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62706

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FILE NO. S-988

OFFICERS:

Conflict of Interest

Bruce Sagan, Chairman
Illinois Arts Council
111 North Wabash Avenue
Chicago, Illinois 60602

Dear Mr. Sagan:

This responds to your request for an opinion as to whether members of the Illinois Arts Council, non-salaried experts appointed to advise the Council, and paid consultants or staff of the Council are in compliance with "AN ACT creating the Illinois Arts Council etc." (Ill. Rev. Stat. 1973, ch. 127, pars. 214.11 et seq.) and with "AN ACT to prevent fraudulent and corrupt practices etc." (Ill. Rev. Stat. 1973, ch. 102, pars. 1 et seq.), herein referred to as The Corrupt Practices Act. You have asked several questions in regard to this matter.

The first series of questions concerns members of the

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Council. As provided by section 2 of "AN ACT creating the Illinois Arts Council (Ill. Rev. Stat. 1973, ch. 127, par. 214.12) the members serve without compensation but may be reimbursed for expenses incurred in the performance of their duties. Your first question is whether there is a conflict of interest when a member of the Council serves without compensation on the board of trustees of a not-for-profit corporation that receives grants from the Council.

Section 3 of The Corrupt Practices Act (Ill. Rev. Stat. 1973, ch. 102, par. 3) provides as follows:

"§ 3. No person holding any office, either by election or appointment under the laws or constitution of this state, may be in any manner interested, either directly or indirectly, in his own name or in the name of any other person, association, trust or corporation, in any contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote. No such officer may represent, either as agent or otherwise, any person, association, trust or corporation, with respect to any application or bid for any contract or work in regard to which such officer may be called upon to vote. Nor may any such officer take or receive, or offer to take or receive, either directly or indirectly, any money or other thing of value as a gift or bribe or means of influencing his vote or action in his official character. Any contract made and procured in violation hereof is void."

In order for a conflict of interest to exist, the officer or member of a public body must have a pecuniary interest

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in the contract entered into by the officer or body. I assume that grants made by the Illinois Arts Council require the organizations which receive such grants to spend them for specified purposes. A grant is thus a contract within the meaning of The Corrupt Practices Act. In Panozzo v. City of Rockford, 306 Ill. App. 443, the rule requiring a pecuniary interest in such contracts was stated at page 456 as follows:

*** Statutes prohibiting public officers from having an interest in contracts executed in their official capacity are declaratory of the common law. 46 C. J. 1038; McCarthy v. City of Bloomington ex rel. McIntosh, 127 Ill. App. 215; Dillon on Municipal Corporation, sec. 531. We find no cases which were decided under any other rule than that the interest in a contract which disqualifies a public officer from executing such a contract in his official capacity, must be pecuniary. As is stated in Meyer v. City of San Diego, 121 Cal. 102, 53 Pac. 434, such interest must be certain, definable, pecuniary or proprietary. The interest must be financial. Mumma v. Town of Brewster, 174 Wash. 112, 24 P. (2d) 438, 440. *** "

In Furlong v. South Park Comrs., 340 Ill. 354, the Illinois Supreme Court intimated that there was no violation of The Corrupt Practices Act when five commissioners of the South Park District served as ex-officio trustees of the Museum of Science and Industry, even though as trustees of the corporation the commissioners passed on all contracts between the park district and the museum. The museum was a not-for-profit corporation

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and the trustees received no compensation. Members of the Illinois Arts Council who serve as directors of not-for-profit corporations are in a position similar to that of the commissioners. I, therefore, am of the opinion that if a member of the Council serves without compensation on the board of trustees of a not-for-profit corporation, he has no pecuniary interest in a grant made by the Council to such not-for-profit corporation and there is no conflict of interest.

Your second question in this series is whether there is a conflict of interest when a member of the Council serves without compensation on the board of trustees of a not-for-profit corporation which receives funds from the Federal government which pass through the Illinois Arts Council. As discussed above, there is no conflict of interest because the member of the Council has no pecuniary interest in the funds which pass through the Council.

Your third question is whether there is a conflict of interest when a council member serves as a paid consultant or a paid employee of a not-for-profit corporation which receives grant funds from the Council. In this situation it is quite clear that a member of the Council would have at least an indirect pecuniary interest in the grant and that under The Corrupt Practices Act, supra, the contract making this grant

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is void.

You have stated in your letter that council rules would prevent such a member from voting on a grant. The case of Peabody v. Sanitary District, 330 Ill. 250, concerned a situation where a sanitary district let a contract to a corporation in which the treasurer of the sanitary district held an interest. The treasurer, under the law, had no vote in the letting of the contract. However, under the rules of the sanitary district, he was the financial advisor of the board of trustees of the district and the court held that he could have been called upon by the trustees to advise them relevant to the financial ability of the corporation to perform the contract. Although he was neither present at the meeting when the contract was let, nor called upon for any advice, the court held that he was in a position where he could have been called upon by the trustees for financial advice and, therefore, the contract was void. At page 258 the court stated:

"* * * While his [Sanitary District Treasurer] testimony is to the effect that he had nothing to do with making or letting the contract to the ballast company, this is quite beside the point. If his duties were such that he could or might have been called upon to take any action in the matter of making a contract, that fact disqualified him from having any interest in the

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contract, either directly or indirectly, and such a contract was void."

