

OHIO ETHICS COMMISSION

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March 18, 2002

Informal Opinion 2002-INF-0318

Alfred J. Fleming, Esq.



Dear Mr. Fleming:

In a letter received by the Ohio Ethics Commission on December 3, 2001, you have requested an advisory opinion regarding a situation where Andrews Metal Products, Inc. (Andrews), a company of which you are a 20% shareholder, provides services under a contract with the Mahoning Valley Sanitary District (MVSD). You are a member of the MVSD Board of Directors.

You have asked whether MVSD can pay Andrews for goods ordered and delivered before the involved employees of either entity were aware of your connection with the other. You have also asked whether Andrews can do business with MVSD in the future.

Opinion Summary

As explained more fully below, the Ohio Ethics Law prohibits a member of the MVSD Board of Directors from having an interest in an MVSD contract. However, with respect to the pending contractual matter, because of the specific facts and circumstances you have described, the Commission has determined that you may be able to meet an exception to the Ethics Law. If you meet the exception, Andrews may complete the pending sale of supplies and services to MVSD. However, this pertains to the completion of the pending transaction only.

The most significant requirement of the exception, based on the facts that you have described, is that MVSD cannot obtain the supplies or services provided by Andrews from any other source for the same or lower cost. In order to meet this prong of the exception, you 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 Andrews were unobtainable by MVSD for the same or lower cost. In addition, R.C. 2921.42(A)(1) and 102.03(D) and (E) prohibit you from voting, discussing, deliberating, formally or informally lobbying, or taking any other action, as a member of the Board of Directors of MVSD, to secure MVSD contracts for Andrews.

With respect to future business dealings, because of your interest in Andrews' contracts, the oath of office that you were required to take as a member of the MVSD Board of Directors appears to prohibit Andrews from selling supplies or services to MVSD. However, the Ethics Commission does not have the statutory authority to apply the provision of law that sets forth your oath of office to the situation you have described. For further guidance regarding the application of your oath of office to the question you have raised, you should speak to the legal advisor for the sanitary district.

If the oath of office that you were required to take as a member of the MVSD Board of Directors does not bar Andrews from selling supplies or services to MVSD, then you continue to be subject to the prohibitions of the Ethics Law and related statutes. Where the MVSD board is required to approve the purchase or its funding, R.C. 2921.42(A)(3) would effectively prohibit Andrews from selling any goods or services to MVSD. Even if the board is not required to approve the purchase or its funding, because of your membership on the Board and the requirements of your oath, the law discourages further business transactions between Andrews and MVSD.

Facts

In your letter to the Ethics Commission, you explain that you are the President of MVSD. You also explain that you are a 20% shareholder in Andrews.

You state that, without your prior knowledge, MVSD entered into a purchase order with Andrews for the purchase of steel grating systems. You stated, in your initial letter, that the total amount of the purchase was \$12,000. In a follow-up letter to the Ethics Commission, however, you state that you subsequently discovered that MVSD purchased only some of the grates originally contemplated; therefore, the total amount of the purchase was \$8,000.

You state that the MVSD personnel received a quote for the grating system in the amount of \$32,740.00 from a company known as the Federal Iron Works Company. You further state that the MVSD personnel then decided to examine whether other metal fabricating companies would provide the grating system at a lower cost. You explain that Andrews provided a purchase order for the grating system for approximately one-third the price proposed by Federal Iron Works Company.

You state that the salesman for Andrews did not know that you were a director of MVSD and that the representative of MVSD did not know that you are a shareholder of Andrews. You explain that your ownership interest in Andrews became known to MVSD at the time an additional product was being considered by MVSD and another employee in a position superior to that of the salesman mentioned your ownership interest in Andrews to the MVSD representative.

In your follow-up letter that you faxed to the Commission, you indicate that Andrews has approximately forty (40) employees located primarily in Youngstown, Ohio, and that Andrews also employs salesmen who are located in New York and Virginia. You further indicate that you are not an employee of Andrews and that you do not maintain an office at Andrews, but that you do handle legal matters for Andrews as its attorney. You state that Andrews does not solicit the sale of its products to entities such as MVSD and does not ordinarily manufacture grates for purifier bridges such as those requested by MVSD. You also state that this was a specialty product request occasioned by the fact that MVSD received a seemingly high quote from a metal fabricator.

In both of your letters to the Commission, you request an advisory opinion concerning the situation that has already taken place, as outlined above, and any future transactions that may be contemplated between MVSD and Andrews.

Prospective Nature of Advisory Opinion

Before the Commission proceeds to provide guidance in this situation, you should be aware that the Ohio Ethics Commission cannot, in an advisory opinion, address matters that have already occurred. The Commission will render an advisory opinion generally in response to a hypothetical question or a question that involves the prospective conduct of the requester. Ohio Ethics Commission Advisory Opinions No. 75-037 and 94-002. The Commission has explained that its function in rendering an advisory opinion is not a fact-finding process and it cannot, in an advisory opinion, determine whether a public official or employee has violated a criminal law. Id.

An advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes, and sets forth the standards that a public official or employee must observe to avoid violating these laws in a given set of circumstances. Adv. Ops. No. 75-037, 90-013, 92-003, and 92-015. If a question is raised with regard to activity that has already occurred, the Ethics Commission can only act through its confidential investigative authority to determine whether the facts indicate that the Ethics Law may have been violated and to refer the matter for prosecution. Adv. Ops. No. 92-003 and 94-002.

For these reasons, the Commission generally will not provide advisory opinions in response to questions that concern past activity. Because your question involves a transaction begun but not yet completed, the Commission will provide general guidance to you about the pending portion of the transaction and about future transactions. However, the advisory guidance has no application to the matters that have already occurred.

Application of Ethics Law and Related Statutes to Board of Directors of a Sanitary District

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:

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[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.

A sanitary district organized in accordance with R.C. Chapter 6115. is a political subdivision of the state. 1994 Ohio Op. Att'y Gen. No. 94-057. Therefore, a sanitary district is a public agency for purposes of R.C. Chapter 102.

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, a sanitary district is a political subdivision of the state. See R.C. Chapter 6115.

Members of the MVSD Board of Directors are appointed pursuant to R.C. 6115.103. Before undertaking his duties, a member of a sanitary district board of directors must take an oath of office. R.C. 6115.11. The duties performed by the board of directors of a sanitary district, as set forth in Chapter 6115. of the Revised Code, involve the exercise of the sovereign authority of the state. Therefore, an MVSD board member is a public official for purposes of Chapter 102. because he is "appointed to an office" of MVSD. A member of the MVSD Board of Directors is also a "public official" for purposes of R.C. 2921.42 and 2921.43 because he is an "appointed officer" of MVSD.

Business Relationship Between MVSD and Andrews

You have asked the Commission two questions. The first deals with a pending contract, wherein Andrews provided goods to the MVSD without your knowledge. In that situation, you have stated that the representative of MVSD was unaware of your connection with Andrews, and the salesperson at Andrews was unaware of your service to MVSD. The second addresses future contracts between Andrews and MVSD. Based upon your request, it is reasonable to believe that the relevant staff at MVSD now have full knowledge of your connection with Andrews, and at Andrews have full knowledge of your connection with MVSD.

This opinion will first consider the pending contract.

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

You are directed to 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.

As stated above, you, as a member of the Board of Directors of MVSD, are a "public official" subject to the prohibitions of R.C. 2921.42.

The term "public contract" includes any purchase or acquisition of property or services "by or for the use of" any political subdivision. R.C. 2921.42(G)(1). The sanitary district's purchase of supplies or services from Andrews falls within the definition of "public contract" for purposes of R.C. 2921.42.

The Ethics Commission has held that an "interest" under R.C. 2921.42 must be definite and direct, and may be pecuniary or fiduciary in nature. See Adv. Ops. No. 78-005 and 81-008. As a shareholder of Andrews, you would have an interest in the contracts of Andrews. See Adv. Op. No. 93-001. Therefore, unless you meet the exception described below, you would have a prohibited interest in MVSD's acquisition of supplies or services from Andrews.

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

R.C. 2921.42(C) provides an exception to R.C. 2921.42(A)(4), as follows:

- (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. Division (C)(2) is of particular note. Division (C)(2) requires that the supplies or services are unobtainable elsewhere at the same or lower cost, or furnished as part of a continuing course of dealing.

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

Division (C)(2) can be met by showing either that the contract is a continuing course of dealing established before the public official was connected with the public employer or that the supplies or services are unobtainable elsewhere for the same or lower cost. With respect to the pending contract you have described, the continuing course of dealing prong of Division (C)(2) cannot be met. Adv. Op. No. 82-007. Therefore, in order to meet the requirements of R.C. 2921.42(C)(2), you must be able to show that the goods or services acquired by MVSD from Andrews are unobtainable elsewhere for the same or lower cost.

You must be able to show, by some objective standard such as a fair and open solicitation of appropriate vendors, that MVSD could not obtain the services and supplies provided by Andrews from any other source for the same or lower cost. Adv. Op. No. 86-002. 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.

In your letter to the Ethics Commission, you explain that Andrews proposed to perform under the contract at a price that was roughly one-third of that quoted by another vendor. You should note that the "unobtainable elsewhere" prong of R.C. 2921.42(C)(2) requires that there be a fair and open solicitation of other vendors, and that the supplies or services provided by Andrews are unobtainable by MVSD from another vendor for the same or lower cost.

