



OHIO ETHICS COMMISSION

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November 17, 1995

Informal Opinion 1995-INF-1117

Steven L. Mowery
Mowery, Brown and Blume

Dear Mr. Mowery:

In your letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes prohibit a former board member of a non-profit corporation that provides affordable housing to mentally retarded citizens from contracting with Choice Housing.

As explained below, the post-employment restrictions of the Ohio Ethics Law and related statutes do not apply to the former board member. Accordingly, the Ohio Ethics Law and related statutes do not prohibit her from contracting with Choice Housing.

At the outset, your letter provides information concerning the non-profit corporation and the former board member. In summary, the Ohio Department of Mental Retardation and Developmental Disabilities (ODMRDD) grants funds to the Scioto County Board of Mental Retardation and Developmental Disabilities (County Board) which contracts with the non-profit corporation, Choice Housing, Inc. (Choice Housing). Choice Housing is organized to provide affordable housing to mentally retarded citizens. Choice Housing has determined that, because of the increase in the number of homes that it owns and operates, it must contract with an outside party for the management and repair of these properties. A former board member of Choice Housing owns a rental management company and desires to contract with Choice Housing. The former board member resigned in contemplation that her company might be awarded this contract.

R.C. Chapter 102. (Ethics Law) definition of "public official or employee"

The threshold issue is whether a board member of Choice Housing is subject to the prohibitions imposed by the Ohio Ethics Laws and related statutes.

The Ethics Commission's jurisdiction is limited to Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. See R.C. 102.02, 102.06, and 102.08. These statutes contain definitions which determine whether an individual is subject to the prohibitions imposed by the Ethics Law and related statutes. See R.C. 102.01 (B) and (C), and 2921.01 (A), described below.

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R.C. 102.01 (B) defines the term "public official or employee" for purposes of Chapter 102. of the Revised Code as "any person who is elected or appointed to an office or is an employee of any public agency." (Emphasis added.) R.C. 102.01 (C) defines the term "public agency" as:

[T]he general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a court, city, village, township, and the five state retirement systems, or any other governmental entity. "Public agency" does not include a department, division, institution, board, commission, authority, or other governmental entity that functions exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes; does not expend more than ten thousand dollars per calendar year, excluding salaries and wages of employees; and whose members are uncompensated. (Emphasis added.)

The issue becomes whether Choice Housing is a "public agency" as R.C. 102.01 (C) defines the term.

In order to fall within the definition of "public agency," an entity must be a department, division, institution, board, commission, authority, bureau or other instrumentality of the state, city, village, township, or other governmental entity. As explained above, Choice Housing provides affordable housing to mentally retarded citizens pursuant to a contract with the Scioto County Board. Thus, it is apparent that Choice Housing is performing a service of a public nature. However, the Ethics Commission has held that a non-profit corporation's performance of a service of a public nature does not, in and of itself, make the non-profit corporation a governmental agency for purposes of the definition of R.C. 102.01 (C). In Advisory Op. No. 75-013, the Ethics Commission held that "although the activities and functions of a non-profit corporation may be of a public nature, Choice Housing is not a governmental agency for purposes of Chapter 102 of the Revised Code." (Emphasis added.) See also Advisory Op. No. 75-019 ("a person, employed by a non-profit corporation which has as its purpose public service, is not a person 'employed by the county, township, municipal corporation or other governmental entity . . .").

Therefore, Choice Housing is not a "public agency" as that term is defined in R.C. 102.01 (C) despite the fact that it performs a public service. Accordingly, Choice Housing's board members do not fall within the definition of "public official or employee" provided by R.C. 102.01 (B) and are not subject to the prohibitions imposed by R.C. Chapter 102.

R.C. 2921.42 and 2921.43 definition of "public official"

Even though Choice Housing is not a public agency for purposes of the Ethics Law, the issue remains whether the board members are subject to the restrictions imposed by R.C. 2921.42 and 2921.43.

