

OHIO ETHICS COMMISSION

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December 28, 2001 Informal Opinion 2001-INF-1228-1

Marlo B. Tannous
Chief Legal Counsel
Ohio Department of Development



Dear Ms. Tannous:

In a letter received by the Ohio Ethics Commission on November 2, 2001, you have asked whether the Ethics Law and related statutes prohibit individuals who have various connections with companies that receive housing credits, loans, and funds from the Ohio Housing Finance Agency (OHFA) from serving as members of the OHFA board. You have asked the Commission about five scenarios. One of your questions deals with an individual who is a full time banker with a bank that participates in OHFA's first time homebuyer mortgage revenue bond program. One of the questions deals with an investment banker who provides services to many state instrumentalities. This opinion will answer these two questions. The Commission will answer your other questions in a separate opinion.

Brief Answer

Because of the exception provided by R.C. 175.03(B), a full-time banker with a bank that services OHFA loans is not prohibited from serving on the OHFA board regardless of whether he would have an interest in an OHFA contract if he were to do so. The exception in R.C. 175.03(B) does not apply to the investment banker.

The Ethics Law prohibits an investment banker from occupying a position of profit in an OHFA contract unless the contract is awarded pursuant to competitive bidding to the lowest and best bidder. The Ethics Law also prohibits the investment banker from having an interest in an OHFA contract. From the information you have provided, it does not appear that the investment banker would have an interest in, or occupy a position of profit in the prosecution of, an OHFA contract. R.C. 2921.42(A)(1) and 102.03(D) and (E) prohibit a public official from authorizing grants, loans, or contracts to himself or his business associates, and from securing or soliciting benefits for himself or his business associates.

The investment banker is also prohibited from selling goods or services to OHFA except through competitive bidding. The investment banker is not prohibited from selling goods or services to other stage agencies where the goods or services are sold through competitive bidding or where he complies with the requirement of the exception set forth in R.C. 102.04(D), by filing the statement described in the section and disqualifying himself, for a period of two years from the date of the filing of his most recent statement, from participating as an OHFA board member in any matters involving public officials and employees of the state agency or agencies to which he sells goods or services.

Facts

In your letter to the Ethics Commission, you explain that OHFA's statutory powers are set forth in Chapter 175. of the Revised Code. As you explain, OHFA administers several programs including the housing credit program, the affordable housing loan program, and the housing development assistance program (HDAP). You state that the OHFA board is responsible for approval of the annual qualified allocation plan (QAP) which determines how housing credits will be allocated to projects. You also state that the OHFA board approves the annual guidelines for affordable housing loans and HDAP funds, and it approves each affordable housing loan request and all HDAP requests that are not required to go before the state controlling board.

You have described two scenarios involving potential board members who have connections with banks. First, you state that a potential board member is a full-time banker with a bank that participates in OHFA's first-time homebuyer mortgage revenue bond program. You explain that the OHFA board approves each bond transaction that provides funds to the first-time homebuyer mortgage revenue bond program and the basic program parameters. You state that OHFA delegates relationships with individual lending institutions to OHFA staff. You explain that while the banker does not work directly with the first-time homebuyer mortgage revenue bond program, the bank is a participating lender, has a contract with OHFA, and is compensated for the OHFA loans that it administers. You state that the bank has participated in the program for many years and will continue to do so.

Second, you state that a potential board member is an investment banker and provides services to many state instrumentalities through a private company. The company is not a lending institution. You state that the investment banker is chosen to perform these services by the individual state instrumentality but not through a competitive selection process.

In order to answer your questions, the Commission must first determine whether the members of the OHFA board are "public officials" subject to the Ethics Law and related statutes.

"Public Official" for Purposes of R.C. Chapter 102. and 2921.42

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." 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 county, 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 instrumentality of the state or a county, municipal corporation, township, 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.

OHFA is an instrumentality established within state government. See R.C. 175.02(A). Therefore, OHFA 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 because the members of OHFA are compensated for their service. See R.C. 175.03(A)(2).

R.C. 2921.42 and 2921.43 apply to any "public official." R.C. 2921.01(A) defines the term "public official" for purposes of R.C. Chapter 2921. 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.

Again, OHFA is an entity established within state government. See R.C. 175.02(A).

