



OHIO ETHICS COMMISSION

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

Advisory Opinion Number 93-009
May 21, 1993

Syllabus by the Commission:

(1) A village mayor is prohibited by Division (A)(4) of Section 2921.42 of the Revised Code from purchasing a cable television company which, prior to his election as mayor, was granted a franchise by village council and provides cable television service to the inhabitants of the village, unless the mayor can establish the exception of Division (C) of Section 2921.42;

(2) The requirement of Division (C)(2) of Section 2921.42 of the Revised Code 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 met by a village mayor who, subsequent to his election to office, purchases a cable company which had entered into a franchise agreement with the village prior to the mayor's election to office.

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You have asked whether the mayor of a village is prohibited by the Ethics Law and related statutes from purchasing a cable company which has a franchise in the village corporate limits and supplies cable service to the inhabitants of the village.

By way of history, you have stated that the mayor has served in office for approximately eighteen months. He is interested in purchasing a cable company which provides service to the inhabitants of the village. You have stated that the cable company pays rent to the village of one hundred dollars per year and pays a three percent franchise fee each year to the village. You have also stated that the franchise granted to the cable company is a nonexclusive franchise, but that no other cable company has ever sought to obtain a franchise.

You have indicated that the franchise was granted in 1986, prior to the time the mayor took office, and is for twenty-five years until the year 2011. The franchise will not come up for renewal for another nineteen years. You have stated that the village legislative authority is, thus, presently making no decisions regarding the contract, but rather only handles complaints from citizens and relays those complaints to the company.

A village mayor is prohibited by Division (A)(4) of Section 2921.42 of the Revised Code from having an "interest in the profits of benefits of a public contract entered into by or for the use of" the village. See R.C. 2921.01(A). See generally Ohio Ethics Commission Advisory Ops. No. 79-005 and 92-013. The village mayor would be considered to have an "interest" in the

franchise agreement between the village and the cable company if he purchased a financial ownership interest in the company. See Advisory Ops. No. 78-006, 81-008, 86-005, and 89-006. The issue remains whether the lease in question is a "public contract" for purposes of R.C. 2921.42.

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. R.C. 2921.42(F)(1). You have stated in your letter of request that the contract with the village is not one where the village itself is purchasing services from the corporation; rather the company is selling a service to inhabitants of the village similar to any other business, with the only difference being that the village must grant a franchise in order for the cable company to use village easements to provide cable service.

It is true that, typically, a public contract is evidenced by the purchase of property or services by a political subdivision, with money flowing from the political subdivision to the provider of the property or service. However, the Commission has also found there to be a "public contract" in instances where consideration is being paid to the political subdivision, but where the political subdivision is also receiving some service as part of the contractor's responsibilities under the contract. For example, in Advisory Opinion No. 91-011, the Ethics Commission was asked if city officials and employees are prohibited by the Ethics Law from lease-purchasing or directly buying housing units in a city-financed housing project constructed on city property. The Commission, in determining whether these purchases or lease-purchases would constitute public contracts, stated:

The Ethics Commission has held that a governmental entity's lease or conveyance of its property is a contract for the acquisition of services by and for the use of the governmental entity, and thus a "public contract," where the governmental entity is leasing or conveying its property in exchange for some benefit or service. See Advisory Opinions No. 78-003, 86-009, and 88-006. For example, in Advisory Opinion No. 86-009 the Commission addressed the specific question whether a city's lease of its park-land for farming was a "public contract" for purposes of R.C. 2921.42. The Commission held that the city's lease for such a purpose was a "public contract" as defined in R.C. 2921.42 (E) "since it is a contract for the purchase or acquisition of farming services or other productive use of public property by the city." Also, in Advisory Opinion No. 88-006 the Ethics Commission held that a city's land reutilization program in which the city sold vacant lots which it had acquired through real estate tax foreclosure proceedings to purchasers who agreed to pay a purchase price and construct improvements upon the lots, or otherwise utilize the property for a specific and useful purpose, was a "public contract" for purposes of R.C. 2921.42. The Commission determined that under the program the city was acquiring community development and revitalization services from the purchasers through its sale of vacant lots. (Emphasis added.)

The Commission went on to compare Advisory Opinion No. 83-006, wherein the Commission held that the sale of "surplus" property, by the city, was not a public contract, in that there was no indication that the city acquired any property or service in exchange for the surplus items sold. See also Advisory Op. No. 88-006.

In this instance, the village is acquiring cable television services by or for the use of the village and its residents in exchange for its grant of a franchise to permit the company to use village easements. See Advisory Op. No. 85-008. Additionally, it is clear that the cable company is required to use the easements for a "specific and useful purpose," as discussed in Advisory Opinions No. 83-006 and 91-011. Accordingly, the franchise agreement between the village and the cable television company is a "public contract" for purposes of R.C. 2921.42(A)(4). See Advisory Op. No. 85-008. R.C. 2921.42(A)(4) would, therefore, prohibit the village mayor from purchasing the cable television company.

