



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 87-003
April 9, 1987

Syllabus by the Commission:

(1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a member of the Ohio Children's Trust Fund Board from serving as a member of the board of trustees or an officer of a nonprofit corporation which receives a grant awarded by the Board, or which receives a subgrant from an organization awarded moneys by the Board, unless all of the criteria for the exemption of Division (C) of Section 2921.42 of the Revised Code are met.

(2) A member of the Ohio Children's Trust Fund Board is not prohibited by Division (A)(4) of Section 2921.42 of the Revised Code from serving as a member of the board of trustees or officer of a nonprofit corporation which is a member of a coalition receiving moneys from a grant awarded by the Board.

(3) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a member of the Ohio Children's Trust Fund Board from authorizing or employing the authority or influence of his office to secure a grant for a nonprofit corporation of which he is a member of the board of trustees or an officer, to secure a grant for an organization which would use the grant to award a subgrant to his corporation, or to secure a grant for the benefit of a coalition which includes a nonprofit corporation of which he is a trustee or officer.

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You asked whether the Ohio Ethics Laws and related statutes prohibit a member of the Ohio Children's Trust Fund Board from serving as a member of the board of trustees or as an officer of a private, nonprofit corporation which receives a grant from the Children's Trust Fund Board.

By way of history, the Ohio Children's Trust Fund Board (hereinafter Board), has been created within the Department of Development, Office of Criminal Justice Services pursuant to Section 3109.15 of the Ohio Revised Code. The Board administers the Children's Trust Fund Special Account for the purposes of supporting programs to prevent child abuse and child neglect. See Section 3109.17 of the Revised Code. Pursuant to Division (B)(3) of Section 3109.17, the Board has the authority to "make grants to public or private agencies or schools for the purpose of child abuse and child neglect prevention programs."

You state in your letter that questions have arisen concerning situations where Board members are also members of the board of trustees and/or officers of organizations which may receive

grants awarded by the Board. In one instance, a Board member also serves as a trustee, the executive director, and a paid consultant for a private nonprofit corporation which has applied for a grant from the Board. This corporation is also part of a coalition which would receive a grant from the Ohio Children's Trust Fund Board through the Mental Health Association in Ohio which has submitted a grant application to the Board on behalf of the coalition. A second Board member is the president and executive director of an organization which is another member of the coalition.

Division (A)(4) of Section 2921.42 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 or governmental agency or instrumentality with which he is connected." As used in Section 2921.42, the term "public official" is defined by Division (A) of Section 2921.01 to include any appointed officer of the state. Pursuant to Section 3109.15 of the Revised Code, the Ohio Children's Trust Fund Board consists of thirteen members, two of whom are the Director of Health and the Director of Human Services. Seven members are appointed by the Governor. Two members of the Board must be members of the House of Representatives, appointed by the Speaker of the House, and two Board members must be members of the Senate, appointed by the President of the Senate. The members of the Board have specific and independent duties to allocate public funds and to perform other sovereign powers on behalf of the state. See R.C. 3109.16 and 3109.17. They are, therefore, state officers. See Ohio Ethics Commission Advisory Opinion No. 85-005. As appointed state officers, members of the Ohio Children's Trust Fund Board are "public officials" for purposes of Section 2921.42 of the Revised Code, and are prohibited by Division (A)(4) of that Section from having an interest in the profits or benefits of a public contract entered into by or for the use of the Board.

Division (E) of Section 2921.42 defines the term "public contract," as used in that section, to include "the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state." Previous advisory opinions by the Commission have concluded that grants by governmental agencies are "public contracts," as defined in R.C. 2921.42(E), since a grant is the purchase or acquisition of services by or for the use of the governmental agency. See Advisory Opinions No. 82-004 and 85-002.

The issue thus becomes whether a trustee or an officer of a private nonprofit corporation has an interest in the profits or benefits of contracts entered into by the corporation. An interest prohibited under Section 2921.42 may be either pecuniary or fiduciary in nature. See Advisory Opinion No. 81-003.