Therefore, it is clear that OHFA is a public agency for purposes of Chapter 102. and Sections 2921.42 and 2921.43. The question becomes whether an OHFA member who 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 and 2921.43 (emphasis added).

OHFA Statutory Composition—R.C. 175.03

OHFA consists of eleven members. R.C. 175.03(A)(1). The director of commerce and the director of development, or their respective designees, are voting members of OHFA. Id. Nine members are appointed by the governor with the advice and consent of the senate. Id. Of the appointed members, the law provides that at least one must have experience in each of the following areas: (1) residential housing construction; (2) residential housing mortgage lending, loan servicing, or brokering; (3) licensed residential housing brokerage business; and (4) the housing needs of senior citizens. Id. At least one board member must be from a background in labor representation in the construction industry. Id. At least one board member must represent each of the following interests: (1) nonprofit multifamily housing development organizations; and (2) for-profit multifamily housing development corporations. Id. The remaining two members must be public members. Id.

Application of the Definition of "Public Official"

Under Ohio law, a person who holds an "office" is an "officer." Muskingum County Democratic Executive Committee v. Burrier, 31 Ohio Op. 570, 572 (C.P. Muskingum County 1945) ("The terms 'officer' and 'office' are paronymous, and in their original and proper sense, are to be regarded as strictly correlative."). See also Adv. Op. No. 85-005.

The Ethics Commission has established five elements which, in combination, will determine whether a person is "appointed to an office." The Commission determines whether the person: (1) is appointed; (2) has a title; (3) exercises a function of government concerning the public; (4) is not subject to a contract of employment; and (5) exercises the "sovereign power" of government. See Ohio Ethics Commission Advisory Opinions No. 74-007 and 75-004. In Advisory Opinion No. 77-004, the Commission held that sovereign 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." See Adv. Op. No. 75-004. See also State ex rel. Landis v. Butler, 95 Ohio St. 157, 160-161 (1917) ("If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with the independent power in the disposition of public property or with the power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.").

Members of OHFA are appointed, exercise a function of government concerning the public, are not subject to a contract of employment, and exercise sovereign power. As explained above, a public agency exercises "sovereign power" if it has the power to exercise final, discretionary, decision-making authority. OHFA has the authority to "purchase and contract to purchase loans or other evidence of debt from, and make and contract to make loans to, or through, lending institutions." R.C. 175.04(B). OHFA also has the authority to "[c]ontract for the administration, origination, and servicing of loans," and the authority to "[m]ake and enter into all contracts, commitments, and agreements, and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers" under Chapter 175. of the Revised Code. R.C. 175.04(E) and (N). In addition, OHFA has the authority to make noninterest-bearing advances or commitments therefor from the housing development fund and to make, undertake commitments to make, and participate in the making of mortgage loans. R.C. 175.04(P)(1) and (4).

Based on the examples of OHFA's statutory duties set forth above, and other statutory duties provided in R.C. Chapter 175., OHFA exercises "sovereign power." Accordingly, a member of OHFA is a public official subject to the provisions of R.C. Chapter 102. and R.C. 2921.42 and 2921.43.

Generally, R.C. 2921.42(A)(4) prohibits a public official from having an interest in grants, loans, or contracts issued by the public agency he serves. R.C. 2921.42(A)(3) prohibits a public official from occupying a position of profit in the prosecution of contracts issued by the

board of which he is a member. R.C. 2921.42(A)(1) and 102.03(D) and (E) prohibit a public official from authorizing grants, loans, or contracts to himself or his business associates, and from securing or soliciting benefits for himself or his business associates.

Before addressing the application of the provisions to the full-time banker and investment banker, the Commission must address the exception set forth in R.C. 175.03(B).

Exception—R.C. 175.03(B)

In R.C. 175.03(B), the General Assembly removed members of the OHFA board from some of the requirements of the Ohio Ethics Law and related statutes. Members of the OHFA board, unlike members of most other state sovereign power boards and commissions that control and expend significant amounts of public money, are not required to file annual financial disclosure statements with the Ohio Ethics Commission. A state sovereign power board member who files a financial disclosure statement must disclose all sources of income, investments of over \$1000, debtors and creditors of over \$1000, and other financial information.

