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June 27, 2008

Informal Opinion 2008-INF-0627-1

The Honorable Nancy H. Rogers
Attorney General, State of Ohio

Dear Attorney General:

On June 12, 2008, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that your husband owns stock in companies that are regulated by, and may do business with, the Attorney General's Office (Office). You have explained that your husband owns less than one percent of each company's common stock. You have explained that you have placed a list of the companies in which your husband owns stock on file with the Office.

You have asked whether the Ethics Law and related statutes prohibit you from participating, as Attorney General, in matters before the Office affecting either the companies in which your husband owns stock or the industries in which they are engaged.

Brief Answer

As explained more fully in this opinion, provided that your husband's relationship to a company is solely as a stockholder who owns less than one percent of the company's outstanding publicly traded stock and you meet the other elements of the exception in R.C. 2921.42(B) that are described below, the Ethics Law and related statutes do not prohibit you from participating in regulatory or contractual matters before the Office affecting either the company or the industry in which the company is engaged.

Conflicts of Interest and Authorization of Contracts

The provisions of the Ethics Law and related statutes that are most applicable to your question are R.C. 102.03(D), involving conflicts of interest, and R.C. 2921.42(A)(1), involving public contracts. As Attorney General for the State of Ohio, you are a "public official" subject to both of these restrictions. R.C. 102.01(B) and (C) and R.C. 2921.01(A).

R.C. 102.03(D) states:

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.

"Anything of value" includes the financial impact, whether beneficial or detrimental, of a public agency's decisions. Ohio Ethics Commission Advisory Opinions No. 85-012, 90-002, and 90-012. The financial and fiduciary impact of regulatory decisions, including decisions to investigate, sue, or settle lawsuits with a particular company, are within the definition of anything of value. Any payment that a business receives for providing goods or services to the Office constitutes "anything of value." Adv. Op. No. 96-005.

R.C. 2921.42(A)(1) provides that no public official shall knowingly:

Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public official's business associates has an interest.

A "public contract" includes any purchase or acquisition of goods or services by or for the use of a public agency. R.C. 2921.42(I)(1)(a). Adv. Op. No. 96-005.

The Ethics Commission has explained that a public official "authorizes" a contract where the contract could not have been awarded without the approval of the official or position in which the official serves. Adv. Ops. No. 88-008, 91-009, and 92-017. As Attorney General, you are ultimately responsible for the authorization of all contracts for the Office.¹

The prohibition in R.C. 102.03(D) applies if a public official's family member is a stockholder in a business that is regulated by or doing business with the agency she serves. R.C. 2921.42(A)(1) applies if the business sells goods or services to or for the use of the agency.

The Commission has explained that R.C. 102.03(D) prohibits a public official from taking actions within the scope of her office to secure a thing of value for a close family member, including her husband, where the thing of value is of such a character as to manifest a substantial and improper influence on the official with respect to her public duties. Adv. Op. No. 98-002. The relationship between a public official and her husband is so close that her objectivity and

¹ There is a statutory provision, R.C. 109.04, which provides that, during the disability of the Attorney General, the first assistant Attorney General shall perform the duties of the office, exercising all the rights, privileges, and powers conferred upon the Attorney General by the Ohio Revised Code. However, within the facts you have presented, it is not necessary for the Commission to further discuss this provision. R.C. 109.04 is discussed in another advisory opinion issued to you on today's date.

independence of judgment would be impaired if she were to make decisions or recommendations, or otherwise take action, on any matter that would result in a definite and direct benefit or detriment to a business in which her husband is a significant investor or owner. See Adv. Op. No. 90-005 (R.C. 102.03(D) prohibits a school board member from using his position of authority over school district employees to secure contracts for a company owned by the board member or his close family members).

R.C. 102.03(D) also prohibits a public official from acting on a matter if her own financial interests or those of a business associate will be definitely and directly affected by the outcome of the matter. However, with respect to business associates, the application of the prohibition depends on the nature and extent of the official's connection to the associate. For example, an official would be barred from participating in matters directly affecting a company of which she is a significant stockholder or investor. Adv. Ops. No. 93-001. The official would not be prohibited from participating in matters affecting a company if her relationship to the company is that of an ordinary customer because such a relationship would not manifest a substantial and improper influence upon the official. Adv. Op. No. 98-001.

As applied to your situation, R.C. 102.03(D) prohibits you from using your position to secure a definite and direct benefit for or avoid a detriment to your husband. If a matter before the Office were to result in a definite and direct benefit or detriment to your husband, you would be unable to perform the duties of your public position relative to that matter.

