



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

Advisory Opinion Number 89-004
February 23, 1989

Syllabus by the Commission:

- (1) Division (A)(4) of Section 2921.42 prohibits a public official from having an interest in the public contracts entered into by all of the political subdivisions, governmental agencies, and instrumentalities with which he is connected;
- (2) A member of a board of county commissioners is prohibited by R.C. 2921.42(A)(4) from having an interest in a public contract entered into by or for the use of a regional transit authority where the board of county commissioners participated in the creation of the authority and the county is included within the transit authority's jurisdiction;
- (3) Division (A)(1) of Section 2921.42 prohibits a member of a board of county commissioners from authorizing, or using the authority or influence of his office to secure authorization of, a public contract in which he, a member of his family, or any of his business associates has an interest, where the public contract is entered into by a regional transit authority which the board of county commissioners participated in creating and which includes the county;
- (4) Division (D) of Section 102.03 of the Revised Code prohibits a member of a board of county commissioners from using the authority or influence of his office to secure for his insurance agency contracts with a regional transit authority where the board of county commissioners has the power to appoint and remove trustees of the transit authority, and to appropriate moneys to the transit authority.

* * * * *

You have submitted a request for an advisory opinion concerning the following situation. You have stated that you are a member of the county board of commissioners and that the board of commissioners appoints three people to serve on the board of trustees of the local regional transit authority (hereinafter transit authority). The board of trustees of the transit authority is also composed of four members who are appointed by the largest city in the county, and three members who are appointed by the area Mayors and Managers Association.

You have also stated that you are a partner in an insurance agency and that your son operates the agency. Your agency wishes to submit insurance bids, seek contracts, and sell and provide insurance and bonding services and contracts to the transit authority. You state that the insurance agency would either submit bids in its own name or that other companies would submit bids, with your agency being a subcontractor or joint bidder. You wish to know whether

your agency is prohibited by the Ethics Law and related statutes from bidding on contracts or contracting with the transit authority.

Division (A)(4) of Section 2921.42 of the Revised Code reads as follows:

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

(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.

The term "public official" is defined for purposes of Section 2921.42 in Section 2921.01 to include any elected officer of a political subdivision of the state. As a county commissioner, you are, therefore, a "public official" who is subject to the prohibitions of Section 2921.42. See R.C. 305.01; Ohio Ethics Commission Advisory Opinions No. 78-003, 78-005, and 80-006.

The term "public contract" is defined for purposes of Section 2921.42 in Division (E) of 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 or any of its political subdivisions, or any agency or instrumentality of either." A regional transit authority is a political subdivision of the state. See R.C. 306.31. Therefore, the purchase, or a contract for the purchase of insurance or bonding services by a regional transit authority is a "public contract" for purposes of Section 2921.42. See Advisory Opinions No. 86-002 and 88-008.

An "interest" which is prohibited under Section 2921.42 must be definite and direct, and may be pecuniary or fiduciary in nature. See Advisory Opinion No. 81-008. As a partner in an insurance agency, you would have an "interest" in the contracts of that agency for purposes of Section 2921.42. See Advisory Opinions No. 78-001 and 82-007.

In this instance, your insurance company wishes to contract with the regional transit authority. Division (A)(4) of Section 2921.42 prohibits a public official from having an interest in a public contract "entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected." (Emphasis added.) The issue, therefore, is whether you are, as a county commissioner, "connected" with the regional transit authority.

In addressing this issue, it must first be determined whether the fact that you are, as a county commissioner, clearly "connected" with the county which you serve, see e-g., R.C. Chapters 305. and 307., necessarily means that you cannot be connected with another political subdivision. R.C. 1.43(A) provides that in construing a statute, "the singular includes the plural, and the plural includes the singular." R.C. 2921.42(A)(4), therefore, may be construed as prohibiting a public official from having an interest in a public contract entered into by or for the use of the political subdivisions or governmental agencies or instrumentalities with which he is connected. Furthermore, although R. C. 2921.42(A)(4) prohibits a public official from having an interest in a public contract entered into by the political subdivision or governmental agency or instrumentality with which he is connected, R.C. 1.02(F) provides that, as used in the Revised Code, the word "or" may be read "and", if the sense requires it. See City of Toledo v. Bernoir 18

Ohio St. 2d 241 (1969) (in determining whether the sense of a statute requires that the word "or" be read as "and," the purpose and goal of the statutory provision must be examined).

As observed by the legislative committee enacting R.C. 2921.42, the purpose of that section is to prohibit "those dealings in which there is a risk that private considerations [of the public official] may detract from serving the public interests." It is clear that the purpose of R.C. 2921.42 is to prevent public officials from personally benefiting from the contracts of a public agency where such personal benefit is to the detriment of the public interest, and that the potential for a public officials private interests to conflict with the public interest is greatest where the public official is doing business with an agency with regard to which he is authorized to exercise authority, discretion, or other official responsibilities. It is apparent that the purpose of R.C. 2921.42 is best served if the statute is interpreted as prohibiting a public official from doing business with all political subdivisions, governmental agencies, and instrumentalities with which he is connected. Therefore, you are prohibited by R.C. 2921.42 from having an interest in the public contracts entered into by all political subdivisions, governmental agencies and instrumentalities with which you are connected as a county commissioner.

It must next be determined whether you are, as a county commissioner, in fact "connected" with the regional transit authority. As noted in Advisory Opinion No. 87-002, R.C. 2921.42 does not define the word "connected," as used in that statute, although "common usage indicates that to be 'connected with' something is to be related to, or associated with, that entity."

