

OHIO ETHICS COMMISSION

Merom Brachman
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Website: <http://www.ethics.state.oh.us>

Advisory Opinion Number 2001-02
February 23, 2001

Syllabus by the Commission:

(1) When a member of the board of directors of a port authority is also an officer of a private company, Division (A)(4) of Section 2921.42 of the Revised Code precludes the private company from applying for and receiving financing from a bond program created and administered by the port authority unless all of the criteria of Division (C) of Section 2921.42 of the Revised Code are met;

(2) If the port authority receives applications for participation in the bond program on a continuing basis, the "unobtainable elsewhere" requirement of Division (C) of Section 2921.42 of the Revised Code can be met by showing that the applications are considered in a fair and open process, and that it can be reasonably projected that the bond program can and will fully support financing of all interested and qualified applicants, including the company for which the board member is an officer;

(3) Division (A)(3) of Section 2921.42 of the Revised Code does not preclude a company that a port authority board member serves as an officer from receiving financing through the authority's bond program provided that the board member's interest in the financing through the program is as a fiduciary due to his position as an officer of the company and his compensation does not include a financial benefit that is definitely and directly attributable to the company's receipt of financing through the program;

(4) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code prohibit a port authority board member from discussing, deliberating or recommending that the authority approve the application of a private company for which he serves as an officer for participation in a bond program created and administered by the authority.

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In your letter to the Ohio Ethics Commission, you ask about the application of the Ohio Ethics Law to a member of the board of directors of the Toledo-Lucas County Port Authority (Authority). Specifically, you ask whether the Ethics Law and related statutes preclude a private company, for which the board member serves as an officer, from applying for and receiving

financing from the Northwest Ohio Bond Program (Program), which the Authority created and administers.

Brief Answer

As explained below, a private company, for which the board member serves as an officer, is not precluded from applying for and receiving financing from the Program, under the specific circumstances that are described herein. The company may apply for and receive financing from the Program, provided that there is an objective demonstration that the economic development services the company is offering to the Authority through its participation in the Program "are unobtainable elsewhere for the same or lower cost" and the board member does not receive either a fee or compensation which would be paid from, or is dependent upon, the company's receipt of financing through the Program.

In addition, the board member would be prohibited from receiving a definite and direct personal profit or benefit from his company's participation in the Program. As discussed below, the board member is also prohibited from participating in any decisions of the Authority that affect the company's participation in the Program and from using his working relationship with public officers and employees to affect, formally or informally, their decision to approve the application of the company for participation in the Program.

Facts-The Northwest Ohio Bond Program

The Authority is organized under R.C. Chapter 4582. It is governed by a board comprised of 13 members. The Mayor of the City of Toledo and the Board of Lucas County Commissioners each appoint six members and the Mayor and the Board of Lucas County Commissioners jointly appoint one member. Board members serve without compensation. The board hires a staff that manages the Authority's operations. The Authority operates airports, a seaport, and is involved in the development of ground transportation projects and the encouragement of economic development. User and landing fees, and lease payments generate ninety-three percent of the Authority's revenue.

You state that the Authority created the Program as a means of stimulating economic development in Lucas County. The Program provides lower cost, long-term fixed interest rate financing and access to national capital markets to companies that, by themselves, are unable to obtain an investment grade rating on bonds. You state that the Program is not a revolving loan fund. Rather, the Program is supported by reserves provided by the Port Authority and a bank letter of credit. The reserves serve as credit enhancements for each bond issue that lower the interest rate available to the borrower. The Authority has a cash reserve of three million dollars to cover potential losses and that the assets of the Port Authority are not reachable. The cash reserve is built up from fees paid to the Authority twice annually for the bonds. The Authority has no exposure to any borrower over eight million dollars. If the financing exceeds eight million dollars, then the remainder must be secured by a bank letter of credit.

A company applies for participation in the Program by presenting a project to the Authority. The Authority and its financial advisors review the application to determine whether the project meets certain criteria. Upon the Authority's approval, the company pays a non-refundable fee to the Authority of \$1,000.00 for the first million dollars in bonds that are anticipated to be issued and \$250.00 for each additional million up to a \$5,000.00 cap. The fee covers the Authority's costs in preparing an inducement resolution and project summary for the Authority's Board of Directors and a Project Specific Term Sheet for the applicant.

