



OHIO ETHICS COMMISSION

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Advisory Opinion Number 92-004
January 31, 1992

Syllabus by the Commission:

- (1) A county sheriff or deputy sheriff is prohibited by Division (A)(4) of Section 2921.42 of the Revised Code from serving as a member of the board of directors or as an officer of the Buckeye State Sheriffs' Association if the Association has contracted with the county to provide pre-employment psychological tests to the sheriff's department, unless the exception of Division (C) of Section 2921.42 can be established;
- (2) The requirement of Division (C)(2) of Section 2921.42 that the supplies or services are being furnished to a political subdivision as part of a continuing course of dealing established prior to the public servant's becoming associated with the political subdivision is not met by a county sheriff or deputy sheriff where the county and the Buckeye State Sheriffs' Association contract prior to the time the sheriff or deputy obtains an interest in the contract by becoming an officer or director of the Association, rather than prior to his taking office as sheriff or deputy sheriff;
- (3) Division (A)(1) of Section 2921.42 and Division (D) of Section 102.03 of the Revised Code prohibit a county sheriff or deputy sheriff from authorizing, or using the authority or influence of his position to secure authorization of, a public contract between his county and the Buckeye State Sheriffs' Association where he serves as an officer or director of the Association;
- (4) There is nothing in the Ethics Law which would prohibit a county from contracting with the Buckeye State Sheriffs' Association immediately after the sheriff or deputy sheriff ceases to serve as an officer or director of the Association.

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You have asked whether the Buckeye State Sheriffs' Association is prohibited by the Ohio Ethics Law and related statutes from selling pre-employment psychological tests to various sheriffs' departments within the State, and, if not, whether the sales must be made pursuant to competitive bidding.

You have stated by way of history, that the Buckeye State Sheriffs' Association (Association) is a nonprofit corporation and professional organization with a voluntary membership composed of elected county sheriffs and deputy sheriffs from throughout the State of Ohio. The board of directors of the Association is composed of sheriffs who are elected annually by the county sheriffs, and includes several officers who are also elected by the

membership. The board of directors also includes four deputy sheriffs who are elected by the members of the Association who are deputy sheriffs. It is the board of directors who would vote to obtain a distributorship to sell the tests.

You have also stated that all profits from the sale of the products would be used to further the goals of the Association, but that no such profits would be directly received by, nor directly benefit, any specific sheriff, including any sheriff who serves on the board of directors. See R.C. 2921.42 (A)(3) (prohibiting a public official from profiting from a public contract which he authorized or approved, unless the contract was competitively bid and his was the lowest and best bid).

There is nothing in the Ethics Law which would generally prohibit the Association from selling tests to counties where sheriffs and deputy sheriffs are mere members of the Association, even where the purchase is not competitively bid, or which would prohibit sheriffs or deputy sheriffs who are mere members from recommending or awarding a bid or non-bid contract for the purchase of tests to the Association, unless a sheriff or deputy sheriff is also an employee of the Association, has assumed a particular duty in the Association for marketing or sale of the tests, would have a personal, financial interest in the sale of the tests, or the facts indicate his objectivity or independence of judgment as a public official could otherwise be impaired. See Ohio Ethics Commission Advisory Opinion No. 89-005; R.C. 102.03 (J). See generally Advisory Opinion No. 90-012.

However, Division (A)(4) of Section 2921.42 of the Revised Code would apply to prohibit sales under certain circumstances. Division (A)(4) 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 R.C. 2921.42 to include any elected or appointed officer, or employee of a political subdivision. See R.C. 2921.01(A). A county sheriff is, therefore, a "public official" for purposes of R.C. 2921.42, and is subject to the prohibitions contained therein. See Advisory Opinion No. 85-015.

The term "public contract" is defined for purposes of R.C. 2921.42 to include 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. See R.C. 2921.42(E)(1). The purchase, or a contract for the purchase, of pre-employment psychological tests by a county for the use of the county sheriff's office would constitute a public contract for purposes of R.C. 2921.42. Therefore, a county sheriff is prohibited by R.C. 2921.42(A)(4) from having an "interest" in the purchase, or a contract for the purchase, of pre-employment psychological tests by the county with which he serves. See generally Advisory Opinion No. 87-002.

