



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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December 3, 1993 Informal Opinion 1993-INF-1203-1

David J. Simko, Esq.
Brown, Schlageter, Craig & Shindler

Dear Mr. Simko:

You have asked: (1) whether the Ohio Ethics Law and related statutes prohibit an individual from serving as a member of Medical College of Ohio board of trustees if he already serves as the acting pulmonary chief of the Medical College; and (2) whether there are any restrictions under the Ohio Ethics Law and related statutes that are applicable to an individual who serves on the board of trustees of the Medical College of Ohio if he is employed by, or serves on the board of trustees of, a private hospital in the same geographical area. This opinion will first consider the question of the appointment of the acting pulmonary chief to the board of trustees and then consider the question of the trustees who have connections to other hospitals in the same area as the Medical College.

TRUSTEE PROVIDING SERVICES TO MEDICAL COLLEGE

You have explained that an individual has been appointed to the board of trustees of the Medical College of Ohio who also serves as the acting pulmonary chief of the Medical College. In his position as the acting pulmonary chief, he, or physicians with whom he is associated in private practice, provide coverage in the pulmonary area to the Medical College on a limited basis as needed. According to the agreement between the Medical College and the individual, his duties include organizing the pulmonary division, assigning residents and students to pulmonary services, developing goals and objectives for residents, and organizing the clinical services at the college. In return for these services, the individual and his medical group receive payment from the Medicine Chairman's Fund of a private corporation.

Division (A)(4) of R.C. 2921.42 provides that no public official shall have an interest in the profits or benefits of any public contract entered into by or for the use of the governmental entity with which he is connected. A member of a state medical college board of trustees is a "public official" as that term is defined in R.C. 2921.01 (A). See generally Ohio Ethics Commission Advisory Op. No. 93-001.

A "public contract" is the purchase or acquisition of property or services "by or for the use of the state or any . . . instrumentality of" the state. R.C. 2921.42 (F) (emphasis added).

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A state medical college is an "instrumentality" of the state. The Ethics Commission has stated that a purchase of property or services for the use of a public entity, even if the money comes from a private source and not from the public entity, is a "public contract" as defined in R.C. 2921.42 (F). See Advisory Op. No. 90-003. The purchase of an individual's services for the Medical College is a "public contract," even though the payment for services comes from a private corporation, and not from the Medical College directly.

Therefore, R.C. 2921.42 (A)(4) prohibits a member of the Medical College board of trustees from having a financial or fiduciary interest in a contract for services purchased for the use of the Medical College.

However, R.C. 2921.42 (C) sets forth an exemption to R.C. 2921.42 (A)(4). R.C. 2921.42 (C) provides that the prohibition of R.C. 2921.42 (A)(4) does not apply to a public contract in which a public official has an interest if all four parts of the exemption apply. The requirements of Division (C) are factual determinations, and will be strictly applied against the public official who must demonstrate that he is in compliance with the requirements. See Advisory Ops. No. 83-004, 84-011, and 88-008.

Of the four requirements, the most important in its application to this case is R.C. 2921.42 (C)(2), which requires that the services are either unobtainable elsewhere for the same or lower cost, or are furnished to the instrumentality as part of a "continuing course of dealing" established prior to the official's becoming associated with the instrumentality. In the situation you have described, the individual was providing services as acting pulmonary chief to the state Medical College prior to his appointment to the board of trustees pursuant to the working agreement you attached. This fact may establish a "continuing course of dealing" as required by R.C. 2921.42 (C)(2). See Advisory Op. No. 88-008. However, if there are any material changes to the duties, payment, level of responsibility, or other aspects of the agreement existing at the time the individual was appointed to the board of trustees, including modifications, extensions, or renewals, such changes will alter the original understanding of the parties and are not within the "continuing course of dealing" exemption in R.C. 2921.42 (C)(2). Id.

If the Medical College and the individual were to change, renew, or modify the agreement in any way, such that the "continuing course of dealing" exemption could no longer be met, the individual could still demonstrate compliance with R.C. 2921.42 (C)(2) if he could show that the services he or his practice provides to the Medical College are "unobtainable elsewhere for the same or lower cost." R.C. 2921.42 (C)(2). See Advisory Op. No. 88-008. The individual trustee must be able to show that the Medical College could not obtain the necessary services from any other source at any lower

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cost. Id. This must be demonstrated in some objective fashion, such as an open and fair competitive bid. Id.