When the company accepts the Project Specific Term Sheet, it pays the Authority a commitment fee of not less than \$10,000.00 that the Authority holds in escrow and applies to the company's costs at closing. The company's costs include fees for bond counsel, underwriter's counsel, printing charges, a rating fee, and other expenses. The company pays a monthly service fee to the Authority in the amount of 0.05% of the outstanding principal and interest. The investment earning on the monthly payments is the property of the Authority.

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

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 he is connected;

R.C. 2921.01(A) defines the term "public official" for purposes of R.C. 2921.42 as any elected or appointed officer, employee, or agent of any political subdivision of the state. A port authority created and organized pursuant to Chapter 4582. of the Revised Code is considered a political subdivision of the state. R.C. 4582.02; Attorney General Opinion No. 1960-11158, p. 111. Therefore, directors, officers, and employees of the Authority are "public officials" who are subject to R.C. 2921.42.

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 or for the use of the political subdivision with which he serves or by which he is employed. Ohio Ethics Commission Advisory Opinion No. 89-008. An interest that is prohibited under R.C. 2921.42(A)(4) must be definite and direct and may be either pecuniary or fiduciary. Adv. Ops. No. 78-005 and 81-003. An officer of a company has a definite and direct fiduciary and pecuniary interest in the company's contracts. Adv. Ops. No. 78-006, 86-005, and 89-008.

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 a political subdivision or any of its agencies or instrumentalities. A public contract exists whenever a political subdivision either purchases services from a provider or acquires services as part of the contractor's responsibility under the contract. Adv. Ops. No. 91-011, 93-009, and 93-012. The Commission has held that a political subdivision's purchase or acquisition of community and economic development services, or urban renewal or revitalization services through the use of grants, loans, land reutilization programs, tax abatements and other similar programs constitutes

a "public contract" for purposes of R.C. 2921.42. Adv. Ops. No. 84-011, 85-002, 88-006, and 89-008. In the instant situation, the Authority's creation and support of the Program by a series of reserves that serve as credit enhancements for each bond issue stimulates economic development in Lucas County and, thus, the financing that a company receives from the Program is a "public contract" for purposes of R.C. 2921.42(A)(4).

The issue that is raised by the facts in this situation is similar to the one that the Ethics Commission addressed in a series of advisory opinions that examined whether public officials who served as city officers or employees were prohibited from participating in their city's housing rehabilitation and revitalization programs. In that series of advisory opinions, the Commission held that public officials would acquire a definite and direct personal interest in a public contract with their own political subdivision by participating in their city's programs and, thus, R.C. 2921.42(A)(4) prohibited them from participating unless they could meet the exception provided by Division (C) of R.C. 2921.42. See also Civil Service Personnel Ass'n v. Ohio Ethics Comm'n, No. 84-4-1065 (Summit County C.P. 1984).

In the instant situation, a member of the board of directors of the Authority who is an officer of a private company that desires to apply for participation in the Program is subject to the prohibition of R.C. 2921.42(A)(4). Because the board member would have an interest in a public contract with the Authority if the company that he serves as an officer participated in the Program, R.C. 2921.42(A)(4) precludes the company from applying for and receiving financing from the Program. The issue becomes whether the exception provided by Division (C) of R.C. 2921.42 can be met.

R.C. 2921.42(C)-Exception to R.C. 2921.42(A)(4)

R.C. 2921.42(C) provides an exception to the prohibition of R.C. 2921.42(A)(4). R.C. 2921.42(C) has four parts, and the official or employee must be able to demonstrate that she meets all four parts to be excepted from the prohibition of R.C. 2921.42(A)(4). Division (C) provides:

(C) This section does not apply to a public contract in which a public official, member of his family, or one of his business associates has an interest, when all of the following apply:

(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 his 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.

In summary, under R.C. 2921.42(C), all of the following must be met: (1) the subject of the contract is necessary supplies or services; (2) the supplies or services are unobtainable elsewhere for the same or lower cost, or are furnished as part of a continuing course of dealing established prior to the public official's association with the public agency; (3) the treatment accorded the public agency is either preferential to or the same as that accorded other customers in similar transactions; and (4) the entire transaction is conducted at arm's length with full knowledge of the public official's interest, and the public official takes no part in any discussion or decision with respect to the contract.

The Ethics Commission has held that, with regard to the criterion of Division (C)(1), a political subdivision's purchase or acquisition of community and economic development services, or urban renewal or revitalization services are necessary services for a political subdivision. Adv. Ops. No. 84-011, 85-002, and 88-006. Likewise, under the criterion of Division (C)(3), a political subdivision's officers and employees who wish to participate in the programs have no "customers or clients in similar transactions." Adv. Op. No. 84-011.

