



OHIO ETHICS COMMISSION

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Note from the Ohio Ethics Commission:

Ohio Ethics Commission Informal Advisory Opinion No. 2010-INF-0912 (Parker) – Consider reviewing Informal Advisory Opinion No. 2011-INF-0330 (Parker), a related opinion decided on different facts.

For more information on Overruled and Obsolete Formal Advisory Opinions please see [Formal Advisory Opinions - OEC \(ohio.gov\)](#). For more information on the Commission's Informal Advisory Opinions please see [Informal Advisory Opinions - OEC \(ohio.gov\)](#).

THIS COVER SHEET IS PROVIDED FOR INFORMATION PURPOSES. IT IS NOT AN ETHICS COMMISSION ADVISORY OPINION. INFORMAL ADVISORY OPINION NO. 2010-INF-0912 (PARKER) IS ATTACHED.

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September 21, 2010 Informal Opinion 2010-INF-0921

Robin Parker, General Counsel
Miami University



Dear Ms. Parker:

On July 7, 2010, the Ohio Ethics Commission received your request for an advisory opinion. In your letter, you explained that Miami University (University) is designated a state university, governed by a board of trustees appointed by the governor. R.C. 3345.011 and 3339.01. Your question involves a member of the University board of trustees (trustee) who also serves as President of the Cincinnati/Northern Kentucky Region for PNC Bank (bank). The trustee is also a shareholder of PNC Financial Services Group, which wholly owns the bank.

You have explained that the University is considering issuing a request for proposals (RFP) for bond underwriting services and an RFP for on-campus banking services. You have stated that the University board of trustees is required to authorize the issuance of bond obligations. R.C. 3345.12(B). The board of trustees has adopted regulations to delegate authority to the President and Vice President for Finance and Business Services to negotiate and sign contracts on behalf of the University. Miami University Regulations Art. V, Sec. 2 and Art. XI, Sec. 9.

You have asked whether the Ethics Law and related statutes prohibit the bank from submitting a response to either of these RFPs. You have also asked whether there are any actions the trustee or the University should take in order to continue to conduct their relationship according to the requirements of the Ohio Ethics Law and related statutes.

Brief Answer

The Ethics Law does not prohibit the bank from responding to either RFP. As explained more fully below, the University trustee would occupy a prohibited position of profit in a bond underwriting contract awarded to the bank during her service or for one year thereafter if the bond was authorized by the board of trustees during her service.

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With respect to the on-campus banking contract, the University trustee is not prohibited from continuing to serve as trustee if the bank receives the contract provided that the board of trustees does not authorize the contract and the trustee meets all four requirements of an exception to the public contract requirement.

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

As you note in your letter, public university trustees are public officials subject to the Ohio Ethics Law (R.C. Chapter 102.) and related statutes (R.C. 2921.42 and 2921.43). R.C. 102.01(B) and (C) and 2921.01(A). R.C. 2921.42(A)(3) provides 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 property or services by or for the use of an instrumentality of the state. Adv. Op. No. 2921.42(I)(1)(a). The University’s purchase of bond underwriting services and on-campus banking services are both public contracts.

The Ethics Commission has held that a public contract will be deemed to have been authorized by a public official or governing board where the public contract could not have been awarded without the approval of the public official, the position in which she serves, or the public entity with which she serves. Adv. Ops. No. 87-004, 88-006, 91-011, and 92-013. See also R.C. 2921.42(A)(1) (discussed below). A public official who is a member of a board is subject to the prohibition of Division (A)(3), even if she abstains from deliberating, voting upon, or otherwise authorizing the subject public contract. Adv. Ops. No. 87-008 and 92-013.

