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August 12, 2010

Informal Opinion 2010-INF-0812-3

Chip Joseph
[REDACTED]

Dear Mr. Joseph:

On July 6, 2010, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you are the director of a transitional program for homeless men (program). You stated that you are also a candidate for Cuyahoga County (county) Council.

You have explained that the program has a budget of about \$1.6 million. The program receives a \$20,000 community development block grant (CDBG) from Cuyahoga County, which accounts for approximately 1.25 percent of the total budget of the program. The funds are used to subsidize the salary of one of the clinical staff members, and do not go toward your salary. You have asked whether the Ethics Law and related statutes prohibit you from continuing to serve as director of the program if you are elected to the county council position.

Brief Answer

The public contract provisions in the Ethics Law prevent those individuals who are responsible for making public purchases and expending public funds from profiting or benefiting from those purchases or expenditures, and from acting to secure such profits or benefits for themselves or closely related parties.

As explained below, within the facts you have presented, you would have an interest, but not occupy a position of profit, in the contract between the county and the program. Therefore, R.C. 2921.42(A)(3) will not prohibit you from holding both positions. Other restrictions contained within R.C. 2921.42, however, will apply to these contracts.

If the program continues to receive funding from the county, R.C. 2921.42(A)(4) would prohibit you from serving as a member of county council and director of the program *unless* you can meet the exception in R.C. 2921.42(C). As discussed below, based on the services the program provides to the county, you may be able to meet this exception. Please note that even if

you meet the exception, and can serve in both positions, R.C. 2921.42(A)(1) and 102.03(D) would prohibit you from voting, discussing, deliberating, formally or informally lobbying, or otherwise participating, as a member of the council, on matters that affect the program. R.C. 102.04(C) also prohibits you, as part of your compensated employment with the program, from representing, advocating, or performing any other services for the program on any matter that is before any agency of the county.

Profiting from a Public Contract—R.C. 2921.42(A)(3)

Because there are contracts between the county and the program, the public contract restrictions in R.C. 2921.42 would apply to you if you were to be elected to county council. See R.C. 2921.01(A) (any elected officer of any political subdivision, including a county, is a “public official”). R.C. 2921.42(A)(3) states that no “public official” shall knowingly:

During the public official’s term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by the public official or by a legislative body, commission, or board of which the public official was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

A public contract includes any purchase or acquisition of goods or services by the county. R.C. 2921.42(I)(1)(a). When a public agency sponsors grants, loans, land reutilization programs, tax abatements, and other similar programs, and acquires community improvement services in return, these are “public contracts” regardless of whether they are funded through state, federal, or other moneys. See, e.g., Ohio Ethics Commission Advisory Opinions No. 2009-06, 2001-02, 92-014, and 87-004; *State v. Lordi* (2000), 140 Ohio App.3d 561, 569, discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001). Therefore, the CDBG that the program receives from the county is a public contract.

The restriction in R.C. 2921.42(A)(3) applies to contracts that are authorized by a public official *or* a board of which he is a member, regardless of whether the official participated in the board’s authorization. A public contract is considered to be authorized by an official or legislative body if the contract could not have been awarded without the approval of the official, the public position in which he serves, or the legislative board of which he is a member. Adv. Op. No. 87-004 and 87-008. Therefore, if you were to serve on county council, this restriction will apply to any contract authorized by the council while you are a member, regardless of whether you abstain from the council’s consideration of the contract. Adv. Op. No. 87-008.

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 his legislative body, while he is a member thereof, unless the contract was competitively bid and was awarded to the party that submitted the lowest and best bid. In the absence of competitive bidding, there is no exception to R.C. 2921.42(A)(3). Adv. Op. No. 92-014.

