



OHIO ETHICS COMMISSION
8 East Long Street, Suite 1200
Columbus, Ohio 43215-2940
Telephone: (614) 466-7090
Fax: (614) 466-8368

Advisory Opinion Number 95-006
August 11, 1995

Syllabus by the Commission:

(1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a county auditor from receiving compensation for performing appraisal services, in the county in which she holds office, under the following circumstances: (a) performing appraisals when the sheriff executes a writ upon real property; and (b) serving as a commissioner or appraiser in a partition action in the common pleas court;

(2) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a county auditor from receiving compensation for performing appraisals on real and personal property for purposes of an inventory to be filed in the probate court.

* * * * *

In a letter directed to the Ethics Commission, as Civil Division Director of a county prosecutor's office, you have asked whether the Ohio Ethics Law and related statutes prohibit a county auditor from receiving compensation for performing real estate appraisals within the county in which she serves in three situations. You have stated that all three situations constitute outside employment that is separate and apart from the statutory duties that the county auditor is required to perform. You state that the auditor has been asked to: (1) perform appraisals where the sheriff executes a writ upon real property; (2) perform appraisals on real and personal property for the administrator or executor of an estate for purposes of an inventory to be filed in the probate court and for which the auditor is paid by the estate; and (3) serve as a commissioner or appraiser in a partition action.

As explained below, the Ohio Ethics Law and related statutes prohibit a county auditor from receiving compensation for performing appraisals in these situations.

Prohibition Imposed by R.C. 2921.42 (A)(4)

Your attention is directed to Division (A)(4) of Section 2921.42 of the Revised Code, which 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 officer of a political subdivision. R.C. 2921.01 (A). A county auditor is a "public official" for purposes of R.C. 2921.42. Advisory Op. No. 81-004.

An "interest" in a public contract that is prohibited under R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. Advisory Op. No. 81-008. An individual who receives payment for services rendered under a contract has a definite and direct interest in the public contract for purposes of R.C. 2921.42. Advisory Op. No. 84-013.

The term "public contract" is defined, for purposes of R.C. 2921.42, in Division (G)(1)(a) of that section and includes the purchase or acquisition, or a contract for the purchase or acquisition, of services by or for the use of the state or its political subdivisions or any agency or instrumentality of either.

A public contract exists whenever the state or a political subdivision purchases or acquires property or a service. The Ethics Commission has held that, in some instances, money will flow from the state or a political subdivision to the provider of property or service. See Advisory Ops. No. 93-007 and 93-009. However, as the Commission explained in Advisory Opinion No. 93-007:

The key factor in determining whether a contract is a "public contract" is whether the governmental entity is acquiring, either through purchase, grant, tax abatement, donation, loan, or other method, property or services. (Citations omitted. Emphasis added.)

As explained below, two of the situations presented in which the auditor has been asked to perform appraisals are "public contracts" for purposes of R.C. 2921.42.

Appraiser for the County Sheriff

A court may issue a writ of execution commanding the sheriff to execute the judgment of the court and levy on the property of a debtor. R.C. 2329.09. When a court issues a writ of execution, the lands, goods, and chattels of a debtor are subject to being taken by the sheriff, upon execution of the writ, and sold. R.C. 2329.01. There are three types of executions: (1) against the property of the judgment debtor; (2) against the person of the judgment debtor; and (3) for delivery of possession of real property. R.C. 2327.02. The writ of execution is required to contain a description of the property and a command to the sheriff to deliver it to the person entitled to it. Id.

Upon delivery of a writ of execution, the sheriff is required to immediately proceed to levy it upon the goods and chattels of the debtor. R.C. 2929.11. If no goods and chattels can be found, the sheriff is required to endorse the words "no goods" on the writ and immediately levy it on the debtor's lands. Id. The sheriff has the power to control the debtor's property and exercise dominion over it at the time of the levy. Gibson v. Chillicothe State Bank 11 Ohio St. 311 (1860).