Division (C) of R.C. 2921.42, however, sets forth an exemption to the prohibition in R.C. 2921.42 (A)(4). R.C. 2921.42 (C) establishes four requirements, and the village mayor must demonstrate compliance with all of those requirements before he may purchase the cable television company.

Division (C)(2) is of particular note, and requires that the village mayor show that the supplies or services the company is offering to the village are "unavailable elsewhere for the same or lower cost" or that the services are being furnished to the village as part of a "continuing course of dealing" established prior to the time the mayor became associated with the village. See Advisory Ops. No. 84-011 and 88-008.

With regard to the "continuing course of dealing" exception, the Ethics Commission has held that if a public contract exists between an individual and a political subdivision prior to the time the individual becomes associated with the political subdivision as an officer or employee, then the requirement of Division (C)(2) is met by a showing of a "continuing course of dealing" and the performance of the contract may be completed. See Advisory Ops. No. 82-007 and 88-008. Therefore, an individual who owned an interest in a company which held a public contract with the village, and who subsequently became associated with the village, would be exempt from the prohibitions of Division (A) (4), so long as he also met the other requirements of R.C. 2921.42 (C).

The question is whether a "continuing course of dealing" exists where the contract is entered into between the political subdivision and the company prior to the public official becoming associated with the political subdivision, and prior to the public official acquiring his interest in the corporation. In Advisory Opinion No. 84-006, the Ethics Commission was asked if a township trustee would have a prohibited interest in a township service contract where the contract pre-existed the trustee's purchase of the business. The Ethics Commission stated, generally, that R.C. 2921.42 (A)(4) prohibits a township trustee from having an interest in a contract between the township and his business for the purchase of services. The Commission proceeded to apply the exemption of R.C. 2921.42 (C) to the facts, stating:

[A] "continuing course of dealing" was established with regard to the existing service contract before the township trustee acquired the firm. However, the statute describes a course of dealing established prior to a public official taking office, rather than prior to his obtaining an ownership interest in the firm. Although the effect may be the same, the statute apparently recognized only the former situation. Furthermore, the Commission has taken a restrictive view of the exemption. In Advisory Opinion No. 82-007, the

Commission held that the exemption "for services being furnished as part of a 'continuing course of dealing' applies only to services provided during the term of the existing contract." Thus, the exemption would no longer apply if the original term of the service contract expired in the two years since the ownership interest was acquired.

Advisory Op. No. 84-006. It is clear from this discussion that a public official's acquisition of an interest in a company, subsequent to the time that the political subdivision with which he is associated entered into a contract with the company, does not establish a "continuing course of business" for purposes of R.C. 2921.42 (C)(2), where there is no public contract existing at the time the individual becomes a public official with the political subdivision. See also Advisory Op. No. 92-004 (the "continuing course of dealing" exemption in R.C. 2921.42 (C)(2) does not apply where a contract between a professional organization and a county sheriff's office was entered into prior to the time the sheriff became an officer of the organization, but subsequent to the sheriff taking office).

However, in the situation you have described, the contract was entered into prior to the time the individual in your question was elected mayor, and prior to the time the individual would obtain an interest in the company. It is clear, in the situation that you have described, that the services provided as a part of the franchise are, indeed, provided as part of a continuing course of dealing established prior to the time the individual was elected mayor and became associated with the village. The fact that the village mayor had no interest in the company at the time the contract was entered into does not necessarily mean that the services provided under the contract are not part of a continuing course of dealing. The important criterion in this analysis is that the contract was entered into prior to the time the individual was elected to village office. Therefore, services provided under the contract between the village and company, in your question, are provided as part of a "continuing course of dealing established prior to the public servant's becoming associated with the political subdivision," and, therefore, the mayor could meet the exemption in R.C. 2921.42 (C)(2), even if he purchases his interest in the company after he became associated with the village.

R.C. 2921.42 (A)(4) clearly prohibits a village official or employee from purchasing an interest in a company which entered into a contract with the village after the official became "associated with" the village, and the "continuing course of dealing" exemption in R.C. 2921.42 (C)(2) does not apply to this situation. However, in the situation you have set forth, the contract predates both the individual's association with the village as mayor and the individual's anticipated purchase of the company. Accordingly, the exemption in R.C. 2921.42 (C)(2) does apply to the situation you have described.

