

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

July 18, 2003

Informal Opinion 2003-INF-0718-2

James Armeni
Auditor, City of Salem

Dear Mr. Armeni:

In a letter that was received by the Ohio Ethics Commission on April 3, 2003, you ask whether the Ohio Ethics Law and related statutes prohibit you from accepting a position on the Board of Directors (Board) of Farmers National Bank of Canfield (Bank) in light of the fact that you are the Auditor for the City of Salem (City) and the City uses the Bank as public depository.

Brief Answer

As explained below, the conflict of interest protections to the public embodied in R.C. 102.03(D) and (E) prohibit you from accepting a position on the Board of a bank that the City uses as a public depository.

Facts

You state that for six years you have served as City Auditor and will run unopposed in the November 2003 election. You also state that your office manages over 40 different funds for the City by monitoring cash flow, revenue, and expenses. You further state that the majority of your duties include bi-weekly payroll processing and payments to vendors.

You state that the Bank that may appoint you to its Board is one of several institutions that serve as a public depository for City funds. You also state that the Bank maintains the City's checking account and several of its investments. You further state the City Treasurer is in frequent contact with the local Bank branch manager regarding City investments but the City has no direct communications with the Board of the Bank. You have not stated whether you would be compensated for serving on the Board of the Bank.

Interest in a Public Contract—R.C. 2921.42(A)(4)

R.C. 2921.42(A)(4) provides that no public official shall:

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, in R.C. 2921.01(A), for purposes of R.C. 2921.42, to include an elected or appointed officer or employee of a political subdivision of the state. A city auditor is a “public official” for purposes of R.C. 2921.42.

The term “public contract” is defined for purposes of R.C. 2921.42, to include “the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of a political subdivision.” The deposit of public funds by a political subdivision in a bank serving as a public depository falls within the definition of a “public contract.” Ohio Ethics Commission Advisory Opinions No. 85-007 and 92-008.

An “interest” that is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. Adv. Op. No. 81-008. A member of the board of directors of a private corporation has a direct and definite, fiduciary, and sometimes pecuniary, interest in the contracts of that corporation. Adv. Ops. No. 83-003, 87-003, and 88-008.

Therefore, if you were to become a member of the Board of the Bank, you would have an “interest” in the contracts of the bank that you serve for purposes of R.C. 2921.42. Adv. Op. No. 92-008. If you were compensated for your service on the Board, you would have a pecuniary interest in the contracts of the bank. Under such a circumstance, because the City uses the Bank as a public depository and you are the City Auditor, R.C. 2921.42(A)(4) prohibits you from becoming a member of the Board of the Bank. However, the Uniform Depository Act, R.C. Chapter 135., includes an exemption from the prohibitions of R.C. 2921.42(A)(4) for officers, directors, stockholders, employees, and owners of interests in public depositories.

Exemption to Having an Interest in a Public Contract—R.C. 135.11

R.C. 135.11 reads:

An officer, director, stockholder, employee, or owner of any interest in a public depository receiving inactive, interim, or active deposits pursuant to sections 135.01 to 135.21, inclusive, of the Revised Code shall not be deemed to be interested, either directly or indirectly, as a result of such relationship, in the deposit of such inactive, interim, or active deposits of public moneys for the purpose of any law of this state prohibiting an officer of the state or of any subdivision from being interested in any contract of the state or of the subdivision.

Therefore, because of the exception in R.C. 135.11, a public official who is member of the board of directors of a bank that is a public depository for the political subdivision that he serves is not considered to have an interest in the deposit of public funds by his political subdivision. Adv. Ops. No. 85-007 and 92-008. In the instant situation, because of the exception that R.C. 135.11, R.C. 2921.42(A)(4) would not prohibit you from serving on the Board of the Bank despite the fact that the City uses the Bank as public depository and you are the City Auditor.

However, the exception provided by R.C. 135.11 applies only to the prohibition against a public official having an "interest" in a public contract with his own political subdivision. R.C. 135.11 does not provide an exemption to all of the protections to the public embodied in the Ohio Ethics Law and related statutes. As explained below, because of your authority and duties as Auditor, R.C. 102.03(D) will prohibit you from serving on the Board of the Bank despite the exemption provided by R.C. 135.11.

Using Authority to Secure Things of Value—R.C. 102.03(D)

Whenever a public official or employee engages in private outside employment or business activity, the conflict of interest restrictions contained in of R.C. 102.03(D) and (E) are implicated. R.C. 102.03(D) and (E) read:

- (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.

The term "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 or is an employee of any political subdivision R.C. 102.01(B). As City Auditor, you are a "public official or employee" for purposes of R.C. 102.03(D) and (E). Adv. Ops. No. 84-004 and 91-008.

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. R.C. 102.01(G). The Ethics Commission has held that the economic impact of a decision by a public official is a thing of value for purposes of R.C. 102.03. Adv. Ops. No. 85-012, 90-002, and 90-012. In addition, the deposit of City funds in a public depository is a thing of value for purposes of R.C. 102.03(D) and (E). Adv. Ops. No. 92-008.