The other three requirements of R.C. 2921.42 (C) are that the services are necessary for the instrumentality, that the treatment the public official accords the instrumentality is the same or preferential to treatment accorded to other clients, and that the entire transaction is conducted at arm's length, with full knowledge of the instrumentality, and that the public servant take no part in the deliberations or decision of the instrumentality with respect to the contract. R.C. 2921.42 (C)(1), (C)(2), and (C)(3).

In addition to R.C. 2921.42 (A)(4), the trustee is bound by the restrictions of R.C. 2921.42 (A)(1) and (A)(3). R.C. 2921.42 (A)(1) prohibits that trustee from voting, discussing, deliberating, or using his position in any other way to secure, renew, or affect his public contract, or any other contract for his business associates, with the Medical College. See Advisory Ops. No. 88-008 and 90-003. R.C. 2921.42 (A)(3) prohibits the trustee from occupying a position of profit in the prosecution of a public contract authorized by him, or by the board of trustees of which he is a member at the time of authorization, unless the contract is competitively bid and his is the lowest and best bid. Therefore, if the service contract was to be renewed, modified, or altered in any other material way, the trustee would be prohibited from participating, in any way, in any actions of the board of trustees relative to the contract, and would be prohibited from providing the services to the Medical College unless he did so pursuant to a competitively bid contract as a result of the lowest and best bid. Id. See also R.C. 2921.42 (C)(2) (discussed above).

Further, R.C. 102.03 (D) prohibits the trustee from using his position as a trustee to secure anything of value that would have a substantial and improper influence upon him in the performance of his duties. Accordingly, he is prohibited from using his position as a trustee, over employees and other trustees of the Medical College, to secure any additional benefits for himself under his contract, or any other thing of value. See Advisory Op. No. 90-003. He is also prohibited from participating in matters before the board of trustees that affect the pulmonary department or his position as chief of the department. See Advisory Op. No. 91-002.

TRUSTEE WHO IS EMPLOYED BY ANOTHER PRIVATE HOSPITAL

You have also asked whether there are any restrictions under the Ohio Ethics Law and related statutes that are applicable to an individual who serves on the board of trustees of a Medical College if he is employed by a private hospital in the same geographical area. You have explained that an individual who is a full-time employee of a private hospital has been appointed to the board of

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trustees of a Medical College. In conversations with the staff, you have stated that this hospital may be said to compete for business with the Medical College.

The central conflict of interest provisions of the Ohio Ethics Law, set forth in R.C. 102.03 (D) and (E), provide that no public official or employee shall accept, solicit, or use the authority or influence of his office 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. A member of a state medical college board of trustees is a "public official or employee," for purposes of R.C. 102.03. See R.C. 102.01 (B) and (C); R.C. 3350.01. The compensation paid to a public official or employee for his private employment falls within the definition of "anything of value" for purposes of R.C. 102.03. R.C. 102.01 (G); 1.03. See Advisory Op. No. 90-008.

The Ethics Commission has stated that R.C. 102.03 (D) and (E) prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his public position to secure anything of value where the thing of value could impair his objectivity and independence of judgment with respect to his official actions and decisions for the public agency with which he serves. See Advisory Ops. No. 90-012 and 92-009. The Commission has stated that the facts and circumstances of each individual situation must be examined to determine the limitations and restrictions required by the Ethics Law. See Advisory Ops. No. 90-002 and 92-009.

R.C. 102.03 (D) and (E) prohibit a public official or employee from holding private employment where the facts demonstrate that his private employment, and the compensation he would receive therefrom, could impair his objectivity and independence of judgment. See generally Advisory Op. No. 92-009. For example, the Commission stated that the Executive Director of the state Barber Board, which regulates the profession of barbers and the operation of barber shops, is prohibited, by R.C. 102.03 (D) and (E), from operating a private barber shop. Advisory Op. No. 92-009. The Commission has further stated that the president of the state controlling board, who has specific duties regarding the exercise of authority over other state entities, is prohibited, by R.C. 102.03 (D) and (E), from being employed by another state agency. Advisory Op. No. 88-002. In Advisory Op. No. 92-008, the Commission held that a township clerk, who exercises significant statutory authority relative to township deposits, is prohibited from being employed by a local bank that is a township depository. In each of these cases, the Commission determined that the conflicts between the public official's or employee's public duties and his private interests were so compelling, because of the significant degree of control or authority which the official and his agency were required to exercise with respect to his private employer, in addition to the fact that the

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official involved was unable to withdraw from the performance of his duties with regard to his own personal employment interests, that the public official or employee was prohibited from holding his public position and pursuing his personal employment. See Advisory Op. No. 92-008.

