



OHIO ETHICS COMMISSION

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August 30, 1989

Informal Opinion 1989-INF-0830

The Honorable Paul H. Jones
Ohio House of Representatives
Chairman, Ohio Children's Trust Fund Board

Dear Representative Jones:

You have asked whether the members of a local child abuse and child neglect advisory board (local board) are subject to the Ethics Law and related statutes. Specifically, you have asked whether a member of a local board would violate Chapter 102. or Section 2921.42 if he is affiliated with an agency as a director, employee, board member, or consultant, and the agency receives an Ohio Children's Trust Fund grant under the following circumstances:

- (1) The grant application was submitted for initial review to the local child abuse and child neglect advisory board;
- (2) The grant application was directly submitted to the Ohio Children's Trust Fund Board without local review;
- (3) The grant application was submitted during the one-year period following the expiration of the term or resignation by a local child abuse and child neglect advisory board member.

The statutory provisions within the jurisdiction of the Ethics Commission, Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code, apply to public officials and employees. It must first be determined, therefore, whether members of the local boards are public officials or employees, so as to be subject to the prohibitions of Chapter 102. or Section 2921.42. In order to make this determination, it is necessary to examine the structure and duties of the local boards, as well as the relationship between the local boards and the Ohio Children's Trust Fund Board.

The Ohio Children's Trust Fund Board (State Board) was created pursuant to R.C. 3109.15 in order to administer the Children's Trust Fund for the purpose of establishing and supporting child abuse and child neglect prevention programs. See R.C. 3109.17. The duties of the State Board include: (1) developing and adopting a state plan for the allocation of moneys in the Children's Trust Fund; (2) developing criteria for county or district allocation plans; (3) establishing criteria for child abuse and child neglect prevention programs; (4) making grants to public or private agencies or schools for the purpose of child abuse and child neglect prevention programs; (5) approving each county or district allocation plan; and (6) reviewing and monitoring the expenditure of moneys from the Children's Trust Fund. *Id.* In Ohio Ethics Commission Advisory Opinion No. 87-003, the Ethics Commission held that members of the State Board are prohibited by R.C. 2921.42(A)(4) from serving as a trustee or officer of a nonprofit corporation which receives a grant awarded by the Board or a subgrant from moneys awarded by the Board, unless the criteria for the exception found in that Section are met. The opinion also held

that R.C. 2921.42(A)(1) prohibits a member of the State Board from authorizing or using the authority or influence of his position to secure a grant for a corporation of which he is a trustee or officer, or for an organization which would use the grant to award a subgrant to his corporation.

R.C. 3109.18 requires each board of county commissioners to establish a child abuse and child neglect advisory board in the metropolitan counties and authorizes the remaining boards of county commissioners to establish a local board or the boards of county commissioners of two or more contiguous counties to form a multicounty district to be served by a multicounty child abuse and child neglect advisory board. The board must consist of members "who represent both public and private child serving agencies, and persons with demonstrated knowledge in programs for children, such as persons from the educational community, parent groups, juvenile justice, and the medical community." R.C. 3109.18. See also Rule 5101:5-1-11.

A local board is required by R.C. 3109.18 to develop an allocation plan for the county or district and to submit the plan to the Children's Trust Fund Advisory Board for approval. The State Board may require a local board to specify in its allocation plan the reasons for accepting or rejecting all grant applications submitted to the local board, and the criteria used to make these decisions. The local board must then monitor the operation of the allocation plan once it is approved by the State Board. The local board is also required to establish procedures for evaluating programs, including reporting requirements for grant recipients.

