



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 210
COLUMBUS, OHIO 43215
(614) 466-7090

Advisory Opinion No. 84-006
April 19, 1984

Syllabus by the Commission:

(1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a township trustee from having an interest in a contract between the township and his private business firm to provide equipment and services to the township, unless all the requirements of Division (C) are met.

(2) The exemption of Division (C) of Section 2921.42 of the Revised Code does not apply to Section 511.13 of the Revised Code.

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You asked whether the Ohio Ethics Law and related statutes prohibit a township trustee, who owns a private business, from: (1) selling equipment to the township; or (2) maintaining a service contract with the township that pre-existed his purchase of the business if there is no other company within a fifty mile radius that can provide the service for township equipment.

You stated, by way of history, that a township has purchased equipment and maintained a service contract with a particular firm for several years. You stated further that the firm was purchased by a township trustee approximately two years ago, and that the township trustee fully disclosed his interest to the township. Since that time, the township has maintained a service contract with the firm because there are no other companies within a fifty mile radius that can provide service for the equipment. You stated that all dealings between the township and the firm have been at arm's length. You asked whether the Ohio Ethics Law and related statutes would prohibit the township trustee from selling additional equipment to the township or maintaining the service contract.

Division (A)(1) of Section 2921.42 of the Revised Code prohibits a public official from authorizing, or using the authority or influence of his office to secure authorization of a public contract in which he, a family member, or a business associate has an interest. Division (A)(4) of Section 2921.42 of the Revised Code prohibits a public official from having an interest in a public contract with the political subdivision, agency, or instrumentality with which he is connected. This prohibition applies even if the public official refrains from improper use of his authority or influence. A township trustee is a "public official" as defined in Division (A) of Section 2921.01 of the Revised Code. A purchase or acquisition of equipment or services by the township is a "public contract" as defined in Division (E)(1) of Section 2921.42 of the Revised Code. The owner of a business is "interested" in the contracts with his firm. Therefore, Division (A)(1) of Section 2921.42 of the Revised Code prohibits a township trustee from authorizing, voting, or using the authority or influence of his office to secure approval of a contract between

the township and his firm for the purchase of equipment or services. Division (A)(4) of Section 2921.42 of the Revised Code prohibits a township trustee from having an interest in a contract between the township and his firm for the purchase of equipment or services, even if he refrains from authorizing, voting, or otherwise using the authority or influence of his office to secure approval of the contract.

Division (C) of Section 2921.42 of the Revised Code provides an exemption from the prohibitions of Division (A) if the following criteria are met:

- (1) the subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
- (2) the services are unobtainable elsewhere for the same or lower cost, or are furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public servant'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 to other customers or clients in similar transactions; and
- (4) the entire transaction is conducted at arms length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interests of the public servant, a member of his family, or business associate, and the public servant takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

In Advisory Opinion No. 83-004, the Commission discussed the requirements of Division (C) of Section 2921.42 of the Revised Code:

These criteria are strictly applied, and the burden is on the public official claiming the exemption to demonstrate compliance. It is particularly important that the requirement that the goods or services are "unobtainable elsewhere for the same or lower cost" be demonstrated by some objective standard.

Thus, the township trustee must demonstrate that he meets all four criteria before his firm can sell new equipment to the township, or maintain the service contract.

Under the facts presented, it appears that the property or services that are the subject of the contract are necessary to the township. In addition, a "continuing course of dealing" was established with regard to the existing service contract before the township trustee acquired the firm. However, the statute describes a course of dealing established prior to a public official taking office, rather than prior to his obtaining an ownership interest in the firm. Although the effect may be the same, the statute apparently recognizes only the former situation. Furthermore, the Commission has taken a restrictive view of the exemption. In Advisory Opinion No. 82-007, the Commission held that the exemption "for services being furnished as part of a 'continuing

course of dealing' applies only to services provided during the term of the existing contract." Thus, the exemption would no longer apply if the original term of the service contract expired in the two years since the ownership interest was acquired. Any renewal would be a "new contract," not subject to the exemption. Of course, any subsequent purchase of equipment also would be a "new contract."

Nevertheless, the facts indicate that there is no other company within a fifty mile radius of the township that can provide service for township equipment. The statute does not indicate a geographic limitation on availability. However, service for equipment should be readily at hand, and presumably costs increase as the distance increases. Therefore, the services would be "unobtainable elsewhere for the same or lower cost," if it can be demonstrated that they are not available from any other source within fifty miles. Therefore, assuming the firm charges the same or better prices to the township as to other customers, and the township trustee discloses his interest and refrains from participating in deliberations, voting, or otherwise using his authority or influence to secure approval of the contract, the exemption would apply. It is less clear whether the exemption would apply to the purchase of new equipment, since it possibly could be ordered from another source for less cost.

The Commission does not have the authority to interpret Section 511.13 of the Revised Code, which prohibits township trustees from having an interest in contracts entered into by the board of township trustees. However, Ohio Attorney General Opinion No. 82-008 interpreted this Section in conjunction with Section 2921.42 of the Revised Code. The Attorney General declined to apply the exemption of Division (C) of Section 2921.42 of the Revised Code to Section 511.13 of the Revised Code:

R. C. 511.13 provides an exception to its general prohibition only in those situations where the township officer in question is neither an officer nor a director of a corporation which is to be party to a proposed contract, but is merely a shareholder of less than five percent of the corporation's stock, the value of which does not exceed five hundred dollars (See: 1982 O. A. G. No. 8, pp. 26, 29).

This exception is similar to that contained in Division (B) of Section 2921.42 of the Revised Code. There is no exemption similar to that contained in Division (C).

Thus, it appears that R. C. 511.13 provides a broader prohibition than R. C. 2921.42, although it provides no criminal sanctions (See: 1982 O. A. G. No. 8, pp. 26, 30).

Therefore, Section 511.13 of the Revised Code prohibits a township trustee from having an interest in any contract entered into by the board of township trustees, unless the interested trustee meets the criteria for a permissible interest specifically set forth in that Section.

The conclusions of this opinion are based on the facts presented and are rendered with regard to questions arising under Chapter 102. and Section 2921.42 of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, (1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a township trustee from having

an interest in a contract between the township and his private business firm to provide equipment and services to the township, unless all the requirements of Division (C) are met; and (2) the exemption of Division (C) of Section 2921.42 of the Revised Code does not apply to Section 511.13 of the Revised Code.



Richard D. Jackson, Chairman
OHIO ETHICS COMMISSION