You have stated that your husband owns stock in companies, and that the Office investigates, has sued, or may sue the companies or the industries in which they are engaged. However, you have described your husband's stock ownership as comprising less than one percent of the common stock of each company.

The Commission has previously addressed issues presented by modest stockholdings. Provided that your husband has no other relationship to a company, such as an officer or director, his interest as a fractional stockholder is so limited that he would not receive a definite and direct benefit from decisions of the Office related to the industry in which the company is engaged. See Adv. Op. No. 92-009 (a public official engaged in a profession is not prohibited from participating in general matters that have a uniform effect on the practice of the profession). Further, his interest in the company is so limited that, for purposes of R.C. 102.03(D), he would not receive a definite and direct benefit from decisions of the Office related to the company itself. Adv. Op. No. 93-001 (a public official who owns a nominal amount of stock in a bank is not prohibited from participating in matters that affect the bank). Contra Adv. Op. No. 91-004 (a public official whose husband is both a management employee and a stockholder of a company is prohibited from acting on matters that affect the company because of her husband's dual connection to it).

Therefore, because your husband owns only a fractional stockholding interest in these companies, R.C. 102.03(D) does not prohibit you from participating, as Attorney General, in decisions of the Office related to the companies and the industries in which they are engaged.

You have explained that the Office may also enter into contracts with these companies. R.C. 2921.42(A)(1) applies to this question. Division (A)(1) prohibits a public official from authorizing a public contract if a "member of [her] family" has an interest in the contract. Any contract under which the Office purchases or acquires goods or services is a "public contract." Generally, again, R.C. 2921.42(A)(1) would prohibit you, as Attorney General, from authorizing, or taking any action to secure authorization of, any contracts for a company if your husband would have an interest in the contracts.

However, there is a stockholding exception to this prohibition in R.C. 2921.42(B), which provides:

- (B) In the absence of bribery or a purpose to defraud, a public official, member of a public official's family, or any of a public official's business associates shall not be considered as having an interest in a public contract or the investment of public funds, if all of the following apply:
 - (1) The interest of that person is limited to owning or controlling shares of the corporation, or being a creditor of the corporation or other organization, that is the contractor on the public contract involved, or that is the issuer of the security in which public funds are invested;
 - (2) The shares owned or controlled by that person do not exceed five per cent of the outstanding shares of the corporation, and the amount due that person as creditor does not exceed five per cent of the total indebtedness of the corporation or other organization;
 - (3) That person, prior to the time the public contract is entered into, files with the political subdivision or governmental agency or instrumentality involved, an affidavit giving that person's exact status in connection with the corporation or other organization.

The burden to demonstrate that the exception in R.C. 2921.42(B) can be met lies with the public official. You can meet the exception in R.C. 2921.42(B) provided that you can show that: (1) your husband's interest in a company is limited to holding stock; (2) your husband owns less than five percent of the outstanding shares of the corporation; and (3) the affidavit described in Division (B)(3) has been filed. See Ohio Ethics Commission Informal Advisory Opinion issued to Marsha P. Ryan (August 29, 2007) (attached).

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The affidavit should disclose your husband's "exact status" as a stockholder of any companies with which the Office may contract. The affidavit should be filed with the Office. Ordinarily, it can be filed with the chief executive officer of a public agency. In your case, because you are the chief executive officer, the affidavit can be filed with the first assistant attorney general, who is authorized by law to act as Attorney General in the event of a disability of the sitting officeholder. R.C. 109.04.

As long as you meet the exception in R.C. 2921.42(B), your husband would not have an interest in a contract entered into by the Office. In that case, R.C. 2921.42(A)(1) does not apply to you and you are not prohibited from authorizing or participating in the authorization of any contracts between the Office and a company in which he is a stockholder.

Conclusion

As explained more fully above, provided that your husband's relationship to the company is solely as a stockholder who owns less than one percent of a company's outstanding publicly traded stock and you can meet the other elements of the exception in R.C. 2921.42(B), the Ethics Law and related statutes do not prohibit you from participating in regulatory or contractual matters before the Office affecting either the company or the industry in which the company is engaged.

This staff advisory opinion represents the views of the undersigned, and has been reviewed by the Chair, Vice-Chair, and Executive Director of the Commission, based on the facts presented and the precedent of the Commission. This opinion provides you with advice under the provisions of R.C. 102.08. It is subject to review for further advice, if necessary, by the Advisory Committee at its meeting on July 2, 2008, and the Ethics Commission at its meeting on July 18, 2008. 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.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

cc: Members of the Commission
David E. Freel, Executive Director

Enclosure: Informal Advisory Opinion issued to Marsha P. Ryan (August 29, 2007)