The Ethics Commission has held that a grant of funds to participants in community and economic development services, or urban renewal or revitalization services must be conducted at "arms length" in order to meet of the criterion of Division (C)(4). A public official may generally participate in urban renewal or revitalization programs operated by his political subdivision provided that the public official is not responsible for determining who is eligible to be a participant in the program or does not otherwise exercise any participation in the decision-making with regard to the applications made by prospective participants. Adv. Ops. No. 84-011, 85-002, and 88-006. In addition, the political subdivision must have full knowledge of the public official's interest. Id. See also R.C. 2921.42(A)(1) and R.C. 102.03(D), set forth below. The Commission has also held that the political subdivision's procedures must be fair and objective with no preference given to the political subdivision's officers and employees.

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

The most crucial criterion for purposes of your question is R.C. 2921.42(C)(2), which requires that the supplies or services are being furnished to the governmental agency as part of "a continuing course of dealing" or are "unobtainable elsewhere for the same or lower cost."

The criterion of R.C. 2921.42(C)(2) is demonstrated, in part, by a showing that the services under the public contract are being furnished as part of a continuing course of dealing

established prior to the time an individual takes public office. The Ethics Commission has stated that when the continuing course of dealing exception can be met, the performance of the contract may be completed. Adv. Op. No. 88-008. However, that is not the case in the instant situation. The present facts do not show that an officer of a company that currently receives financing from the Authority's Program was subsequently appointed as a member of the Authority's board of directors. In the instant situation, the company that the Authority board member serves as a board member desires now to apply for and receive financing from the Authority's Program. Therefore, Division (C)(2) cannot be met in the instant situation by showing a "continuing course of dealing."

The issue then becomes whether the "unobtainable elsewhere for the same or lower cost" requirement of Division (C) can be met in the instant situation. In order to address this issue, it is necessary to review the Ethics Commission precedent addressing the Division (C)(2) exception in instances of public officials participating in their city's housing rehabilitation and revitalization programs. As explained below, the Ethics Commission has determined that there are two methods by which public officials who desire to participate in their city's housing rehabilitation and revitalization programs could meet the Division (C)(2) exception.

The Ethics Commission addressed the first method in Advisory Opinion No. 84-011, which involved the issue of public officials who served a city participating in their city's housing rehabilitation and revitalization programs. In that opinion, the Commission explained:

The criterion that the goods and services be "unobtainable elsewhere 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 city employee must receive preference. Thus, it is only when all qualified persons who are not city employees have received grants or loans and funds are still available that the rehabilitation of the city employee's property is "unobtainable elsewhere for the same or lower cost." (Emphasis in original).

The Commission concluded in Advisory Opinion No. 84-011 that the requirements of Division (C)(2) were met where: (1) there were sufficient funds available; (2) all of the qualified applicants in the target area had received grants or loans, except the city employee; and, (3) the funds would have lapsed if not used in the target area within a specified period of time. The Commission also noted that the city employee met the criteria for the grant and would have been unable to rehabilitate his property without the grant, so that the city would have been unable to achieve its goal of rehabilitating all homes in the target area, unless the city employee received the grant.

The Commission addressed the second method in an informal advisory opinion to the Director of the City of Cleveland's Department of Community Development which the Ethics Commission issued in 1988. The opinion held that if a municipality accepts applications for participation in urban revitalization programs throughout the year on a first-come first-served basis in a fair and open application process in which all interested and qualified applicants have an equal opportunity to be considered, then the requirement of Division (C)(2) can be met if the municipality can show that sufficient funds have historically been able to meet demand and can

reasonably project that sufficient funds are, and will be, available to fully serve all interested and qualified persons, even if all eligible and interested public officials who serve the municipality are permitted to participate.

Application of Precedent

These two methods of meeting the Division (C)(2) "unobtainable elsewhere for the same or lower cost" exception in instances of public officials participating in their city's housing programs apply to your question. Therefore, in order to meet the exception, the board member must show that the economic development services his company is offering to the Authority through its participation in the Program "are unobtainable elsewhere for the same or lower cost."

