

OHIO ETHICS COMMISSION

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September 7, 2001 Informal Opinion 2001-INF-0907-2

Joseph C. Robertson, Interim Director
Ohio Department of Development
77 South High Street

Dear Mr. Robertson:

In a letter received by the Ohio Ethics Commission on July 2, 2001, you have asked whether the Ethics Law and related statutes prohibit a member of the Executive Staff of the Ohio Department of Development (ODOD) from serving on the Board of Trustees of the Ohio Statewide Development Corporation (OSDC). You have explained that the Deputy Director of ODOD's Economic Development Division is the member of the Executive Staff that has been asked to serve on the Board of Trustees of the OSDC, and that the Deputy Director is interested in pursuing the Board of Trustees' appointment. You have also explained that OSDC is under contract with ODOD to administer a Regional 166 Loan Program in several Ohio counties.

Opinion Summary

As explained more fully below, the Ethics Law and related statutes prohibit the Deputy Director from serving on the Board of Trustees of OSDC unless she can meet each of the four requirements of the statutory exception to the public contract prohibition.

If the Deputy Director can meet the requirements of the statutory exception to the public contract prohibition, then the Deputy Director would not be absolutely prohibited from serving on the Board of Trustees of OSDC. However, the Deputy Director would be subject to other provisions of the Ethics Law and related statutes that would place restrictions on her ability to perform official duties relating to matters affecting the interests of OSDC. The Deputy Director would be prohibited from voting, deliberating, participating in discussions, or otherwise using her position, either formally or informally, to secure anything of value, including an ODOD contract, for OSDC.

Facts

In your letter to the Ohio Ethics Commission, you explain that the Deputy Director of ODOD's Economic Development Division has been asked to serve on the Board of Trustees of OSDC. You further explain that the Deputy Director is interested in pursuing the Board of Trustees' appointment.

You state that OSDC is a not-for-profit community based lender specializing in packaging U.S. Small Business Association (SBA) 504 loans and other state and federal loan programs. You also state that OSDC is under contract with ODOD to administer a \$1M Regional 166 Loan Program in several Ohio counties. You explain that, in accordance with the Loan Administration Agreement, OSDC receives fees from ODOD for servicing the loans approved through the Regional 166 Loan Program. You also explain that OSDC advises a small number of its loan clients in applying for other loans and grants from ODOD.

You state that the duties of the Deputy Director of the Economic Development Division include supervising the ODOD personnel who review, and make recommendations to the Director of ODOD on, the grant and loan proposals. You further state that the Director relies on the input of the Deputy Director and Division staff in making funding determinations. You explain that, in addition to the departmental programs, all Regional 166 loans that are approved by OSDC must receive an ODOD recommendation and Development Financing Advisory Council approval. You state that approximately 15-20% of the OSDC loans (or 7 to 10 annually) involve some sort of ODOD loan or grant assistance.

You explain that there is the possibility that additional dollars may become available for the Regional 166 administrators of which there are twelve agencies statewide. You state that any allocation decisions for additional resources would initiate within the Economic Development Division.

You explain that OSDC was previously housed within ODOD's Economic Development Division and staffed with ODOD personnel. You state that, in early 2000, OSDC acquired its own staff and independent identity. As you explain, ODOD staff members have served on the OSDC Board of Trustees in the past. As you also explain, however, ODOD staff members who have served on the Board have not been of supervisory capacity.

Finally, you state that ODOD believes that participation on OSDC's Board of Trustees provides valuable continuity in the loan program and regional development efforts and that ODOD would like to pursue the relationship. You also state, however, that if it is determined that a real or perceived conflict of interest exists, ODOD staff will not participate on OSDC's Board of Trustees.

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

R.C. 2921.42(A)(4) directly addresses the question you have presented in your letter to the Ethics Commission. 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.

The term "public official" is defined, for purposes of the provisions of R.C. 2921.42, to include any elected or appointed officer, or employee, or agent of the state. See R.C. 2921.01(A). Employees of ODOD are "public officials" subject to the prohibitions of R.C. 2921.42. See Ohio Ethics Commission Advisory Opinion No. 87-004.

The term "public contract," as used in R.C. 2921.42, is defined to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state. Therefore, ODOD's acquisition of OSDC's services to administer loans 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.

R.C. 2921.42(A)(4) prohibits the Deputy Director of the Economic Development Division of ODOD from having a financial or fiduciary interest in any public contract entered into by or for the use of ODOD. The Deputy Director would have a fiduciary interest in ODOD's contract with OSDC if she were to serve on the Board of Trustees of OSDC. 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). Therefore, unless the Deputy Director could meet each of the four requirements of the exception discussed below, she would be prohibited from serving on the Board of Trustees of OSDC.

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

The Deputy Director would be required to meet the exception contained in R.C. 2921.42(C) if she were to serve on the Board of Trustees of OSDC and thereby have a fiduciary interest in an ODOD 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 ODOD has full knowledge of the Deputy Director's interest in its contracts, and that the Deputy Director take no part in the deliberations and decisions of ODOD with respect to the contracts in which she has an interest.

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

The Deputy Director can meet the requirements in R.C. 2921.42(C)(2) if she can show by some objective standard that the supplies or services provided by OSDC to ODOD are "unobtainable elsewhere for the same or lower cost." She 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 OSDC are unobtainable by ODOD for the same or lower cost. Adv. Op. No. 86-002. While a competitive bidding process may provide evidence that a 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.

