

**OPINION NO. 83-024**

**Syllabus:**

A member of a metropolitan housing authority is prohibited by R.C. 2921.42(A)(4) and R.C. 3735.29 from serving on the board of trustees of a nonprofit corporation which contracts with the metropolitan housing authority.

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**To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, May 23, 1983**

I have before me your request for an opinion concerning the propriety of certain transactions between a metropolitan housing authority and various nonprofit corporations. From your letter of request, I understand that during the

Bureau of Inspection and Supervision of Public Offices' last two audits of a metropolitan housing authority, see R.C. 3735.34, it was discovered that the metropolitan housing authority has entered into certain contractual arrangements with several nonprofit corporations whereby the housing authority leases land to the corporations. The corporations then build housing projects on this property, and lease the housing units to the housing authority, which manages and maintains the housing units. You state that the boards of trustees of the metropolitan housing authority and each of the nonprofit corporations are composed of the same people. It is this last fact which leads me to the conclusion that the arrangements between the housing authority and the nonprofit corporations are improper.

R.C. 3735.29 states: "No member or employee of a metropolitan housing authority shall have any interest, directly or indirectly, in any contract for property, materials, or services to be acquired by said authority." See generally 1966 Op. Att'y Gen. No. 66-162. R.C. 2921.42(A)(4) prohibits any public official from knowingly having "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." R.C. 2921.01(A) defines "public official" as "any elected or appointed officer, or employee, or agent of the state or any political subdivision thereof. . . ." A member of a metropolitan housing authority appears to meet this definition. See R.C. 3735.31; R.C. 3735.56; Ohio Ethics Commission, Advisory Opinion No. 82-007 (member of the board of trustees of a regional sewer district is a "public official" for purposes of R.C. 2921.01(A)). See also State ex rel. Crance v. Kennedy, 53 Ohio St. 2d 166, 373 N.E.2d 383 (1978) (member of a metropolitan housing authority holds a public office). Thus, a member of a metropolitan housing authority is subject to R.C. 2921.42(A)(4) as well as R.C. 3735.29.

In the interpretation of R.C. 2921.42 and similar statutes prohibiting specific public officials from having an interest in their agencies' contracts, it has been established that an "interest" in a contract may be fiduciary as well as pecuniary; accordingly, a public official may not serve on the board of trustees or directors of a nonprofit corporation which contracts with the governmental entity he serves.<sup>1</sup> 1979 Op. Att'y Gen. No. 79-055 (pursuant to R.C. 305.27, which provides that no county commissioner shall be concerned in any contract for work to be done for the county, and R.C. 2921.42, a member of a board of county commissioners may not be involved in the management or control of a nonprofit corporation which contracts with the board of commissioners for the delivery of services; management is generally carried out by the corporation's trustees and officers); 1974 Op. Att'y Gen. No. 74-039 (disapproved in part by 1979 Op. Att'y Gen. No. 79-111) (pursuant to R.C. 305.27, a county commissioner may not serve as director of a county agricultural society, since there are contractual arrangements between the board of county commissioners and the agricultural society); Ohio Ethics Commission,

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<sup>1</sup> R.C. 2921.42(B) and (C) provide exceptions to the prohibition of R.C. 2921.42(A)(4). Whether these provisions apply to a particular public official is a factual determination. From the information you have provided, it does not appear these exceptions are applicable in the instant situation. In any event, these exceptions are not available to a housing authority board member who falls within the prohibition of R.C. 3735.29. But cf. R.C. 305.27 (section prohibiting county commissioner from being concerned in county contracts does not apply if commissioner is merely a stockholder in a corporation, owning not less than five percent of the stock, the value of which is not in excess of five hundred dollars, if he is not an officer or director of the corporation, and if he files a disclosure statement).

I note, also, that according to Ohio Ethics Commission, Advisory Opinion No. 82-004, R.C. 2921.42(A)(4) does not prohibit a public official from serving on the board of a nonprofit corporation which receives funds as a sub-grant from the public agency which the official serves, when the public agency received such money from the federal government on the condition that a member of the public agency serve, in his official capacity, on the board of the nonprofit corporation ultimately receiving the money.