In the instant situation, because the Authority receives applications on a continuing basis the "unobtainable elsewhere" requirement of Division (C) can be met by showing that the applications are considered in a fair and open process, and that it can be reasonably projected that the Program can and will fully support financing of all interested and qualified applicants, including the company that the board member serves as an officer. However, even if the Division (C) exception to the prohibition imposed by R.C. 2921.42(A)(4) can be met, the question remains whether the prohibition imposed by R.C. 2921.42(A)(3) will preclude the company from receiving financing through the Program.

Prohibition Imposed by R.C. 2921.42(A)(3)-Position of Profit

Your attention is directed to R.C. 2921.42(A)(3), which provides that no public official shall knowingly:

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

The Ethics Commission has held that a public contract will be deemed to have been authorized by a public official, legislative body, board, or commission for purposes of R.C. 2921.42(A)(3), where the public contract could not have been awarded without the approval of the public official, the position in which he serves, or the public entity with which he serves. Adv. Ops. No. 87-004, 88-006, 91-011, and 92-013. See also R.C. 2921.42(A)(1) (discussed below).

R.C. 2921.42(A)(3) does not require that a public official "[h]ave an interest in the profits or benefits of a public contract," but prohibits a public official from "occupy[ing] any position of profit in the prosecution of a public contract" which he or his board authorized, and which was not let by competitive bidding to the lowest and best bidder. A public official who is a member

of a board is subject to the prohibition of Division (A)(3), even if he abstains from deliberating, voting upon, or otherwise authorizing the public contract. Adv. Ops. No. 87-008 and 92-013. The question that you have asked will rise or fall upon this issue because financing through the Program is not let by competitive bidding.

In Advisory Opinion No. 92-013, the Ethics Commission held that the General Assembly's use of the words "occupy any position of profit in the prosecution of a public contract" in R.C. 2921.42(A)(3) specifically distinguishes a different type of situation than having "an interest in the profits or benefits of a public contract." In that advisory opinion, the Commission construed the word "profit," according to rules of grammar and common usage, as meaning "to obtain financial gain or other benefit." The Commission explained the different prohibitions imposed by Divisions (A)(4) and (A)(3) of R.C. 2921.42, holding:

[A]n "interest" which is prohibited by Division (A)(4) must be definite and direct and may be either pecuniary or fiduciary in nature. However, the term "profit" connotes only a pecuniary or financial gain or benefit. An "interest" under Division (A)(4) thus identifies a broader prohibition than occupying a "position of profit in the prosecution of a public contract." For example, a public official may be deemed to have an "interest" in a public contract, but not "profit" from the public contract, if his interest is only fiduciary . . . Indeed, the previous advisory opinions in which both Divisions (A)(3) and (A)(4) were applicable involved situations in which the public official was determined to have a financial "interest" in the profits or benefits of a public contract for purposes of Division (A)(4) and to "profit" from the public contract for purposes of Division (A)(3). (Emphasis added).

The Commission has held that a public official will be deemed to "occupy [a] position of profit" in a public contract whenever the official receives a fee or compensation which would be paid from, or is dependent upon, the contract, or the official would receive some other profit or benefit from the contract. Adv. Ops. No. 88-008 and 95-007. A "position of profit" that is prohibited under Division (A)(3) must be definite and direct in nature. Id. See also Adv. Op. No. 93-008 (a school board member does not "occupy a position of profit" in the board's employment of his minor child for purposes of Division (A)(3) if the board member does not exercise his statutory right to his minor child's earnings).

Therefore, in light of the precedent established by Advisory Opinions No. 92-013 and 93-008, R.C. 2921.42(A)(3) would not prohibit a company that an Authority board member serves as an officer from receiving financing through the Program provided that the board member's compensation does not include a financial benefit that is definitely and directly attributable to the company's receipt of financing from the Authority through the Program. In such an instance, the board member's interest in the financing through the Program is only fiduciary due to his position as an officer of the company.

If, however, the board member were to receive a fee or compensation which would be paid from, or is dependent upon, the company's receipt of financing through the Program, or the official would receive some other definite and direct personal profit or benefit from the financing, then he would be deemed to occupy a "position of profit" in a public contract and the

prohibition imposed by R.C. 2921.42(A)(3) would preclude the company, for which the board member serves as an officer, from applying for and receiving financing from the Program because the financing is not awarded through competitive bidding. In such a situation, the prohibition of R.C. 2921.42(A)(3) and other provisions of the Ethics Law, Chapter 102. of the Revised Code would apply and the company could not receive the financing even if the exception provided by Division (C) of R.C. 2921.42 has been met. See Adv. Op. No. 88-006 (R.C. 2921.42(A)(3) prohibits a city officer or employee who must approve the sale of property under a land reutilization program, or who serves on a legislative body, board, or commission, which must approve the sale, from purchasing the property where there is no competitive bidding).