R.C. 2921.42(A)(3) does not apply to contracts let by competitive bidding to the lowest and best bidder. In the absence of competitive bidding, there is no exception to R.C. 2921.42(A)(3). Adv. Op. No. 92-014. You have explained that the two contracts will be awarded by RFP processes. An RFP is not a competitive bidding process. While an RFP process has some competitive aspects, it is not a competitive bid. See *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.* (1994), 73 Ohio St. 3d 590, 600 (“The RFP method of procurement is not competitive bidding.”) See also Adv. Op. No. 88-006 (distinguishing between ‘competitive bidding’ and a political subdivision’s ‘selection process’ for purposes of the public contract provisions of the Ethics Law). The “competitive bidding” exception does not apply to these contracts.

A public official will be deemed to “occupy [a] position of profit” in a public contract whenever the official receives some financial profit or benefit from the contract. Adv. Ops. No.

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88-008 and 95-007. A “position of profit” that is prohibited under Division (A)(3) must be definite and direct in nature. Id.

The Commission has explained that a public official who owns stock in a company will be considered to occupy a position of profit in the prosecution of the corporation’s contracts if “the official has some financial or fiduciary relationship to the corporation (such as board member, trustee, employee, contractor, or officer) in addition to holding stock.” Adv. Op. No. 2009-05. While an officer of a company may have a fiduciary interest in the contracts of the company, the officer does not necessarily occupy a position of profit in the contract. Adv. Op. No. 2001-02.

Because the trustee is the President of the bank, and a stockholder of PNC Financial Services Group, she will occupy a position of profit in the prosecution of the bank’s contracts. R.C. 2921.42(A)(3) prohibits the trustee from profiting from any contract between the bank and the university if the contract: (1) is authorized by her, or by the board of trustees even if she does not participate in the authorization; and (2) is not competitively bid. The trustee is prohibited from profiting from these University contracts during her service on the board and for one year after leaving the board.

Delegation of Authorization

You have stated that R.C. 3345.12(B) requires a resolution of the Board of Trustees to authorize the issuance of bond obligations. However, the University has adopted Regulations to delegate authority to negotiate and sign contracts on behalf of the University, including contracts for bond underwriting services and on-campus banking services, to the President and Vice-President for Finance and Business Services. You have asked whether, if the contracts are authorized by these university officers, as a result of the delegation of authority, the board of trustees would be considered to have authorized the contract.

As you note in your letter, the Commission considered a similar situation in Advisory Opinion No. 90-005. In that opinion, the Commission was asked whether a school board has authorized a contract if the contract was authorized by the district’s treasurer.

R.C. 3313.18 requires that a board of education authorize, by roll call vote, the purchase of property or the payment of any debt or claim. The Commission concluded that such votes constituted the “authorization” of these contracts, even if employees of the district actually negotiated or signed the contracts. However, R.C. 3313.18 also provides that a board of education may dispense with the adoption of resolutions authorizing all contracts of the district provided that the board adopts an annual appropriation resolution if provision for these payments is included in the annual appropriation resolution.

In Advisory Opinion No. 90-005, the Commission concluded that the school board was not “authorizing” contracts of the district where the contracts were entered into by administrative

staff of the district, without the board's input, **and** the board had adopted the resolution described in R.C. 3313.18 dispensing with the adoption of resolutions authorizing all district contracts.

In the situation you have described, the board of trustees has elected to delegate its authority to enter into contracts to employees of the University who are appointed by and under the direction of the board of trustees. In contrast to school district contracts described in Advisory Opinion No. 90-005, there is no statutory provision specifically allowing or empowering University trustees to delegate their authority to enter into or authorize contracts.

Therefore, the Commission's decision in Advisory Opinion No. 90-005 does not apply to the situation you have described. In any situation where a board of trustees is **required** to act on a contract matter, and in the absence of a statutory provision empowering it to delegate its authority, the board of trustees has "authorized" the contract.

