



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

Advisory Opinion Number 92-020
November 20, 1992

Syllabus of the Commission:

(1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits the clerk of city council from being employed or hired by the city to act as chief labor negotiator, unless he can meet the requirements of Division (C) of Section 2921.42 of the Revised Code.

(2) Division (C) of Section 102.04 of the Revised Code does not prohibit the clerk of city council from receiving compensation from the mayor's office to provide services as chief labor negotiator;

* * * * *

You have asked whether you may contract with a statutory city to serve as chief labor negotiator, in light of the fact that you have been appointed as clerk of council for the city.

You have stated, by way of history, that during 1990, you were engaged by the city to represent it in connection with negotiations of collective bargaining agreements with the city's three unions. You are an attorney in private practice, and handled these negotiations as an independent contractor, with the fees for your professional services being paid to the law firm. You have explained that, in March of 1991, you were appointed by the city council as clerk of council. You have stated that all professional services under the 1990 contract had "essentially terminated" by the time you were appointed clerk of council.

You have further stated that the city's labor contracts will expire during 1993, and you would like to submit a proposal to the city to again act as the chief labor negotiator during the upcoming labor negotiations. You do not wish to resign as clerk of council.

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 clerk of city council is a public official who is subject to the prohibitions of R.C. 2921.42. See R.C. 731.04; Ohio Ethics Commission Advisory Opinion No. 91-007.

A "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 a political subdivision. The Ethics Commission has held that the employment of, or purchase of services from, an individual by the State or a political subdivision, or a contract for his employment or for his services, constitutes a "public contract" for purposes of Section 2921.42 since the State or political subdivision is acquiring or purchasing the services of the individual. See Advisory Opinions No. 80-001, 81-004, 85-002, 85-015, 88-001, 90-010, 91-002, and 92-012. Therefore, an agreement between you and the city to act as chief labor negotiator is a "public contract" for purposes of R.C. 2921.42.

R.C. 2921.42 (A)(4) 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 with which he is connected. See generally Advisory Opinion No. 87-002. An "interest" which is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. See Advisory Opinion No. 91-002. An individual who receives compensation or remuneration for services performed under a public contract would have a definite and direct, pecuniary interest in the public contract. See Advisory Opinions No. 88-001 and 91-002.

The Ethics Commission has held that R.C. 2921.42 prohibits a public official from holding employment with, or being hired as an independent contractor to provide services to, the political subdivision with which he serves as a public official. See Advisory Opinions No. 88-001 and 91-002. You are prohibited, by R.C. 2921.42(A)(4), from being employed or hired by the city to serve as the city's chief labor negotiator because you currently serve as the clerk of city council.

As you state in your letter, Division (C) of Section 2921.42 provides an exemption to the prohibition of Division (A)(4). Division (C) contains four criteria which must be met in order for a public official to be exempt from the prohibition of R.C. 2921.42(A)(4). These criteria are strictly applied against the public official or employee and the burden is upon the public official to demonstrate his compliance with the exemption. See Advisory Opinions No. 84-011, 87-003, and 91-011.

Division (C)(2) requires that the goods or services provided by a public official to his own political subdivision be "unobtainable elsewhere for the same or lower cost." You have stated that persons interested in serving as chief labor negotiator will submit written proposals, and that the city will follow a bid process in selecting the negotiator. In order to meet the requirement of Division (C)(2), you must submit the lowest bid in order to be permitted to contract with the city. The bid process must be open and fair, the city must ensure that reasonable efforts are used to secure competitive bids, and that a broad opportunity to bid is given. Advisory Opinion No. 88-001. Bids must be solicited on an open and fair basis, and not limited to solicitations from city officials and employees; the city must make every reasonable effort to open the bidding process to all interested and qualified individuals and to award the work to the person who will provide the necessary services at the lowest cost. Id. All bid specifications must objectively be valid and proper considerations and not designed to favor a particular person. Id. See Advisory Opinions No. 82-007 and 83-004. See also Advisory Opinion No. 84-002 (it would be "extremely difficult" to demonstrate that legal services would be "unobtainable elsewhere for the same or lower cost").

You must also show compliance with the other requirements of R.C. 2921.42 (C). Of specific note is R.C. 2921.42 (C)(4), which requires that the transaction be at arm's length, with full knowledge of the political subdivision of the public servant's interest, and that the public servant take no part in the deliberations and decision of the political subdivision with respect to the contract. You must also show compliance with R.C. 2921.42 (C)(1) and (C)(3). Division (C)(1) requires that the city reasonably and objectively demonstrate that the services of a labor negotiator are necessary services for the city, and Division (C)(3) requires that the treatment accorded the city by you is preferential to, or the same as, that accorded to other parties to which you provide services.

If you are able to meet the exemption of Division (C) of Section 2921.42, you must also comply with Division (A)(1) of Section 2921.42, which provides that no public official shall knowingly:

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.