Authorizing a Public Contract-R.C. 2921.42(A)(1)

Your attention is next directed to R.C. 2921.42(A)(1), which provides that no public official shall knowingly:

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

The pertinent elements of this provision are: (1) a public official; (2) is prohibited from authorizing, or employing the authority or influence of his office to secure authorization; (3) of any public contract; (4) in which he, a member of his family, or any of his business associates; (5) has an interest. Adv. Ops. No. 78-002, 85-015, and 92-008, respectively.

As set forth above, the board member would have an interest in the contracts of the company that he serves as an officer. In addition, the company is his business associate for purposes of R.C. 2921.42(A)(1). See Adv. Op. No. 86-002 (a business association is created whenever persons join together to pursue a common business purpose). See also Adv. Op. No. 92-003.

R.C. 2921.42 (A)(1) prohibits a public official from "authorizing" a public contract in which either he or a business associate has an interest, or employing the "authority or influence of his office" to secure authorization of a public contract in which his business associate has an interest. The exact actions prohibited by R.C. 2921.42(A)(1) turn on what constitute actions that "authorize" and "employ the authority or influence of his office." Adv. Op. No. 98-004. The Commission has interpreted this statutory language to mean that a public official will be deemed to have "authorized" a public contract, for the purposes of R.C. 2921.42, where the contract could not have been awarded without the approval of the public position in which the official serves. See Adv. Ops. No. 87-004, 88-008, 90-010, and 92-012. Accordingly, R.C. 2921.42(A)(1) prohibits a public official from voting, discussing, deliberating, or otherwise participating in any part of his public agency's decision-making process with respect to the continuation, implementation, or terms and conditions of a public contract in which either he or a business associate has an interest. Adv. Op. No. 92-003.

Therefore, the Authority board member who is an officer of a company that desires to participate in the Program must abstain from participating and voting in official proceedings of the Authority regarding the company's application to participate in the program. The board member is prohibited from discussing, deliberating or recommending that the Authority approve the company's application as a participant in the Program.

Furthermore, the prohibition against a public official authorizing, or securing authorization of, a public contract in which he or his business associate has an interest extends beyond the initial award of the public contract and prohibits a public official from participating in any matter or decision that would affect the continuation, implementation, or terms and conditions of the public contract. See generally Adv. Ops. No. 82-003, 89-005, and 92-012. These matters and decisions include, but are not limited to, the authorization and approval of benefits under the contract to the business associate, and the renewal, modification, termination, or renegotiation of the contract's terms.

It must be noted that R.C. 2921.42(A)(1) also prohibits a public official from employing the "authority or influence of his office" to secure authorization of a public contract in which a business associate has an interest. The Ethics Commission has construed the words the words "authority or influence" according to rules of grammar and common usage and held that the use of the words "authority or influence" in R.C. 2921.42(A)(1) specifically characterize a broader range of activity than that described by the word "authorize." See Adv. Op. No. 94-002. Therefore, the prohibition against a public official employing the "authority or influence of his office" to secure a public contract in which a business associate has an interest bars the Authority board member from exercising the power and influence inherent in his position as a board member to affect the decisions of other Authority officers and employees, and the Authority's legal counsel, to approve the application of the company that he serves as an officer for participation in the Program. See also R.C. 102.03(D), set forth below.

Conflicts of Interest-R.C. 102.03(D) and (E)

Your question also implicates R.C. 102.03(D) and (E), which 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.

A "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 of a political subdivision. R.C. 102.01(B) and (C). A member of a port authority is a public official for purposes of R.C. 102.03(D) and (E). Adv. Op. No. 90-013.

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). A definite and direct pecuniary benefit is considered to be a thing of value under R.C. 102.03(D). Adv. Ops. No. 79-008, 86-007, and 89-005. The low-cost financing that the company would receive falls under the definition of "anything of value."