Whenever the execution is levied upon lands and tenements, the sheriff shall have an appraisal made of the property by "three disinterested freeholders, residents of the county where the lands taken in execution are situated." R.C. 2329.17. Upon receiving an appraisal of the property, the sheriff shall deposit a copy of it with the court that has ordered the execution and immediately advertise and sell the real estate in a manner prescribed by R.C. 2329.01 through 2329.61. R.C. 2319.18. You state that pursuant to R.C. 2335.02, the appraiser's fee is typically taxed as court costs. The sheriff's engagement of an appraiser to determine the value of real estate in a court-ordered execution is a "public contract" for purposes of R.C. 2921.42, because it is the purchase or acquisition of appraisal services by or for the use of the sheriff's office and to comply with the court's order. In the instant situation, the payment that the auditor would receive for performing the real estate appraisal would constitute a definite and direct pecuniary interest in a public contract for purposes of R.C. 2921.42 (A)(4).

Appraiser or Commissioner in a Partition Action

R.C. Chapter 5307. provides a statutory scheme for the partition of land when partition is warranted in certain legal proceedings. Whenever a court of common pleas orders a partition, it appoints "three disinterested and judicious freeholders of the vicinity to be commissioners to make the partition." R.C. 5307.04. The commissioners shall view and examine the estate and divide the land in an equitable manner. R.C. 5307.06. The commissioners must provide the court with a factual analysis in order to enable the court to make an independent determination for the basis for partition. McGill v Roush, 87 Ohio App. 3d 66 (Champaign County 1993).

In situations where the commissioners have divided the land in accordance with R.C. 5307.44, the court shall order the sheriff to execute and deliver deeds to each person entitled to them. R.C. 5307.08. In the event that the commissioners determine that they cannot divide the estate without injuring its value, they are required to provide the court with an appraised value of the estate. R.C. 5307.09. The commissioners are paid a fee for their services by the clerk of courts, in accordance with R.C. 2335.01. Att'y Gen. Op. No. 69-109.

The service provided as a commissioner or appraiser in a partition action under R.C. Chapter 5307. is a public contract for purposes of R.C. 2921.42, because it is the purchase or acquisition of partition or appraisal services by or for the use of the court that has ordered the partition. In the instant situation, the payment that the auditor would receive for performing the real estate appraisal would constitute a definite and direct pecuniary interest in a public contract for purposes of R.C. 2921.42 (A)(4).

Having determined that the two situations described above are public contracts, the issue becomes whether R.C. 2921.42 (A)(4) prohibits the auditor from having an interest in these public contracts.

Contracting with the Political Subdivision as a Whole

R.C. 2921.42 (A)(4) 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 Ethics Commission held

that R.C. 2921.42 (A)(4) prohibits "a public official connected with a political subdivision from contracting with the political subdivision as a whole and not just with the particular agency, board, or department of the political subdivision with which he serves." (Emphasis added). Advisory Op. Nos. 87-002 and 88-003. In Advisory Opinion No. 87-002, the Commission held that R.C. 2921.42 (A)(4) prohibits a member of a county board of elections from selling property or services to the county as a whole and not just to the board of elections. See also Advisory Op. No. 88-003 (all county officials and employees are prohibited from having an interest in the acquisition of property by the board of county commissioners, regardless of whether they serve with the board of county commissioners or with other county boards, offices, departments, or agencies).

Accordingly, R.C. 2921.42 (A)(4) prohibits the auditor from having an interest in a public contract with all public offices, boards, departments, commissions, or agencies of the county with which she serves. In the instant situation, R.C. 2921.42 (A)(4) prohibits a county auditor from: (1) performing appraisals when the sheriff, of the county with which she serves as auditor, executes a writ upon real property; and (2) serving as a commissioner or appraiser in a partition action in the common pleas court of the county with which she serves as auditor.

Exception Provided by R.C. 2921.42 (C)

Division (C) of Section 2921.42 sets forth an exemption to the prohibition of Division (A)(4). In order to meet the exemption provided by R.C. 2921.42 (C), a public official must meet, and demonstrate compliance, with four requirements. Division (C)(2) is of particular note, and requires that the services that are the subject of the public contract be "unobtainable elsewhere for the same or lower cost."

Whether an individual's services are "unobtainable elsewhere for the same or lower cost" is determined by the facts and circumstances of each individual situation. Advisory Op. No. 93-008. Valid and proper considerations must determine whether an individual's services are "unobtainable elsewhere for the same or lower cost." See Advisory Ops. No. 84-002, 88-001, and 93-008. One consideration is the nature of the services provided by the public official.