Instead of providing the information required of other state officials, appointed members of the OHFA board are required to file a signed written statement, with the agency, setting forth any sales of goods, property, or services to the agency in which they, their immediate family members, and their business associates, are interested. R.C. 175.03(B). The members are not required to disclose their sources of income, investments, debtors, creditors, or other information required by financial disclosure filers. Further, instead of requiring an annual update to the statement, as is required for financial disclosure filers, R.C. 175.03(B) requires OHFA board members to supplement the statement "from time to time to reflect changes."

Finally, R.C. 175.03(B) provides:

No member shall participate in portions of agency meetings dealing with, or vote concerning, any such matter. The requirements of this section pertaining to disclosure and prohibition from participation and voting do not apply to agency loans to lending institutions or contracts between the agency and lending institutions for the purchase, administration, or servicing of loans notwithstanding that such lending institution has a director, officer, employee, or owner who is a member of the agency, and no such loans or contracts shall be deemed to be prohibited or otherwise regulated by reason of any other law or rule. (Emphasis added.)

It is clear, from this exception, that the General Assembly intended that any OHFA member who is a director, officer, employee, or owner of a lending institution would not be required to disclose any loans or contracts between OHFA and the lending institution the board member served. More importantly, for purposes of the Ethics Law, the exception also provides that "no loans or contracts shall be deemed to be prohibited or otherwise regulated by reason of any other law or rule." Compare R.C. 135.11 (an officer, director, stockholder, employee, or owner of any interest in a public depository does not have an interest in the deposit of public funds by a public agency for purposes of the public contract law).

Therefore, while the OHFA board member who is a full-time banker is a public official for purposes of the Ethics Law and related statutes, it is clear that the General Assembly intended that the Ethics Law and related statutes would not prohibit or regulate such contracts or loans. Based on R.C. 175.03(B), a full-time banker at a bank that administers OHFA loans is not prohibited from serving on the board of OHFA. The banker is also not prohibited from participating in matters that affect OHFA loans or contracts with his employing bank.

R.C. 175.03(B) does not apply to the investment banker, because he is not employed by or associated with a lending institution. This advisory opinion will now turn to the application of provisions of the Ethics Law and related statutes to the investment banker.

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

The situations you have described implicate 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 political subdivision or governmental agency or instrumentality with which he is connected.

The term “public contract” includes any purchase or acquisition of property or services by or for the use of any political subdivision. R.C. 2921.42(G)(1). The Commission has stated that a public agency’s acquisition of property or services through its issuance of a grant or a loan is a public contract. Adv. Ops. No. 85-002, 87-003, 89-006, and 92-014. Through its issuance of HDAP funds, and funds for affordable housing loans, OHFA acquires the services of the fund recipients towards the development of housing in the state and the facilitation of home ownership by Ohio’s citizens. These loans are, therefore, public contracts for purposes of R.C. 2921.42(G)(1).

An “interest” prohibited under R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. Adv. Ops. No. 81-008 and 92-017. R.C. 2921.42(A)(4) prohibits a public official from having a definite and direct pecuniary or fiduciary interest in a public contract with his own governmental agency. Adv. Ops. No. 99-004 (fiduciary interest) and 2000-02 (pecuniary interest).

In Advisory Opinion No. 81-003, the Commission stated that a board member of a private agency has a fiduciary or pecuniary interest in the contracts of the agency, such that he is prohibited from also serving as a member of a county board of mental retardation and developmental disabilities where the private agency and the county board have contractual relationships. The Commission has also stated that an officer or chief administrative official of a private for-profit or non-profit corporation has a fiduciary interest in the contracts of the corporation, and may have a pecuniary interest as well. Adv. Ops. No. 81-008.

Based on the information that you have provided, it does not appear that the investment banker in the scenario that you described would have a pecuniary or fiduciary interest in an

OHFA contract if he were to serve on the OHFA board. If he were to have such an interest, he would also be required to meet each of the four requirements of R.C. 2921.42(C). Because it appears that the investment banker does not have a prohibited interest in any OHFA contract, this opinion will not discuss the exception.

Profiting from an OHFA Contract—R.C. 2921.42(A)(3)

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.

