



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 93-013
September 10, 1993

Syllabus by the Commission:

- (1) A person who sells insurance consultation services to a county and performs government functions pursuant to an independent contract is a "public servant" for purposes of Section 2921.43 of the Revised Code;
- (2) Division (A)(1) of Section 2921.43 of the Revised Code prohibits an independent contractor who is a public servant from receiving money from any party, other than the public entity he serves, for performing any tasks or duties he is responsible for performing pursuant to his contract with the public entity.

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You have asked if the Ohio Ethics Law and related statutes prohibit an insurance consultant to a board of county commissioners from receiving both his consulting fee from the county and fees from an insurance provider or broker for consulting and administration services on the insurance plan purchased by the Commissioners.

By way of history, you have explained that the county commissioners have entered into a contract with an individual to provide insurance consulting services. The consulting contract sets forth the consultant's duties, which include: (1) advising the county about cost containment trends in the insurance industry; (2) advising the county commissioners about the availability and costs of new or different coverage; (3) making cost and feature comparisons between the county's current plan and other plans; (4) preparing specifications of the county's insurance plan for insurance company bids; and (5) procuring bids for insurance companies meeting the specifications for the county's insurance. In return for these services, the county commissioners pay the consultant \$600.00 each month.

You have asked if the consultant is prohibited, by the Ohio Ethics Law, from also receiving fees from an insurance provider or broker for providing consulting and administration services on the insurance plan purchased by the commissioners.

In Advisory Opinion No. 75-012, the Ethics Commission set forth the factors considered to distinguish an independent contractor from an employee. See also Ohio Ethics Commission Advisory Ops. No. 75-028 and 77-008; Gillum v. Industrial Comm., 141 Ohio St. 373, 381-382 (1943). Some of the factors considered include the extent of control the employer exercises over the details of the work, whether or not the individual is engaged in a distinct occupation or business, the skills required in the particular occupation, the length of time the individual is

engaged, the method of payment (by job or by time), and whether or not the parties believe they are creating a relationship of employer and employee. Advisory Op. No. 75-012. The Commission further stated that the primary test is whether one is engaged in a distinct occupation or business, but that the other tests must be examined. Advisory Ops. No. 75-028 and 77-008. The terms of the contract between the county and the consultant indicate that the consultant is an independent contractor.

Ethics restrictions are found in Revised Code Sections 102.03, 102.04, 2921.42, and 2921.43. The prohibitions of R.C. 102.03 apply to any "public official or employee." An independent contractor is not generally a public official or public employee, as that term is defined for purposes of R.C. 102.03 of the Revised Code. See R.C. 102.01 (B) and Advisory Ops. No. 77-004 and 89-003. The prohibition of R.C. 102.04 (C) applies to "person[s] elected or appointed to an office of or employed by" counties and other political entities. An independent contractor is not elected or appointed to an office of or employed by the county, and, accordingly, is not subject to the limitations in R.C. 102.04 (C). See Advisory Opinion No. 75-012. Therefore, the consultant in your question is not subject to the prohibitions in Chapter 102.

However, as stated above, the Ethics Law also includes Sections 2921.42 and 2921.43 of the Revised Code. The prohibitions in Section 2921.42 of the Revised Code apply to any "public official." The term "public official" is defined in R.C. 2921.01 (A) as "any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity." As stated above, a consultant who serves subject to an independent contract is not elected or appointed to an office or an employee of the county. However, in order to ascertain whether a consultant is a "public official" as that term is defined in R.C. 2921.01 (A), it must be determined whether the consultant is an "agent" of the county.

In Advisory Opinion No. 92-001, the Ethics Commission determined that a person is an "agent" of a public entity for purposes of R.C. 2921.42 if all three of the following apply: (1) the individual has the authority to enter into contracts with others and thus has the authority to act on the public entity's behalf and bind the public entity; (2) the public entity exercises the right of control over the individual; and (3) the individual's contractually prescribed actions are directed toward the attainment of an objective sought by the public entity.

A review of the materials you provided indicates that the individual consultant in your question does not have the authority to enter into contracts on behalf of, or otherwise bind, the county. Accordingly, the individual in your question is not an officer, an employee, or an agent of the county, and therefore, is not a "public official" for purposes of the prohibitions of R.C. 2921.42.

The Ethics Law also includes the restrictions set forth in R.C. 2921.43. These prohibitions apply to "public servants." R.C. 2921.01 (B) defines the term "public servant" as: (1) any public official; (2) "[a]ny person performing ad hoc a governmental function, including without limitation a juror, member of a temporary commission, master, arbitrator, advisor, or consultant"; and (3) a candidate for public office. As explained above, the individual you have described is not a "public official" as that term is defined in R.C. 2921.01 (A). However, he is a

"consultant." The question, then, is whether the consultant in your question is performing ad hoc a governmental function.

The term "ad hoc" is defined as "for this special purpose." Black's Law Dictionary 39 (1979). The consultant in your case is acting for the purpose of procuring and providing insurance benefit plans by the county for the employees of the county. This is clearly a governmental function. For example, as set forth above, the consultant, acting on behalf of the county, prepares specifications of the county's insurance plan for insurance company bids and procures bids from insurance companies meeting the specifications for the county's insurance. Therefore, the consultant falls within the definition of "public servant" for purposes of R.C. 2921.43.