Local boards must give public notice about the availability of funds and review all applications for grants received, using criteria established by the State Board and any criteria developed by the local board. R.C. 3109.18. Applications are then submitted to the State Board after review by the local board. The local board must notify each applicant of the action taken on its application, and if the local board does not recommend an applicant for funding, or recommends an applicant for funding at a substantial reduction in the grant award, the board must notify the applicant of the reasons for such action. Rule 5101:5-1-13(F). The Executive Director of the State Board has indicated that applications which are not recommended for approval are not forwarded to the State Board for review. A local board must, however, notify any applicant not recommended for funding or recommended for funding at a substantial reduction in the grant award of its right to ask for reconsideration from the local board. Rule 5101:5-1-13(G) and (H). The local advisory board's final decision in response to a request for reconsideration is appealable to the State Board for final determination. Rule 5101:5-1-23. The local board must submit the results of any grant reconsideration with its local allocation plan containing its recommendations for funding, see Rule 5101:5-1-13(G), and in rendering its final decision on a request for reconsideration, the State Board may consider the availability of funds, time remaining in the grant year, existing priorities, and other relevant factors. Rule 5101:5-1-23(L). The State Board is not required to reduce or terminate funding to any grantee or change funding priorities in order to implement a final grant appeal decision. Id. It is my understanding from the staff of the State Board that often there are no remaining funds available for applicants who are approved for funding only after their appeal is decided by the State Board.

A local board must establish procedures for evaluating Trust Fund programs, including report requirements, Rule 5101:5-1-13(A)(4) and must monitor and evaluate the local allocation plan and those programs funded pursuant to State Board guidelines and

procedures. Rule 5101:5-1-21. A local board may provide information and make recommendations to the State Board about a grantee's compliance with pertinent rules and regulations, and must notify the State Board of any cause or alleged cause for terminating or suspending payments to a grantee. Rule 5101:5-1-25. The State Board makes the final decision whether to terminate a grant. Id.

As noted above, in determining the applicability of the Ohio Ethics Law and related statutes to the members of the local advisory boards, the threshold question is whether the members are public officials or employees for purposes of Section 2921.42 and Chapter 102. of the Revised Code. Chapter 102. is generally applicable to any "public official or employee" which includes any person who is elected or appointed to an office or is an employee of any public agency, including any board or instrumentality of the state, a county, or any other governmental entity. See R.C. 102.01(B) and (C). R.C. 2921.42 is applicable to any "public official," which includes any elected or appointed officer, or employee, or agent of the state or any political subdivision thereof. See R.C. 2921.01(A).

In Advisory Opinion No. 85-005, the Ethics Commission held that a member of the Technical Advisory Committee to the Coal Development Office is not a public official or employee for purposes of R.C. Chapter 102. or R.C. 2921.42. The opinion states that in determining whether a position is a public office, the "essential requirement" is that the law confers on the position certain duties that involve the exercise of the sovereign power of the state. In explaining what is meant by "sovereign power," the opinion quotes the Ohio Supreme Court case of State ex rel. Landis V. Butler, 95 Ohio St. 157 (1917), as follows:

If specific statutory independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with the independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state. Id. at 160.

The opinion also cites Advisory Opinion No. 75-004 which states: "it becomes apparent that 'sovereign power' is a concept meant to imply that the exercise of duty entrusted to one by virtue of statute or some other public authority. These duties . . . involve some discretionary, decision-making qualities." The Ethics Commission found in Advisory Opinion No. 85-005 that the role of the Technical Advisory Committee was merely advisory and did not involve the exercise of the sovereign power of the state, and therefore, members of the Committee were not public officials for purposes of Chapter 102. or R.C. 2921.42.

In this instance, the local boards certainly play an advisory role in making recommendations to the State Board with regard to which applicants should be funded. It may also be said that the local boards assist the State Board, and are under the supervision and guidance of the State Board in administering the Children's Trust Fund on the local level. The role of the local boards is not, however, purely advisory in nature. Local boards must develop and monitor an allocation plan for the distribution of funds locally. Although such plan is subject to the approval of the State Board, it is apparent that it is the local board's responsibility to actually develop the plan rather than to merely advise

the State Board as to the plan's development. Local boards are authorized to develop criteria by which to review grant applications and to use those criteria, along with state criteria, in making its determinations. The decision of a local board to not recommend an applicant for funding is not reviewed by the State Board. An applicant which is not recommended may request reconsideration. That request is again heard by the local board. The local board's decision to deny the applicant for funding upon a request for reconsideration may then be appealed to the State Board; however, the State Board's decision to grant funding to an applicant who successfully appeals may, as a practical matter, be limited in that funding priorities have already been established and moneys distributed to grant applicants who were initially recommended for funding, and moneys may not be available to fund the applicant's request.