The Ethics Commission concluded in Advisory Opinion No. 81-008 that a city council member who also serves as a member of the board of trustees of a nonprofit corporation that contracts with the city has an interest in the contract between the corporation and the city, and thus may not serve on the board of the nonprofit corporation. Citing the legislative committee which enacted Section 2921.42, the opinion states: "this dual interest creates a situation 'in which there is a risk that private considerations may detract from serving the public interests'." Similarly, the Commission concluded in Advisory Opinion No. 81-005 that a city official is prohibited by R.C. 2921.42 (A)(4) from serving as an officer or a board member of an undesignated community improvement corporation, one type of nonprofit corporation, which is

established by the city and receives funds distributed through the city. Advisory Opinions No. 81-005 and 81-008 are consistent with those opinions of the Commission which have concluded that members of the board of directors and officers of for-profit corporations have a fiduciary interest, and in some instances, a pecuniary interest in the contracts of the corporation. See, e.g., Advisory Opinions No. 85-007, 85-009, 86-002, and 86-005.

It is apparent from the foregoing opinions that trustees and officers of a nonprofit corporation have an interest in the contracts of the corporation. This interest is fiduciary in nature, and could also be pecuniary in instances where an officer receives compensation, see R.C. 1702.01(C). Thus, members of the Ohio Children's Trust Fund Board are prohibited by Division (A)(4) of Section 2921.42 from serving as a trustee or an officer of a nonprofit corporation to which a grant has been awarded by the Board.

In the second situation you posed, Board members are officers or trustees of corporations which would not receive a grant directly from the Board. A grant would be awarded by the Board to the Mental Health Association in Ohio on behalf of a coalition of which the corporations are members.

A staff member of the Board has indicated that the grant received by the Mental Health Association may be used by the coalition to pay for the services of a coordinator and for legal services, and to print coalition materials which could be used by the member corporations. In order to be prohibited under Section 2921.42, an "interest" must be definite and direct. See Advisory Opinion No. 78-005. While a member corporation would benefit indirectly from the grant to the Mental Health Association, if the grant were used to purchase goods and services which further the objectives of the coalition and its members, a member corporation would not be a party to the grant or otherwise substantially benefit from the grant. The interest of the trustees or officers of the member corporations in the grant to the Mental Health Association is not a definite and direct interest. Thus, the prohibition of Division (A)(4) would not apply. See generally Advisory Opinions No. 85-002 and 85-011.

The grant may also be used by the Mental Health Association to provide subgrants to member corporations of the coalition. A subcontract, or subgrant, between the Association and a nonprofit corporation qualifies as a "public contract," since it, like the primary grant, is for the purchase or acquisition of services for the state. See Advisory Opinions No. 82-007 and 84-008. Further, the trustees and officers of the corporation would have a definite, direct interest in the grant. Therefore, a member of the Board is prohibited by R.C. 2921.42 (A)(4) from serving as a trustee or an officer of a nonprofit corporation which receives a subgrant from an organization which was awarded a grant by the Board.

Division (C) of Section 2921.42 could provide an exception to the prohibition of Division (A)(4), and permit a Board member to have an interest in a grant awarded by the Board if 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 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 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 servant, 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.

The requirements of Division (C) are factual determinations, and whether a particular transaction meets the criteria of Division (C) depends upon the facts and circumstances of each individual case. See Advisory Opinion No. 78-001. These criteria are strictly applied against the public official, and the burden is on the official to demonstrate that he is in compliance with the exemption. See Advisory Opinions No. 84-011 and 83-004. In considering whether a city employee could receive from the city a grant for housing rehabilitation, the Commission stated in Advisory Opinion No. 84-011:

While the exemption [of Division (C)] is most readily applied to direct purchases of goods or services, the same principles are applicable to other public contracts, such as the rehabilitation grants or loans in the instant case. However, the application of the exemption must be consistent with the principle underlying Section 2921.42 of the Revised Code that 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.

Division (C)(2) of Section 2921.42 requires that the services under the contract be unobtainable elsewhere for the same or lower cost or are being furnished to the governmental agency as part of a continuing course of dealing established prior to the public servant's becoming associated with the governmental agency involved. In the first situation you have posed, one grant was awarded in Fiscal Year 1986 to the corporation of which a Board member is a trustee and the executive director. Even assuming that the first grant was awarded to the corporation prior to the individual becoming a Board member, the fact that an initial grant had been awarded does not, for purposes of the second grant, properly establish a "continuing course of dealing" for purposes of Division (C)(2) of Section R.C. 2921.42. In Advisory Opinion No. 82-007, the Commission concluded that the continuing course of dealing exception applies only to services being provided during the term of the contract which pre-existed the appointment of the interested individual to his public position, and that the awarding of a second contract subsequent to the official's appointment does not qualify for the exception.