Division (A)(1) of R.C. 2921.42 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 has an interest. Therefore, R.C. 2921.42 (A)(1) prohibits you from discussing, deliberating, recommending, or otherwise using your official authority in any way, formally or informally, to secure the city's labor negotiator contract for yourself. See Advisory Opinions No. 88-006 and 91-011. See also R.C. 2921.42(A)(3) (prohibiting a public official from profiting from a public contract which he has authorized, where the contract was not competitively bid and not the lowest and best bid) and Advisory Opinion No. 91-007 (explaining the operation of R.C. 2921.42(A)(3) with regard to the clerk of city council); R.C. 2921.42 (C)(4) (requiring that the contract transaction be completed at "arm's length," with full knowledge of the political subdivision of the official's or employee's interest, and that the official or employee take no part in the political subdivision's deliberations or decision with respect to the contract).

Division (C) of Section 102.04 of the Revised Code reads as follows:

Except as provided in division (D) of this section, no person who is elected or appointed to an office of or employed by a county, township, municipal corporation, or any other governmental entity, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which he is an officer or employee.

R.C. 102.04(C) prohibits you, as a city officer or employee, from receiving compensation "other than from the agency with which [you] serve . . ." for personally rendering services on a matter which is before a city agency, department, board, bureau, commission, or other instrumentality of the city. You serve with the city council. However, the mayor would pay your compensation as the chief labor negotiator. Arguably, therefore, you would thus receive

compensation other than from the agency with which you serve for personally rendering services on a matter pending before the city. R.C. 102.04 does not state that a person who is appointed to an office is prohibited from receiving compensation other than from the political subdivision or governmental entity with which he serves; rather the statute uses the term "public agency" which connotes a narrower and more specific source of income. Cf. R.C. 102.01(C)(defining "public agency" for purposes of R.C. Chapter 102. as "any department, division, institution, board, commission, authority, bureau or other instrumentality of" a city); Advisory Opinion No. 91-009. In the first part of R.C. 102.04(C), the statute lists the various political subdivisions as a whole in describing the scope of the statute's applicability, and then uses the term "agency" as the proper source of compensation, rather than referring to the various political subdivisions themselves as the source of compensation. This evidences a legislative intent that the word "agency" means something different than the political subdivision as a whole. See Kiefer v. State, 106 Ohio St. 285 (1922). Perhaps more compelling is the last portion of R.C. 102.04 which refers to the matter which is before "any agency, department, board, bureau, commission, or other instrumentality . . . of the entity of which he is an officer or employee." This aptly demonstrates that the term "agency," as used in R.C. 102.04 (C), may mean something narrower than the governmental entity as a whole with which the official serves. Cf. Advisory Opinion No. 91-009 (the exception to the Revolving Door prohibition which allows a former official to be retained or employed by the "public agency by which he was employed or on which he served" permits a former county official to be retained by the specific department, division, or board with which he served but not the county as a whole). Therefore, Division (C) of Section 102.04 arguably prohibits you from receiving compensation from the mayor's office to provide personal services on a matter which is before any agency, department, board, bureau, commission, or other instrumentality of the city. See generally Advisory Opinion No. 82-006.

However, in examining the structure of Section 102.04 as a whole, it is apparent that the legislature intended that Division (C) not apply to situations where a public official or employee is receiving compensation from more than one agency of the political subdivision with which he serves, but rather is applicable to situations where a public official or employee would receive compensation from a source other than his employing political subdivision to personally render services on matters pending before his political subdivision. See generally Advisory Opinion No. 75-015. See also The Black-Clawson Co. v. Evatt, 139 Ohio St. 100 (1941) (one sentence should not be isolated and dissociated from the context of a statute; the four corners of the enactment must be examined to determine the intent of the enacting body).

Division (A) of Section 102.04 imposes on officers and employees of the State the same restrictions that Division (C) imposes on officers and employees of local governmental entities. Division (B) prohibits an officer and employee of the State from selling goods or services to State entities without competitive bidding. Thus, Section 102.04 contains two separate and distinct prohibitions for State officers and employees. It is obvious that if Division (A) prohibited State officials and employees from receiving compensation from other state agencies for the provision of services, then the enactment of Division (B) would have been unnecessary. R.C. 102.04 (B), as it applies to State officers and employees, was enacted in 1976, three years after the enactment of Division (A). Am. H.B. 1040, eff. Aug. 27, 1976. See R.C. 1.47(B) ("[i]n enacting a statute, it is presumed that: . . . [t]he entire statute is intended to be effective").

