

OPINION NO. 83-037**Syllabus:**

1. A legal adviser to a metropolitan housing authority who conveys his property to a city is not in violation of R.C. 3735.29 or R.C. 2921.42(A)(4) if the city subsequently conveys the property to the metropolitan housing authority.
2. R.C. 3735.29 is not a criminal statute since there is no statutory penalty for a violation of its provisions. R.C. 2901.03.

To: Stephen M. Stern, Jefferson County Prosecuting Attorney, Steubenville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 22, 1983

I have before me your request for my opinion concerning a possible conflict of interest involving the Jefferson Metropolitan Housing Authority. From the attachment to your letter of request, I understand that the legal adviser of the Jefferson Metropolitan Housing Authority sold a parcel of land to the city of Steubenville, which then conveyed the property to the housing authority. Your questions concerning this matter are as follows:

1. In your opinion, do the facts set forth in the correspondence enclosed present a direct conflict with Revised Code 3735.29, which prohibits an employee of a metropolitan housing authority from having an interest, directly or indirectly, in any contract for property to be acquired by said authority?
2. Since there appears to be no penalty provision under this section, which prosecutorial agency would be the proper agency for prosecution?
3. Can a taxpayer himself bring an action in matters of this nature?

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." This provision prohibits a member or employee of a housing authority from selling property in which he has an interest to the metropolitan housing authority. See 1966 Op. Att'y Gen. No. 66-162.

It is unclear from your letter whether the legal adviser of the housing authority is an employee or an independent contractor of the metropolitan housing authority. Such a determination is factual in nature, and turns primarily on the question whether the employer retains the right to control the mode and manner of

work to be performed. If such control is retained, the relationship of employer and employee exists. If the employer does not retain such control, but is concerned only with the ultimate result to be accomplished, the relationship is that of employer and independent contractor. Councell v. Douglas, 163 Ohio St. 292, 126 N.E.2d 597 (1955).

If the legal adviser is an independent contractor, rather than an employee, he does not appear to fall within the scope of R.C. 3735.29. However, even assuming that the legal adviser is an employee of the housing authority, I can find no authority for the proposition that he would be in violation of R.C. 3735.29 if he sold his property to the city, even though the city then conveyed the property to the housing authority, absent facts indicating that the two transfers constituted a single transaction. The arrangement you have described does not fall within the prohibition of R.C. 3735.29 because at the time the property was conveyed by the city to the housing authority, the legal adviser no longer had an interest in the property. I realize that there exists the potential for abuse in a situation such as you describe. However, this office must assume, in the absence of evidence to the contrary, that all parties are acting in good faith, and in accordance with the law. See generally State ex rel. Corrigan v. Hensel, 2 Ohio St. 2d 96, 206 N.E.2d 563 (1965); State ex rel. Hunt v. Hildebrand, 93 Ohio St. 1, 112 N.E. 138 (1915), aff'd, 241 U.S. 565 (1916).

The same analysis is applicable to R.C. 2921.42(A)(4), which prohibits a 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." A "public official" is defined at R.C. 2921.01(A) as "any elected or appointed officer, or employee, or agent of the state or any political subdivision thereof, whether in a temporary or permanent capacity, and including without limitation legislators, judges, and law enforcement officers." Again, an independent contractor, does not appear to fall within the definition of "public official," and thus is not within the scope of R.C. 2921.42(A)(4). See Councell v. Douglas (distinguishing between an agent and an independent contractor, as well as between a servant, or employee, and an independent contractor); Newcomb v. Dredge, 105 Ohio App. 417, 152 N.E.2d 801 (Clark County 1957); cf. R.C. 2921.01(B) (defining "public servant" as a public official, as well as, among others, "[a]ny person performing ad hoc a governmental function, including without limitation a[n] . . . advisor, or consultant"). However, even if the legal adviser is a public official, he does not appear to have violated R.C. 2921.42(A)(4) by conveying his property to the city, because, again, he had no interest in the property at the time the property was conveyed by the city to the housing authority.