Bond Underwriting Contract

The board is **required** to adopt a resolution to authorize the issuance of bond obligations. R.C. 3345.12(B). The bond underwriting and other contracts related to issuance of bond obligations could not be awarded without the board's resolution to authorize the issuance of bond obligations. The Commission has explained that a public official or employee cannot avoid a violation of the Ethics Law by delegating, to a subordinate official or employee, authority she is statutorily required to exercise. Adv. Op. No. 2009-06. Even if the board has also adopted a resolution to delegate any further authority regarding the bond underwriting contract to officials of the University, the board has "authorized" the contracts resulting from their authorization of the issuance of bond obligations.

Therefore, because the board of trustees of which she is a member is required to authorize the issuance of bond obligations, if the University were to enter into a bond underwriting contract with the bank, the prohibition in R.C. 2921.42(A)(3) applies and the trustee occupies a position of profit in the prosecution of the contract. The trustee is prohibited from occupying such a position of profit during her service on the board of trustees and for one year thereafter.

Therefore, if the board of trustees authorized the issuance of a bond while she is a member, the trustee cannot occupy a position of profit in a bond underwriting contract awarded in connection with the bond until twelve months after she steps down from her position as a trustee. As noted on page 3 of this Opinion, because she is an officer and stockholder of the bank, the trustee will occupy a position of profit in the prosecuting of the bank's contracts.

On-Campus Banking Services Contract

With respect to the contract for on-campus banking services, your letter does not state whether the board of trustees would be required to vote on the matter. If the board of trustees is not statutorily required to award the on-campus banking service contracts, or otherwise authorize the program requiring the contracts, the prohibition in R.C. 2921.42(A)(3) would not apply.

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In that case, if the board of trustees has made a decision to delegate the authority to negotiate and authorize **all** contracts, including contracts related to on-campus banking services, the board will not be considered to have authorized the contract. In that case, the trustee would not occupy a position of profit in, and the bank will not be prohibited from engaging in, the contract.

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

In your letter, you state that, even if the trustee does not occupy a prohibited position of profit in the on-campus banking services contract awarded to the bank, the trustee recognizes that the prohibition in R.C. 2921.42(A)(4) will apply to her. R.C. 2921.42(A)(4) 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 the public official is connected.

An “interest” that is prohibited by R.C. 2921.42(A)(4) must be definite and direct and may be either financial or fiduciary in nature. Adv. Op. No. 81-008. As an officer of the bank, the trustee will have a fiduciary, and may have a financial, interest in the contracts of the bank.

Therefore, if she were to simultaneously serve on the University board of trustees and as an officer of the bank, the trustee has a **prohibited interest** in the on-campus banking services contract between the University and the bank. As you note, R.C. 2921.42(A)(4) prohibits the trustee from having such an interest, unless she can objectively demonstrate that she meets 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(C)(1)

Provided that the on-campus banking services are awarded and administered by the University to carry out its mandate and purpose, as established by statutes, charter, ordinances, or resolutions of the trustees (before the trustee in question became a member), the services that the University 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, the trustee would be able to meet the requirement in R.C. 2921.42(C)(1).

Unobtainable Elsewhere for the Same or Lower Cost—R.C. 2921.42(C)(2)

R.C. 2921.42(C)(2) requires that the service provided to the University by the bank are “unobtainable elsewhere for the same or lower cost.”¹ This requirement 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.

In order to meet this requirement in R.C. 2921.42(C)(2), the trustee must demonstrate, by some objective standard, that the services provided by the bank are unique, and that no other source could perform the same services for the same or lower cost. Adv. Op. No. 88-001.

¹ R.C. 2921.42(C)(2) can also be met if the official can demonstrate that the contract is a continuing course of dealing established before she became affiliated with the public agency. Given the facts you have presented, the trustee could not show that she meets this aspect of the requirement.

You have stated that the University will use an RFP process² to select the provider for on-campus banking services. You stated that the University believes “an RFP process will satisfy the O.R.C. § 2921.42(C) requirement to demonstrate the supplies or services are unobtainable elsewhere for the same or lower cost.”