Advisory Opinion No. 81-008 (pursuant to R.C. 2921.42, a member of city council may not serve on the board of a nonprofit corporation which contracts to sell goods or services to the city).

The reasoning behind the conclusion that a public officer may not serve on the managing board of a corporation which contracts with the governmental entity he serves, is that the fiduciary trust and loyalty which a public officer owes his governmental body and which a trustee or director owes his corporation cannot be simultaneously carried out when these duties conflict. It is a well-established principle in Ohio that a person may not hold dual positions which require him to perform conflicting duties. Public officials may not put themselves in a position which would detract from their public responsibilities and interests. See generally State ex rel. Taylor v. Pinney, 13 Ohio Dec. 210 (C.P. Franklin County 1902). As explained more specifically by my predecessor in Op. No. 74-039 and Op. No. 79-055, directors or trustees of an organization are subject to reelection by the members of the organization. "Their continuation in office, therefore, depends on their record in promoting the interests of the society, and such interests would prevent [a public officer who also served as a trustee from exercising] complete objectivity in making the decisions required of him as a [public officer]. . . ." Op. No. 74-039 at 2-170. It should also be noted that one person may not properly control the services delivered to a governmental body while at the same time passing upon the adequacy of those services as a public officer. Op. No. 79-055.

Thus, I conclude that a member of the board of a metropolitan housing authority is prohibited by R.C. 2921.42(A)(4) and R.C. 3735.29 from serving on the board of trustees of a nonprofit corporation which contracts with the housing authority.<sup>2</sup> This does not mean that a metropolitan housing authority does not have the power to enter into leases and other types of contractual arrangements with nonprofit corporations. See R.C. 3735.31; R.C. 3735.32. Indeed, the members may be involved to a limited extent in a contracting nonprofit corporation. See Op. No. 79-055 (detailing the permissible scope of a public officer's involvement in a contracting nonprofit corporation).<sup>3</sup> I stress, however, that whatever the degree of his involvement with a contracting nonprofit corporation, a housing authority member should be aware of potential ethical problems which could arise if he were to engage in certain activities. See, e.g., R.C. 102.03(A) (a public officer may not act in a representative capacity for any person on any matter in which he personally participated as a public officer); R.C. 102.04 (a public officer may not

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<sup>2</sup> I note that the violation of R.C. 2921.42(A)(4) is a first degree misdemeanor. R.C. 2921.42(D). Of course, this office cannot pass on the criminal guilt or innocence of particular individuals, as that function is solely within the power of the judiciary. See 1983 Op. Att'y Gen. No. 83-001. My conclusion regarding the violation of R.C. 2921.42(A)(4) under the circumstances presented by your letter is rendered merely for the purpose of determining the propriety of the arrangements between the housing authority and the nonprofit corporations.

No criminal penalty or other sanction is specified for a violation of R.C. 3735.29. However, R.C. 3.07-.10 provides for the removal upon complaint and hearing of public officers for various forms of misconduct in office. Again, I express no opinion on the applicability of this procedure in the instant case, but merely provide the foregoing as a point of information.

<sup>3</sup> Under the reasoning of Ohio Ethics Commission, Advisory Opinion No. 82-004, summarized in footnote 1, *supra*, it may even be argued that a housing authority member is not prohibited by R.C. 3735.29 from serving on the board of a nonprofit corporation which receives money from the housing authority, if the housing authority receives such money as a grant from the federal government and the terms of the federal grant require a housing authority member to serve on the board of the nonprofit corporation in his official capacity. However, I understand from a member of your staff that there is no such requirement in this case. Accordingly, I express no opinion on that argument.

receive compensation other than from the agency which he serves for any service rendered by him in any matter before the agency he serves); R.C. 2921.42(A)(1) (a public official may not knowingly authorize, or use his authority to secure authorization of a public contract in which he, a family member, or a business associate has an interest).

In conclusion, it is my opinion, and you are advised, that a member of a metropolitan housing authority is prohibited by R.C. 2921.42(A)(4) and R.C. 3735.29 from serving on the board of trustees of a nonprofit corporation which contracts with the metropolitan housing authority.