Further, local boards must establish procedures for evaluating Trust Fund programs, and monitor and evaluate the local allocation plan and the programs which are funded. They must report programs which may be in noncompliance to the State Board for possible termination or suspension of funding. In viewing the powers and duties of the local boards, it must be concluded that the boards are not merely advisory in nature, but also exercise those duties that involve discretionary, and decision-making qualities. The members of the local boards are, therefore, subject to Chapter 102. and Section 2921.42 of the Revised Code.

Division (A)(4) of Section 2921.42 of the Revised Code states:

(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.

Grants are considered to fall within the meaning of public contract for purposes of R.C. 2921.42. See R.C. 2921.42(E) and Advisory Opinion No. 87-003. Although the grants are, in this instance, finally awarded by the State Board, it is clear that, as described above, the State Board and local boards are closely related, and may certainly be considered as connected for purposes of R.C. 2921.42. See Advisory Opinion No. 87-002 ("to be 'connected with' something is to be related to, or associated with, that entity"). See also Advisory Opinion No. 89-004 (R.C. 2921.42(A)(4) prohibits a public official from having an interest in the public contracts entered into by all of the governmental entities with which he is connected). Therefore, R.C. 2921.42(A)(4) prohibits a local board member from having an interest in a grant awarded from Trust Fund moneys by the State Board.

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. Owners and shareholders of a corporation are deemed to have an interest in the contracts of the corporation. See Advisory Opinion No. 86-002. Furthermore, officers, directors, and trustees of organizations are also deemed to be interested in the contracts or grants of the organization. See Advisory Opinions No. 81-005, 81-008, 86-002, 87-003, and 88-008. Therefore, members of the local boards are prohibited by R.C. 2921.42(A)(4) from having an ownership interest in, or from serving as a trustee, director, or officer of, an organization to which a grant has been awarded by the Children's Trust Fund Board.

An employee who has no ownership or fiduciary interest in his employing agency is not, as a general matter, deemed to have an interest in his employer's contracts for purposes of R.C. 2921.42. See Advisory Opinions No. 78-006, 82-003, and 85-008. However, an employee will be considered to have an interest in a contract (including a grant) between his employing agency and the governmental entity with which he is connected, where: (1) the employee takes part in the contract negotiations or application process; (2) the employee is involved in the execution or administration of the contract, or serves in a management position, with the responsibility to oversee the execution or administration of the contract; (3) the employing agency receives most or all of its funding from the contract, such that the establishment or operation of the agency is dependent upon the receipt of the contract; (4) the creation or continuation of the employee's position is dependent upon the receipt of the contract; or (5) the employee's compensation, whether salary or commission, is based or dependent upon the contract. See Advisory Opinions No. 78-006, 82-003, 84-009, and 85-008. Similarly, a consultant would not be considered to have an interest in the contracts of his employing agency, unless one of the factual circumstances set forth above with regard to employees is present. See Advisory Opinions No. 84-008 and 84-009. Therefore, a board member would be prohibited from serving as an employee of, or consultant to, a grantee organization, where he would have an interest in the grant under one of the circumstances set forth above.

It must be emphasized that if an organization receives a grant from the board, then a board member may not serve in a fiduciary capacity with that organization, regardless of whether the individual is appointed to serve as an officer or board member of the organization, or is hired pursuant to contract to fulfill the duties and responsibilities of an officer or board member. See generally Advisory Opinion No. 77-004. Further, the prohibition of R.C. 2921.42 applies to an individual who has an interest in a Trust Fund grant under one of the circumstances set forth above, regardless of whether the individual serves as an employee of the grantee organization or is hired as a consultant by the grantee. See generally Advisory Opinion No. 77-004. See also City of Parma Heights v. Schroeder, 26 Ohio Op. 2d 119 (1963) and Attorney General Opinion No 80-048 (one cannot do indirectly what he cannot lawfully do directly).