The Ethics Commission, in Advisory Opinion No. 84-002, addressed the exception of Division (C)(2) in connection with a public official's desire to provide legal services and held that "[i]t would be extremely difficult to demonstrate that legal services [provided by a firm in which a public official has an interest] would be 'unobtainable elsewhere for the same or lower cost'." (Emphasis added). See also Advisory Ops. No. 78-001 ("the legal services [to be provided by a law partner of a city council member] are probably obtainable elsewhere for the same or lower cost") and 90-007 ("[i]t may be difficult to demonstrate that legal services provided by the prosecuting attorney's partner would be 'unobtainable elsewhere for the same or lower cost.'"). See also Advisory Op. No 95-004. In light of the precedent regarding the issue of a public official providing professional services, it appears unlikely that the auditor can meet the burden of establishing that her professional services in the two situations described above are "unobtainable elsewhere for the same or lower cost."

However, the Ethics Commission has held that while R.C. 2921.42 (C)(2) does not indicate a geographic limitation on availability, the necessary supplies and services should be readily at hand for use by the political subdivision and that presumably the costs of securing the supplies or services increase with distance. See Advisory Op. No. 84-006. The facts and circumstances of each individual situation, such as the available number of qualified appraisers and the urgency of securing an appraisal will determine whether the services are "unobtainable elsewhere for the same or lower cost."

If the auditor can meet the criterion of Division (C)(2), the auditor must, in addition, comply with the other provisions of R.C. 2921.42 (C). Of particular note is R.C. 2921.42 (C)(4), which requires that the transaction be conducted at arm's length, with full knowledge of the governmental agency of the public official's interest, and requires that the public official take no part in the deliberations and decision of the governmental agency with respect to the contract. See also R.C. 2921.42 (A)(1) (discussed below).

Nevertheless, even if the auditor can meet the burden of establishing that her services as an appraiser in the above situations are 'unobtainable elsewhere for the same or lower cost,' as well as the remaining criteria of R.C. 2921.42 (C), then R.C. 2921.42 (A)(1) and R.C. 102.03 (D) would prohibit the auditor from using the authority or influence of her position to secure the public contracts for herself. Advisory Op. No. 92-012. This prohibition includes, but is not limited to, lobbying, discussing, recommending, or otherwise using the authority or influence of her office, either formally or informally, in matters affecting the appointment of herself as an appraiser in the two situations described above.

Appraiser for the Executor or Administrator of an Estate

The question remains as to whether the auditor may perform appraisals on real and personal property for purposes of an inventory to be filed in the probate court. As explained below, the prohibition imposed by R.C. 2921.42 (A)(4) is not applicable to this situation because the appraisal requested by the administrator or executor for purposes of an inventory to be filed in probate court, and paid for by the estate, is not a public contract. The issue becomes whether other provisions of the Ohio Ethics Law and related statutes prohibit the auditor from performing an appraisal on real and personal property for purposes of an inventory to be filed in the probate court.

General Restrictions Upon Private Outside Employment

The Ethics Commission has consistently held that the Ohio Ethics Law and related statutes do not prohibit public officials from engaging in private outside employment, or the practice of a profession, as long as no conflict of interest exists between the official's private interests and public duties. See Advisory Ops. No. 84-009, 86-0010, and 90-002. However, the Commission has explained that the Ethics Law and related statutes impose restrictions upon public officials and employees with regard to their ability to engage in private outside employment or the practice of a profession. These restrictions are imposed in order to serve the public interest in effective, objective, and impartial government by preventing the creation of a situation which may impair the objectivity and impartiality, and therefore the effectiveness, of a

public official or employee, or the public agency with which he serves. See Advisory Ops. No. 89-014, 90-002, and 93-014.

Prohibition Imposed by R.C. 102.03 (D) and (E)

R.C. 102.03 (D) and (E) read as follows:

(D) 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.

(E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

A county auditor is a "public official or employee" and subject to the prohibitions of R.C. 102.03 (D) and (E). See Advisory Op. No. 83-001. See also Advisory Ops. 79-002 and 82-001.