R.C. 2921.42(A)(3) does not require that a public official “[h]ave an interest in the profits or benefits of a public contract,” but prohibits a public official from “occupy[ing] any position of profit in the prosecution of a public contract,” under specific circumstances. See Adv. Op. No. 92-013. Therefore, the issue is whether any of the individuals in the scenarios you have described would “occupy a position of profit” in a contract of OHFA.

The Ethics Commission has stated that the position of profit that a public official occupies in the prosecution of a public contract for purposes of R.C. 2921.42(A)(3) must be definite and direct. See Adv. Op. No. 92-013. A public official occupies a position of profit in a public contract when he will realize a pecuniary advantage, gain, or benefit, which is a definite and direct result of the public contract. Adv. Ops. No. 92-013 and 92-017.

R.C. 2921.42(A)(3) would prohibit the investment banker from receiving any profit or benefit from an OHFA contract, grant, or loan, either by providing investment services to a state institution directly related to the contract, grant, or loan, or by receiving compensation for services from the proceeds of the contract, grant, or loan. It is not clear, from the facts you have provided, that the investment banker provides services or receives compensation of this kind. R.C. 2921.43(A)(3) would require the investment banker to decline opportunities of this kind.

Securing a Contract or Other Benefit—R.C. 2921.42(A)(1) and 102.03(D) and (E)

It is also necessary to examine provisions of the Ethics Law and related statutes that impose restrictions on participation in certain matters. As stated briefly above, R.C. 2921.42(A)(1) prohibits a public official from authorizing, or using his position to secure authorization of, a public contract in which he or a business associate has an interest.

R.C. 2921.42(A)(1) prohibits a public official from voting, discussing, deliberating, or otherwise participating in any part of his public agency’s decision-making process with respect to the continuation, implementation, or terms and conditions of a public contract in which either he or a business associate has an interest. Adv. Op. No. 92-003. Furthermore, the prohibition against a

public official authorizing, or securing authorization of, a public contract in which he or his business associate has an interest extends beyond the initial award of the public contract and prohibits a public official from participating in any matter or decision that would affect the continuation, implementation, or terms and conditions of the public contract. See generally Adv. Ops. No. 82-003, 89-005, and 92-012. These matters and decisions include, but are not limited to, the authorization and approval of benefits under the contract to his company, and the renewal, modification, termination, or renegotiation of the contract's terms.

It must be noted that R.C. 2921.42 also prohibits a public official from employing the "authority or influence of his office" to secure authorization of a public contract in which a business associate has an interest. The prohibition against a public official employing the "authority or influence of his office" to secure a public contract in which his company has an interest bars the OHFA board member who is an investment banker from exercising the power and influence inherent in his position as a board member to affect the decisions of other OHFA officers and employees in matters affecting his employer or his other business associates.

R.C. 102.03(D) and (E) are also applicable to your question. R.C. 102.03(D) and (E) prohibit a public official from using the authority or influence of his office to secure, and from soliciting, 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 definite and direct pecuniary benefit is considered to be a thing of value under R.C. 102.03(D) and (E). Adv. Ops. No. 79-008, 86-007, and 89-005. The loans or funds that the investment banker's employer would receive for providing services under an OHFA contract would fall within the definition of "anything of value."

The Ethics Commission has held that R.C. 102.03(D) prohibits a public official or employee from participating in matters before the public agency he serves that will benefit parties with whom he has a close family, economic, or business relationship because the relationship may impair the public official's objectivity and independence of judgment. Adv. Op. No. 98-002. See also Adv. Ops. No. 89-008, 89-015 and 90-008. R.C. 102.03(E) prohibits a public official or employee from merely soliciting or receiving an improper thing of value and does not require that he use the authority or influence of his position to secure it. Adv. Ops. No. 86-011 and 89-006.

In the instant situation, the relationship between a board member and the company by which he is employed as an investment banker is such that the board member's objectivity and independence of judgment could be impaired with respect to the interests of the company. Therefore, R.C. 102.03(D), as well as R.C. 2921.42(A)(1), prohibits an OHFA board member from using the authority or influence of his official position with regard to any matter that would provide a definite and direct pecuniary benefit to him or the company by which he is employed. These matters include, but may not be limited to, decisions to award funds or contracts to a company to perform work on an OHFA project where it is foreseeable, at the time the decision to award the funds or contracts is made, that the board member's company would perform services on that project related to the award of OHFA funds.

