Ben Rose, *Chair*
Shirley Mays, *Vice Chair*
Merom Brachman
Betty Davis
Steven Dettelbach
Ann Marie Tracey

David E. Freel,
*Executive Director*

OHIO ETHICS COMMISSION
8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368

www.ethics.ohio.gov

# INFORMATION SHEET: ADVISORY OPINION NO. 2009-02
# MATTERS AFFECTING FAMILY MEMBER'S EMPLOYER

**What are the questions addressed in the opinion?**

Can a public official participate in the authorization of a contract if his or her family member's employer has an interest in the contract? Can a public official participate in regulatory matters that affect a family member's employer?

**What are the answers in the opinion?**

No, the public official cannot participate in a contractual or regulatory matter before his or her public agency **if** his or her family member has an interest in the contract or will receive a definite and direct benefit from the matter. However, if the public official's family member does not have an interest and will not receive a benefit from the matter, the official is not prohibited from participating in matters affecting a relative's employer.

The opinion sets forth factors that establish when an employee has an interest in his or her employer's contracts. The opinion also describes when an employee will receive a definite and direct benefit from a regulatory matter affecting his or her employer. Finally, the opinion includes examples of the restrictions.

**To whom does this opinion apply?**

The conclusions in this opinion apply to all individuals who are elected or appointed to, or employed by, any public agency, including but not limited to any state agency, county, city, township, school district, public library, and regional authority, regardless of whether the person is: (1) compensated or uncompensated; (2) serving full time or part time; or (3) serving in a temporary or permanent position.

**When did the conclusions in this opinion become effective?**

The opinion became effective when rendered by the Commission at its meeting on March 3, 2009.

**For More Information, Please Contact:**

David E. Freel, Executive Director, **or**
Jennifer A. Hardin, Chief Advisory Attorney
(614) 466-7090

**THIS COVER SHEET IS PROVIDED FOR INFORMATION PURPOSES.
IT IS NOT AN ETHICS COMMISSION ADVISORY OPINION.
ADVISORY OPINION NO. 2009-02 IS ATTACHED.**

Ben Rose, *Chair*
Shirley Mays, *Vice Chair*
Merom Brachman
Betty Davis
Steven Dettelbach
Ann Marie Tracey

David E. Freel,
*Executive Director*

OHIO ETHICS COMMISSION
8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368

www.ethics.ohio.gov

Advisory Opinion
Number 2009-02
March 3, 2009

Syllabus by the Commission:

(1) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a public official from authorizing a public contract if a family member has a definite and direct interest in the contract;

(2) R.C. 2921.42(A)(1) prohibits a public official from authorizing a contract to the employer of a family member if the official's family member has a definite and direct interest in the contract as an employee of the company;

(3) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a public official or employee from participating in any matter before the public agency that affects the interests of the employer of a family member if the family member will receive anything of value as a result of the agency's decision on the matter;

(4) Neither R.C. 2921.42(A)(1) nor 102.03(D) and (E) prohibit a public official or employee from participating in any matter before his or her public agency that affects an employer of a family member if the family member is an "ordinary employee," as defined in this opinion, and does not have a personal interest in or receive anything of value from the regulatory matter.

* * * *

R.C. 2921.42(A)(1) prohibits a public official or employee from participating in the authorization of any public contract if a member of the official's family has an interest in the contract. See Ohio Ethics Commission Advisory Opinion No. 79-005. R.C. 102.03(D) and (E) prohibit a public official or employee from participating in a contractual or other matter before his or her public agency if his or her family member would receive a benefit, or suffer a detriment, as a result of the agency's decision on the matter. See Adv. Op. No. 98-003.

The Commission has been asked whether the Ohio Ethics Law and related statutes prohibit a public official or employee from participating in contractual, regulatory, or other matters before his or her public agency if the matters affect a family member's *employer*.

**Contracts—R.C. 2921.42(A)(1) and Definitions**

Division (A)(1) of Section 2921.42 of the Ohio Revised Code provides that no public official shall knowingly:

> Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public official's business associates has an interest.

This restriction applies to all individuals who are elected or appointed to, or employed by, any public agency, such as any state agency, and any county, city, township, school district, public library, and regional authority. R.C. 2921.01(A). The restriction applies whether the person's public position is: (1) compensated or uncompensated; (2) full time or part time; or (3) temporary or permanent.

A "**public contract**" is defined 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, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either.

A public contract can be a bid or unbid, written or oral agreement. Adv. Op. No. 87-002. Examples include: (1) purchases of goods such as vehicles and computers; (2) purchases of services such as insurance; (3) the employment of any person; (4) grants, loans, and other kind of financial assistance; and (5) the design, construction, alteration, repair, or maintenance of any public property. Id. Public contracts can exist between a public agency and: (1) a private company or individual; (2) a non-profit organization; or (3) another public agency.