The prohibition of R.C. 2921.42(A)(3) will apply whenever a public official realizes a financial advantage, gain, or benefit that is a definite and direct result of a public contract authorized by him *or* by a legislative body of which he is a member, if the contract was not competitively bid and awarded to the lowest and best bidder. Adv. Op. No. 89-006. A public official will be deemed to profit from a contract awarded to his employer where: (1) the establishment or operations of his employer is dependent upon receipt of the contract; (2) the creation or continuation of the official's position with his employer is dependent upon the award of the contract; (3) monies received from the contract would be used by his employer to compensate the employee or as a basis for the official's compensation; or (4) the employee would otherwise profit from the award of the contract. Adv. Ops. No. 87-004 and 88-008.

One test of the first of these parameters, whether the establishment or operations of a company or organization are "dependent" on a particular contract or funding source, is the amount of funding the company or organization receives from the source. If any one source provides twenty-five or more percent of a company's or organization's funding, the Commission concludes, absent a showing to the contrary, that the establishment or operation of the company or organization is dependent on that source of funding. If this source of funding is a public agency, and an official of the agency is also an executive employee of the company or organization, the public official occupies a "position of profit" in the prosecution of the contracts between the agency and the company or organization. This is true even if the company or organization uses funds other than those provided by the agency to compensate the employee.

Other factors may suggest that an organization is "dependent" on a source of funding even if the source provides less than twenty-five percent of the agency's funding. A public official employed by an organization that receives funding from the public agency he serves should consult with the agency to determine whether the organization is dependent on the agency's funding.

Even if a company or organization is not dependent on a public agency for its funding, an official of the agency who is also employed in an executive position with the company or organization could occupy a position of profit in the prosecuting of contracts between the employer and the agency in one of the other ways described above. If the creation or continuation of the person's position with the company or organization is dependent on the contract with the public agency he serves, the official occupies a position of profit in the contract. Also, an employee of an organization occupies a definite and direct position of profit in a contract of the organization when, for example, he receives a fee or commission from the contract, or some portion of the funds is earmarked to support his salary.

If a public official is employed with an organization that has a contract with his public agency, and organization is *not* dependent on the agency's funding, the official will not necessarily occupy a position of profit in the contracts between the agency and the organization. This is true even if the funds are part of the organization's general operating budget from which the salaries of all employees are drawn.

As set forth above, you are the program's director. However, the program receives less than two percent of its total funding from the county. You have presented no other facts that suggest that the program is dependent on the county contract. Further, the funds the program receives from the county are used by the program to pay the salary of another employee, and do not go to your benefit in any way. Applying the facts you have described to the factors above, it is apparent that the operations of the organization are not dependent upon the county grant and you do not otherwise profit from the contract.

Therefore, if elected to county council, you would not occupy a definite and direct position of profit in the program's contract with the county. If the amount of the county's support of the program increases, or the contractual arrangements between the county and the program would change in any way, such that you would occupy a definite and direct position of profit in a county contract, R.C. 2921.42(A)(3) would prohibit you from serving in both positions at the same time.

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

If elected to county council, you will also be subject to R.C. 2921.42(A)(4), which states 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 the public official is connected.

R.C. 2921.42(A)(4) prohibits a public official from having any definite and direct, pecuniary or fiduciary, interest in the contracts of his agency. Adv. Ops. No. 78-005 and 81-003. An officer, chief administrative official, or member of the board of an organization has a fiduciary interest in the contracts of the organization. Adv. Ops. No. 92-004 and 96-005. A person who serves as a chief administrative official of an organization, and is compensated for his service, also has a financial interest in the contracts of the organization.

Therefore, if you were to simultaneously serve on the county council and as the director of the program, you would have a **prohibited interest** in the contracts between the county and the program. R.C. 2921.42(A)(4) would prohibit you from serving in both positions at the same time **unless you can meet an exception to the law contained in R.C. 2921.42(C).**

Exception—R.C. 2921.42(C)

R.C. 2921.42(C) provides that R.C. 2921.42(A)(4) does not apply to a public contract in which a public official has an interest when all four requirements in the exception can be met. The criteria are strictly construed against the public official who must show compliance with them. Adv. Ops. No. 83-004 and 84-011. The Ethics Commission has explained that the application of the (C) exception must be consistent with the underlying principle in R.C. 2921.42: “[A] public official should not have an interest in a public contract with the

governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity." (Emphasis added). Id. All four requirements in R.C. 2921.42(C) must be met, and they are:

- (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 the public official's 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.

