



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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December 14, 1989

Informal Opinion 1989-INF-1214

Duane Jager
Ohio Department of Human Services

Dear Mr. Jager:

You have indicated that the Ohio Department of Human Services (ODHS) and the Ohio Board of Regents have entered into an agreement whereby various two-year colleges will deliver staff training for county departments of human services (county departments). Under the agreement, the Regents will contract with Hocking Technical College to design the project, and Hocking Technical will subcontract with other colleges to provide the training. The agreement is monitored by ODHS.

The colleges are interested in employing individuals with practical experience and expertise in the human services area to provide training under this arrangement. You have asked whether the Ethics Law and related statutes would prohibit employees of ODHS or the county departments of human services from accepting positions with the local colleges to provide training services under the interagency agreement to county boards of human services.

Division (A)(4) of Section 2921.42 of the Revised Code 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. 2921.42 in R.C. 2921.01(A) to include any elected or appointed officer, or employee of the state or any political subdivision thereof. Therefore, officials and employees of the Ohio Department of Human Services and the county departments of human services are "public officials" who are subject to the prohibitions of R.C. 2921.42. See R.C. 121.02(I), 329.01, 329.02, 5101.02, 5101.05.

The term "public contract" is defined in Division (E) of Section 2921.42 for purposes 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 or any of its

political subdivisions, or any agency or instrumentality of either." Therefore, the agreement between ODHS and the Board of Regents, the contract between the Regents and Hocking Technical College, the subcontracts between Hocking Technical and the other colleges, and the employment of instructors by the colleges are all "public contracts" for purposes of R.C. 2921.42, since they are entered into by the state or two-year colleges, which are political subdivisions, see R.C. 3354.03, 3357.04, 3358.01(A), for the provision of training services for the use of the state and county departments of human services.

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 Ohio Ethics Commission Advisory Opinion No. 81-008. Individuals who received compensation for providing training services would have a definite and direct pecuniary interest in the contracts under which such services are provided.

R.C. 2921.42(A)(4) would, therefore, prohibit employees of ODHS from being employed by local colleges to provide training under the proposed arrangement since the compensation from such employment would constitute an interest in the profits or benefits of a public contract entered into by ODHS. R.C. 2921.42(A)(4) would also prohibit an employee of a county department of human services from being employed by a local college to provide training services to employees of the same county department of human services since the compensation derived therefrom would constitute an interest in a public contract entered into for the use of the political subdivision and governmental agency with which he is connected.

You have also asked whether an employee of a county department of human services could provide training to employees of other county departments of human services. R.C. 2921.42(A)(4) prohibits a public official from having an interest in a public contract entered into by "the political subdivision or governmental agency or instrumentality with which he is connected." The Ethics Commission has held that R.C. 2921.42(A)(4) prohibits a public official from having an interest in the public contracts entered into by all of the political subdivisions, governmental agencies, and instrumentalities with which he is connected. See Advisory Opinion No. 89-004. It is clear that an employee of a county department of human services is "connected" with the county for purposes of R.C. 2921.42, and is prohibited from having an interest in a contract entered into by or for the use of the county. See R.C. 329.01, 329.02, 329.04. The issue remains, however, whether an employee of a county department of human services is "connected" to ODHS, such that he would be prohibited from having an interest in a contract entered into by ODHS.

In Advisory Opinion No. 87-002, the Commission stated that, "common usage indicates that to be 'connected with' something is to be related to, or associated with, that entity." Although county employees are not, by virtue of such employment, generally connected with an agency of the state, county departments of human services do possess a unique relationship with ODHS. Generally, ODHS supervises, monitors, and acts as a financial conduit for several income assistance programs which are then administered on the local level by the county departments of human services. For example, R.C. 329.04 provides that the county department is the county administration for all purposes of the Aid to Dependent Children Program, which is overseen by ODHS, see R.C. Chapter 5107. R.C. 329.04 also provides that the county department must perform any duties assigned by ODHS regarding the provision of social services, including services authorized by the federal Social Security Act. The county boards must submit

an annual report of its work to ODHS. See 329.04(E). R.C. 329.05 states that a county department may assist in administering any other state public welfare activity. See also R.C. 329.04(H). The county departments also participate in the administration of the federal food stamp program and the state General Assistance Program, which are supervised by ODHS. See R.C. 329.042, 5101.54, 5113.05. R.C. 329.041 states that if ODHS finds that a county department is not properly complying with the AFDC or General Assistance Programs, it may exercise the county's powers and duties until satisfied that compliance will be secured.

It is apparent that the county departments of human services are related to, or associated with, ODHS. Therefore, an employee of a county department is prohibited by R.C. 2921.42 from having an interest in a public contract entered into by ODHS, and would be prohibited, in this instance, from providing training services to employees of other county departments.

