

OHIO ETHICS COMMISSION

Merom Brachman, *Chair*
Sarah M. Brown, *Vice Chair*



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.ohio.gov

David E. Freel, *Executive Director*

April 14, 2004

Informal Opinion 2004-INF-0414-2

The Honorable Frank Pierce
Belmont County Prosecuting Attorney



Dear Prosecutor Pierce:

In a letter that was received by the Ohio Ethics Commission on December 15, 2003, you ask whether the Ohio Ethics Law and related statutes prohibit the Directors of the Belmont County and Jefferson County Recycling and Litter Prevention Programs (RLP's) from serving on the Board of Trustees of the Jefferson-Belmont Regional Solid Waste Management Authority (Regional Authority).

Brief Answer

As explained below, because R.C. 343.01(K)(1)(a) and (c), and 343.01(K)(2) provide exceptions to the prohibitions imposed by the Ohio Ethics Law and related statutes, the Directors of the Belmont and Jefferson RLP's are not prohibited from serving on the Board of Trustees of the Regional Authority despite the fact that the Regional Authority will make expenditures of money to, and enter into contracts with, their respective RLP's.

Facts—The Jefferson–Belmont Regional Solid Waste Authority

The Regional Authority is a regional solid management authority created under R.C. 343.011. Under the provisions of R.C. 343.011(B) and the Regional Authority's bylaws, its board of trustees is comprised of the following individuals from each participating county: (1) a representative of the boards of county commissioners; (2) the chief executive officers of the most populous municipal corporations; (3) the health commissioner of the health district with the largest territorial jurisdiction; (4) a representative chosen by a majority vote of the boards of township trustees; (5) a representative of villages; (6) a representative of the industrial, commercial, and institutional generators of solid waste; and (7) a resident of each county to represent the general interests of its citizens. The representatives of villages, solid waste generator, and citizens are appointed by a majority vote of the other four representatives of each county. R.C. 3737.54(H) provides that the board of trustees of a "regional solid waste management authority" is a "solid waste management policy committee."

You state that the Jefferson-Belmont Regional Solid Waste Authority has fourteen board members. You also state that the Belmont County Boards of Township Trustees have appointed the director of the Belmont County Recycling and Litter Prevention Program (Belmont RLP) as their representative. In addition, the four appointed representatives of Jefferson County have selected the director of the Jefferson County Recycling and Litter Prevention Program (Jefferson RLP) to be a member of the Regional Authority.

You state that the Regional Authority has made expenditures of money to the Belmont and Jefferson RLP's. The RLP directors have, in the past, requested funds from the board of the Regional Authority to operate their programs and the Regional Board has voted to make expenditures to the Belmont and Jefferson RLP's.

You state that, beginning this year, the Regional Authority will be responsible for bringing to fruition a new solid waste management plan that the Ohio Environmental Protection Agency (OEPA) has implemented. The Regional Authority will enter into formal contracts with the Belmont and Jefferson RLP's, and possibly other service providers, to implement activities that are required under the new plan.

The Purpose of an Advisory Opinion

It must be noted that you state that the Regional Authority has made expenditures of funds to the Belmont and Jefferson RLP's in the past. This advisory opinion addresses your question in light of all of the facts presented. The Ethics Commission issues advisory opinions in response to either a hypothetical or prospective question. Ohio Ethics Commission Advisory Opinion No. 75-037. These opinions guide public officials concerning their future conduct. The Commission has explained that the rendering of advisory opinions is not a fact-finding process and that the Commission cannot, in rendering an advisory opinion, determine whether a public official or employee has violated a law. *Id.* Rather, an advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes and sets forth the standards and criteria that a public official or employee must observe to avoid violating the law in a given set of circumstances. Adv. Ops. No. 90-013 and 92-015. Therefore, this opinion will not address any prior actions of the board members, but will address only future activity.

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

Your attention is first directed to R.C. 2921.42(A)(4), which 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.

Division (A)(4) of R.C. 2921.42 prohibits a public official from having an interest in a public contract entered into by a public agency with which the official is connected.

R.C. 2921.01(A) defines the term "public official" as any elected or appointed officer, or employee, or agent of the state or any political subdivision, which includes a statutorily created regional authority. Adv. Op. No. 89-004.

R.C. 3734.54(C) states that except for the purposes of Chapters 102., 2744., and 2921. of the Revised Code, membership on a solid waste management policy committee of a joint solid waste management district does not constitute holding public office or employment under state law. As set forth above, under the provisions of 3737.54(H), a "solid waste management policy committee" includes the board of trustees of a regional solid waste management authority. Therefore, in the instant situation, members of the board of trustees of the Regional Authority are "public officials" subject to the prohibitions imposed by R.C. 2921.42(A)(4).

R.C. 2921.42(G)(1)(a) defines the term "public contract" as the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of any agency or instrumentality of the state or any of its political subdivisions. A public agency's expenditure of money to another public agency is a "public contract" for purposes of R.C. 2921.42(A)(4) because the proper use of the money results in the purchase or acquisition of services by or for the use of the granting public agency. See Adv. Op. No. 89-006 (concerning grants from the Ohio Department of Mental Health to fund graduate level programs at state colleges and universities). See also Adv. Ops. No. 82-004, 85-002, and 87-003.

Therefore, the expenditure of money by the Regional Authority to the Belmont and Jefferson RLP's, and formal contracts entered into between the Regional Authority and the Belmont and Jefferson RLP's to implement activities that are required under the new OEPA plan, are public contracts for purposes of R.C. 2921.42(A)(4). The Regional Authority will be acquiring services from the Belmont and Jefferson RLP's as a result of expending the money and entering into the contracts.