Necessary Services—R.C. 2921.42(A)(1)

Provided that the grant to the program is awarded and administered by the county to carry out its mandate and purpose, as established by statutes, charter, ordinances, or resolutions of the county, the services the county would acquire through the contract would be considered necessary. R.C. 3379.04. Adv. Ops. No. 85-002, 88-006, and 2001-02. In that case, you would be able to meet the requirement in R.C. 2921.42(C)(1).

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

R.C. 2921.42(C)(2) requires that the service provided to the county by the program are either "unobtainable elsewhere for the same or lower cost," or are furnished as part of a "continuing course of dealing" established before you became associated with the county.

Continuing Course of Dealing

A continuing course of dealing is a contractual agreement between the parties that existed *prior to* the time that the official assumed public office. Adv. Ops. No. 82-007, 84-006, and 88-008. You are not yet a county official and the county has already awarded a grant to the

program. Therefore, if you were to be elected to county council, you will meet the “continuing course of dealing” requirement in Division (C)(2) regarding the grant that is in place at the time you are sworn in to office.

If the original grant from the county to the program provides for automatic renewal, without any action by the county or any changes to the terms or conditions of the contract after the current terms expire, the automatic renewal would be considered part of a continuing course of dealing. Adv. Op. No. 88-008. If, however, a renewal requires the county to act, or there is any revision or change in the grant terms, the resulting grant agreement would be considered a new contract, and not part of a “continuing course of dealing.” Id.

If a renewal of the contract cannot be deemed part of a “continuing course of dealing,” then you would be required to demonstrate that the county cannot acquire the services provided by the program, under its contract with the county and in return for the grant, from other sources for the same or lower cost.

Unobtainable Elsewhere for the Same or Lower Cost

The requirement that the goods or services be “unobtainable elsewhere for the same or lower cost” must be demonstrated by an objective standard. As stated in Advisory Opinion No. 84-011:

The criterion that the goods or services be “unobtainable for the same or lower cost” requires that a public official or employee be at a disadvantage when attempting to do business with his governmental entity, and that an equally qualified applicant who is not a [public official] must receive preference.

With respect to a grant, you will be required to demonstrate that the county could not acquire the services provided by the program from any other provider for the same or lower cost. The Ethics Commission has held that, in some rare instances, an organization to which a public official has an employment or fiduciary relationship may be uniquely qualified to provide services to agencies with which the official is connected. Adv. Op. No. 88-001. You can meet these requirements where either: (1) all qualified and interested applicants for CDBG grants have received grants and funds remain to provide grants to the program; or (2) the county accepts applications for CDBG funds on an ongoing first-come, first-served basis, in a fair and open application process in which all interested and qualified applicants receive funding, and where there has historically been enough money to fund all qualified grant applications. See Adv. Op. No. 93-008 and 2001-02. The purpose is to require a demonstration that grant funds are distributed fairly, without the official’s public position influencing decision makers.

Same or Better Treatment—R.C. 2921.42(C)(3)

The third requirement, R.C. 2921.42(C)(3), is that the program treats the county either better than or the same as it would treat other customers or clients in similar transaction. In

situations where the contract involves grant programs, the Commission has explained that grant recipients have no "customers or clients in similar transactions." Adv. Ops. No. 84-011 and 2001-02. Therefore, you can meet this part of the exception.

Arm's Length Transaction—R.C. 2921.42(C)(4)

Finally, R.C. 2921.42(C)(4) requires that the entire transaction is conducted at arm's length, that the county has full knowledge that you have an interest in any grant awarded to the program, and that you take no part in the county's decisions regarding the grant. For example, you would be prohibited from discussing program contracts with the County Executive.