A "**member of the public official's family**" includes but is not limited to the official's spouse, children, whether dependent or not, parents, siblings, grandparents, and grandchildren, regardless of where these relatives live. See Adv. Ops. No. 80-001 and 90-010. Also included is any *other* person related to the official by blood or marriage who resides in the same household as the official. Id.

A public official **authorizes or uses his or her position to secure authorization** of a public contract if he or she votes on, deliberates on, recommends, formally or informally lobbies for, or takes any other official action on the contract. Adv. Op. No. 88-008. A prohibited "**interest**" in a public contract is a definite and direct interest that can be of either a financial or fiduciary nature. Adv. Ops. No. 81-008 and 88-001.

**Prior Application of the Restriction**

In past opinions, the Commission has held that a public official is prohibited from awarding a contract to a family member's employer **if** the family member has a definite and direct interest in the contract. A determination of whether an employee has an interest in his or her employer's contracts depends on the facts and circumstances of the particular situation. See Adv. Op. No. 84-009. In Advisory Opinion No. 89-008, and again in Advisory Opinion No. 92-002, the Commission held that an employee has an interest in his or her employer's contracts if the employee:

(a) has an ownership interest in the company;
(b) is a director, trustee, or officer of the company or agency;
(c) takes part in the negotiation of the contract;
(d) is paid a salary that is based on the proceeds of the contract;
(e) receives a share of the contract's proceeds in a commission or fee;
(f) has employment responsibilities that include participation in or oversight of the administration or execution of the contract;
(g) is employed by an employer that receives all or most of its funding from a contract and is dependent on the receipt of the contract; or
(h) is employed in a position that is dependent on the contract.

An appeals court concluded that a jury was justified in finding that a mayor's brother had an interest in his employer's contracts because the brother acted as manager and participated in the administration and execution of the contracts. *State v. Urbin*, (2002), 148 Ohio App. 3d 293, ¶¶ 13-16. In reaching its conclusion, the jury relied on the factors set forth by the Ethics Commission in Advisory Opinion No. 92-002. See also *State v. Urbin* (2003), 100 Ohio St. 3d 1207, ¶¶ 13-14 (appeal dismissed as improvidently allowed) (In an opinion concurring with the dismissal, Chief Justice Moyer wrote that the Ethics Commission's definition of when an employee has an interest in his or her employer's contracts is "a reasonable interpretation of the term 'interest' as used in R.C. 2921.42" and the court did not err in incorporating elements of an Ethics Commission opinion in jury instructions.)

If a public official's family member has an interest in the contracts of his or her employer in any of the ways described above, R.C. 2921.42(A)(1) would prohibit the official from participating in the authorization of any contract between the public agency and the family member's employer. If, however, the family member **does not** have an interest in the contracts of his or her employer, the family member is an "ordinary employee" of the employer. R.C. 2921.42(A)(1) would not prohibit the public official from authorizing a contract between the public agency and the family member's employer if the family member is an "ordinary employee."

**Anything of Value—R.C. 102.03(D) and (E) and Definitions**

R.C. 102.03(D) and (E) provide:

(D) No public official or employee shall use or authorize the use of the authority or influence of 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 the public official or employee with respect to that person's 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 the public official or employee with respect to that person's duties.

These restrictions apply to individuals who are elected or appointed to, or employed by, any public agency, including but not limited to any state agency, and any county, city, township, school district, public library, and regional authority.[1] R.C. 102.01(B) and (C). The restrictions apply regardless of whether the person is: (1) compensated or uncompensated; (2) serving full time or part time; or (3) serving in a temporary or permanent position.

"**Anything of value**" includes money and every other thing of value. See R.C. 102.03(G). In addition, the beneficial or detrimental economic impact of a regulatory or other decision by a public body is a thing of value. Adv. Ops. No. 85-012, 90-002, and 90-012. A zoning variance, grant award, or code compliance inspection can all be or result in things of value.

**Prior Application of the Restriction**

In past advisory opinions, the Commission has stated that R.C. 102.03(D) and (E) prohibit a public official or employee from using his or her position to secure and from soliciting anything of value for an individual with whom the public official or employee has a close family relationship. See Adv. Op. No. 98-003. The prohibition applies regardless of whether the official or employee receives a personal benefit from the matter. Adv. Op. No. 98-002. See also Ohio Sup.Ct., Bd Comm'rs on Grievances and Discipline, CPR Op. 91-23 (1991) (The prohibition in R.C. 102.03(D) "would apply to value accruing to a family member or business associate, even though the public official does not benefit personally."). The Commission has stated that voting on, recommending, deliberating about, or taking any other action within the scope of a public official's or employee's public authority is use of or authorization of the use of the authority or influence of a public official's or employee's office or employment. Adv. Op. No. 88-005.