R.C. 2921.42(A)(4) prohibits a public official from having an interest in the profits or benefits of a public contract entered into by a political subdivision with which he is "connected." See Adv. Op. No. 89-004 (the purpose of R.C. 2921.42 is best served if the statute is interpreted as prohibiting a public official from having an interest in contracts with all political subdivisions, governmental agencies, and instrumentalities with which he is connected). 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. Ops. No. 81-008 and 89-004.

In the instant situation, as county employees, the directors of the Belmont and Jefferson RLP's will have fiduciary interests in the expenditure of funds from, and contracts entered into between, the Regional Authority to their respective RLP's. However, R.C. 343.01(K)(1) provides two exceptions to R.C. 2921.42.

R.C. 343.01(K)(1)(c) provides that a member of the board of trustees of a regional solid waste management authority shall not be considered to be directly or indirectly interested in, or improperly influenced by, the expenditure of money made by the authority for the benefit of any county forming the district of which that member is also a member, officer, or employee. In addition, R.C. 343.01(K)(1)(a) provides that a member of the board of trustees of a regional solid waste management authority shall not be considered to be directly or indirectly interested in a contract under R.C. Chapter 343., or R.C. Sections 307.15, or 3734.52 to 3734.575, that is entered into between the district, and any county forming the district, of which that member is also a member, officer, or employee.

Application of Exception

As stated above, the Belmont County Boards of Township Trustees have appointed the director of the Belmont RLP as their representative on the Regional Authority. In addition, the four appointed representatives of Jefferson County have selected the director of the Jefferson RLP to serve on the Authority. As explained above, the Regional Authority has made expenditures of money to, and for the benefit of, both the Belmont and Jefferson RLP's. As also explained above, in addition to making expenditures of money, you expect that the Regional Authority will enter into formal contracts with the Belmont and Jefferson RLP's to implement activities that are required under the new OEPA plan.

R.C. 2921.42(A)(4) would generally prohibit a county employee from serving on a Regional Authority that makes grants to the county by which he is employed. However, because of the exceptions in R.C. 343.01(K)(1)(a) and (c), the directors of the Belmont and Jefferson RLP's will not be considered to have an interest in the expenditure of funds from, and contracts entered into between, the Regional Authority to their respective RLP's.

Other Ethics Law Requirements

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, a family member, or a business associate has an interest. A public official's outside employer, whether a private entity or public agency, is his business associate for purposes of R.C. 2921.42(A)(1). See Adv. Op. No. 89-006. Therefore, R.C. 2921.42(A)(1) would generally prohibit a county employee, who also serves as a member of a regional authority, from participating in the authorization of public contracts from the regional authority to the county by which he is employed.

Further, R.C. 102.03(D) prohibits a public official or employee from using or authorizing the use of the authority or influence of his public position to secure anything of value if the thing of value is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. R.C. 102.03(D) prohibits a public official from participating in any matter that would provide a definite and direct pecuniary benefit to an entity that he serves as an officer

or employee. Adv. Ops. No. 89-006, 90-012, and 92-004. Therefore, R.C. 102.03(D) prohibits public official or employee from participating in matters before his public agency that will secure a definite and direct pecuniary benefit for either his private or public outside employer. See Adv. Ops. No. 89-008 and 91-006, respectively.

However, as set forth above, R.C. 343.01(K)(1)(c) provides that a member of the board of trustees of a regional solid waste management authority shall not be considered to be improperly influenced by the expenditure of money made by the district for the benefit of any county forming the district of which that member is also a member, officer, or employee. In addition, R.C. 343.01(K)(2) provides that a county is not considered a business associate, for purposes of R.C. 2921.42, of a person who is concurrently a member of the board of directors of the solid waste district (which includes a regional solid waste management authority) and an employee of a county that is included within the district. R.C. 343.01(K)(2) provides that a person in those concurrent positions "may participate fully in deliberations concerning and vote on or otherwise participate in the approval or disapproval of any contract or expenditure of funds."

Therefore, in the instant situation, because of the exceptions in R.C. 343.01(K)(1) and (2), the directors of the Belmont and Jefferson RLP's are not prohibited from participating in matters before the Regional Authority that would affect the Regional Authority's expenditure of funds to, and contracts entered into with, their respective RLP's.

It must be stressed however, that R.C. 343.01(K)(1)(a) and (c), and 343.01(K)(2), provide exceptions to the Ethics Law and related statutes "only to the extent that any interest or influence could arise from his public office or employment with the political subdivision" that receives the expenditure of money, or the award of a contract from the district for the benefit of any county forming the district of which that member is also a member, officer, or employee. R.C. 343.01(K)(3) specifically provides:

Nothing in (K)(1) or (2) of this section shall be construed to exempt any member of the board . . . of trustees . . . of a solid waste management district from a conflict of interest arising because of a personal or private business interest.

It is clear that the General Assembly has crafted an exception to the Ohio Ethics Law that will allow public officials and employees to simultaneously serve on solid waste management authorities, and fully participate in matters that affect the public agencies they serve. However, the General Assembly has left intact the prohibitions in the Ohio Ethics Law and related statutes that will apply to conflicts of interest that arise outside of the person's public office or employment. For example, a board member of a Regional Authority is prohibited from having an interest in the expenditure of money from the Regional Authority to a private company that he owns or by which he is employed.

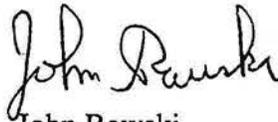
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Conclusion

As explained above, because R.C. 343.01(K)(1)(a) and (c), and 343.01(K)(2) provide exceptions to the prohibitions imposed by the Ohio Ethics Law and related statutes, the Directors of the Belmont and Jefferson RLP's are not prohibited from serving on the Board of Trustees of the Regional Authority despite the fact that the Regional Authority will make expenditures of money to, and enter into contracts with, their respective RLP's.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 7, 2004. 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