Other Requirements of R.C. 2921.42(C)

Where you can meet the requirements imposed by Division (C)(2), you must, in addition, comply with the other provisions of R.C. 2921.42(C). R.C. 2921.42(C)(1) requires that the supplies or services are necessary purchases for the MVSD. Division (C)(3) requires that the treatment provided by Andrews to MVSD is as good as or better than the treatment provided by Andrews to its other clients or customers.

Division (C)(4) requires that the transaction be conducted at arm's length, that MVSD has full knowledge of your interest, and that you take no part in the deliberations and decisions of MVSD with respect to the contracts. 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 manner in which Andrews conducts business with MVSD must be similar to the manner in which it conducts business with other entities, and the terms and conditions of the contracts between

Andrews and MVSD must be similar to the terms and conditions of standard contracts for similar supplies or services. Second, MVSD must have full knowledge of your interest in its contract with Andrews. Third, you cannot take any part in the decisions of MVSD with respect to the contracts. You are prohibited from cosigning a check written to pay for goods or services provided by Andrews. Adv. Op. No. 91-002. You are also prohibited from formally or informally using your position on the board to secure a contract for Andrews. This final prong of the exception, coupled with the application of R.C. 2921.42(A)(1) and 102.03(D), as discussed below, places stringent restrictions on all public officials and employees who have a financial or fiduciary interest in a particular matter pending before their public boards.

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 the pending MVSD contract in which you have an interest.

Using Public Position to Secure a Contract or Benefit—R.C. 2921.42(A)(1) and 102.03(D) and (E)

Assuming that you have met the exception discussed above, the prohibitions in R.C. 2921.42(A)(1), and R.C. 102.03(D) and (E), must also be observed.

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 of any public contract in which he, a member of his family, or any of his business associates has an interest.

As set forth above, you would be considered to have an interest in the contracts of Andrews. Accordingly, you are prohibited by R.C. 2921.42(A)(1) from voting, discussing, deliberating, formally or informally lobbying, or taking any other action, as a member of the board of directors of MVSD, to secure the MVSD contract for Andrews. Adv. Ops. No. 79-005 and 90-003. You are prohibited from signing the check written by MVSD to pay Andrews, from recommending Andrews to other MVSD officials or employees, and from using your position of authority over other MVSD officials or employees, in any other way, to secure business for Andrews.

Divisions (D) and (E) of Section 102.03 of the Revised Code provide:

- (D) 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.

- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

As stated above, you, as a member of the Board of Directors of MVSD, are a "public official" subject to the prohibitions of R.C. 102.03.

The term "anything of value" is defined, for purposes of R.C. 102.03 in R.C. 1.03, to include money and every other thing of value. See R.C. 102.01(G). A pecuniary interest in a private business, and the benefit of a contract to that business, 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) 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. R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting anything of value if the thing of value could manifest a substantial and improper influence with respect to the person's duties. See Adv. Ops. No. 91-010, 92-008, 92-018, and 97-001. 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 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, the thing of value must also be of a "substantial" nature. See Adv. Ops. No. 86-011 and 92-014. In your situation, the pecuniary benefits that would accrue as a result of your interest in the contracts of Andrews would be substantial.

Therefore, R.C. 102.03(D) and (E) prohibit you from: (a) using public time, facilities, personnel, or resources to perform any work for Andrews; (b) using your relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding Andrews; (c) discussing, deliberating, or taking any action, as an MVSD official, on any matter involving Andrews; and (d) using your public position or authority in any other way to secure a benefit for Andrews. Adv. Op. No. 96-004.

Future Business Relationships between MVSD and Andrews

You have also asked about future business dealings between Andrews and MVSD. As stated above, a director of the board of trustees of a sanitary district must take the oath of office described in R.C. 6115.11. It is important to note that the oath includes a statement that a director of a sanitary district "will not be interested directly or indirectly in any contract let for

the purpose of carrying out sections 6115.01 to 6115.79, inclusive, of the Revised Code.” R.C. 6115.11 (emphasis added). There does not appear to be any exception to this statement in the oath of office. Although this provision of law appears to place a significant restriction on Andrews’ ability to engage in future business dealings with the MVSD, the Ethics Commission does not have the statutory authority to apply R.C. 6115.11 to the situation you have described. For further guidance regarding the application of your oath of office to the question you have raised, you should speak to the legal advisor for the sanitary district.

If the legal advisor determines that your oath of office is not a bar to future business between Andrews and MVSD, even though each party is now aware of your affiliation with the other, you must be able to comply with all of the restrictions discussed above as they apply to those transactions. Further, you should be aware of R.C. 2921.42(A)(3), which provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid.