R.C. 102.03(D) does not speak in terms of a public official's or employee's "interest," but rather prohibits a public official or employee from taking any action, formally or informally, to secure a thing of value for himself or an entity that he serves in a private capacity 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. Adv. Ops. No. 88-004 and 91-004. The Ethics Commission has explained that the Ohio Ethics Law and related statutes do not prohibit public officials and employees from engaging in outside private business activity provided that no conflict of interest exists between the official's or employee's duties as a public official or employee and the interests that he serves in his private capacity. Adv. Op. No. 96-004.

The Ethics Commission has explained that R.C. 102.03(D) prohibits a public official or employee from participating in any matter that would provide a benefit to an entity that he serves in a fiduciary capacity, such as trustee. Adv. Ops. No. 89-005, 90-012, and 92-004. R.C. 102.03(E) prohibits a public official from using his unique access to other officials, and employees, of the public agency he serves to solicit anything of value for an entity that he serves in a fiduciary capacity. Therefore, if you were to serve on the Bank's Board, R.C. 102.03(D) and (E) would prohibit you from participating, as City Auditor, in matters before the City that could affect, or involve, the financial interests of the Bank and from soliciting anything of value for the Bank.

However, the Ethics Commission has explained a public official's or employee's withdrawal from consideration of matters that could pose a conflict of interest must not interfere with the official's or employee's performance of his duties. Adv. Ops. No. 89-010 and 90-002. The Commission has identified situations where a public official's or employee's private interests would be of such a character as to manifest a substantial and improper influence upon the public official or employee with regard to his official decisions and responsibilities. In these situations, the public official or employee is unable, because of the authority of the public position he holds, to withdraw from matters in which he has a conflict of interest. In such situations, R.C. 102.03(D) and (E) prohibits the public official or employee from engaging in the private outside business activity. Adv. Ops. No. 92-008 (a township clerk is prohibited from holding employment with a bank that is a depository of township funds) and 92-009 (the Executive Director of the Ohio State Barber Board is prohibited from owning and operating a barber shop). See also Adv. Ops. No. 84-009, 88-002, and 89-015.

The application of the prohibitions in R.C. 102.03(D) and (E) depends upon the facts and circumstances of each individual situation. Adv. Op. No. 87-008. Therefore, it is necessary to examine the duties that you perform in your position as City Auditor to determine whether your withdrawal from consideration of matters that could involve the Bank would interfere with the performance of your duties as City Auditor.

Duties of a City Auditor

A city auditor is a member of the executive branch of a city operating under a statutory plan of government. R.C. 733.01. A city auditor is elected for a term of four years and must be an elector of the city. R.C. 733.10. A city auditor is responsible for examining and auditing the accounts of all city officers and departments. R.C. 733.12. A city auditor may also require evidence from any agent or employee of the city that a particular amount in question is, in fact, due. R.C. 733.13. A city auditor is responsible, under penalty of personal liability, for ensuring that the funds of the municipal corporation are properly expended. R.C. 733.14. In order to accomplish his duties, the city auditor has the power to question municipal agents or employees and to recover money from city officials. R.C. 733.13.

As stated above, the Bank maintains the City's checking account and several of its investments. It is apparent that transactions between the City and the Bank could become an issue requiring your judgment as Auditor. As stated above, as Auditor, you are personally liable for the proper expenditure of City funds. Therefore, if you were to serve on the Bank's Board, your private business interests, as a fiduciary to the Bank, would be of such a character as to manifest a substantial and improper influence upon you with regard to your official decisions and responsibilities. R.C. 102.03(D) would prohibit you from participating, as the Auditor, in matters affecting the interests of the Bank, which could arise at any time. R.C. 102.03(E) would prohibit you from using your unique access to other City officials and employees, as Auditor, to solicit any benefit for the Bank.

Because R.C. 102.03(D) would prohibit you from participating in matters affecting a Bank of which you are a Board member, you would be required to withdraw from those matters to serve on the Bank Board. You could not withdraw by delegating your authority to a subordinate employee. In order to effectively withdraw, your official duties as Auditor would have to be performed by someone at the same or higher level of authority than you. However, the official duties described above are statutorily assigned to the elected auditor. It would be impossible for you to transfer your statutory authority to another City official. Therefore, because your withdrawal would interfere with the performance of your statutorily mandated duties as City Auditor, R.C. 102.03(D) prohibits you from serving as a member of the Board of Bank that is a depository of City funds.

Conclusion

As explained above, the conflict of interest protections to the public embodied in R.C. 102.03(D) and (E) prohibit you from accepting a position on the Board of a bank that the City uses as a public depository.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on July 18, 2003. The Commission commends you for requesting guidance before taking any actions that could be prohibited by the Ethics Law.

James Armeni
July 18, 2003
Page 6

The opinion is based on the facts presented. It 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,

A handwritten signature in cursive script that reads "John Rawski".

John Rawski
Staff Attorney