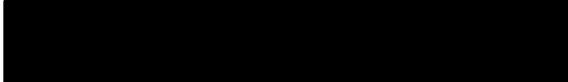




OHIO ETHICS COMMISSION
THE ATLAS BUILDING
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October 11, 1991 Informal Opinion 1991-INF-1011-1

Regina Sweeney, Chairperson
Ken Campbell, Executive Director
Ohio Developmental Disabilities Planning Council



Dear Ms. Sweeney and Mr. Campbell:

You have asked whether the Ethics Law and related statutes would prohibit members of the Ohio Developmental Disabilities Planning Council (ODDPC) from serving as board members, officers, or employees of agencies which receive grants from the ODDPC.

The ODDPC was created and continued by Executive Order pursuant to Section 107.18(A) and (B) of the Ohio Revised Code, and in conformity with federal law, 42 U.S.C. §§6000-6083, the Developmental Disabilities Assistance and Bill of Rights Act. The federal act provides that any state which receives federal assistance in developing a comprehensive system and providing services and assistance to persons with developmental disabilities and their families must establish a state planning council. 42 U.S.C. §6024. See also 42 U.S.C. §6021. Section 6024(b)(3) states that the council must include representatives of the principal state agencies, including the state agency that administers funds provided under the Rehabilitation Act of 1973, the state agency that administers funds provided under the Education of the Handicapped Act, the state agency that administers funds provided under the Older Americans Act of 1965, and the state agency that administers funds provided under Title XIX of the Social Security Act for persons with developmental disabilities.

The council must also include higher education training facilities, each university affiliated program, the state protection and advocacy system, and representatives from local agencies, non-governmental agencies, and private nonprofit groups concerned with services for persons with developmental disabilities. Id. Persons with developmental disabilities and members of their families must also serve on the council. Id.

The Executive Order establishing the ODDPC provides, in accordance with the federal act, that the ODDPC shall be composed of members from the principal state agencies, including the departments which administer funds under the specified federal acts, the Rehabilitation Services Commission, the Department of Aging, the Department of Education, the Department of Human

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Services, and the Department of Mental Retardation and Developmental Disabilities, and the Ohio Legal Rights Service Commission, the state protection and advocacy system. These state agency representatives are the directors or administrative heads of the agencies, or a senior staff employee designated by the director or administrative head. Other members include the directors of university affiliated programs, a representative of local public agencies, a representative of private agencies, and a representative of private advocacy organizations. The other seventeen members must be persons with developmental disabilities or immediate family members of such persons. All members are appointed by the Governor.

Each State which desires to participate in federal assistance under 42 U.S.C. §§6000-6083 must adopt a State Plan that has been approved by the federal government. 42 U.S.C. § 6022. The ODDPC, along with the ODMRDD, has adopted a State Plan for 1991 which sets forth five service areas: child development, community living, employment, human resource development, and systems advocacy. Within each service area, several specific projects or initiatives are identified and discussed, with respect to goals, objectives, and funding. (A State Plan for FY 1992-1994 has also been drafted.)

The Council's By-Laws, Article V, establish several standing committees, including child development, community living, employment, human resources development, and inter-agency. The responsibilities of the committees include: identifying planning priorities, and making recommendations as to funding, legislation, public awareness, and public policy needed to carry out those priorities. By-Laws, Art. V (7). Each standing committee includes initiatives in the State Plan to be funded, and a grant review panel is selected for each initiative.

Council Policy provides that applicants for funds awarded by the ODDPC must be reviewed by a three-member or five-member panel. The panels consist of Council members, including members who serve on the Committee originating the State Plan objective, and special advisors or outside experts. A panel is selected by the Committee which developed the State Plan initiative and objectives for the project.

The ODDPC awards DD Basic State Grant Funds through one of two methods: competitive selection, and non-competitive allocation. These grants are funded with federal moneys.