The Commission has concluded that an RFP process is not a competitive bidding process, and cannot absolutely establish whether a particular provider is the lowest cost provider. See *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Management District* (1994), 73 Ohio St. 3d 590, 600 (“The RFP method of procurement is not competitive bidding.”) See also Adv. Op. No. 88-006. However, even though an RFP is not a strict competitive bid, it can still help to establish whether there are multiple parties that would be interested in providing a particular service to the agency and determine whether a particular provider is the lowest cost provider. In order for an RFP to be truly assistive, it must be open and fair, with all potentially interested providers given the opportunity to respond to it. The RFP or other selection process cannot be prepared by University officials or employees to favor the interests of any potential provider, including a company with which a University official is connected. If the University were to use such an open and fair RFP process, it will demonstrate the University’s good faith effort to identify potential providers of the needed on-campus banking services other than the trustee’s employer.

Further, the interested public official (in this case, the trustee) is prohibited from participating, in any way, in the University’s decision to issue an RFP, or establishment of the terms and conditions of the contract. See also R.C. 2921.42(A)(1) and 102.03(D), discussed below. If the RFP is openly and fairly created and advertised, the trustee does not participate in any way in the University’s activities related to the RFP, and the bank’s response to the RFP is the only or lowest cost for the necessary services, the RFP process, while not definitive, will help the trustee demonstrate that she meets the “unobtainable elsewhere” requirement in R.C. 2921.42(C)(2). In order to meet this requirement, the trustee must show that the bank will provide the on-campus banking services to the University at the lowest cost of any potential provider, in an open and fair selection process that does not favor the bank.

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

The third requirement, R.C. 2921.42(C)(3), is that the bank treats the University either better than or the same as it would treat other customers or clients in similar transaction. The trustee would have to show that the banking services the bank provides to the University are the same as or better than the services it provides to any other customer for which it provides similar services in similar transactions. If the bank were to provide better treatment to any other customer for which it provides similar services in similar transactions, the trustee could not meet the requirement in R.C. 2921.42(C)(3).

² An RFP process is a negotiated procurement method, where both parties have greater flexibility. Each party has the freedom to propose or chose alternatives in service delivery, price, and payment methods. The purchasing party can use subjective scoring criteria to assess responding proposals, with greater weight given to considerations such as past experience with the vendor or quality, rather than cost.

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 University has full knowledge that the trustee has an interest in any contracts awarded to the bank, and that the trustee takes no part in the University's decisions regarding the contract. For example, R.C. 2921.42(C)(4) prohibits the trustee from discussing any bank contracts with the University president, the Vice President for Finance and Business Services, and any other official or employee of the University.

In an arm's length transaction: (1) both the bank and the University act voluntarily, without compulsion or duress; (2) the transaction occurs in an open market; and (3) both the bank and the University 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 the trustee is unable to meet **any** of the four requirements in R.C. 2921.42(C), she is prohibited from simultaneously serving as a member of the board of trustees and an officer of the bank. Further, if the trustee is unable to show that she meets the exception in R.C. 2921.42(C), the contract would be void and unenforceable. R.C. 2921.42(H).

Based on the facts you have presented, the trustee may be able to meet all four parts of this exception for the on-campus banking services contract. If she is able to meet the four requirements in the exception in R.C. 2921.42(C), the trustee would not have an unlawful interest in the University contract you have described. However, the trustee must comply with other provisions of the Ethics Law that will limit her conduct.

Other Requirements

R.C. 2921.42(A)(1), a felony provision, states that a public official shall not knowingly authorize or employ the authority or influence of her office to secure authorization of any public contract in which she has an interest. The exception in R.C. 2921.42(C) (discussed above) does not apply to this prohibition. The trustee is subject to R.C. 2921.42(A)(1) even if she meets the R.C. 2921.42(C) exception.

R.C. 2921.42(A)(1) prohibits the trustee from voting upon, discussing, or otherwise using her authority or influence to secure any allocation of University funds to the bank. The trustee is prohibited, for example, from recommending the bank to the University, or from using her position to set forth competitive bidding or RFP requirements if the bank is likely to submit a bid

or response. The trustee is prohibited from discussing contract matters related to the bank with any University officials or employees, including the President and the Vice President for Finance and Business Services.