Section 306.32 of the Revised Code provides that any county or counties, municipal corporations, townships, or any combination thereof, may create a regional transit authority by the adoption of a resolution or ordinance by the boards of county commissioners, municipal legislative authorities, and boards of township trustees of each political subdivision creating or joining in the creation of the regional transit authority. The territorial boundaries of a regional transit authority are coextensive with the territorial boundaries of the political subdivisions included within the authority, see R.C. 306.32. The members of the authority's board of trustees are appointed as provided in the resolutions or ordinances creating the authority, and the appointing authority may at any time remove a trustee for misfeasance, nonfeasance, or malfeasance. See R.C. 306.33. Section 306.47 authorizes the board of county commissioners of a county included within a regional transit authority to appropriate moneys from its general fund its portion of the expenses of the authority as provided in its resolution or ordinance creating the authority.

In this particular instance, the board of county commissioners with which you serve participated in the creation of the transit authority, and the territorial boundaries and jurisdiction of the transit authority are coextensive with the territorial boundaries of the county. See County Resolution Creating Regional Transit Authority (hereinafter Resolution), Section 2. The board of county commissioners on which you serve is empowered to appoint three members of the transit authority's board of trustees. See Resolution, § 5(A)(3). The county is also charged with providing financial and other assistance to the transit authority. See Resolution, § 7(A), (B), (C). It is apparent that you are, as a county commissioner, related to, or associated with, the regional transit authority. Therefore, you are "connected" with the transit authority and are prohibited by R.C. 2921.42(A)(4) from having an interest in a public contract entered into by the transit

authority. Your insurance agency may not sell insurance or bonding services or contracts to the transit authority. The Commission has held that a subcontract under a public contract is also a "public contract" for purposes of R.C. 2921.42 since the subcontract, like the prime contract, is for the purchase or acquisition of goods or services for the state or a political subdivision. See Advisory Opinions No. 82-007, 84-008, and 87-003. Therefore, R.C. 2921.42(A)(4) would also prohibit your insurance agency from acting as a subcontractor under a contract with the transit authority.

You have asked whether it would make a difference if the three members of the transit authority who are appointed by the board of county commissioners would abstain from participating in the transit authority's consideration of your agency's bid or contract. There is nothing in the Ethics Law which would permit your insurance agency to do business with the transit authority on the grounds that the county's appointees to the transit authority abstained from participating in consideration of your agency.

However, Division (C) of Section 2921.42 provides an exception to the general prohibition against you selling insurance or other services to the transit authority, and reads as follows:

(C) This section does not apply to a public contract in which a public servant, 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 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. As stated in Advisory Opinion No. 83-004:

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 [under Division (C)(2)] that the goods or services are "unobtainable elsewhere for the same or lower cost" be demonstrated by some objective standard.

One indication that the services are "unobtainable elsewhere for the same or lower cost" would be where a public contract is competitively bid, and your agency submits the lowest bid. See Advisory Opinions No. 82-007 and 83-004. However, the bidding process must be open and fair, and the transit authority must make every reasonable effort to open the selection process to all interested and qualified parties and to award the contract to the party that will provide the necessary services at the lowest cost. See Advisory Opinions No. 83-004 and 88-001. Furthermore, the transit authority's specifications or requirements must be valid and proper considerations, and not drawn to favor any particular company. See Advisory Opinion No. 88-001.

Assuming that all of the criteria of Division (C) of Section 2921.42 can be established so that your insurance agency and the transit authority can properly contract, the prohibitions of R.C. 2921.42(A)(1) must be observed. This provision 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 member of his family or any of his business associates has an interest. Therefore, R.C. 2921.42(A)(1) would prohibit you from using your authority or influence, formally or informally, to secure for your insurance agency a contract or subcontract with the transit authority.

Your attention is also drawn to Division (D) of Section 102.03 of the Revised Code, which states:

No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his duties.

In this instance, the board of county commissioners, of which you are a member, appoints three members to the board of trustees of the transit authority, and has the authority to remove its appointees from office. The board of county commissioners is also empowered to appropriate moneys to the transit authority. You therefore serve in a position of authority and influence over the members of the board of trustees of the transit authority. You are prohibited by R.C. 102.03(D) from using that authority or influence as a county commissioner to secure contracts or subcontracts for your insurance agency from the transit authority.

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, and does not purport to interpret other laws or rules.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (A)(4) of Section 2921.42 prohibits a public official from having an interest in the

public contracts entered into by all of the political subdivisions, governmental agencies, and instrumentalities with which he is connected; (2) A member of a board of county commissioners is prohibited by R.C. 2921.42(A)(4) from having an interest in a public contract entered into by or for the use of a regional transit authority where the board of county commissioners participated in the creation of the authority and the county is included within the transit authority's jurisdiction; (3) Division (A)(1) of Section 2921.42 prohibits a member of a board of county commissioners from authorizing, or using the authority or influence of his office to secure authorization of, a public contract in which he, a member of his family, or any of his business associates has an interest, where the public contract is entered into by a regional transit authority which the board of county commissioners participated in creating and which includes the county; (4) Division (D) of Section 102.03 of the Revised Code prohibits a member of a board of county commissioners from using the authority or influence of his office to secure for his insurance agency contracts with a regional transit authority where the board of county commissioners has the power to appoint and remove trustees of the transit authority, and to appropriate moneys to the transit authority.



Richard D. Jackson, Chairman
Ohio Ethics Commission