An "interest" which is prohibited by R.C. 2921.42 must be definite and direct, and may be pecuniary or fiduciary in nature. See Advisory Opinions No. 81-003 and 81-008. In Advisory Opinion No. 87-003, the Ethics Commission held that directors, trustees, and officers of corporations, including nonprofit corporations, have an "interest" in the contracts of the corporations with which they serve. This interest is fiduciary in nature, and may also be pecuniary in instances where an officer receives compensation. Id. Therefore, a county sheriff is prohibited by R.C. 2921.42 (A)(4) from serving as a member of the board of directors or as an officer of the Association if the Association has contracted with the county to provide pre-employment psychological tests to the sheriff's department. Similarly, if a sheriff serves on the board of directors, or as an officer, of the Association, then the Association may not sell tests to the county.

Division (C) of Section 2921.42 does, however, provide an exception to the prohibition of Division (A)(4), and would permit the Association to sell the tests to a county served by a sheriff who is a director or officer of the Association, 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.

Whether a particular transaction meets the criteria of Division (C) depends upon the facts and circumstances of each individual case. See Advisory Opinion No. 87-003. The criteria are strictly construed against the public official, and the burden is on the official to demonstrate that he is in compliance with all of the requirements of the exemption. See Advisory Opinions No. 83-004 and 84-011.

It is of particular importance that the county sheriff be able to demonstrate that he is in compliance with Division (C)(2) of Section 2921.42, which requires that the supplies or services that would be provided to the county by the Association "are unobtainable elsewhere for the same or lower cost." As stated in Advisory Opinion No. 84-011, "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. . . . [A] public official or employee [must] be at a disadvantage when attempting to do business with his governmental entity." If it can objectively be shown that the service or product being offered by the Association is unique or not available elsewhere, or is not available elsewhere at the same or lower cost, then the requirement of Division (C)(2) may be met. See Advisory Opinion No. 87-003. This requirement must be demonstrated by some objective standard, such as an open and fair competitive bidding process. See Advisory Opinions No. 83-004, 87-003, and 88-001. The county must ensure that reasonable efforts are used to prepare appropriate bid specifications and to secure competitive bids, and that a broad opportunity to bid is given. See Advisory Opinion No. 88-001. Bids must be solicited on an open and fair basis, and not limited to a solicitation from the Association. Id. All interested and qualified parties must have an opportunity to bid and the contract must be awarded to the party who will provide the necessary services at the lowest cost. Id.

Division (C)(1) requires that the county reasonably and objectively demonstrate that the tests are necessary services for the county, and Division (C)(3) requires that the treatment accorded the sheriff's county by the Association is either preferential to, or the same as, that accorded to other parties to which the Association sells the tests.

Division (C)(4) requires that the transaction be conducted at arm's length, with knowledge by the county that the sheriff serves in a fiduciary capacity with the Association, and that the sheriff take no part in the deliberations or decision of the county with respect to the contract with the Association. See also R.C. 2921.42 (A)(1) and 102.03(D) (discussed below).

Assuming that the requirements of Division (C) of Section 2921.42 can be met, so that the Association can properly sell tests to sheriffs who serve in a fiduciary capacity with the Association, the prohibitions of Division (A)(1) of Section 2921.42 must still be observed. Division (A)(1) reads as follows:

(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.