Division (C) of Section 2921.42 does, however, provide 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 important that the requirement of Division (C)(2), that the goods or services are "unobtainable elsewhere for the same or lower cost" be objectively demonstrated. See Advisory Opinion No. 83-004. One indication that this requirement has been met would be where an open and fair competitive bidding process has been held, and the official has submitted the lowest bid. Id.

You have indicated that the colleges will openly advertise for persons to fill the training positions, and are indeed required to do so by pertinent regulations and collective bargaining agreements. However, it is anticipated that the practical knowledge and expertise of the employees of ODHS and the county employees will make them desirable candidates for the positions. In Advisory Opinion No. 88-001, the Commission addressed the issue whether physicians, who were employed at developmental centers operated by the Department of Mental Retardation and Developmental Disabilities, were prohibited from entering into personal services contracts with the Department to provide on-call services during evenings, weekends, and holidays to the developmental centers at which they were regularly employed. The Department indicated that its employees were uniquely qualified to provide these services since they were already familiar with the developmental centers and the residents. In addressing this issue within the context of the requirements of Division (C)(2), the Commission stated:

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 requirements of Division (C)(2).

Therefore, the colleges must conduct an open and fair selection process that is not limited to solicitations from ODHS and county department employees, and is available to all interested and qualified individuals. If, however, it can be justified objectively that practical knowledge and experience is a valid and proper consideration in choosing the program's training instructors, then the experience of current state and county employees, coupled with an open and fair selection process, may indicate that an ODHS employee or employee of a county department of human services who is selected to provide training services may be able to meet the requirements of Division (C)(2).

Assuming that all of the criteria of Division (C) of Section 2921.42 can be established, so that an ODHS or county department employee may properly contract with the local colleges to provide training 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 state or county employee from using his authority or influence, formally or informally, to secure for himself a contract to provide training services under the program. This conduct would also be prohibited by R.C. 102.03(D), set forth below. See Advisory Opinion No. 89-006. See also R.C. 2921.42(C)(4) (set forth above).

R.C. 102.03(D) and (E) would also have application in this situation. These provisions read as follows:

- (D) No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his 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 him with respect to his duties.

R.C. 102.03 would prohibit an ODHS employee or county department employee who had official responsibility for developing, overseeing, supervising, evaluating, or performing other duties with regard to this program from receiving compensation from the colleges for providing training services. See Advisory Opinion No. 89-006. See also R.C. 2921.42(A)(3). You have indicated that no employees from the ODHS Office of Benefits Administration, which administers the agreement, will accept training positions. R.C. 102.03 would also prohibit a state or county employee who may be expected to provide training as part of his official duties from receiving compensation under this program for providing such training. See Advisory Opinions No. 84-012 and 84-013. See also R.C. 2921.43 (prohibiting a public servant from soliciting or accepting any compensation or supplement to perform his official duties). Also, a state or county employee would be prohibited from: (1) making recommendations or otherwise using his position, formally or informally, to secure anything of value for the college by which he was employed; (2) using official time, facilities, or resources to perform work for a college; (3) receiving compensation for services rendered on any project he has recommended in his official capacity; (4) refraining from rendering any service or otherwise performing his official

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duties in order to secure a training position; and (5) recommending the college to ODHS, a county department, or Hocking Technical College as a contract recipient. See Advisory Opinion No. 89-006.

You have also asked whether ODHS or a county department could assign employees to perform training duties at the local colleges as part of their official responsibilities. The employees would continue to receive their regular compensation from ODHS or the county, and ODHS or the county would be reimbursed as agreed upon by the various parties. There is nothing in the Ethics Law which would prohibit this arrangement among public agencies. An ODHS or county department employee who provided training services as part of his official responsibilities and who received only his state or county compensation for providing those services would not have an improper interest in a contract with his own governmental agency for purposes of R.C. 2921.42. Furthermore, there would be no outside compensation which would be of such character as to manifest a substantial and improper influence upon the ODHS or county department employees with respect to their duties. It should be noted, however, that the Ethics Commission has no authority to determine whether the public agencies involved would have the statutory or administrative authority to agree to such an arrangement, and you should contact legal counsel with regard to these issues. You may also wish to contact the Department of Administrative Services with respect to the Employee Exchange Program established by R.C. 124.389.

This informal advisory opinion was approved by the Ethics Commission at its meeting on December 14, 1989, and is based on the facts presented. It is rendered with respect 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. If you have further questions or require additional information, please contact me.

Sincerely,



Melissa A. Warheit
Executive Director

MW/pg

Jager-D (#IAO-2)