

OHIO ETHICS COMMISSION

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May 10, 2001

Informal Opinion 2001-INF-0510-1

Fred L. Dailey
Director, Ohio Department of Agriculture



Dear Mr. Dailey:

You have asked whether the Ohio Ethics Law and related statutes prohibit individuals from serving as members of the Board of Trustees (Board) of the Southern Ohio Agricultural and Community Development Foundation (Foundation) if they have an ownership interest in a farm that may receive a grant or loan from the Foundation. In addition you have asked whether a family member or business associate of the Board members may receive a grant or loan from the Foundation. Finally, you ask whether a Board member may apply for a grant or loan from an outside source with whom the Foundation contracted to provide assistance to tobacco farmers.

You have also asked whether individuals may serve as members of the Board if they are members of another board that receives a grant from the Foundation. This question will be answered in a separate advisory opinion.

Brief Answer

As explained below, because of the unique character of the Foundation, R.C.2921.42(A)(3) and R.C. 2921.42(A)(4) do not prohibit Foundation Board members, who are tobacco farmers, from receiving a grant or loan from the Foundation, or an outside source under contract to the Foundation, in order to assist them in their endeavor to replace their tobacco production with other agricultural products.

However, Foundation Board members are prohibited from participating in and voting on any matters that would secure a grant or loan for themselves, their family members, and business associates. Board members, their family members, and business associates are prohibited from receiving a grant or loan in disproportion to the grants or loans provided to other qualified applicants or with conditions that are selective or differential to the conditions under which the grants or loans are provided to other individuals, public agencies, or privately owned companies.

Facts—The Foundation: Purpose and Composition

The Southern Ohio Agricultural and Community Development Trust Fund (Trust Fund) is one of six funds created as a result of the Tobacco Master Settlement Agreement Fund. The Trust Fund was earmarked for use by the Foundation, which is charged with the worthy and heavy task of replacing tobacco production in southern Ohio with other agricultural products while mitigating the adverse economic impact created by the transition. R.C. 183.15. The Foundation is required to implement a plan that will entice tobacco growers to voluntarily shift their farming operation to other agricultural commodities. *Id.* The Foundation is required to make copies of its plan available to the public. R.C. 183.15(D). The Foundation is authorized to make grants or loans to individuals, public agencies, or privately owned companies to carry out the plan. *Id.* In addition, the Foundation is required to adopt rules under R.C. Chapter 119, regarding conflicts of interest in the making of grants or loans. *Id.*

The Foundation is governed by a twelve-member board of trustees. R.C. 183.12. The Board is comprised of the Director of Agriculture, Director of Development, Executive Director of the Ohio Rural Development Partnership, and the Director of the Ohio State University Extension who serve as ex officio members. R.C. 183.12(A). The remaining eight members of the Board are appointed by the Governor and include two residents of major tobacco-producing counties with experience in economic and community development; three active farmers from major tobacco-producing counties; and three active tobacco farmers from major tobacco-producing counties. R.C. 183.12(B)-(D). Board members serve without compensation but receive reasonable and necessary expenses incurred while conducting Foundation business. R.C. 183.12(D). Board members are required to file a non-confidential financial disclosure statement with the Ohio Ethics Commission. R.C. 102.02(A).

Application of the Public Contract Statutes—R.C. 2921.42(A)(3) and (A)(4)

Your attention is first directed to R.C.2921.42(A)(3), which reads:

(A) No public official shall knowingly do any of the following:

...

(3) 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 their board or commission exercises 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.”

As explained above, the Board has final, discretionary, decision-making authority in meeting the Foundation’s statutorily established goal of replacing tobacco production in southern Ohio with other agricultural products while mitigating the adverse economic impact created by the transition, and therefore, the Board exercises the sovereign power of government. Therefore, its members are state officers for purposes of R.C. 2921.01(A) and subject to the prohibitions imposed by R.C. 2921.42.

The term “public contract” includes any purchase or acquisition of property or services by or for the use of the state or any political subdivision. R.C. 2921.42(G)(1). The Ethics Commission has held that a grant or loan from the state or a political subdivision to an individual, public agency, or privately owned company that is designed to provide a service for the grantor is a public contract for purposes of the prohibitions of R.C. 2921.42. See Ohio Ethics Commission Advisory Opinions No. 89-006, 89-008, and 92-014. A public contract is considered to be authorized by a public official or board if the contract could not have been awarded without the approval of the official, the position he holds, or the board upon which he serves. See Adv. Op. No. 87-004.

R.C. 2921.42(A)(3) prohibits a public official from profiting from a public contract, including a grant or loan, authorized by the board upon which he serves unless the contract was let by competitive bidding to the lowest and best bidder. The Ethics Commission has held that because grants and loans are not let by competitive bidding, a public board member is prohibited from profiting from grants and loans authorized by their board for a period of one year even if the official abstains from the proceeding and decision to award the grant or loan. Adv. Op. No. 88-006.