Under the competitive selection method, the ODDPC publishes and disseminates a Notice of Funds Available (NOFA's). Each

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Committee must review, prior to issuance, NOFA's as to priorities assigned. By-Laws Art. V(7)(F). The grant review panel must be selected prior to the issuance of the NOFA for the project. Applications are submitted and reviewed by the grant review panel to select the best proposal. Criteria for the selection of competitive grants have been established by Council Policy, which further provides that the criteria must be incorporated into score sheets used by review panel members. Prior to the meeting of the panel, the reviewers must complete a score sheet for each proposal and assign points according to how well the proposal meets the criteria. The reviewer totals the points and brings the score sheet to the meeting of the panel. At the meeting, the panel totals the points of the entire panel for each proposal. This process will eliminate all but two or three applicants. The panel then discusses the remaining proposals based on the criteria, and a final vote is taken to select the successful applicant. Panels have the option not to fund any proposal. If the panel feels there are so many conditions to be fulfilled that the outcome is in essence a rewrite of the proposal, the decision regarding whether to fund any proposal must be referred to the full committee of origin. See also By-Laws Art. V(G). There is a grant appeals process. Your staff has indicated that almost 95% of the Basic State Grants are awarded by competitive selection. Projects initially funded by competitive selection may be continued without being subject to the competitive selection process, although a proposal for continuation funding must be submitted for review.

Grants may be awarded through non-competitive allocation where the use of the competitive process is infeasible for one of the specified reasons. Designated recipients must complete the same application as competitive applicants and are subject to the same review process. A grant review panel must approve the proposal.

Your staff has indicated that it is each committee which chooses the initiatives to include in the State Plan for funding, prioritizes those initiatives, and estimates the budget for each initiative, and it is the grant review panel, rather than the ODDPC, which selects the applicant to whom to award the grant. However, it is the ODDPC, which distributes funds to each initiative, and decides which of the lower priority initiatives will be funded. Furthermore, the ODDPC may overrule the decision of a grant review panel, and is the responsible authority for awarding the grants.

You have asked whether a member of the ODDPC would violate the Ethics Law and related statutes if the agency with which he is affiliated receives a grant awarded by the ODDPC. As noted above, federal law mandates that the principal state agencies, including

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the agencies which administer funds under the four specified federal acts and the Ohio Legal Rights Services Commission, as the state protection advocacy system, be represented on the Council. The university affiliated programs must also be represented on the Council. These are university programs which are designated under federal law to provide research, training, and other services and directly receive federal funds. See U.S.C §§ 6061, and 6062. You have indicated that the two university affiliated programs in Ohio also wish to seek grants from the ODDPC. Also, local public organizations and private organizations must be represented on the ODDPC.

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.

A "public official" is defined for purposes of R.C. 2921.42 in R.C. 2921.01(A) to include any appointed officer or agent of the state. As discussed above, the ODDPC is created pursuant to Executive Order of the Governor, and many of these appointees are "public officials" independent of their position on the ODDPC. The members of the ODDPC have the independent and sovereign duty to develop policy initiatives and to allocate public funds to address those initiatives, and are, therefore, state officers. See Ohio Ethics Commission Advisory Opinions No. 85-005 and 87-003. As state officers, members of the ODDPC are "public officials" for purposes of R.C. 2921.42, and are prohibited by Division (A)(4) of that section from having an "interest" in the profits or benefits of a public contract entered into by or for the use of the ODDPC.

Division (E) of Section 2921.42 defines the term "public contract," 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." Grants by governmental agencies are "public contracts" as that term is defined and used in R.C. 2921.42, since a grant is the purchase or acquisition of services by or for the use of the governmental agency. See Advisory Opinions No. 82-004 and 85-002. Further, grants which are awarded through a state agency or political subdivision and funded

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by federal or other moneys are "public contracts" under R.C. 2921.42 since specific services are being purchased or acquired by or for the use of the state or political subdivision with such moneys. See Advisory Opinions No. 84-011 and 85-002.