In an arm's length transaction: (1) both the program and the county act voluntarily, without compulsion or duress; (2) the transaction occurs in an open market; and (3) both the program and the county act in their own self-interest. *Walters v. Knox Cty. Bd. of Rev.* (1989), 47 Ohio St.3d 23, 25. With respect to the criteria set forth in Division (C)(4), the Commission has concluded that, if the public agency's procedure for determining whether to provide financing for a particular project, notice to prospective funding recipients, and selection of qualified projects are fair and objective with no preference given to organizations connected with public officials or employees, it will significantly help a public official to demonstrate compliance. Adv. Op. No. 84-011.

Summary of R.C. 2921.42(C) Exception

If you are unable to meet any of the four requirements in R.C. 2921.42(C), you would be prohibited from simultaneously serving as a member of the council and as the director of the program. Based on the facts you have presented, you may be able to meet all four parts of this exception. If you are able to meet all four parts of the exception in R.C. 2921.42(C), you would not have an unlawful interest in the county grant you have described. However, you must comply with other provisions of the Ethics Law that will condition your conduct.

Other Requirements

R.C. 2921.42(A)(1), a felony provision of the law, states that a public official shall not knowingly authorize or employ the authority or influence of his office to secure authorization of any public contract in which he has an interest. This provision would prohibit you, as a county council member, from voting upon, discussing, or otherwise using your authority or influence to secure, any allocation of county funds to the program. You would be prohibited, for example, from recommending the program to any county agency. You would be prohibited from discussing contract matters related to the program with any county officials or employees, including the County Executive.

R.C. 102.03(D) would prohibit you from using or authorizing the use of the authority or influence of your office to secure anything of value if the thing of value is of such a character as to manifest a substantial and improper influence upon you with respect to your duties.

R.C. 102.03(E) would prohibit you from soliciting anything of value if the thing of value is of such a character as to manifest a substantial and improper influence upon you with respect to your duties. The Ethics Commission has determined that R.C. 102.03(D) and (E) prohibit a public official from participating in any matter that would provide a benefit to an organization that he serves in a fiduciary capacity and from soliciting any benefit to an organization he serves in a fiduciary capacity. See Adv. Ops. No. 89-005, 90-012, and 92-004.

In the situation you have described, the funding that the program receives from the county is a thing of value. Because you serve as the director of the program, the grant that the program receives from the county could manifest a substantial and improper influence upon you in matters before the county council involving the program. Adv. Op. No. 87-006.

Therefore, R.C. 102.03(D) and (E) would prohibit you from participating in matters before county council that affect the interests of the program. You would be prohibited from participating in council votes or discussion, and any other formal action by council, involving these matters. In addition, you are prohibited from participating in such matters informally by discussing them with other council members and engaging in formal or informal lobbying on behalf of the program. You would be prohibited from discussing matters related to the program with any county officials or employees, including the County Executive.

Further, the Commission delineated the specific application of R.C. 102.03(D) to outside employment issues. Some of the restrictions will apply to you if you are elected to county council and continue to serve as the director of the program. Specifically, you will be prohibited from lending the stature inherent in your public position to the promotion or advocacy of a matter for the program. Adv. Op. No. 2008-02. If the program has expressed a position on a matter that is before council, even if the program is not a party to the matter, you will be prohibited from participating in council's discussion, consideration, or actions on the matter. *Id.* You would also be prohibited from discussing matters on which the program board has expressed a position with any county officials or employees, including the County Executive. The program has expressed a position on a matter where its board votes or makes a determination on a matter, directs staff to lobby or speak on its behalf on the matter, or otherwise makes its position on the matter known through communications by the board or the staff of the organization.