The exemption in Division (C)(2) of Section 2921.42 may be satisfied, however, if the official can establish, as a factual matter, that the services "are unobtainable elsewhere for the same or lower cost." As pointed out in Ohio Ethics Commission Advisory Opinion No. 83-004, the requirement that the goods or services be "unobtainable elsewhere for the same or lower cost" must be demonstrated by some 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.

If, however, a trustee or officer can objectively show that the services his corporation provides are unique or not available elsewhere, he may meet the requirement of Division (C)(2).

Assuming that the criteria of Division (C) can be established, and that a grant or subgrant may properly be awarded to the nonprofit corporations in question, the Board members who are trustees or officers of the corporations must observe the prohibition of Division (A)(1) of Section 2921.42 of the Revised Code. Division (A)(1) 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 a Board member from voting upon, discussing, or otherwise using his authority or influence to secure, a grant for his corporation or for an organization which would use the grant to award a subgrant to his corporation. See also R.C. 102.03(D) (prohibiting a public official from using or authorizing the use of the authority or influence of his office "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 him with respect to his duties"); R.C. 2921.42 (C)(4) (providing that in order to establish the exception of Division (C), the public servant may take no part in deliberations or decision of the governmental agency with respect to the public contract).

Division (A)(1) of Section 2921.42 also prohibits a public official from using his authority or influence to secure authorization of a public contract in which a business associate has an interest. Returning to the situation where the Mental Health Association would accept the grant on behalf, and for the use, of the coalition, it is apparent that the coalition and its member corporations are "business associates" for purposes of Division (A)(1) of Section 2921.42, since they are engaged in a common business concern. See Advisory Opinion No. 86-002. Further, the coalition would directly benefit from the grant. Thus, a Board member is prohibited by R.C. 2921.42 (A)(1) from using the authority or influence of his office to secure a grant for the use of the coalition.

To summarize, a member of the Ohio Children's Trust Fund Board is prohibited by Division (A)(4) of Section 2921.42 of the Revised Code from serving as a member of the board of trustees or an officer of a nonprofit corporation which has received a grant from the Board or which has received a subgrant from an organization awarded a grant by the Board, unless the criteria for the exemption of Division (C) of Section 2921.42 can be established. If the requirements of Division (C) can be met, so that a grant or subgrant may be properly awarded to

the nonprofit corporation, the interested Board member is prohibited by Division (A)(1) of Section 2921.42 from using his authority or influence to secure the grant from which his corporation would benefit. A Board member is not prohibited by Division (A)(4) of Section 2921.42 from serving as a trustee or officer of a nonprofit corporation which is a member of a coalition receiving a grant from the Board. The Board member would be prohibited by Division (A)(1) of Section 2921.42, however, from using his authority or influence to secure the grant for the coalition.

This advisory opinion is based on the facts presented, and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a member of the Ohio Children's Trust Fund Board from serving as a member of the board of trustees or an officer of a nonprofit corporation which receives a grant awarded by the Board, or which receives a subgrant from an organization awarded moneys by the Board, unless an of the criteria for the exemption of Division (C) of Section 2921.42 of the Revised Code are met; (2) A member of the Ohio Children's Trust Fund Board is not prohibited by Division (A)(4) of Section 2921.42 of the Revised Code from serving as a member of the board of trustees or officer of a nonprofit corporation which is a member of a coalition receiving moneys from a grant awarded by the Board; and (3) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a member of the Ohio Children's Trust Fund Board from authorizing or employing the authority or influence of his office to secure a grant for a nonprofit corporation of which he is a member of the board of trustees or an officer, to secure a grant for an organization which would use the grant to award a subgrant to his corporation, or to secure a grant for the benefit of a coalition which includes a nonprofit corporation of which he is a trustee or officer.


Merom Braehman, Chairman
Ohio Ethics Commission