



OHIO ETHICS COMMISSION

THE ATLAS BUILDING 1200
8 EAST LONG STREET, SUITE
COLUMBUS, OHIO 43215-2940
(614) 466-7090

Advisory Opinion Number 88-001
January 13, 1988

Syllabus by the Commission:

(1) Division (B) of Section 102.04 of the Revised Code does not apply to the provision of personal, professional services, and thus would not prohibit a physician who is employed by the Department of Mental Retardation and Developmental Disabilities from contracting to provide on-call medical services to the Department, regardless of whether such contract was competitively bid;

(2) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a physician who is employed by the Department of Mental Retardation and Developmental Disabilities from contracting with the Department to provide on-call medical services, unless all of the criteria for the exemption of Division (C) of Section 2921.42 of the Revised Code are met;

(3) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code prohibit a physician who is employed by the Department of Mental Retardation and Developmental Disabilities from authorizing, or using the authority or influence of his employment to secure authorization of, a contract under which he would provide on-call medical services to the Department.

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You asked whether the Ohio Ethics Law and related statutes prohibit physicians, who are employed at developmental centers operated by the Department of Mental Retardation and Developmental Disabilities (hereinafter Department), from entering into personal service contracts with the Department to provide on-call medical services during evenings, nights, weekends, and holidays.

By way of history, the Department of Mental Retardation and Developmental Disabilities employs physicians to work at developmental centers under its jurisdiction. See R.C. 5123.03-- .05; R.C. 5123.09. These physicians are employed under the state civil service system and serve on a full-time basis. See R.C. 124.11(A)(13); R.C. 5123.09.

The Department wishes to enter into personal service contracts with certain of these physicians. Under such a contract, a physician would provide on-call services during evenings, nights, weekends, and holidays to the developmental center at which he is regularly employed. These services would be performed at times other than during the physician's regularly assigned working hours. The contracts would not be competitively bid, but would be subject to

Controlling Board approval. The Department states that the purpose of the on-call contracts is to provide continuity in medical services to residents during evenings, nights, weekends, and holidays, and that in-house physicians who provide full-time services are able to provide this continuity since they are better acquainted with the residents' individual habilitation plans and the operation of the developmental center. The Department further states that the payment of overtime compensation to staff physicians is not economically feasible.

You have specifically inquired as to the application of Division (B) of Section 102.04 of the Revised Code, which reads as follows:

Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall sell or agree to sell, except through competitive bidding, any goods or services to the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

A person who is employed by the Department of Mental Retardation and Developmental Disabilities is employed by a department of the state. See R.C. 5123.04; R.C. 5123.09; Advisory Opinion No. 84-009. Therefore, an employee of the Department of Mental Retardation and Developmental Disabilities is generally prohibited by R.C. 102.04(B) from selling any service to any department, division, institution, instrumentality, board, commission or bureau of the state, except through competitive bidding. In Ohio Ethics Commission Advisory Opinion No. 77-006, however, the Commission held that the prohibitions of R.C. 102.04(B) do not apply to the provision of personal, professional services. Therefore, R.C. 102.04(B) does not prohibit a physician who is employed by the Department of Mental Retardation and Developmental Disabilities from entering into a personal service contract with the Department for the provision of professional services even though such contract was not competitively bid.

However, a physician who is employed by the Department, and who wishes to enter into a personal service contract with the Department, is bound by the prohibitions of Division (A)(4) of Section 2921.42, 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. Chapter 2921. in R.C. 2921.01(A) to include any employee of the state. A physician who is employed at a developmental center operated by the Department of Mental Retardation and Developmental Disabilities is a "public official" as defined in R.C. 2921.01(A), and, thus, is subject to the prohibition of R.C. 2921.42(A)(4). See Advisory Opinion No. 84-009. A "public contract" is defined for purposes of R.C. 2921.42 in Division (E) of that section 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. A personal service contract entered into between the Department and a physician for the provision of on-call medical services is a "public contract" for purposes of R.C. 2921.42(A)(4), since the contract is for the purchase of medical services by the state.

An "interest" which is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. See Advisory Opinion No. 81-008. A physician employed by the Department who contracted with the Department to provide on-call medical services outside of his regular working hours would have a definite and direct, pecuniary interest in the profits or benefits of a contract entered into by the governmental agency or instrumentality with which he is connected. See generally Advisory Opinion No. 84-009. Therefore, R.C. 2921.42(A)(4) prohibits a physician, who is employed at a developmental center by the Department of Mental Retardation and Developmental Disabilities, from entering into a personal service contract with the Department to provide on-call medical services to residents of the developmental center outside of his regular working hours.

The Department has the authority, of course, to assign physicians employed at the developmental centers all appropriate duties and to set the physicians' work hours and compensation, within applicable civil service and other employment laws. The Ohio Ethics Law does not prohibit the Department from requiring its employees, as a term or condition of their employment, to work during the nights, evenings, weekends, or holidays, or from appropriately compensating these employees for working such hours. R.C. 2921.42(A)(4) does, however, prohibit a physician who is regularly employed within the civil service system by the Department of Mental Retardation and Developmental Disabilities from entering into a personal service contract with the Department to perform certain duties outside of his regularly assigned working hours, regardless of whether the Department could lawfully require the physician to perform such duties or work during such hours as part of his regular employment with the Department.