R.C. 102.03 defines "anything of value" for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 102.01 (G). A definite pecuniary benefit to a person is considered to be a thing of value under R.C. 102.03 (D) and (E). Advisory Ops. No. 79-0010, 85-006, and 89-008. Thus, payments received from an estate for conducting an appraisal falls within the definition of "anything of value."

R.C. 102.03 (D) and (E) prohibit a public official or employee from soliciting or accepting, or using the authority or influence of his position to secure, anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. See Advisory Ops. No. 87-006, 89-0010, and 93-014. The Ethics Commission has held that R.C. 102.03 (D) and (E) prohibit a public official or employee from soliciting, accepting, or using his position to secure anything of value from a party where such thing of value could impair the official's or employee's "independence of judgment in the performance of his duties and affect subsequent decisions in matters involving the donor of the thing of value." Advisory Op. 84-010. See also Advisory Op. No. 93-014.

Thus, the Commission has held that a public official or employee who engages in a private outside business or the practice of a profession is prohibited from accepting, soliciting, or using his authority or influence to secure commissions, fees, or other payments from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the official's or employee's public agency, since such payments are of such a character as to improperly influence the official or employee with respect to the performance of his duties regarding those parties. See, e.g., Advisory Ops. No. 83-007 (an employee of the Board of Cosmetology is prohibited from selling products to regulated salons), 84-009 (an MRDD employee is prohibited from selling consulting services to a corporation that operates group homes under contract to MRDD), 84-014 (a city fire chief is prohibited from soliciting or receiving a commission on the city's purchase of fire equipment), 87-006 (an official or employee of a county MRDD board is

prohibited from being employed by a residential service provider), and 93-014 (a member of a board of education is prohibited from selling annuities to school district employees).

The Ethics Commission has held, in certain circumstances, that an official or employee is not absolutely prohibited from engaging in private outside employment or the practice of a profession, but must withdraw from consideration of matters which would pose a conflict of interest for him. The Commission has held that a withdrawal by a public official or employee from a matter which poses a conflict of interest may not interfere with the official's or employee's performance of his duties. See Advisory Opinions No. 89-006, 89-010, and 90-002.

The issue in the instant situation is whether the county auditor's performing appraisals on real and personal property for purposes of an inventory to be filed in the probate court could interfere with the performance of her duties as county auditor. As explained below, a review of the estate tax laws and the statutory duties of a county auditor reveals a nexus between the duties of the county auditor, the state tax commissioner, and the probate court which would implicate the prohibition imposed by R.C. 102.03 (D) and (E).

The jurisdiction of a probate court includes probate and testamentary matters, including inventories provided by executors and administrators of decedents estates. See R.C. 2101.24 (A)(1)(c) (the probate court has authority "[t]o direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates.") The Revised Code provides a statutory scheme for the managing of a decedents' estate in probate court. An executor or administrator of an estate, within one month after his appointment, shall return to the probate court a true inventory of the decedent's chattels, moneys, rights, credits, and real estate located within the state. R.C. 2115.02. In order for the probate court to accept an inventory, it must be in a form specified by statute. R.C. 2115.07.

Real estate and personal property comprised in the inventory must be appraised by one disinterested person, appointed by the estate's executor or administrator, subject to the approval of the probate court. R.C. 2115.06. However, if the value of an asset is readily ascertainable without the exercise of the judgment of an appraiser, then the asset need not be appraised. R.C. 2115.02. In the event that an appraiser fails to perform his duties, the executor or administrator shall appoint, with probate court approval, another person to perform the appraisal. Id. The appraiser is paid by the executor or administrator for his services. R.C. 2115.06. In the event that an executor or administrator fails to file an inventory, the probate court shall order him to do so. R.C. 2115.03.

The performance of an appraisal on real and personal property for the executor or administrator of an estate, for purposes of an inventory to be filed in the probate court, is not a public contract for purposes of R.C. 2921.42. Unlike the two previous situations addressed in this opinion, the appraiser is not being paid for services by the court or from public funds to perform a function for a public agency. An appraiser who performs an appraisal on real and personal property for purposes of an inventory to be filed in the probate court is paid by the executor or administrator, and it is the executor or administrator, not the probate court, who is acquiring the services of the appraiser.