The prohibition of R.C. 2921.42(A)(4) is also applicable to your question. R.C. 2921.42(A)(4) 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 the Foundation’s Board is a public official for purposes of R.C. 2921.42. As also stated above, a grant or loan from the Board is a 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. Therefore, R.C. 2921.42(A)(4) prohibits a public official from receiving a grant or loan from the public agency he serves.

Before determining the application of R.C. 2921.42(A)(3) and (A)(4) to the Board members, it is necessary to examine the responsibilities of the Board and its statutorily mandated goal.

Unique Characteristics of the Foundation

When interpreting the Ohio Ethics Law and related statutes, the Ethics Commission follows the rules of statutory interpretation codified in the Revised Code. R.C. 1.47 states that when interpreting a statute, it is presumed that the General Assembly intended the entire statute to be effective to achieve a just and reasonable result feasible of execution. In addition, R.C. 1.49 states that the consequences of a particular construction may be considered in interpreting a statute. See also Adv. Op. No. 89-001.

As stated above, the Foundation is statutorily charged with the unambiguous mandate to replace tobacco production in southern Ohio with other agricultural products while mitigating the adverse economic impact created by the transition. Therefore, the reduction of tobacco farming from the state, without adverse economic consequences to tobacco farmers, is the just and reasonable result that the General Assembly intended when it created the Foundation.

It is apparent that the General Assembly required that tobacco farmers be included on the Foundation's Board in order to represent the interests of the class of farmers that would be most directly affected by the implementation of its plan to encourage tobacco growers to voluntarily shift their farming operation to other agricultural commodities. The consequence of holding that R.C. 2921.42(A)(4), as well as R.C. 2921.42(A)(3), prohibits a Board member, who is a tobacco farmer, from receiving a grant or loan from the Foundation in order to assist him in his endeavor to replace tobacco production with other agricultural products regardless of his official actions, would be counterproductive to the result that the General Assembly intended by creating the Foundation.

The Board members who would be prohibited from receiving grants or loans from the Foundation would be economically disadvantaged in comparison to tobacco farmers who are not board members. This economic disadvantage could prevent them from attempting to replace their tobacco crop with other agricultural products. Thus, an absurdity would be created of having tobacco farmers—who have no economic assistance to stop their tobacco production—serving on the Board of the Foundation that is charged with creating and implementing a plan to reduce tobacco farming within the state. In addition, the Board member who remains a tobacco farmer would have an economic interest that is antagonistic to that of other members of the class of farmers that the General Assembly intended him to represent.

Having tobacco farmers—who have no incentive to stop their tobacco production—serve on the Board of the Foundation that is charged with implementing a plan to eradicate the production of tobacco creates a dual interest in which the Board member's continued tobacco production runs counter to the public interest of eradicating tobacco production in the state. Accordingly, because of the unique responsibilities of the Foundation, specifically enacted by the General Assembly, R.C. 2921.42(A)(3) and R.C. 2921.42(A)(4) do not prohibit a Board member, who is a tobacco farmer, from receiving a grant or loan from the Foundation in order to assist the

farmer in his endeavor to replace his tobacco crop with other agricultural products. But see R.C. 102.03(D) (discussed below).

Authorizing a Grant or Loan—R.C. 2921.42(A)(1)

The instant situation also implicates provisions of the Ethics Law and related statutes that prohibit a public official from participating in a matter in which he, a family member, or a business associate, has a definite and direct financial or fiduciary interest. 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.

R.C. 2921.42(A)(1) prohibits a Board member from voting, discussing, deliberating, or using his position, in any way, with respect to a grant awarded by the Foundation in which he, his family member, or his business associate, has a financial or fiduciary interest. Thus, even if a board member is not prohibited from receiving a grant or loan from the Foundation, R.C. 2921.42(A)(1) does prohibit the Board member from voting upon, discussing, or otherwise using the authority or influence of his public position, either formally or informally, to secure authorization of a loan or grant for himself from the Foundation. This includes a bar upon the Board member's participation in any issue relating to the loan or grant after it is entered into, such as a dispute regarding, or modification to, the terms of the loan or grant. In addition, 2921.42(A)(1) prohibits a Board member from participating, in any way, in the consideration or award of the grant or loan to a family member or business associate.

The Ethics Commission has determined that for purposes of R.C. 2921.42, a family member includes a spouse, children, whether dependent or not, parents, grandparents, grandchildren, and siblings. Adv. Ops. No. 80-001 and 85-015. The term family member also includes other persons related to the official by blood or marriage and residing in the same household with the official. Id. See also Walsh v. Bollas, 82 Ohio App. 3d 588 (Lake County 1992).

The Ethics Commission has held that for purposes of R.C. 2921.42, a business association is created whenever persons join together, formally or informally, to pursue a common business purpose. Adv. Op. No. 86-002. See also Adv. Ops. No. 84-009 (consultants engaged by a corporation), 85-004 (partners in limited and general partnerships), 89-008 (employers and employees), 89-015 (partners or associates in a law firm), and 93-001 (stockholders capable of affecting the corporation's management or operation).