However, Division (C) of Section 2921.42 provides an exception to the prohibition of Division (A)(4), and reads as follows:

(C) This section does not apply to a public contract in which a public servant, member of his family, or one of his business associates has an interest, when all of the following apply:

- (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;
- (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public servant's becoming associated with the political subdivision or governmental agency or instrumentality involved;
- (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;

(4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public servant, member of his family, or business associate, and the public servant takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

Each of the criteria of Division (C) is a question of fact which, when applied to the circumstances of an individual case, will determine whether a particular transaction fits within the exception of Division (C). See Advisory Opinions No. 80-003 and 82-007. The criteria of Division (C) are strictly construed against the public official, and the burden is on the official to demonstrate that he is in compliance with the exemption. See Advisory Opinions No. 83-004 and 84-011.

It is particularly important that the requirement under R.C. 2921.42(C)(2), that the goods or services are "unobtainable elsewhere for the same or lower cost" be demonstrated by some objective standard. See Advisory Opinion No. 83-004. One indication that the services are "unobtainable elsewhere for the same or lower cost," would be where a public contract is competitively bid and the public official submits the lowest bid; however it would not be determinative. See Advisory Opinions No. 82-007 and 83-004. As stated in Advisory Opinion No. 83-004, "factors such as the availability and adequacy of notice to potential competitors, the openness and fairness of the bidding process, and the conditions of the market must be considered in determining whether the public official complies with Division (C)(2) of Section 2921.42 of the Revised Code." The Department must, of course, observe all pertinent statutory and administrative requirements governing its authority to contract, and the manner in which contracts must be competitively bid. However, the Department, to the extent it is not bound by statutory or administrative restrictions, must ensure that reasonable efforts are used to secure competitive bids, and that a very broad opportunity to bid be given. While the Department has discretion, where there are no limiting statutes or regulations, in determining what services are to be provided pursuant to contract, in formulating bid specifications, and in advertising the bids, it is clear that in order to meet the requirements of Division (C)(2), bids must be solicited on an open and fair basis, and not limited to solicitations from employees of the Department. The Department must make every reasonable effort to open the bidding process to all interested and qualified individuals outside of the Department and to award the work to the person or persons who will provide the necessary services at the lowest cost.

The Department has stated that physicians who are regularly employed at developmental centers are uniquely qualified to provide on-call services since they are already familiar with the developmental center facilities and with residents' individual habilitation plans, so as to be able to provide continuity of care. The Department must be able to justify objectively the validity of considering the ability to provide continuity of care in choosing physicians to provide on-call services, since such a specification would give Department employees an inherent advantage in being awarded the contracts to perform these services. If, however, continuity of care can objectively be shown by the Department to be a valid and proper consideration, a physician's familiarity with a developmental center and the residents, coupled with an open competitive bidding process, may indicate that a physician who is regularly employed at a developmental

center and who is awarded a contract through competitive bidding to provide on-call services at the center where he is employed would be able to meet the requirement of Division (C)(2).

In addition, the Department questions whether a contract to provide on-call medical services awarded to a corporation pursuant to competitive bidding, where the corporation would subcontract with an employee of the Department to perform such services outside of his regularly assigned working hours would fall within the exemption of Division (C)(2). A subcontract awarded under a general public contract is, itself, also a public contract for purposes of R.C. 2921.42. See Advisory Opinions No. 82-007 and 84-008. The issue becomes whether the requirement of Division (C)(2) is met once the corporation demonstrates that it can provide the required medical services at the lowest cost, or whether the subcontracting physician must also show that he is providing the services at the lowest cost. The legislative Committee Comment to R.C. 2921.42 states, in part, as follows:

[T]he section does not prohibit public servants from all dealings in which they may have some interest, no matter how remote or above-board. It prohibits only those dealings in which there is a risk that private considerations may detract from serving the public interests.

The underlying principle of the exemption of Division (C)(2) is to permit a public official to have an interest in a public contract with his governmental agency in those limited situations where the contract is the best or only alternative available to the governmental agency. See Advisory Opinion No. 84-011. If a corporation demonstrates that it will provide to the Department services at the lowest cost, the objective of Division (C)(2) is met in that the Department's interests are best served by such a contract. Therefore, it would be unnecessary for the subcontracting physician to show independently that his services are being provided at the lowest cost to the corporation.

Assuming that all of the criteria of Division (C) of Section 2921.42 can be established, so that a physician employed by the Department may properly contract with the Department to provide on-call services, the prohibitions of R.C. 2921.42(A)(1) must be observed. This provision prohibits a public official from authorizing or employing the authority or influence of his office to secure authorization of a public contract in which he has an interest. Therefore, R.C. 2921.42(A)(1) would prohibit a physician employed by the Department from using his authority or influence, formally or informally, to secure for himself a contract with the Department. This conduct would also be prohibited by R.C. 102.03(D) which prohibits a public official or employee from using or authorizing the use of the authority or influence of his office or employment 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 also R.C. 2921.42(C)(4) (set forth above).

This advisory opinion is based on the facts presented, and 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 (B) of Section 102.04 of the Revised Code does not apply to the provision of personal, professional services, and thus would not prohibit a physician who is employed by the Department of Mental Retardation and Developmental Disabilities from contracting to provide on-call medical services to the Department, regardless of whether such contract was competitively bid; (2) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a physician who is employed by the Department of Mental Retardation and Developmental Disabilities from contracting with the Department to provide on-call medical services, unless all of the criteria for the exemption of Division (C) of Section 2921.42 of the Revised Code are met; and (3) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code prohibit a physician who is employed by the Department of Mental Retardation and Developmental Disabilities from authorizing, or using the authority or influence of his employment to secure authorization of, a contract under which he would provide on-call medical services to the Department.



Merom Brachman, Chairman
Ohio Ethics Commission