Division (C) of Section 2921.42 may provide an exception to the prohibition of Division (A)(4), and permit a local board member to have an interest in a Trust Fund grant if all of the following apply:

- (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.

The requirements of Division (C) are factual determinations, and whether a particular transaction meets the criteria of Division (C) depends upon the facts and circumstances of each individual case. See Advisory Opinion No. 78-001. These criteria are strictly applied 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.

Division (C)(2) of Section 2921.42 requires that the services under the contract be unobtainable elsewhere for the same or lower cost or are being furnished to the governmental agency as part of a continuing course of dealing established prior to the public servant's becoming associated with the governmental agency involved. Therefore, a local board member may meet the requirement of Division (C)(2) if he is appointed to the board subsequent to the time when a grant was awarded to the agency with which he serves. In Advisory Opinion No. 82-007, the Commission held that material changes in the agreement existing at the time of an official's appointment, including modifications, extensions, or renewals, are not within the Division (C)(2) exemption, since such changes alter the original understanding of the parties. See also Advisory Opinions No. 82-007 and 84-006. A board member would not meet the continuing course of dealing exception if a grant in which he has an interest is awarded after his appointment to the board, even if the original grant was awarded prior to his appointment.

The exemption in Division (C)(2) of Section 2921.42 may be satisfied, however, if the official can establish, as a factual matter, that the services "are unobtainable elsewhere for the same or lower cost." As pointed out in Ohio Ethics Commission Advisory Opinion No. 83-004, the requirement that the goods or services be "unobtainable elsewhere for the same or lower cost" must be demonstrated by some objective standard. As stated in Advisory Opinion No. 84-011:

The criterion that the goods or services be "unobtainable for the same or lower cost" requires that a public official or employee be at a disadvantage when attempting to do business with his governmental entity, and that an equally qualified applicant who is not a [public official] must receive preference.

If, however, it can be objectively shown that the services his corporation provides are unique and not available elsewhere, or not available elsewhere at the same or lower cost, he may meet the requirement of Division (C)(2). See Advisory Opinion No. 87-003. In considering whether a city employee could receive from the city a grant for housing rehabilitation, the Commission stated in Advisory Opinion No. 84-011:

While the exemption [of Division (C)] is most readily applied to direct purchases of goods or services, the same principles are applicable to other

public contracts, such as the rehabilitation grants or loans in the instant case. However, the application of the exemption must be consistent with the principle underlying Section 2921.42 of the Revised Code that a public official should not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity. (Emphasis added.)

Your attention is also drawn to Division (A)(3) of Section 2921.42, which provides:

(A) No public official shall knowingly do any of the following:

. . .

(3) During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid.

A public contract (including a grant) is considered to be authorized by an official or board if the contract could not have been awarded without the approval of the official or board. See Advisory Opinion No. 87-004. Therefore, a local board member is prohibited while on the board and for one year thereafter from profiting from a grant which was recommended for funding by the local board. A board member will be deemed to profit from the grant, where: (1) the establishment or operation of the agency with which he serves is dependent upon receipt of the grant; (2) the creation or continuation of the official's position with the recipient agency is dependent upon the award of the grant; (3) the grant funds would be used by the recipient to compensate the board member or as a basis for the board member's compensation; or (4) he would otherwise profit from the award of the grant. See Advisory Opinions No. 87-004 and 88-008. A board member is subject to the prohibition of R.C. 2921.42(A)(3), even though he may have abstained from participating in consideration of the grant from which he would profit. See Advisory Opinion No. 88-008.