However, a public official or employee is not prohibited from holding outside private employment simply because his private employer may have some relationship with the public agency for which he also serves where: (1) the authority of the public agency and the interests of the private employer do not significantly conflict; and (2) the interests of the private employer are not dependent upon the official's or employee's responsibilities or he is able to withdraw from the performance of those duties. The Ethics Law will, however, condition the public official's or employee's conduct. See Advisory Ops. No. 89-006, 91-004, and 91-006.

For example, in Advisory Opinion No. 89-006, the Ethics Commission stated that an employee of the state Department of Mental Health is not prohibited, by R.C. 102.03 (D) and (E), from accepting employment from a college or university that receives grant funds from the Department of Mental Health (ODMH). The Commission held that an ODMH employee is not prohibited from holding both positions so long as the employee receives no compensation or other benefit from the ODMH grant and either he has no official ODMH duties involving the college or university that employs him, or he is able to withdraw from any official ODMH duties involving the college or university that employs him. Advisory Op. No. 89-006. The Commission also stated that R.C. 102.03 (D) prohibits the ODMH employee who is also employed by a college or university that receives grant funds from ODMH from using his official position at ODMH to secure any grant funds, or any other thing of value, for the college or university that employs him. Id.

In other opinions, the Commission has carefully examined the public duties of individual officials and employees, and explained how the restrictions in R.C. 102.03 have a differential impact upon officials and employees with different public duties. For example, in Advisory Opinion No. 92-008, the Ethics Commission explained that a township clerk is prohibited from holding employment with a bank that is a depository of township funds, while a township trustee is not prohibited from serving on the board of trustees of a bank that is a depository of township funds. The Commission's distinction was based on the positions held by the clerk and the trustee. A township clerk is a sole office-holder, while a township trustee is a member of a board. With respect to township deposits, the township clerk has significant duties that the clerk alone can perform. If the township clerk must abstain from the performance of his duties because of a conflict of interest, there is no other office-holder who can perform the duties of his position. By contrast, if a

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township trustee must abstain from the performance of his duties because of a conflict of interest, the remaining members of the board of trustees can still perform the duties of the office.

Clearly, a conflict of interest can have a more significant impact on a sole office-holder, such as a township clerk, county sheriff, or city mayor, than on an office-holder who serves on a multi-person board, such as a township trustee, county commissioner, or city council member. A conflict for a sole office-holder generally cannot be resolved by abstention, because there is no other individual who can perform the duties of the officer-holder, and the office-holder's duties must be performed. See generally Advisory Ops. No. 92-004 and 92-008. However, a member of a board, commission, or other body can resolve many conflicts of interest by abstaining in cases of conflict from every aspect of the decision-making process of the board, commission, or body, and the board, commission, or body can continue to make decisions. See Advisory Op. No. 92-008. See also Advisory Op. No. 91-004 (stating that R.C. 102.03 (D) prohibits an individual who is a member of a city planning commission and also holds employment with a local bank, from acting on matters that would have an impact on the interests of the bank by which he is employed); Advisory Op. No. 91-006 (stating that a city council member, who is also employed as a school principal in a school district that includes the city, is prohibited from acting on issues, such as the council's grant of a tax abatement to a business located within the city, that would have a direct and definite impact upon the school district by which he was employed).