However, R.C. 5713.01 requires a county auditor to be the chief assessing officer of the county in which he holds office and to list and value the real property within the county for taxation in accordance with the statutory scheme established by Revised Code Chapter 5713. See R.C. 319.28 (a county auditor is required to compile a general tax list of real property within the county). See also R.C. 5715.01 (a county auditor acts under the tax commissioner's direction and supervision in assessing real property for purposes of taxation). Also, pursuant to Revised Code Chapter 5731., a county auditor exercises duties with regard to estate taxes on a decedent's estate. R.C. 5731.21 requires that an executor or administrator file an estate tax return, in duplicate, with the probate court. The return shall include real property that is listed in the inventory of the decedent's estate. R.C. 5731.21. A county auditor may, and when directed by the Tax Commissioner shall, appoint deputies to assist him in the performance of his duties under the estate tax law. R.C. 5731.44. Furthermore, the tax commissioner may designate an employee or employees of the county auditor or the probate court, with the consent of the auditor or probate judge, as his agent or agents to assist him in accepting estate tax filings. R.C. 5731.26. The county treasurer is required to keep accounts showing estate taxes and interest received, and settle these accounts with the county auditor. R.C. 5731.46.

In the instant situation, where real property of the decedent's estate lies within the county in which the auditor holds office, he would be asked to appraise real property in his private capacity for purposes of an inventory to be filed in probate court, that he has appraised in his official capacity as county auditor pursuant to R.C. 5713.01. The county auditor, or his employees, also exercises authority with regard to determining the value of a decedent's estate. In both situations, the county auditor would be required to act upon matters in a private capacity that he has acted upon in his official capacity. Furthermore, the county auditor would receive a thing of value for performing the appraisal from a party that is regulated by or interested in matters before his office. Therefore, R.C. 102.03 (D) and (E) prohibit the county auditor from performing an appraisal on real and personal property for purposes of an inventory to be filed in the probate court.

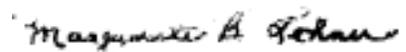
The Ethics Commission has recognized that in some instances, a public official's or employee's withdrawal from a matter will not interfere with the performance of his duties provided that the official or employee delegates responsibility to a subordinate, with review of the subordinate's action by an official or entity independent of, or superior to, the official with the conflict of interest, or empowers an authority who is independent of, or superior to, the official with the conflict of interest to approve the matter, if such transfer of authority is permitted under relevant statutes. See Advisory Opinions No. 92-004 and 92-008.

However, in the instant situation, the county auditor is the appointing authority for employees in the county auditor's office and has the discretion to determine the need for their employment. R.C. 319.05. As the appointing authority of employees within the county auditor's office, the county auditor is required to supervise the employees' work and is in a position to control the work product. Id. The county auditor would also be required to evaluate the performance of his employees in accomplishing their tasks. It is apparent that there is no one to whom employees in the county auditor's office could report, other than the county auditor, with respect to the review and approval of matters pertaining to a decedent's estate.

If the county auditor were to perform an appraisal for an executor or administrator of a decedent's estate within his county and then withdraw from the consideration of matters which would pose a conflict of interest for him, then the employees, over whom the county auditor is the appointing authority, would be required to determine whether the county auditor, as a private appraiser has met all the requirements necessary for the estate tax filing. This would result in an untenable situation for the employees of the county auditor's office. See Advisory Ops. No. 89-015 (if the law firm of a city law director were to serve as opposing counsel, then an assistant city law director could not objectively fulfill his duties) and 92-009 (if the Executive Director of the Barber Board were to own a barber shop, then an employee of the Barber Board could not objectively determine whether the Executive Director's barber shop meets requirements established by statute and rules adopted by the Barber Board). Accordingly, R.C. 102.03 (D) and (E) prohibit the county auditor from performing an appraisal on real and personal property for purposes of an inventory to be filed in the probate court.

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 a county auditor from receiving compensation for performing appraisal services, in the county in which she holds office, under the following circumstances: (a) performing appraisals when the sheriff executes a writ upon real property; and (b) serving as a commissioner or appraiser in a partition action in the common pleas court; and (2) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a county auditor from receiving compensation for performing appraisals on real and personal property for purposes of an inventory to be filed in the probate court.



Marguerite B. Lehner, Chair
Ohio Ethics Commission