A thing of value is considered to be of an improper character for purposes of R.C. 102.03(D) and (E) whenever the thing of value is secured from a party that is interested in matters before, regulated by, or doing or seeking to do business with the public agency with which the official or employee serves, or where the thing of value could impair the official's or employee's objectivity and independence of judgment with respect to his official actions and decisions for the public agency with which he serves or by which he is employed. Adv. Ops. No. 79-002, 89-006, 90-012, and 92-009. The Ethics Commission has held that R.C. 102.03(D) prohibits a public official or employee from participating in matters that will benefit parties with whom he has a close family, economic, or business relationship because the relationships may impair the public official's objectivity and independence of judgment. Adv. Op. No. 98-002. See also Adv. Ops. No. 89-008, 89-015 and 90-008. R.C. 102.03(E) prohibits a public official or employee from merely soliciting or receiving an improper thing of value and does not require that he use the authority or influence of his position to secure it. Adv. Ops. No. 86-011 and 89-006.

The Ethics Commission has explained that a public official or employee must exercise his duties without hindrance by any improper influence. Adv. Op. No. 89-010. The prohibitions imposed by R.C. 102.03(D) and (E) serve the public interest in effective, objective, and impartial government by preventing the creation of a situation that may impair the objectivity and independence of judgment, and therefore, the effectiveness of a public official or employee, or the political subdivision with which he serves. Adv. Ops. No. 89-014 and 90-002.

In the instant situation, the relationship between the board member and the company that he serves as an officer is such that the board member's objectivity and independence of judgment could be impaired with respect to the interests of the company in the Authority's decision to approve the company as a participant in the Program. Therefore, R.C. 102.03(D), as well as R.C. 2921.42(A)(1), prohibits the board member from using the authority or influence of his official position with regard to any matter that would provide a definite and direct pecuniary benefit to the company that he serves as an officer.

In addition, the Ethics Commission has recognized that a public official or employee will develop working relationships by cooperating with other public officials and employees while performing his official duties. R.C. 102.03(D) prohibits a public official or employee who engages in private outside employment or business activity from using relationships developed while performing his public duties to secure a favorable decision or action by another public official or employee regarding his private interests or the interests of his business associates. Adv. Op. No. 96-004.

A person appointed to the board of the Authority has access to Authority board members and other officials and employees which is unique to that enjoyed by individuals who do not

serve in such office. R.C. 102.03(D) prohibits the board member from using his unique position and access, as an appointed member of the Authority's board, and his working relationship with other public officers and employees, to affect their approval of the application of the company that he serves as an officer for participation in the Program. The board member is prohibited from formally and informally recommending or lobbying for the company that he serves as an officer, and from taking any other formal or informal action to persuade Authority officials and employees to approve the company's application for participation in the Program.

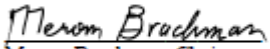
Conclusion

As explained above, a private company, for which the board member serves as an officer, is not precluded from applying for and receiving financing from the Program, under the specific circumstances that are described herein. The company may apply for and receive financing from the Program, provided that there is an objective demonstration that the economic development services the company is offering to the Authority through its participation in the Program "are unobtainable elsewhere for the same or lower cost" and the board member does not receive either a fee or compensation which would be paid from, or is dependent upon, the company's receipt of financing through the Program.

In addition, the board member would be prohibited from receiving a definite and direct personal profit or benefit from his company's participation in the Program. As discussed above, the board member is also prohibited from participating in any decisions of the Authority that affect the company's participation in the Program and from using his working relationship with public officers and employees to affect, formally or informally, their decision to approve the application of the company for participation in the Program.

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. Therefore, it is opinion of the Ohio Ethics Commission, and you are so advised, that: (1) When a member of the board of directors of a port authority is also an officer of a private company, Division (A)(4) of Section 2921.42 of the Revised Code precludes the private company from applying for and receiving financing from a bond program created and administered by the port authority unless all of the criteria of Division (C) of Section 2921.42 of the Revised Code are met; (2) If the port authority receives applications for participation in the bond program on a continuing basis, the "unobtainable elsewhere" requirement of Division (C) of Section 2921.42 of the Revised Code can be met by showing that the applications are considered in a fair and open process, and that it can be reasonably projected that the bond program can and will fully support financing of all interested and qualified applicants, including the company for which the board member is an officer; (3) Division (A)(3) of Section 2921.42 of the Revised Code does not preclude a company that a port authority board member serves as an officer from receiving financing through the authority's bond program provided that the board member's interest in the financing through the program is as a fiduciary due to his position as an officer of the company and his compensation does not include a financial benefit that is definitely and directly attributable to the company's receipt of

financing through the program; and (4) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code prohibit a port authority board member from discussing, deliberating or recommending that the authority approve the application of a private company for which he serves as an officer for participation in a bond program created and administered by the authority.


Merom Brachman, Chair
Ohio Ethics Commission