



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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COLUMBUS, OHIO 43215
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Advisory Opinion Number 86-009
September 3, 1986

Syllabus by the Commission:

(1) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a city council member from authorizing, voting, or otherwise using the authority or influence of his office to secure approval of a lease of city-owned park land to a private party by whom he is employed to farm the leased property.

(2) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a city council member from having an interest in the profits or benefits of a lease of city-owned park land for farming, unless the exemption of Division (C) applies.

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You asked whether the Ohio Ethics Law and related statutes would prohibit a city council member from being employed with or without compensation by a lessee of city-owned park land to farm the leased property.

You stated, by way of history, that a city leased city-owned park land to a private party for farming, and that the lease was awarded to the highest and best bidder. You stated further that the private party seeks to employ a city council member to do part or all of the work, which includes plowing, planting, and harvesting the fields. You indicated that the ordinance and lease agreement specify that only soybeans may be planted and that the lessee will pay a specified amount per acre at the end of the term of the lease. You asked whether the Ohio Ethics Law and related statutes would prohibit the city council member from undertaking the work, whether or not he is compensated by the lessee.

Division (A) of Section 2921.42 of the Revised Code provides, in pertinent part:

(A) No public official shall knowingly do any of the following:

(1) 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; . . .

(4) 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.

A city council member is a "public official" as defined in Division (A) of Section 2921.01 of the Revised Code, since he is an elected officer of a political subdivision of the state (See: Advisory Opinion No. 78-001). A lease of real property is a contractual agreement, and the lease and ordinance specify that it is for the farming of soybeans. The proceeds of the farming operation presumably will be used to pay the rent at the end of the term of the lease. Thus, the transaction is a "public contract" as defined in Division (E)(1) of Section 2921.42 of the Revised Code, since it is a contract for the purchase or acquisition of farming services or other productive use of public property by the city. In Ohio Ethics Commission Advisory Opinion No. 82-007, the Commission held that a subcontract under a public contract is also a "public contract." In the instant case, it appears that the city council member would be subcontracting part or all of the work under the prime contract. Even if the relationship is not a subcontract in the strict sense, the city council member clearly would have an "interest" in the profits or benefits of the lease between the city and the private party if he is compensated for the farming of soybeans specified by the lease and ordinance. Also, an employer is the "business associate" of an employee (See: Advisory Opinions No. 78-006 and 79-005). Therefore, Division (A)(1) of Section 2921.42 of the Revised Code prohibits the city council member from authorizing, voting, or otherwise using the authority or influence of his office to secure approval of a lease of city-owned land to a private party by whom he is employed to farm the leased property. In addition, Division (A)(4) of Section 2921.42 of the Revised Code prohibits him from having an interest in the profits or benefits of such a lease, even if he refrains from participation in discussions or the vote on the transaction. However, these prohibitions would not apply if he were performing the work without compensation.

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

- (1) The subject of the 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 furnished as part of a continuing course of dealing established prior to the public servant's becoming associated with the political subdivision governmental agency or instrumentality;
- (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; and
- (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 servant, member of his family, or business associates, 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 Ohio Ethics Commission Advisory Opinion No. 83-004, the Commission held the following:

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.

The use of competitive bidding would indicate that the services are "unobtainable elsewhere for the same or lower cost," but it is not determinative. The Commission held that such factors as the availability and adequacy of notice to potential competitors, the openness and fairness of the bidding process, and the conditions of the market must also be considered in determining whether the exemption applies. In addition, all other criteria must be met, including the requirement that the public official refrain from participation in the deliberations and decision on the lease. However, even if the city council member can meet these requirements, the transaction may create the appearance of impropriety, particularly if the city council member were compensated.

This advisory opinion is based on the facts presented, and is limited 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, that: (1) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a city council member from authorizing, voting, or otherwise using the authority or influence of his office to secure approval of a lease of city-owned park land to a private party by whom he is employed to farm the leased property; and (2) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a city council member from having an interest in the profits or benefits of a lease of city-owned park land for farming, unless the exemption of Division (C) applies.


Merom Brachman, Chairman
Ohio Ethics Commission