Assuming that the criteria of Division (C) can be established and the requirements of R.C. 2921.42(A)(3), where applicable, can be met so that a grant may properly be awarded to an agency with which a local board is connected, the board member who is a trustee or officer of the corporation must observe the prohibition of Division (A)(1) of Section 2921.42 of the Revised Code. Division (A)(1) states that a public official shall not knowingly authorize or employ the authority or influence of his office to secure authorization of any public contract in which he has an interest. This provision would prohibit a board member from voting upon, discussing, or otherwise using his authority or influence to secure, a grant for his organization. See also R.C. 102.03(D) (prohibiting a public official from using or authorizing the use of the authority or influence of his office "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 him with respect to his duties"); R.C. 2921.42(C)(4) (providing that in order to establish the exception of Division (C), the public servant may take no part in deliberations or decision of the governmental agency with respect to the public contract).

Division (A)(1) of Section 2921.42 also prohibits a public official from using his authority or influence to secure authorization of a public contract in which a business

associate has an interest. A public official's outside employer is deemed to be his "business associate" for purposes of R.C. 2921.42(A)(1). See Advisory Opinions No. 78-006, 80-003, 81-001, 84-008, 84-009, 84-013, and 84-014. Therefore, a local board member is prohibited by R.C. 2921.42(A)(1) from participating in consideration of a grant for an organization which he serves as an employee or consultant, even though he himself may not have an interest in the grant.

In your second question, you have asked whether the same considerations apply to a local board member in instances where a grant application is submitted to the State Board without local review. Your staff has explained that the State Board has control over certain discretionary funds which it directly awards for special projects without the participation of the local boards.

As discussed above, a local board member is subject to the restrictions imposed by R.C. 2921.42 with respect to all grants which are awarded by the State Board. It is immaterial whether a grant was awarded with local participation or without local approval.

Your third question involves the post-employment restrictions of the Ohio Ethics Law. Division (A) of Section 102.03 of the Revised Code reads, in pertinent part, as follows:

No present or former public official or employee shall, during his public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which he personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion. . . . As used in this division, "matter" includes any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments. As used in this division, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person.

Therefore, a member of a local board is prohibited, while on the board and for one year after leaving the board, from representing any agency before the local board, the State Board, or any other public agency on any matter in which he participated through the exercise of administrative discretion while on the local board. Any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person is deemed to be "representation" for purposes of R.C. 102.03. Documents which are prepared by a former board member, but signed or presented by another person would fall within the prohibition of R.C. 102.03(A). See Advisory Opinions No. 86-001 and 89-003.

R.C. 102.03(A) defines a "matter" for purposes of that Section to include any case, proceeding, application, determination, issue, or question. A former board member would be prohibited from representing an agency on a grant or grant application he considered as a board member or any request for renewal of such grant.

The prohibitions of R.C. 2921.42(A)(3), as set forth above, also apply to a former board member for a period of one year after he leaves the board. As a final note, R.C. 102.03(B) reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

A local board member or former board member is prohibited from using or disclosing to any party confidential information without appropriate authorization. This prohibition is in effect so long as the information remains confidential.

The State Board's Executive Director has asked that the possibility of ex officio members serving on the local board be considered. The Ethics Commission has previously held that R.C. 2921.42(A)(4) does not prohibit a public official from serving on the board of an organization which contracts with his public agency, where he has officially been designated to serve on the board in his capacity as a public official and is representing the public agency's interests in that capacity. See Advisory Opinions No. 83-010 and 84-001. In this instance, however, members of local boards would not be serving with grantee agencies as representatives of the local boards. Therefore, the "official capacity" exception would not be applicable in this instance.

The parties may, however, wish to consider whether the expertise and advice of local officials or other knowledgeable persons in the community who serve with agencies desiring to obtain Trust Fund moneys can be utilized by the local boards without actually serving on the board. It may be necessary to ascertain from legal counsel whether this advisory role can be established under existing law, or whether statutory change would be necessary.

This informal opinion was approved by the Ethics Commission at its meeting on August 30, 1989. It 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. This informal opinion is based on an interpretation of the Ethics Law and related statutes and does not purport to interpret other laws or rules. If you have any questions, or wish to request a formal advisory opinion from the Commission, please contact me.

Sincerely,



Melissa A. Warheit
Executive Director