There are other ethical provisions of which the individual involved should be aware. R.C. 2921.42(A)(1) prohibits a public official from knowingly authorizing or using his authority to secure authorization of, a public contract in which he, a family member, or a business associate has an interest. R.C. Chapter 102, the Ohio Ethics Law, provides other prohibitions. See, e.g., R.C. 102.03(A) (a public official or employee may not "act in a representative capacity for any person on any matter in which he personally participated as a public official or employee"); R.C. 102.03(D) (a public official or employee may not "use or attempt to use his official position to secure anything of value for himself that would not ordinarily accrue to him in the performance of his official duties, which thing is of such character as to manifest a substantial and improper influence upon him with respect to his duties"); R.C. 102.04 (a public official or employee may not receive compensation other than

¹ The violation of R.C. 2921.42(A)(4) is a first degree misdemeanor. R.C. 2921.42(D). As an executive officer, I cannot determine the criminal guilt or innocence of a particular individual, as that authority rests solely with the judiciary. The discussion of R.C. 2921.42 is rendered for informational purposes, and merely represents my analysis of how R.C. 2921.42 is to be interpreted. See 1983 Op. Att'y Gen. No. 83-024; 1983 Op. Att'y Gen. No. 83-001. I note that, pursuant to R.C. 102.08, the Ohio Ethics Commission has the authority to issue advisory opinions concerning R.C. 2921.42.

from the agency which he serves for any service rendered by him in any matter before the agency he serves). The Ohio Ethics Commission, which has jurisdiction over R.C. Chapter 102, see R.C. 102.06, 102.08, has specifically stated that an independent contractor is not a public official or employee for purposes of R.C. Chapter 102, see Ohio Ethics Commission, Advisory Opinions No. 75-028, No. 75-016, No. 75-012, unless he exercises a portion of his agency's sovereign power, Ohio Ethics Commission, Advisory Opinion No. 77-004. The Ethics Commission has set out in the above-cited opinions several factors which must be considered in determining whether a person is an employee or independent contractor. The Commission considers the primary test to be whether the one employed is engaged in a distinct occupation or business, such as the practice of law. Such a distinct occupation strongly indicates that a person is an independent contractor rather than an employee. Advisory Opinions No. 75-028, No. 75-016, No. 75-012.

Turning to your second question, concerning the proper agency for prosecution of violations of R.C. 3735.29, I reiterate that, under the facts provided, I do not believe that the legal adviser of the metropolitan housing authority has violated the provisions of R.C. 3735.29. As a point of information, I note that R.C. 3735.29 is not a criminal statute. Pursuant to R.C. 2901.03(A), "[n]o conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code." Division (B) of R.C. 2901.03 reads: "An offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to meet such duty." (Emphasis added.) Because there is no statutory penalty provided for a violation of R.C. 3735.29, violations may not be prosecuted as criminal offenses. As noted in footnote 1, supra, a violation of R.C. 2921.42(A)(4) is a first degree misdemeanor, which could be prosecuted by you, the county prosecuting attorney, see R.C. 309.08; R.C. 2931.03, or the city solicitor, R.C. 1901.20; R.C. 1901.34; R.C. 2931.041.

My predecessors have noted that, at least in certain situations, contracts entered into in violation of a statute prohibiting a public official from having an interest in his agency's contracts may be found illegal and invalid. See Op. No. 66-162; 1959 Op. Att'y Gen. No. 51, p. 29; 1951 Op. Att'y Gen. No. 812, p. 589; 1946 Op. Att'y Gen. No. 873, p. 272. Public money illegally expended must be noted in the Bureau of Inspection and Supervision of Public Offices' report of its examination of a public office, and such report must be filed with the appropriate official for the collection of any money illegally expended. R.C. 117.09; R.C. 117.10. See 1946 Op. No. 873. See also R.C. 3735.34 (the transactions of a metropolitan housing authority are "subject to the inspection and approval of the bureau of inspection and supervision of public offices, which shall transmit its report to the state board of housing," although, upon approval of the chief inspector of the Bureau of Inspection and Supervision, the audit or examination of a federal agency may be used in lieu of an examination by the Bureau). In the case of a metropolitan housing authority, if the Bureau determined that a particular expenditure was illegal, the prosecuting attorney would receive a copy of the Bureau's report, and would have the authority to bring a civil action to recover the money and, if appropriate, criminal proceedings. R.C. 117.10. See State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976) (stating when recovery of public money erroneously paid may be denied).

Turning to your third question, whether a taxpayer may bring an action for a violation of R.C. 3735.29, I note that the Attorney General has a duty pursuant to R.C. 109.14 to advise prosecuting attorneys only with respect to their duties. Pursuant to R.C. 309.09, a prosecuting attorney must act as legal adviser to various public entities. However, prosecutors have no authority to advise private citizens. Accordingly, the Attorney General has no authority to advise prosecuting attorneys concerning the remedies of private citizens.

In conclusion, it is my opinion, and you are advised, that:

1. A legal adviser to a metropolitan housing authority who conveys his property to a city is not in violation of R.C. 3735.29 or

R.C. 2921.42(A)(4) if the city subsequently conveys the property to the metropolitan housing authority.

2. R.C. 3735.29 is not a criminal statute since there is no statutory penalty for a violation of its provisions. R.C. 2901.03.