Again, at page 261, the court states:

"* * * The thing prohibited is an interest of a public officer, either directly or indirectly, in any contract in the making of which some action may be required of such officer. * * *"

Under "AN ACT creating the Illinois Arts Council", supra, members of the Council are or may be required to vote on contracts for grants. The rules of the Council could not abrogate this responsibility. An administrative agency may only exercise its power in conformity with the statutes.

(The People v. Richeimer, 298 Ill. 611.) A rule preventing a member from voting on such a contract is of no effect, and the contract is void whether or not the member votes on it.

In regard to the above situations, you have also asked whether the chairman has any different legal requirements than member of the Council. Neither The Corrupt Practices Act nor "AN ACT creating the Illinois Arts Council" makes any distinction in this regard between the chairman and the members.

Your second series of questions concerns members of panels of experts who are appointed by the chairman. They serve without compensation and make recommendations to the

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Council on the acceptance or rejection of an application. Your first two questions are similar to the first two questions discussed above. They are whether there is a conflict of interest when a panel member serves without compensation on the board of trustees of a not-for-profit corporation that either (1) receives grant funds from the Council, or (2) receives funds from the Federal government which pass through the Illinois Arts Council, but on which the panel does not make a recommendation. As discussed above, since panel members have no pecuniary interest in the grant contracts, there is no conflict of interest.

The third question in the series is whether there is a conflict of interest when a panel member serves as either a paid consultant or a paid employee of a not-for-profit corporation which receives grant funds from the Council. The Corrupt Practices Act applies only to officers, but if panel members are officers under this statute, there is no question that the panel members have a pecuniary interest in the grant and that it is void. I understand from further discussions with you that it is unnecessary to consider whether panel members are in fact officers.

Your third series of questions are the same three

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questions posed in each series discussed above, but concern paid consultants and paid staff of the Council. This does not present a problem under The Corrupt Practices Act which concerns only officers, but does present a problem under section 11.1 of the Illinois Purchasing Act. (Ill. Rev. Stat. 1973, ch. 127, par. 132.11-1.) This section provides in pertinent part as follows:

"§ 11.1 It is unlawful for any person * * * appointed to or employed in any of the offices of State government, * * * who is the wife, husband or minor child of any such persons to have or acquire any contract, or any direct pecuniary interest in any contract therein, whether for stationery, printing, paper or for any services, materials or supplies, which will be wholly or partially satisfied by the payment of funds appropriated by the General Assembly of the State of Illinois * * *.

It is unlawful for any firm, partnership, association or corporation in which any such person is entitled to receive more than 7 1/2% of the total distributable income to have or acquire any such contract or direct pecuniary interest therein.

It is unlawful for any firm, partnership, association or corporation in which any such person together with his spouse or minor children is entitled to receive more than 15%, in the aggregate, of the total distributable income to have or acquire any such contract or direct pecuniary interest therein.

* * *

This Section does not affect the validity of any contract made between the State and an officer or employee of the State or member of the General Assembly, his spouse, minor child or any combination of such persons, if that contract was in existence before his election or employment as such officer, member, or employee. Such a contract

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is void, however, if it cannot be completed within 6 months after such officer, member, or employee takes office, or is employed.

This Section does not apply to a contract for personal services (1) as a teacher or school administrator between a member of the General Assembly or his spouse, or a State officer or employee or his or her spouse, and any school district, junior college district, the University of Illinois, Southern Illinois University or any institution under the control of the Board of Governors of State Colleges and Universities or under the control of the Board of Regents or (2) of a wholly ministerial character including but not limited to services as a laborer, clerk, typist, stenographer, page, bookkeeper, receptionist or telephone switchboard operator, made by a spouse or minor child of an elective or appointive State officer or employee or of a member of the General Assembly.

Any person convicted of a violation of this Section shall be guilty of a business offense and shall be fined not more than \$2,500." (emphasis added.)

In answer to the first two questions, since these persons have no pecuniary interest in grants when they serve without compensation on the boards of trustees of not-for-profit corporations which receive grants from the Council or from the Federal government which passed through the Council, they have no pecuniary interest in such grants and there is no violation of the Illinois Purchasing Act.

The third question under this situation is whether there is a conflict of interest when the paid consultant or

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staff member serves as a paid consultant or paid employee of a not-for-profit corporation which receives grant funds from the Council. Under the Illinois Purchasing Act as quoted above, it is unlawful for a State employee, with certain exceptions, to be a party to any contract or to have any direct pecuniary interest therein, which is to be paid for by funds appropriated by the Illinois General Assembly. Whether there is a violation of the Illinois Purchasing Act under the situation presented in this third question depends on the nature of the employment and the nature of the interest in the contract or grant. Thus, whether there is a violation depends on facts which are not contained in your request.

This opinion is limited to construction of the statutes cited and is not to be construed as a holding with regard to the fiduciary nature of the positions held, and the ramifications thereof, either by members of the Illinois Arts Council or by persons who act as directors of not-for-profit corporations.

Very truly yours,

A T T O R N E Y G E N E R A L