As discussed above, a director or officer of the Association would have a fiduciary interest in the contract between the Association and the county he serves. Therefore, Division (A)(1) would prohibit a sheriff who serves as a director or officer of the Association from authorizing, or using the authority or influence of his position as sheriff to secure authorization of, a public contract for the provision of psychological tests between the Association and his county. You have stated that the board of county commissioners would be required to authorize and award the contract. You have also stated that the county sheriff has no authority to award the contract. However, the county sheriff would be required to refrain from participating in any manner, formally or informally, in the consideration, recommendation, or award of the contract. He would be prohibited from recommending or requesting that the contract be awarded to the Association, from participating in the preparation of the bid specifications, and from otherwise

using his influence or authority to secure the contract for the Association. See Advisory Opinion No. 88-001. In light of the fact that the tests would be for the use of the sheriff's office and the sheriff is an independent elected officeholder who is ultimately responsible for the operations of his department and would be expected to be involved in the purchase of tests for his department, it is apparent that the sheriff would be unable to comply with Division (A)(1), as well as Division (C)(4) of Section 2921.42, as set forth above. Cf. Advisory Opinion No. 90-010.

R.C. 102.03(D), which prohibits a public official or employee, see R.C. 102.01(B) and (C), from using the authority or influence of his office or employment to secure anything of value that is of such character as to manifest a substantial and improper influence upon him with respect to his duties, has been interpreted by the Commission as prohibiting a public official from participating in any matter that would provide a benefit to an organization which he serves as an officer or in another fiduciary capacity. See Advisory Opinions No. 89-005 and 90-012. R.C. 102.03(D), would, therefore, also prohibit a county sheriff from participating in the award of a contract to the Association if he served as a director or officer of the Association. Again, this restriction could not be met by a county sheriff since he must determine in the first instance that his department desires to purchase psychological tests, and would be expected to be actively involved in suggesting or preparing bid specifications, evaluating bids, and recommending the successful bidder, even if he has no formal authority to ultimately award the contract.

In some instances, the Commission has held that, in order to avoid violating R.C. 2921.42 and R.C. 102.03(D), a public official or employee may withdraw from participating in a matter, such as the award of a contract, and either delegate to someone under his supervision the authority to approve a contract, with review of the subordinate's action by an official or entity independent of, or superior to, the official or employee with the conflict of interest or empower an authority who is independent of, or superior to, the official or employee with the conflict of interest to approve the contract, if such transfer of authority is permitted under relevant statutes or municipal provisions. See Advisory Opinions No. 83-001, 85-002, 89-006, and 90-010. In this instance, however, it would not be possible for a county sheriff, who is an independent elected officer and ultimately responsible for the operation of the sheriff's office, to withdraw from determining the necessity of purchasing psychological tests and otherwise being actively involved in the purchase of the tests and the choice of the vendor. See generally Advisory Opinions No. 89-006, 89-010, and 90-002 (the withdrawal of a public official or employee may not interfere with the performance of his official duties).

You have also indicated that the Association elects four deputy sheriffs to serve on the board as deputy directors of the Association. Deputy sheriffs are also "public officials" who are subject to the prohibitions of R.C. 2921.42 and R.C. 102.03(D). See R.C. 2921.01(A), and 102.01(B) and (C). R.C. 2921.42 (A)(4) would prohibit a deputy sheriff from serving as a deputy director of the Association if the Association has contracted with the county to provide tests to the sheriff's department, unless the exception of Division (C) of Section 2921.42 can be established. Similarly, the Association may not sell tests to the counties served by the deputy sheriffs who are on the board as deputy directors of the Association, unless the exception of Division (C) of Section 2921.42 can be met. If the exception can be established, such that the Association may sell tests to those counties, the deputy sheriffs who serve as deputy directors of the Association would be prohibited by R.C. 2921.42(A)(1) and R.C. 102.03(D) from

participating in their official capacity in the consideration, recommendation, and award of a contract by their counties to the Association, as discussed above. In this instance, however, it would be a much easier matter for a deputy sheriff than the county sheriff himself, to withdraw from consideration of the contract.

You also ask for what length of time after a member leaves the board of directors he is prohibited from purchasing psychological tests from the Association. Although the Ethics Law does include post-employment restrictions which apply to public officials or employees after they leave public office or employment, there is nothing in the Ethics Law which prohibits a public official from doing business with an organization for a period of time after the official has ceased to have an interest in the organization's contracts. Cf. Advisory Opinion No. 90-011 (R.C. 102.03(D) does not generally prohibit a public official from participating in a matter presented to his agency by a former client of his law firm or law partner). Therefore, a county sheriff or deputy sheriff may do business with the Association immediately after he ceases to serve as an officer or director of the Association. He would, however, be prohibited, while serving as an officer or director, from participating in any manner as county sheriff or deputy sheriff with respect to the contract, even in contemplation of his resignation as director or officer. See generally Advisory Opinion No. 87-008.

