving the entity with which he is affiliated; and (c) using his public position or authority in any other way to secure a benefit for the entity with which he is affiliated. Adv. Op. No. 96-004. In particular, R.C. 102.03(D), as well as R.C. 2921.42(A)(1), would prohibit a member of CAAM from voting, discussing, deliberating, or using his position, in any way, with respect to any contract, including a grant, in which he, his family member, or his business associate, has any financial or fiduciary interest, and that is entered into by, or for the use of, CAAM.

Representative John E. Barnes, Jr.

April 6, 2001

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Conclusion

As discussed above, provisions of the public contract restrictions of R.C. 2921.42 directly address your questions. A member of CAAM is prohibited from profiting from any CAAM contract, including a grant issued by CAAM, under R.C. 2921.42(A)(3). A member of CAAM is not prohibited under R.C. 2921.42(A)(4) from serving with a private or public agency that enters into a contract with CAAM so long as service with the public or private agency is one of the statutory qualifications to be appointed to CAAM, and the CAAM member does not have a personal financial or other fiduciary interest in the CAAM contract. If the CAAM member has a personal financial interest in a CAAM contract, or if he would have a fiduciary interest apart from his position with the public or private entity that qualifies him to be appointed to CAAM, then the CAAM member would have a prohibited interest in a public contract unless he can demonstrate compliance with each of the four requirements of the exception to the public contract prohibition.

Finally, R.C. 2921.42(A)(1) and the conflict of interest provision contained in R.C. 102.03(D) prohibit a member of CAAM from participating in discussions, decisions, or otherwise using his position, either formally or informally, to secure a contract, including a grant issued by CAAM, for the public or private entity he serves if he, his family members, or his business associates, has any financial or fiduciary interest in the contract.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 6, 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,



David E. Freel
Executive Director

Cc: Sam Thomas III, Acting Executive Director
Ohio Commission on African American Males