In this case, you have explained that one member of the board of trustees is employed by a hospital that is a competitor of the Medical College. The concern may exist that the member of the board of trustees could use his position on the board in some way to benefit his employing hospital at the expense of the Medical College, and that his objectivity and impartiality as a Medical College trustee could be impaired by his own private interests and those of his employer. The Medical College board of trustees is, of course, a multi-person public body, and the board of trustees can operate and govern if one member of the board is required to abstain. Given this circumstance, and applying the conclusions set forth above, there is nothing within the Ethics law that specifically prohibits an individual from serving as a trustee of the Medical College even though the interests of his employer may, from time to time, be affected by the decisions of the Medical College board of trustees. For example, matters involving the state's certificate of need requirements, where other area hospitals will be considered, would be matters where the interests of the individual trustee's employee would be affected, and therefore, the individual trustee would have a conflict of interest. The trustee would be required, by R.C. 102.03 (D), to withdraw from the board's consideration of these matters.

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R.C. 102.03 (D) prohibits a public official or employee from using his position in any way to secure anything of value not only for himself, but for other parties, if the relationship between the public official or employee and the other parties is such that his objectivity and independence of judgment could be impaired. Advisory Op. No. 88-005. In Advisory Opinion No. 88-005, the Ethics Commission stated that a public official is prohibited from participating in official matters that involve the interests of his private employer. See also Advisory Ops. No. 89-008 and 92-008. See also Advisory Op. No. 90-002 (discussing the restrictions of R.C. 102.03 (D) on a public employee who is in a position to make decisions that affect his competitor). Accordingly, the state medical college trustee is prohibited, by R.C. 102.03 (D), from discussing, deliberating, voting, formally or informally lobbying, or taking any other action on any matters that would result in a direct and definite pecuniary benefit or detriment to the interests of the private hospital that employs him. See Advisory Ops. No. 91-004, 91-006, and 92-008.

TRUSTEE ON BOARD OF TRUSTEES OF PRIVATE HOSPITAL

Finally, you have asked whether a member of the board of trustees of the Medical College of Ohio is prohibited from simultaneously serving as a member of the board of trustees of a private hospital in the same geographical area. Again, you have stated that this hospital may be said to compete for business with the Medical College.

As mentioned above with regard to outside employment, a public official or employee is not generally prohibited from having outside business interests simply because the business interests may result in some limited conflicts of interest. See Advisory Ops. No. 92-008 and 93-001. However, the Ethics Commission has stated that R.C. 102.03 (D) prohibits a public official or employee from participating in matters affecting an organization with which he is connected if: (1) he is an officer, board member, or employee of the organization; (2) he has assumed a particular responsibility in the organization with respect to the subject matter; (3) the matter would affect his personal, pecuniary interests; or (4) the facts otherwise indicate that his connection with the organization could impair his objectivity or independence of judgment. Advisory Op. No. 89-005. See also Advisory Op. No. 92-008. For example, in Advisory Opinion No. 92-008, the Ethics Commission was asked whether a township trustee was prohibited from serving as a member of the board of directors of a local bank that was a depository of township funds. The Commission stated that R.C. 102.03 (D) does not prohibit the township trustee from holding his public position because he has a fiduciary relationship with the bank that is a depository of township funds, so long as the trustee does not participate, in any way, in any decisions or deliberations of the township that would have a

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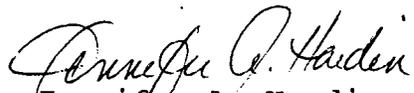
direct and definite impact upon the bank. Advisory Op. 92-008. See also Advisory Op. No. 89-005.

Applying the same analysis to your question, a member of the board of trustees of the Medical College is not prohibited, by R.C. 102.03, from serving simultaneously as a member of the board of trustees of a "competing" private hospital. However, an individual who serves as a member of the board of trustees of a local hospital does occupy a fiduciary position with regard to the hospital. Therefore, as stated in Advisory Opinion No. 92-008 with regard to the township trustee, the individual who serves on both the board of trustees of a local hospital and the board of trustee of the Medical College is prohibited, by R.C. 102.03 (D), from acting as a Medical College trustee on any matters that would have a direct and definite impact on the interests of the competing hospital he serves as a trustee. See Advisory Op. No. 92-008.

This informal advisory opinion was approved by the Ethics Commission at its meeting on December 3, 1993. The conclusions of this opinion apply only to the Medical College of Ohio, under the facts presented, and would not apply if there were any contractual or other types of relationships between the Medical College of Ohio and the private hospitals described in the question. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules.

If you have any questions, please feel free to contact this Office again.

Sincerely,


Jennifer A. Hardin
Staff Attorney