You also ask whether a contract, which is awarded to the Association by a county whose sheriff or deputy sheriff is not a director or officer of the Association, must be terminated if the sheriff or deputy sheriff is elected as a director or officer after the contract is awarded. As an officer or director, he would then have an "interest" in the contract, as prohibited by Division (A)(4) of Section 2921.42. As set forth above, one of the criterion of the exception to the prohibition of Division (A)(4), as set forth in Division (C)(2) of Section 2921.42, is that "the supplies or services . . . 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." This "continuing course of dealing" exception would apply if an individual, or a firm in which he had a financial or fiduciary interest, entered into a contract with the county, and subsequent to the commencement of the contract the individual became an officer or employee of the county. See Advisory Opinions No. 82-007, 84-006, 87-003, and 88-008. In such a situation, the exception would permit the contract to be fulfilled. Id. However, that is not the situation you present. As explained in Advisory Opinion No. 84-006, which addressed the question whether R.C. 2921.42 would prohibit a township trustee who owned a private business from maintaining a service contract with the township that pre-existed his purchase of the business, the continuing course of dealing exception "describes a course of dealing established prior to a public official taking office, rather than prior to his obtaining an . . . interest in the firm." Likewise, in this instance, the contract would be established prior to the sheriff or deputy obtaining an "interest" in the contract by becoming an officer or director of the Association, rather than prior to his taking office as sheriff or deputy sheriff. Therefore, the "continuing course of dealing" exception would not apply. However, the requirement of (C)(2) may still be met if, as discussed above, the sheriff or deputy can demonstrate that the supplies or services are "unobtainable elsewhere for the same or lower cost," and each individual situation would have to be examined to determine whether this criterion could be met even though the

"continuing course of dealing" criterion could not be established. See Advisory Opinion No. 84-006.

The Commission wishes to make clear that this opinion is not intended to impinge on the ability of the Association to advocate the interests of its members, or the ability of the membership to accept benefits the Association may be able to secure for its membership. In this instance, however, the Association stands in the same position to the county and the sheriff's office as any other vendor who wishes to sell a service or product to the county would stand. The sheriff and county must be able to objectively consider the appropriateness of the purchase, as well as the quality and price of the product or service being offered. This objectivity could be impaired if the sheriff or his deputy also serves in a fiduciary capacity with the vendor; in this case, the Association.

This advisory opinion is based on the facts presented. It 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) A county sheriff or deputy sheriff is prohibited by Division (A)(4) of Section 2921.42 of the Revised Code from serving as a member of the board of directors or as an officer of the Buckeye State Sheriffs' Association if the Association has contracted with the county to provide pre-employment psychological tests to the sheriff's department, unless the exception of Division (C) of Section 2921.42 can be established; (2) The requirement of Division (C)(2) of Section 2921.42 that the supplies or services are being furnished to a political subdivision as part of a continuing course of dealing established prior to the public servant's becoming associated with the political subdivision is not met by a county sheriff or deputy sheriff where the county and the Buckeye State Sheriffs' Association contract prior to the time the sheriff or deputy obtains an interest in the contract by becoming an officer or director of the Association, rather than prior to his taking office as sheriff or deputy sheriff; (3) Division (A)(1) of Section 2921.42 and Division (D) of Section 102.03 of the Revised Code prohibit a county sheriff or deputy sheriff from authorizing, or using the authority or influence of his position to secure authorization of, a public contract between his county and the Buckeye State Sheriffs' Association where he serves as an officer or director of the Association; and (4) There is nothing in the Ethics Law which would prohibit a county from contracting with the Buckeye State Sheriffs' Association immediately after the sheriff or deputy sheriff ceases to serve as an officer or director of the Association.


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