You should note, however, that the "continuing course of dealing" exemption in R.C. 2921.42 (C)(2) applies only to contracts as they were entered into prior to the time the village mayor became associated with the village. You have stated that the franchise was entered into in 1986 and is for 25 years until the year 2011; the franchise will not come up for renewal for 19 years. However, material changes in the agreement existing at the time of the mayor's election, including modifications, extensions, or renewals, are not within the Division (C)(2) exemption since such changes alter the original understanding of the parties. See Advisory Ops. No. 82-007 and 88-008.

As stated above, the village mayor must also show compliance with the other provisions of R.C. 2921.42 (C). R.C. 2921.42 (C)(4) 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. See also R.C. 2921.42(A)(1) and R.C. 102.03(D) (discussed below). Division (C)(1) requires that the village reasonably and objectively demonstrate that the cable services are necessary for the village, and Division (C)(3) requires that the treatment accorded the village by the company is preferential to, or the same as, that accorded to other parties to which the corporation provides services.

If the village mayor can meet all of the provisions of R.C. 2921.42(C), such that he is not prohibited by R.C. 2921.42(A)(4) from acquiring the cable company which has a contract with the village, he is also bound by other provisions of the Ohio Ethics Law.

Division (A)(3) of Section 2921.42 prohibits a public official, during his public service and for one year thereafter, from profiting from any public contract authorized by him or by any legislative authority, board, or commission of which he was a member at the time of authorization, unless the contract was competitively bid and was the lowest and best bid. A public contract will be deemed to have been "authorized" for purposes of Division (A)(3) if the contract could not have been awarded without the approval of the official or legislative body. See Advisory Op. No. 87-004. In this instance, the contract was authorized prior to the time the mayor took office and prior to the time he acquired any interest in the company. Therefore, Division (A)(3) is not applicable in this instance. However, a village mayor must sign all commissions, licenses, permits, and instruments granted by the legislative authority, R.C. 733.30, and must vote to break any ties on council, R.C. 733.24. R.C. 2921.42(A)(3) prohibits the village mayor from profiting from any contract which he must authorize or approve. If the mayor purchases the cable company, he would be prohibited by R.C. 2921.42(A)(3) from voting to break any tie, signing, or otherwise approving or authorizing any public contract with the company.

R.C. 2921.42(A)(1) 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 family member, or business associate has an interest. In this instance, the village council authorized the contract prior to the time the individual took office as mayor. However, the prohibition of R.C. 2921.42(A)(1) extends beyond the initial award of the contract, and prohibits a public official from participating in any matter or decision which would affect the continuation, implementation, or terms and conditions of the contract, even if the prohibitions of R.C. 2921.42(A)(1) were inapplicable at the time the contract was awarded. Advisory Op. No. 92-012. If the mayor acquires the cable company, then R.C. 2921.42(A)(1) would prohibit the mayor from authorizing, or approving, voting upon, discussing, deliberating, recommending, or otherwise using, formally or informally, the authority or influence which is inherent in the position and prestige of his office, including his power over other village officers and employees, to secure, renew, modify, or renegotiate the contract with the cable company.

The village mayor is also subject to Division (D) of Section 102.03 of the Revised Code, which prohibits a public official or employee from using the authority or influence of his

position to secure anything of value that is of an improper and substantial character. R.C. 102.03(D) would also prohibit the village mayor, if he acquired an interest in the company, from using his official authority or influence in any manner to secure any benefit for the company. For example, you have stated that the village legislative authority fields complaints from citizens and relays those complaints to the company. The mayor would be prohibited from using his official authority or influence over other village officials and employees, or otherwise, with regard to complaints lodged with the village against the company. See also R.C. 733.30 (the mayor of a municipality must "perform all the duties prescribed by the bylaws and ordinances of the municipal corporation," and must "see that all ordinances, bylaws, and resolutions of the legislative authority are faithfully obeyed and enforced".) If the mayor purchases the company, he must refrain from performing his duties in such a manner so as to favor or provide a benefit for the company. R.C. 2921.42(A)(1) and R.C. 102.03(D) would require the village mayor to completely abstain from any formal or informal participation as mayor in matters affecting the company or the contract. If the mayor is unable to do so in light of the responsibilities he is required to perform in his official capacity, then he will be prohibited from acquiring the company. See Advisory Op. No. 92-009.

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) A village mayor is prohibited by Division (A)(4) of Section 2921.42 of the Revised Code from purchasing a cable television company which, prior to his election as mayor, was granted a franchise by village council and provides cable television service to the inhabitants of the village, unless the mayor can establish the exception of Division (C) of Section 2921.42; (2) The requirement of Division (C)(2) of Section 2921.42 of the Revised Code 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 met by a village mayor who, subsequent to his election to office, purchases a cable company which had entered into a franchise agreement with the village prior to the mayor's election to office.


Jack Paul DeSario, Chair
Ohio Ethics Commission