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 her public position. Adv. Op. No. 88-008. Therefore, the continuing course of dealing requirement can be met where the contract in which the Deputy Director has a fiduciary interest existed prior to the time the Deputy Director became associated with ODOD, and where the contract has not been modified or renewed (unless the renewal is pursuant to the terms of the original contract and does not significantly change the terms of the contract) since the Deputy Director became associated with ODOD.

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

Other Requirements of R.C. 2921.42(C)

Where the Deputy Director who has a fiduciary interest in an ODOD contract can meet the requirements imposed by Divisions (C)(2) and (C)(4), she must, in addition, comply with the other provisions of R.C. 2921.42(C). R.C. 2921.42(C)(1) requires that the services are necessary purchases for ODOD. Division (C)(3) requires that the treatment provided by OSDC to ODOD is as good as, or better than, the treatment provided by OSDC 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 an ODOD contract in which the Deputy Director has an interest.

Authorizing a Contract in Which the Deputy Director Has an Interest—R.C. 2921.42(A)(1)

If the Deputy Director can meet the requirements of the exception to the public contract prohibition discussed above, then the Deputy Director would not be absolutely prohibited from serving on the Board of Trustees of OSDC. However, the Deputy Director would be subject to other provisions of the Ethics Law and related statutes that would place significant restrictions on her ability to perform official duties relating to matters affecting OSDC.

In particular, if the Deputy Director were able to meet the exception to the public contract prohibition discussed above, such that she would not be absolutely prohibited from serving on the Board of Trustees of OSDC, she would need to adhere to the prohibition contained in R.C. 2921.42(A)(1), which provides the following:

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

...

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

As discussed above, a member of the board of directors of a non-profit corporation generally has an interest in the contracts of that corporation. Therefore, the Deputy Director would be prohibited from voting, discussing, deliberating, formally or informally lobbying, or otherwise using the authority or influence of her position with ODOD to secure ODOD contracts for OSDC. Adv. Op. No. 89-008. The Deputy Director would also be prohibited from acting on matters that would affect OSDC's competitors for contracts if acting on those matters would have a definite and direct impact on the contracts awarded to OSDC.

Using a Public Position to Secure a Thing of Value for OSDC—R.C. 102.03(D)

If the Deputy Director were able to meet the exception to the public contract prohibition discussed above, such that she would not be absolutely prohibited from serving on the Board of Trustees of OSDC, she would also need to adhere to the prohibition contained in 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.

A "public official or employee" is defined, for purposes of R.C. 102.03, to include any person who is elected or appointed to an office of, or employed by, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state. R.C. 102.01(B) and (C). Employees of ODOD are, therefore, "public official(s) or employee(s)" subject to the prohibitions of R.C. 102.03(D). See Adv. Op. No. 87-004.

The term "anything of value" is defined to include money and every other thing of value. R.C. 102.01(G) and 1.03. It includes any definite and direct pecuniary benefit, such as a payment for goods or services. Adv. Op. No. 90-003. R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of her office to secure anything of value for any person, business, or other entity, if the relationship between the official and that person or other entity is such that the official's objectivity or independence of judgment could be impaired with respect to matters that affect the interests of that party. Adv. Op. No. 89-008. The Commission has stated that R.C. 102.03(D) prohibits a public official from participating in any matter that would provide a benefit to an organization that she serves as an officer or board member. See Adv. Ops. No. 89-005 and 94-001. Therefore, R.C. 102.03(D) prohibits the Deputy Director from voting, deliberating, participating in discussions, or otherwise using her position, either formally or informally, to secure anything of value for OSDC. Id.

In your letter to the Ethics Commission, you explain that the duties of the Deputy Director include supervising the ODOD personnel who review and make recommendations on the grant and loan proposals to the Director of ODOD. You state that the Director relies on the input of the Deputy Director and Division staff in making funding determinations. You also state that approximately 15-20% of OSDC loans involve some sort of ODOD loan or grant assistance. As you also explain, the Deputy Director has proposed to abstain from consideration of those projects involving direct ODOD assistance as a means to avoid a conflict of interest.

Based on the prohibitions imposed by R.C. 2921.42(A)(1) and 102.03(D), as described above, abstention in such matters, and any other matters that would definitely and directly affect the interests of OSDC, would be required in the event the Deputy Director would serve on the Board of Trustees of OSDC. As stated above, however, the Deputy Director is prohibited from serving on the Board of Trustees unless she can demonstrate compliance with each of the four requirements of the statutory exception to the public contract prohibition.

Prospective Application of Advisory Opinion

In your letter to the Ethics Commission, you indicate that, in the past, ODOD staff served on the OSDC Board of Trustees. You also indicate that OSDC was previously housed within ODOD's Economic Development Division and staffed with ODOD personnel. You should note that this advisory opinion does not address past situations involving ODOD staff who served on the Board of Trustees of OSDC. The conclusions set forth in this advisory opinion are based upon your description of the present relationship between ODOD and OSDC, the present status of OSDC as an entity independent of ODOD, and the duties and authority of the Deputy Director of the Economic Development Division.

Conclusion

As explained above, the Ethics Law and related statutes prohibit the Deputy Director from serving on the Board of Trustees of OSDC unless she can meet each of the four requirements of the statutory exception to the public contract prohibition.

If the Deputy Director can meet the requirements of the statutory exception to the public contract prohibition, then the Deputy Director would not be absolutely prohibited from serving on the Board of Trustees of OSDC. However, the Deputy Director would be subject to other provisions of the Ethics Law and related statutes that would place restrictions on her ability to perform official duties relating to matters affecting the interests of OSDC. The Deputy Director would be prohibited from voting, deliberating, participating in discussions, or otherwise using her position, either formally or informally, to secure anything of value, including an ODOD contract, for OSDC.

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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 7, 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