An "interest" which is prohibited under R.C. 2921.42(A) must be definite and direct, and may be either pecuniary or fiduciary in nature. See Advisory Opinion No. 81-003. An owner or shareholder of a for-profit corporation obviously has a direct, pecuniary interest in the contracts of that corporation. See Advisory Opinions No. 84-006, 85-001, and 86-002. But see R.C. 2921.42(B) (exempting from the prohibitions of R.C. 2921.42 persons whose only interest in a corporation is the ownership or control of shares of the corporation and where such shares do not exceed five percent of the outstanding shares, so long as such persons file the specified affidavit). A partner has an interest in the contracts of the partnership. See Advisory Opinion No. 82-007. The Commission has also held that officers, trustees, and other board members of for-profit, as well as nonprofit corporations, have an interest in the contracts of their corporations. See Advisory Opinions No. 85-007, 85-009, 86-002, and 86-005 (for-profit corporations); Advisory Opinions No. 81-005, 81-008, and 87-003 (nonprofit corporations). Similarly, an officer or board member of a public agency would be deemed to have an interest in the public agency's contracts. See generally Advisory Opinion No. 81-005.

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, 85-008, and 89-006. Similarly, it is noted that a person who serves with an organization as a consultant would be deemed to have an interest in the organization's grant if one or more of these factual circumstances is present.

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Therefore, a member of the ODDPC is prohibited by R.C. 2921.42(A)(4) from serving with an agency that receives a grant from the ODDPC, if the member serves as a board member or officer of, or in another fiduciary capacity with, the agency, or if he is an employee or consultant with the agency and has an "interest" in the grant, as described above.

You have pointed out that federal law mandates the composition of the Council, and requires the principal state agencies, including the state agencies which administer funds under four specified federal acts, the state advocacy and protection system, the university affiliated programs, and other organizations representing pertinent interests, to be represented on the Council. The Commission has recognized an "official capacity" exception to the prohibition of Section 2921.42(A)(4) in instances where an official of a public agency that awards a contract or grant to an organization also serves with that organization in his official capacity as a representative of his public agency's interests. For example, in Advisory Opinion No. 83-010, the Commission held that a city council member would not be prohibited from serving on the board of a community development corporation that sold goods or services to the city if the council member served on the board in his official capacity, stating that the official designation by the city requiring the council member to serve on the board of the corporation in his official capacity was "sufficient to demonstrate that the public official does not have a prohibited personal interest in the public contract." Also, the Commission held in Advisory Opinion No. 84-001, that R.C. 2921.42 would not prohibit a city officer or employee from serving in his official capacity on the board of a nonprofit corporation which provided contract paramedic services to the city since he was "designated by the municipal government to represent its interests on the board," and, thus, "there would not be a dual interest in which private considerations would distract from his serving the public interest". See also Advisory Opinion No. 82-004.

The "official capacity" exception could come into play if a member of the ODDPC served with an organization receiving funds from the ODDPC in his official capacity with, and in order to represent the interests of, the ODDPC. However, in this instance, the situation is reversed. Members of the ODDPC serve on the Council by virtue of the fact that they serve with another agency or organization, and do not serve with the second organization in their capacity as an ODDPC member. For example, the Director of MD/DD serves on the Council because of the position he holds as Director. The Department of MR/DD does not grant moneys to the Council. A member of ODDPC, which is the funding agency, does not serve with the Department of MR/DD, the potential grant recipient

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by virtue of his position with, or as a representative of, the ODDPC. Therefore, the "official capacity" exception would not apply in this instance.

It is recognized that federal law mandates that representatives of certain agencies serve as members of the ODDPC. However, federal law does not also mandate that these agencies receive funding from the ODDPC. It is apparent that members of the ODDPC who serve with other organizations would have a conflict of interest in situations where their agency is interested in funding from the ODDPC. Unlike the officer who serves with a recipient agency in his "official capacity" as a representative of the funding agency, the members of the ODDPC do not serve with recipient agencies in their official capacities as representatives of the ODDPC, and would have a personal, fiduciary and perhaps pecuniary interest in the award of ODDPC moneys to their agencies in the sense that their interest in the grant would not be that of the ODDPC's, but would be either their own interest or the interest of the agencies with which they serve.

Division (C) of Section 2921.42 does, however, provide an exception to the prohibition of Division (A)(4), and may permit a Council member to have an interest in a Council grant if 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

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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 servant.

Advisory Opinion No. 87-003 summarizes the criteria of Division (C) as follows:

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. 84-011 and 83-004.

It is particularly important that the requirement of Division (C)(2) that the services be "unobtainable elsewhere for the same or lower cost" be demonstrated by some objective standard. See Advisory Opinion No. 83-004. 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 of the agency or corporation are unique and not available elsewhere, or are not available elsewhere for the same or lower cost, the Council member 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

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governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity. (Emphasis added).