If Division (B), or an analogous provision, were applicable to local officials and employees, it would clearly apply to the question you have raised, since you have asked about selling your services to an entity of the city. However, Division (B) does not apply to city officers and employees, and there is no provision in Section 102.04 which contains analogous provisions for local officers and employees. Section 102.04 (C) contains the only prohibition in Section 102.04 which pertains to local officers and employees. If the Ethics Commission were to hold that Division (C) applies to prohibit you from contracting with another city entity, then the Commission would, in effect, be legislating a prohibition for Section 102.04 that the General Assembly has not seen fit to enact. It is apparent from the separate provisions of Divisions (A) and (B) that Division (C) does not operate to prohibit a local official from contracting with other entities of his political subdivision. Therefore, R.C. 2921.42 remains the sole restriction under the Ethics Law with specific regard to the ability of a local officer or employee to contract with his own political subdivision. R.C. 102.04(C) does not prohibit you from receiving compensation from an agency of city government, other than your own, to provide services to that agency. See generally Advisory Opinions No. 75-010, 75-011, 75-015, 76-004, and 77-006.

(Perhaps an explanation for the differential treatment of State officials and local officials under R.C. 102.04 is the fact that R.C. 2921.42 (A)(4) prohibits a State official or employee from contracting with his own specific entity of State government, while R.C. 2921.42(A)(4) prohibits a local officer or employee from contracting with his political subdivision as a whole. See Advisory Opinions No. 84-008 and 87-002. Although the means by which a public official or employee may meet the respective exceptions to the prohibitions of R.C. 102.04 and 2921.42 (A)(4) differ, Sections 102.04 and 2921.42, taken together, roughly prohibit the same conduct for State officials and local officials.)

You are, however, also subject to the prohibitions of Divisions (D) and (E) of Section 102.03 of the Revised Code. Divisions (D) and (E) prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his position to secure anything of value that is of such a character as to render a substantial and improper influence upon the official or employee with respect to his duties. A public official or employee is prohibited from accepting, soliciting, or using his position to secure outside employment or the purchase of his services where such outside employment could impair the officials' or employee's objectivity or independence of judgment with respect to his official duties. See Advisory Opinions No. 87-006, 88-002, 89-006 and 89-010. R.C. 102.03(D), like R.C. 2921.42(A)(1), would prohibit you from using the authority or influence of your position as clerk of city council, formally or informally, to secure the procurement of your services as chief labor negotiator. See Advisory Opinion No. 89-006.

You would also be prohibited from accepting or soliciting employment as chief labor negotiator with the city if such position would interfere with the performance of your duties as clerk of city council. Id. The collective bargaining agreement which is negotiated between the mayor's representative and the employees' organization must be approved or rejected by city council, and must be approved by the city council before it is binding. R.C. 4117.10(C). Therefore, the agreement which you would negotiate would ultimately be required to come before city council for approval. In Advisory Opinion No. 91-007, the Commission addressed the issue whether the members of city council or the clerk of city council were prohibited from receiving an in-term increase in compensation. The Commission examined the respective duties

of the members of council and the clerk of city council, and found that, even though members of council were prohibited from receiving an in-term increase in compensation since they exercise discretionary authority with respect to the ordinance enacting such increase, the clerk of council performs ministerial functions, and has no authority to introduce the ordinance establishing the benefit or to determine its content or substance, and has no discretion or decision-making authority as to whether the ordinance would be enacted. The Commission found, therefore, that the clerk's objectivity and independence of judgment could not be impaired by enactment of the ordinance providing an in-term benefit. The Commission cautioned, however, that R.C. 102.03(D) would "prohibit the clerk from misusing his position or influence, formally, or informally, to secure an in-term increase in compensation."

Similarly, in this instance, R.C. 102.03 would not prohibit you from acting as chief labor negotiator for the City, but would prohibit you from misusing the authority or influence of your position as clerk with respect to the negotiation or ratification of the collective bargaining agreement.

R.C. 102.03(D) would also prohibit you from: (1) using city time, facilities, or resources to conduct your business as labor negotiator, except as provided in the agreement between the city and you in your capacity as labor negotiator; (2) using the title of your official position in soliciting employment as labor negotiator or acting in the position of negotiator; (3) receiving compensation for services as labor negotiator which you have recommended in your official capacity as clerk; or (4) refraining from performing your official duties, in order to secure business from the city. Furthermore, R.C. 102.03 prohibits you from receiving compensation for rendering services which are your duty to perform or provide as clerk of council. This conduct is also prohibited by R.C. 2921.43, which prohibits a public servant from accepting any compensation, other than as provided by law, to perform his official duties. See Advisory Opinions No. 89-012 and 92-006.

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) Division (A)(4) of Section 2921.42 of the Revised Code prohibits the clerk of city council from being employed or hired by the city to act as chief labor negotiator, unless he can meet the requirements of Division (C) of Section 2921.42; (2) Division (C) of Section 102.04 of the Revised Code does not prohibit the clerk of city council from receiving compensation from the mayor's office to provide services as chief labor negotiator; and (3) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code prohibit the clerk of city council from using the authority and influence of his official position as clerk to secure a position with the city as chief labor negotiator and from misusing his official position with respect to the negotiation or ratification of the collective bargaining agreement he has negotiated.

Marguerite B. Lehner

Marguerite B. Lehner, Chair
Ohio Ethics Commission