Prevention of Conflicts of Interest—R.C. 102.03(D)

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 Foundation Board members exercise final, discretionary, decision-making authority, and, therefore, the Foundation is a "public agency" as that term is used in the definition of "public official or employee." Also, the Board members of Foundation 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 interest in a private enterprise, and the benefit that results from the award of a public contract to that enterprise, 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 acting, formally or informally, to secure a thing of value that 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 and 88-004.

A matter that affects the personal financial interests of a public official or employee would generally be of such a character as to manifest an improper influence upon him with respect to his duties. See Adv. Ops. No. 88-004 and 90-003. In addition, as explained below,

it is not necessary for a public official or employee to have a personal pecuniary interest in a matter to invoke the prohibition imposed by R.C. 102.03(D).

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, 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 benefits that would accrue as a result of a Board member's receipt of a grant or loan from the Foundation would be substantial.

The Ethics Commission has held that R.C. 102.03(D), in its amended form, prohibits a public official or employee from participating in matters that will benefit parties with whom he has a close family, economic, or business relationship because the relationships may impair the public official's objectivity and independence of judgment. Adv. Ops. No. 88-004, 89-008, and 97-002.

For example, in Advisory Opinion No. 89-008, the Ethics Commission held that R.C. 102.03(D) prohibits a member of a city council from voting, deliberating, participating in discussions, or otherwise using his official authority or influence with regard to secure a tax abatement for his private employer, because the relationship between the public official and his private employer is such that the council member's objectivity and independence of judgment could be impaired by the relationship. With respect to family members, the Commission has specifically stated that R.C. 102.03(D) prohibits a public official or employee from using his authority or influence, formally or informally, to secure anything of value for members of the official's or employee's family. See Adv. Ops. No. 90-004 (spouse), 97-004 (children), and 98-002 (siblings).

Therefore, R.C. 102.03(D) prohibits a Foundation Board member from: (a) using his relationship with other public officials and employees to secure a favorable decision or action by the other Foundation officials or employees regarding a grant or loan that he, a family member, or business associate, would receive; (b) discussing, deliberating, or taking any action, as a Foundation Board member, on any matter involving a grant or loan that he, a family member, or business associate, would receive; and (c) using his public position or authority in any other way to secure a benefit for himself, a family member, or business associate. Adv. Op. No. 96-004. In addition, a Board member, his family member, or business associate, who receives a grant or loan from the Foundation, is prohibited from receiving a grant or loan in disproportion to the grants or loans provided to other qualified applicants or with conditions that are selective or differential to the conditions under which the grants or loans are provided to other individuals, public agencies, or privately owned companies.

As a final matter, it is apparent from the General Assembly's decision to include the Foundation Board members in the class of public officials and employees who are required by R.C. 102.02(A) to file a non-confidential financial disclosure statement that the General Assembly acted with full awareness of the restrictions imposed by the Ethic Law and related statutes when they created the Foundation. Ordinarily, members of uncompensated state boards

and commissions who are required to file a financial disclosure statement, file statements that are confidential. The public disclosure of a Board member's financial interests, which would include the names under which the Board member and his immediate family members do business, sources of income, and investments, protects the public interest while advancing the Foundation's goal of implementing a plan that will encourage all tobacco growers to voluntarily make the transition from tobacco production to other agricultural commodities.

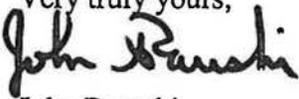
Conclusion

As explained above, because of the unique character of the Foundation, R.C.2921.42(A)(3) and R.C. 2921.42(A)(4) do not prohibit Foundation Board members, who are tobacco farmers, from receiving a grant or loan from the Foundation, or an outside source under contract to the Foundation, in order to assist them in their endeavor to replace their tobacco production with other agricultural products.

However, Foundation Board members are prohibited from participating in and voting on any matters that would secure a grant or loan for themselves, their family members, and business associates. Board members, their family members, and business associates are prohibited from receiving a grant or loan in disproportion to the grants or loans provided to other qualified applicants or with conditions that are selective or differential to the conditions under which the grants or loans are provided to other individuals, public agencies, or privately owned companies.

The conclusion of this advisory opinion is based and dependent entirely on the recognition that the Foundation was created to achieve the worthy goal replacing tobacco production in southern Ohio with other agricultural products while mitigating the adverse economic impact created by the transition. It is limited to addressing whether the Ohio Ethics Law and related statutes prohibit individuals from serving as board members of the Foundation if they, their family members, or business associates, have an ownership interest in a farm that may receive a grant or loan from the Foundation as means to aid the Foundation in achieving its goal. Nothing in this advisory opinion should be construed as relieving a Board member from the restrictions described above that prohibit a public official from participating or voting in matters in which he, a family member, or a business associate, would derive a definite and particular personal financial benefit.

The Ethics Commission approved this informal advisory opinion at its meeting on May 10, 2001. The opinion is based upon 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 further questions, please feel free to contact this Office again.

Very truly yours,

John Rawski
Staff Attorney