Division (C)(4) must also be met before the exemption of Division (C) can be established. The award of the grant must be conducted at arm's length, the ODDPC must know of the member's interest or the interest of the member's agency, and the members may take no part in the deliberations or decision of the ODDPC with respect to the grant. See also R.C. 2921.42 (A)(1) (discussed below.)

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 into 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. Your staff has indicated that it is each committee which chooses and prioritizes the initiatives to include in the State Plan for funding, and it is the grant review panels, rather than the ODDPC as a whole which selects the successful grant applicants. Thus, it may be argued that the ODDPC itself does not award the grant for purposes of Division (A)(3). However, it is the ODDPC, as a whole, which adopts the State Plan, receives federal funds for distribution, allocates funds among the initiatives and helps determine which priorities will be funded, and establishes policies for the award of grants. Furthermore, the Council may overrule a panel's selection and is considered to be the authority responsible for awarding the grants. The Council may delegate duties to the standing committees and grant review panels in order to facilitate the grant process. However, it cannot be said that it is not the ODDPC which awards or authorizes the award of the grants. Although the ODDPC does conduct a selection process

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for the award of grants, it does not conduct a competitive bidding process. See Advisory Opinion No. 88-006.

Therefore, a Council member is prohibited, while on the ODDPC and for one year thereafter, from profiting from a grant which was awarded by the ODDPC. A Council member will be deemed to profit from a 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 member or as a basis for the 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 Council 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 Council member is connected, the Council member who is an employee of the organization with an "interest" in the grant, or who is a trustee, officer, or board member of the organization 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 Council member from voting upon, discussing, or otherwise using his authority or influence to secure, a grant for his organization. See also R.C. 2921.42 (C)(4) (set forth above). This participation would also be prohibited by R.C. 102.03(D), which prohibits a public official or employee from using 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. R.C. 102.03(D) prohibits a public official from participating in any matter that directly affects the interests of an agency which he serves in a fiduciary capacity. See Advisory Opinion No. 88-005.

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 Council member is prohibited by

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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. See also R.C. 2921.42(C)(4).

Again, this participation would also be prohibited by R.C. 102.03(D) which, as the Commission has held, prohibits a public official from participating in any matter that affects the interests of his outside employer. See Advisory Opinion No. 88-005.

In sum, R.C. 2921.42(A)(1) and 102.03(D) would prohibit a Council member from voting, deliberating, participating in discussions, or otherwise using the authority or influence of his position, formally or informally, to secure an ODDPC grant for himself or for an agency which he owns, or serves as an employee, consultant, officer, trustee, or board member. A Council member should not, in light of these prohibitions, serve on the grant review panels for those initiatives or projects for which his agency will submit a grant application. As discussed above, the ODDPC, as a whole, distributes funds among the various initiatives developed by the committees. A review panel is then selected by the appropriate committee to award funds under that initiative. Council members are not prohibited by R.C. 2921.42 (A)(1) or R.C. 102.03 (D) from participating in the distribution of funds among the initiatives on the grounds that the agency with which he serves may apply for a grant or continuation funding under that initiative. The member's or agency's interest would be too indefinite and indirect at that point to mandate abstention. However, the Council member's participation could create an appearance of impropriety, and certainly emphasizes the potential conflict that exists for ODDPC members who serve with agencies that wish to apply for, and receive, funds from the ODDPC.

As a final matter, R.C. 102.04(A) would prohibit a Council member from receiving compensation from his agency for personally providing any service with regard to the agency's grant application or other matter pending before the Council, and R.C. 102.03(A) would prohibit a Council member from representing his agency before the Council, or any other public agency on any matter in which he personally participated as a Council member or in any other capacity as a public official. R.C. 102.03(B) would prohibit a Council member from using or disclosing to his agency or any other party, confidential information.

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This informal staff advisory opinion was approved by the Ethics Commission at its meeting on October 11, 1991. 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. If you wish to have a formal opinion issued by the Commission, or if you have any questions, please contact me.

Sincerely,



Melissa A. Warheit
Executive Director

MAW/mw