Division (A) of Section 2921.43 of the Revised Code provides, in pertinent part, as follows:

(A) No public servant shall knowingly solicit or accept and no person shall knowingly promise or give to a public servant either of the following:

(1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform his official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation.

R.C. 2921.43 prohibits a public servant from accepting "any compensation," other than as allowed by R.C. 102.03 (G) through (I) or other provisions of law for: (1) performing any duty, act, or service required in his official capacity as a public servant; (2) the general performance of his duties; or (3) as a supplement to his public compensation. See Advisory Opinions No. 92-014 and 92-015. The exceptions set forth in R.C. 102.03 (G) to (I) do not apply to the situation you have described.

The payment the consultant receives from the county, pursuant to the contract between the consultant and the county, is "compensation" as allowed by law. However, the individual in your question also wishes to receive payment for services from an insurance company. Payment received by an individual from an insurance provider for consulting and administration services would also be "compensation," but is not allowed by provisions of law. See Advisory Opinions No. 92-014 and 92-015. The question, then, is whether the public servant in your question would receive compensation from the insurance company for performing any duty, act, or service required in his official capacity as a public servant, or for the general performance of his duties, or as a supplement to his public compensation.

A public servant is prohibited from receiving compensation, other than that provided by law, for performing those duties he is responsible for in his official capacity. See Advisory Opinion No. 92-015; Ohio Op. Att'y Gen. No. 84-019. R.C. 2921.43 (A) is clearly intended to prevent situations where a public servant is answering to both a public and a private master in the performance of his public duties.

An independent contractor who is a public servant, and therefore subject to the prohibitions of R.C. 2921.43, is prohibited from receiving money from any party, other than the public entity he serves, for performing any tasks or duties he is responsible for performing pursuant to his contract. In the situation you have described, the public servant has contracted to provide basic insurance consultation services to the county. The contract states that the public servant's duties include, but are not limited to, advising the county as to the availability and costs of insurance coverage afforded by the employee benefit plan, meeting with the county to review loss ratios of the insurance program and procure any necessary actuarial studies, and communicating with county employees to promote additional participation in the plan.

The consultant states that his responsibilities to the plan provider would amount to "administration" of the employee benefit plan. An examination of the contract between the county and the consultant reveals that the consultant provides services to the county on that same employee benefit plan. Whether the duties performed by the consultant for the county are the same as the duties he would perform for the insurance company is a factual determination, and this office has been given no facts upon which to make that determination. However, R.C. 2921.43 (A) specifically prohibits a public servant from accepting compensation from a private source for performing the same services for which he is being compensated by the county. In the situation you have described, therefore, R.C. 2921.43 (A) prohibits the consultant, who is a public servant, from receiving compensation from the insurance company, in addition to his compensation from the county, if he is performing the same services for the insurance company that he is being compensated for in his official capacity as a public servant.

A public servant owes his first duty of responsibility to the public entity he serves, over any other person or entity. If an independent contractor were a "public official or employee," and therefore subject to R.C. 102.03, there is no question but that he would be prohibited from receiving money from a private source for performing any services on any matter where there is a conflict of interest. See generally Advisory Op. No. 89-006. In the situation you have described, for example, the insurance consultant could be in a position where he is assessing the insurance losses for the county, and also making decisions about insurance coverage for county employees under the same plan. The consultant is required to prepare specifications and procure bids from insurance companies for the county's insurance and may also be in a position where he submits a response to the bid specifications he drafted. If the consultant were a "public official or employee," dual activities of this type would be clearly prohibited by R.C. 102.03. See also R.C. 2921.42 (prohibiting a person subject to its restrictions from using his authority or influence to secure a public contract for himself or a business associate, and from having an interest in a public contract entered into by his political subdivision).

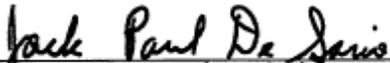
However, the prohibitions of R.C. 2921.43 (A) are somewhat more limited. R.C. 2921.43 (A) does not prohibit the individual in your question from receiving money from a private source for performing administrative services on the county insurance plan if those services are different from the services he is performing for the county, even though there may be conflicting interests between the county and insurance company. In addition, the public servant is not prohibited from providing services identical to the ones he provides to the county to other entities on other plans. See generally Advisory Opinion No. 93-002. However, R.C. 2921.43 (A) does prohibit the

public servant from receiving compensation from both the county and the insurance company, if he is providing the same services on the same county employee benefit plan to both entities.

The subject of privatization of public services creates new areas of conflicts of interest for public entities. It is in the best interest of a public entity to ensure that its public servants, regardless of whether they are public officials and employees, are not subject to divided loyalties in the performance of their public duties. R.C. 2921.43 (A) prohibits public servants from receiving additional private compensation for performing duties in their public capacity. The public entity can, of course, go beyond R.C. 2921.43, and include, within its contracts, provisions that otherwise limit the outside business opportunities of independent contractors which may create a conflict of interest.

This advisory opinion is based on the facts presented. 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 opinion of the Ohio Ethics Commission, and you are so advised, that: (1) A person who sells insurance consultation services to a county and performs government functions pursuant to an independent contract is a "public servant" for purposes of Section 2921.43 of the Revised Code; and (2) Division (A)(1) of Section 2921.43 of the Revised Code prohibits an independent contractor who is a public servant from receiving money from any party, other than the public entity he serves, for performing any tasks or duties he is responsible for performing pursuant to his contract with the public entity.


Jack Paul DeSario, Chair
Ohio Ethics Commission