R.C. 102.03(D) prohibits the trustee from using or authorizing the use of the authority or influence of her 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 her with respect to her duties. R.C. 102.03(E) prohibits the trustee from soliciting anything of value if the thing of value is of such a character as to manifest a substantial and improper influence upon her with respect to her 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 definite and direct benefit to the official or her employer. See Adv. Ops. No. 89-009 and 2009-06.

In the situation you have described, the proceeds of any contract between the University and the bank is a thing of value. Because the trustee serves as an Officer of the bank, the proceeds of these contracts could manifest a substantial and improper influence upon her in matters before the University involving the bank. Adv. Op. No. 87-006.

Therefore, R.C. 102.03(D) and (E) prohibit the trustee from participating in matters before the University that affect the interests of the bank. The trustee is prohibited from participating in board votes or discussion, and any other formal action by the board, involving these matters. In addition, the trustee is prohibited from participating in such matters informally by discussing them with other trustees and engaging in formal or informal lobbying on behalf of the bank. For example, the trustee is prohibited from discussing matters related to the bank with any University officials or employees, including the President and the Vice President for Finance and Business Services.

Because the bank has affiliated companies and organizations, the restrictions in R.C. 102.03(D) and (E) apply to matters affecting those companies and organizations as well. The trustee is prohibited from participating in any of the ways described above in matters before the University affecting the companies and organizations affiliated with the bank. Adv. Op. No. 2008-02.

The trustees should also be aware that R.C. 102.04(A) prohibits her from receiving compensation from the bank for performing services on matters pending before the University. The trustee is compensated for her service as an officer of the bank. Therefore, in the course of her job duties for the bank, she is prohibited from discussing the bank's interests with any University official or employee, and from interacting with University departments and offices regarding any of the services that the bank provides to the University.

You have explained that the trustee, in her role as an officer of the bank, has oversight responsibility for the bank's corporate and institutional banking and retail banking services units. Further, you explained that these two units would be the most likely to submit the bank's response to the proposed RFP for banking services. R.C. 102.04(A) prohibits the bank officer,

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while she is trustee for the University, from performing any services in the course of her bank employment on the bank's proposal. She is prohibited from writing, reviewing, directing, or taking any other action, within the scope of her employment at the bank, on the bank's proposal.

Finally, R.C. 102.03(B) will prohibit the trustee from disclosing or using, without appropriate authorization, any confidential information she acquired during her service as a trustee. The trustee will be prohibited from disclosing or using the information even if she does not personally benefit from the disclosure or use. There is no time limit for this prohibition, and it will apply to the official during and after her service, as long as the information is confidential.

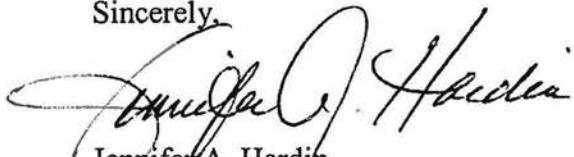
Conclusion

The Ethics Law does not prohibit the bank from responding to either RFP. As explained more fully above, the University trustee would occupy a prohibited position of profit in a bond underwriting contract awarded to the bank during her service or for one year thereafter if the bond was authorized by the board of trustees during her service.

With respect to the on-campus banking contract, the University trustee is not prohibited from continuing to serve as trustee if the bank receives the contract provided that the board of trustees does not authorize the contract and the trustee meets all four requirements of an exception to the public contract requirement.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 8, 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,



Jennifer A. Hardin
Chief Advisory Attorney

cc: Chancellor Eric D. Fingerhut, Ohio Board of Regents
Bruce Johnson, President, Inter-University Council of Ohio
Rebecca Albers, Chief, Education Section, Ohio Attorney General's Office