Other specific restrictions are enumerated in Advisory Opinion No. 96-004 and 2008-02. For example, you are prohibited from using public time, facilities, personnel, or other resources in conducting the program's business. See also R.C. 2921.41 (theft in office). Copies of these opinions are enclosed for your use.

You should also be aware that R.C. 102.04(C) prohibits you, as a member of county Council, from receiving compensation from the program for performing services on matters pending before any instrumentality of the county.¹ You are compensated for your

¹ There is an exception to this prohibition, but it would not apply to you as an elected official.

service as the director of the program. Therefore, in the course of your job duties with the program, you would be prohibited from discussing the program's grant with any county official or employee, and from interacting with county offices regarding any of the services that the program provides to the county.

For example, if the county and the program are working together on a joint project, you would be prohibited from acting as the program's representative on the project in any meetings with the county. Adv. Op. No. 89-008. You would be prohibited from making telephone calls, sending e-mails or letters, or performing any other services on the joint project as an employee of the program. Adv. Op. No. 91-006.

If it is necessary for an employee of the program to perform services on any matters that will be before a county agency, it must be someone other than you. If your job duties as the program director require that work on matters that will be before any county agencies, it would be impossible for you to engage in those job duties and comply with R.C. 102.04(C) while you serve on county council.

Additionally, R.C. 102.03(A)(1) prohibits you from representing the program, before any public agency including but not limited to the county, on any matter in which you personally participated as a public official. Unlike R.C. 102.04(C), which prohibits you from receiving compensation to perform services, R.C. 102.03(A)(1) prohibits you from representing any person on certain matters regardless of whether you receive compensation for your services. This prohibition applies to you during your public service and for one year after your public service.

Therefore, if you participated in a matter as a member of county council, and were later asked to represent the program or any other person except the county on the matter before any public agency, such as a state department, municipality, or regional authority, R.C. 102.03(A)(1) would prohibit you from engaging in those activities.

Finally, if you were to be elected to county council, R.C. 102.03(B) will prohibit you from disclosing or using, without appropriate authorization, any confidential information you acquired during that service. You will be prohibited from disclosing or using the information even if you do not personally benefit from the disclosure or use. There is no time limit for this prohibition, and it will apply to you during and after your service, as long as the information is confidential.

Conclusion

The Commission advises that, if you continue to serve as the program director after being elected to county council, you should exercise extreme caution to make sure you are complying with all of the requirements in the law discussed in this opinion. Failure to comply with these restrictions can result in consequences for the county as well as criminal penalty for you. For example, if you were unable to show that you meet the exception in R.C. 2921.42(C) regarding the program's grant from the county, the contract would be void and unenforceable.

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R.C. 2921.42(H). You should seek assistance from the Ethics Commission if you have any questions about your ability to comply with the law after election to county council.

As explained above, within the facts you have presented, within the facts you have presented, you would have an interest, but not occupy a position of profit, in the contract between the county and the program. Therefore, R.C. 2921.42(A)(3) will not prohibit you from holding both positions. Other restrictions contained within R.C. 2921.42 will apply to these contracts.

If the program continues to receive funding from the county, R.C. 2921.42(A)(4) would prohibit you from serving as a member of county council and director of the program *unless* you can meet the exception in R.C. 2921.42(C). As discussed below, based on the services the program provides to the county, you may be able to meet this exception. Please note that even if you meet the exception, and can serve in both positions, R.C. 2921.42(A)(1) and 102.03(D) would prohibit you from voting, discussing, deliberating, formally or informally lobbying, or otherwise participating, as a member of the council, on matters that affect the program. R.C. 102.04(C) also prohibits you, as part of your compensated employment with the program, from performing services for the program on any matter that is before any agency of the county.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on August 10, 2010. 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 black ink that reads "Jennifer A. Hardin". The signature is written in a cursive style with a large, looping initial "J".

Jennifer A. Hardin
Chief Advisory Attorney

Enclosures: Advisory Opinion No. 96-004 and 2008-02