R.C. 2921.42 (A)(3) prohibits a public official, during his term of office and for one year thereafter, from profiting from a contract that was awarded by the board on which he serves, unless the contract was competitively bid and was awarded to the party that submitted the lowest and best bid. A public official occupies a position of profit in a public contract when he will realize a pecuniary advantage, gain, or benefit that is a definite and direct result of the public contract. Adv. Ops. No. 92-013 and 92-017. The Ethics Commission has held that a person with an ownership interest in a business occupies a position of profit in the contracts of the business for purposes of R.C. 2921.42(A)(3). Adv. Ops. No. 90-003 and 93-001. In the situation that you have presented, as the owner of twenty percent of Andrews, you would profit from any contract awarded to Andrews. See Adv. Op. No. 93-001.

A public official or board is considered to have “authorized” a public contract for purposes of R.C. 2921.42(A)(3) where the public contract could not have been awarded without the approval of the public official, the board of which he is a member, or the position in which he serves. Adv. Ops. No. 87-004, 92-008, and 92-012. Therefore, the restriction in R.C. 2921.42(A)(3) would apply to you for any contract you authorized. It would also apply for any contract authorized pursuant to the approval of the Board of Directors of MVSD while you are a member thereof, regardless of whether you abstained from matters before the board involving the authorization of the contract. Adv. Op. No. 2000-02. See also R.C. 2921.42(A)(1) (discussed above).

From a discussion with the Treasurer of MVSD, the Commission understands that some contracts are approved by the Board of Directors.¹ Also, one director is required to sign each check that is written from MVSD's account. R.C. 2921.42(A)(3) prohibits you from occupying a position of profit in any contract that would have to be approved by the MVSD Board of Directors, or approved or signed by you, unless the contract is let by competitive bidding to the lowest and best bidder. The exception in R.C. 2921.42(C), discussed above, does not apply to this prohibition. The practical result of this prohibition is that Andrews could not sell goods or services to MVSD, where the contract would have to be authorized by the Board of Directors, or where you would have to approve or sign contracts or payments to Andrews, except through competitive bidding.

Finally, from your initial correspondence, it appears that neither the MVSD staff nor Andrews was aware of the potential conflict of interest a member of the Board faced in their efforts to secure a significantly less costly item needed by MVSD. However, both your oath of office and the Ethics Law discourage Andrews from engaging in future business dealings with MVSD. While Andrews should be paid for the goods it has already provided, where you can meet the requirements in the law as applied to the facts you have presented, this is in large part because the employees involved in the transaction were unaware of your connections to each entity. Now it is clear that each entity is aware of your connection to the other. For these reasons, and because of past problems experienced by MVSD, your oath of office and the Ethics Law would discourage future transactions.

Conclusion

As explained above, the Ohio Ethics Law prohibits a member of the MVSD Board of Directors from having an interest in an MVSD contract. However, with respect to the pending contractual matter, because of the specific facts and circumstances you have described, the Commission has determined that you may be able to meet an exception to the Ethics Law. If you meet the exception, Andrews may complete the pending sale of supplies and services to MVSD. However, this pertains to the completion of the pending transaction only.

The most significant requirement of the exception, based on the facts that you have described, is that MVSD cannot obtain the supplies or services provided by Andrews from any other source for the same or lower cost. In order to meet this prong of the exception, you 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 Andrews were unobtainable by MVSD for the same or lower cost. In addition, R.C. 2921.42(A)(1) and 102.03(D) and (E) prohibit you from voting, discussing, deliberating, formally or informally lobbying, or taking any other action, as a member of the Board of Directors of MVSD, to secure MVSD contracts for Andrews.

¹ With respect to the pending transaction, the Commission understands from a discussion with the MVSD treasurer that the board of directors of MVSD will have no role in authorizing these types of contracts or the contract with Andrews or any payment to Andrews. Therefore, it is unnecessary to discuss the application of R.C. 2921.42(A)(3).

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With respect to future business dealings, because of your interest in Andrews' contracts, the oath of office that you were required to take as a member of the MVSD Board of Directors appears to prohibit Andrews from selling supplies or services to MVSD. However, the Ethics Commission does not have the statutory authority to apply the provision of law that sets forth your oath of office to the situation you have described. For further guidance regarding the application of your oath of office to the question you have raised, you should speak to the legal advisor for the sanitary district.

If the oath of office that you were required to take as a member of the MVSD Board of Directors does not bar Andrews from selling supplies or services to MVSD, then you continue to be subject to the prohibitions of the Ethics Law and related statutes. Where the MVSD board is required to approve the purchase or its funding, R.C. 2921.42(A)(3) would effectively prohibit Andrews from selling any goods or services to MVSD. Even if the board is not required to approve the purchase or its funding, because of your membership on the Board and the requirements of your oath, the law discourages further business transactions between Andrews and MVSD.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on March 1, 2002. The Commission commends you for requesting guidance before taking any actions that could be prohibited by law.

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