R.C. 102.03(D) also prohibits a public official or employee who engages in private outside employment or business activity from using relationships developed while performing his public duties to secure a favorable decision or action by another public official or employee regarding his private interests or the interests of his business associates. Adv. Op. No. 96-004. A person appointed to the board of OHFA has access to OHFA board members and other officials and employees which is unique to that enjoyed by individuals who do not serve in such office. R.C. 102.03(D) prohibits the OHFA board member who is an investment banker from using his unique position and access, as an appointed member of the OHFA board, and his working relationship with other public officers and employees, to secure anything of value for him or the company that he serves as an officer. An OHFA board member is prohibited from formally and informally recommending or lobbying for the company by which he is employed, and from taking any other formal or informal action to persuade OHFA officials and employees to approve things of value to him or his employer.

Selling Goods or Services to Other State Agencies—R.C. 102.04(B)

Finally, the situation involving the investment banker implicates R.C. 102.04(B), which provides the following:

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 sell or agree to sell, except through competitive bidding, any goods or services to the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

R.C. 102.04(B) prohibits a person appointed to an office of the state from selling, or agreeing to sell, any goods or services, except through competitive bidding, to the general assembly or any state department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts. See Adv. Op. No. 77-006. As stated above, a member of the OHFA board is appointed to an office of the state. Therefore, except as provided below, a member of the OHFA board is prohibited from selling, or agreeing to sell, any goods or services, except through competitive bidding, to any state department, division, institution, instrumentality, board, commission, or bureau of the state. See also R.C. 2921.42(A)(4), discussed above. There is an exception to this restriction, set forth in R.C. 102.04(D).

R.C. 102.04(D) does not provide an exception to services that are sold to the investment banker's own state agency—the Department of Development. R.C. 102.04(D) does, however, provide an exception to the sale of goods or services to state agencies other than the investment banker's own state agency. The provisions of R.C. 102.04(D) and (E) require that the investment banker file a statement, disclosing specific information, with the state agency he serves (Department of Development), the state agency to which he is selling services, and the Ohio Ethics Commission. Further, the investment banker must disqualify himself, for a period of two years from the date of the filing of his most recent statement, from participating as an OHFA board member in any matters involving public officials and employees of the state agency

or agencies to which he sells goods or services. Even if the investment banker is able to meet the exemption of R.C. 102.04(D), he is, in addition, required to adhere to the restrictions and prohibitions of the other applicable provisions of the Ethics Law and related statutes as discussed above. A copy of the statement required by R.C. 102.04(D) is attached to this opinion.

Conclusion

As explained more fully above, because of the exception provided by R.C. 175.03(B), a full-time banker with a bank that services OHFA loans is not prohibited from serving on the OHFA board regardless of whether he would have an interest in an OHFA contract if he were to do so. The exception in R.C. 175.03(B) does not apply to the investment banker.

The Ethics Law prohibits an investment banker from occupying a position of profit in an OHFA contract unless the contract is awarded pursuant to competitive bidding to the lowest and best bidder. The Ethics Law also prohibits the investment banker from having an interest in an OHFA contract. From the information you have provided, it does not appear that the investment banker would have an interest in, or occupy a position of profit in the prosecution of, an OHFA contract. R.C. 2921.42(A)(1) and 102.03(D) and (E) prohibit a public official from authorizing grants, loans, or contracts to himself or his business associates, and from securing or soliciting benefits for himself or his business associates.

The investment banker is also prohibited from selling goods or services to OHFA except through competitive bidding. The investment banker is not prohibited from selling goods or services to other stage agencies where the goods or services are sold through competitive bidding or where he complies with the requirement of the exception set forth in R.C. 102.04(D), by filing the statement described in the section and disqualifying himself, for a period of two years from the date of the filing of his most recent statement, from participating as an OHFA board member in any matters involving public officials and employees of the state agency or agencies to which he sells goods or services.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on December 14, 2001. The Commission commends you for seeking advisory guidance, on behalf of the OHFA board, before any action that could be prohibited by law was taken.

The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42 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 feel free to contact this Office again.

Sincerely,


Jennifer A. Hardin
Chief Advisory Attorney