[1] Teachers, professors, instructors, and other educators, who do not perform any supervisory or administrative functions, are the only group of public employees that are not subject to R.C. 102.03(D) and (E). R.C. 102.01(B).

The Commission has concluded that, when a matter before a public agency will result in a definite and direct benefit for, or the avoidance of a detriment to, an official's family member, the public official's or employee's objectivity and independence of judgment when reviewing the matter will be impaired. Adv. Op. No. 89-009. The law applies whenever matters before an official affects his or her close family members. See generally Adv. Ops. No. 79-008 (spouse), 88-005 (children), and 98-002 (siblings).

Therefore, if a matter before a public agency affects the *employer* of a public official's or employee's family member, and the family member would receive a definite and direct benefit or detriment from the agency's decision on the matter, R.C. 102.03(D) and (E) prohibit the official or employee from participating in the agency's decision-making on the matter. Adv. Op. No. 89-008. If the official's family member will not receive a definite and direct benefit from, or suffer a definite and direct detriment from, a matter affecting his or her employer, R.C. 102.03(D) and (E) do not prohibit the official from participating in the matter.

**Examples of the R.C. 2921.42(A)(1) and 102.03(D) and (E) Restrictions**

A. The child of a county employee is an employee of a non-profit organization. The county employee is responsible for reviewing and ranking grant applications submitted by organizations, including the one that employs his child. R.C. 2921.42(A)(1) would prohibit the county employee from reviewing and ranking the applications if his child, as an employee of one of the applicant organizations, has a definite and direct interest in the grant. One such situation would be that the grant is the only source of the organization's funding. However, if the county employee's child is an "ordinary employee" of the organization, and does not have a definite and direct interest in a grant awarded to it, R.C. 2921.42(A)(1) does not prohibit the county employee from acting on the applications.

B. A city council member's spouse is the construction manager on a project that depends on the approval of a zoning variance request filed by his employer. R.C. 102.03(D) and (E) prohibit the council member from acting in any way to secure approval of the variance because her spouse will receive a definite and direct benefit as construction manager on the project. However, if the council member's spouse is an "ordinary employee" of the company, acting as a tradesman on the project, and will not receive any definite and direct benefit from the city's decision on the variance, R.C. 102.03(D) and (E) do not prohibit the council member from acting on the variance.

C. Because a township health inspector's brother is the manager of a restaurant in the township, R.C. 102.03(D) and (E) prohibit the inspector from conducting an inspection of the restaurant. If the inspector's brother were a server at the restaurant, R.C. 102.03(D) and (E) would not prohibit the inspector from conducting the inspection unless the result of the inspection would definitely and directly affect the restaurant's servers.

**Additional Considerations**

The Ethics Law and related statutes set *minimum* standards that all public officials and employees are required to meet in order to avoid a violation of a criminal law. Even where a public official or employee meets these minimum standards, members of the public may question the propriety of the public official's or employee's actions. Therefore, even if a public official's or employee's family member does not have an interest as described above, the public official or employee may choose to abstain from participating in matters that have any impact on the company that employs a family member.

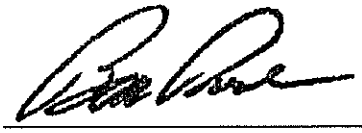
Further, many public agencies have specific rules, policies, and guidelines that limit the activities of the officials and employees of those agencies. A public agency cannot set a rule, policy, or guideline that is *less* restrictive than the Ethics Law. However, any public official or employee with a family member who is employed by a company or organization that is doing or seeking to do business with, regulated by, or interested in matters before the agency should check with the legal advisor for the agency to determine whether he or she is subject to rules, policies, or guidelines that set restrictions in addition to those contained in the Ethics Law.

**Conclusion**

This advisory opinion is based on the facts described in the opinion. 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 as follows: First, Division (A)(1) of Section 2921.42 of the Revised Code prohibits a public official from authorizing a public contract to the employer of a family member if the family member has a definite and direct interest in the contract. Second, Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a public official or employee from participating in any matter before the public agency that affects the interests of the employer of a family member if the family member will receive anything of value as a result of the agency's decision on the matter. Finally, neither R.C. 2921.42(A)(1) nor 102.03(D) and (E) prohibit a public official or employee from participating in any matter before his or her public agency that affects an employer of a family member if the family member is an "ordinary employee," as defined in this opinion, and does not have a personal interest in or receive anything of value from the regulatory matter.

By my signature below, I certify that Advisory Opinion No. 2009-02 was rendered by the Ohio Ethics Commission at its meeting on March 3, 2009.



Ben Rose, Chair
Ohio Ethics Commission