R.C. 2921.42 imposes prohibitions upon any "public official" and R.C. 2921.43 imposes prohibitions upon any "public servant." R.C. 2921.01 (A) defines the term "public official" for purposes of R.C. Chapter 2921. as:

[A]ny elected or appointed officer, or employee, or agent of the state or any political subdivision thereof, whether in a temporary or permanent capacity, and including without limitation legislators, judges and law enforcement officers. (Emphasis added.) R.C. 2921.01 (B), includes any public official, as well as any person performing ad hoc a governmental function, such as an advisor or consultant.

An officer or employee of a non-profit corporation is not an "elected or appointed officer, or employee, . . . of the state or any political subdivision." However, R.C. 2921.01 also includes "agents" of the state, as well as officers and employees, within the definition of "public official" for purposes of R.C. 2921.42 and 2921.43. Thus, the issue becomes whether the board member of Choice Housing is an "agent of the state" and thus, a "public official" as defined in Division (A) of Section 2921.01 of the Revised Code.

The criteria necessary for a person to be deemed an "agent of the state" is succinctly described in the first syllabus paragraph of Advisory Opinion No. 92-001, which reads as follows:

A person is an "agent of the state," and thus, a "public official" as defined in Division (A) of Section 2921.01 of the Revised Code, when: (a) the person has the power to act on behalf of and bind the state by his actions; (b) the state has the right to control the actions of the person; and (c) the actions of the person are directed toward the attainment of an objective sought by the state

See also Advisory Op. No. 85-005. A non-profit corporation that provides affordable housing to mentally retarded citizens pursuant to a contract with a county board of mental retardation and developmental disabilities performs a function that is directed toward the attainment of an objective sought by ODMRDD and the Scioto County Board.

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Choice Housing's Articles of Incorporation and additional materials that you have provided regarding the contract between the Scioto County Board and Choice Housing, establish that the Scioto County Board and ODMRDD do not control the day-to-day operation of Choice Housing. Nothing in Choice Housing's Articles of Incorporation and other materials you have provided establish that Choice Housing's officers and employees have the power to act on behalf of and bind the state and county. The fact that there are conditions upon the use of funds granted by the ODMRDD in order to ensure that the funds are being properly used to achieve the stated public purpose does not rise to the level where it can be said that either the ODMRDD or the Scioto County Board controls the actions of Choice Housing's officers and employees.

Therefore, since the criteria necessary to establish an agency relationship, as described by the Ethics Commission in Advisory Opinion No. 92-001, do not appear to be met in this instance based upon the materials you have submitted, a board member of Choice Housing is not an "agent of the state." Accordingly, the board member of Choice Housing does not fall within the definition of "public official" provided by R.C. 2921.01 (A) and are not subject to the prohibitions imposed by R.C. 2921.42. But see Advisory Op. No. 92-001 (under the appropriate circumstances a party which is not an agent of the state may act to bind the state and thus create an agency relationship).

R.C. 2921.43 also falls within the Ethics Law and this statute applies to "public servants." R.C. 2921.01 (B) defines the term "public servant" as used in R.C. 2921.43 as: any public official as defined in R.C. 2921.01 (A); a candidate for public office; and, "[a]ny person performing ad hoc a governmental function, including without limitation a juror, member of a temporary commission, master, arbitrator, advisor, or consultant."

The prohibitions of the Ohio Ethics Law that affect public officials and employees after leaving public service are found in Chapter 102. and R.C. 2921.42. See R.C. 102.03 (A), 102.03 (B), and R.C. 2921.42 (A)(3). R.C. 2921.43 (A) prohibits a public servant from accepting compensation, other than allowed by law, to perform his official duties. R.C. 2921.43 (A) also prohibits a person, including an individual, corporation, partnership, association or other similar entity, from promising or giving to a public servant any compensation, other than allowed by law, to perform any act in his public capacity or generally perform the duties of his public position. R.C. 1.59, 2921.43(A). See also Advisory Ops. No. 89-012, 89-013, 89-014, and 90-001. As a result, the prohibitions imposed by R.C. 2921.43 (A) do not affect former public servants. Because the individual in question has resigned from Choice Housing's board of directors, the issue whether a board member of Choice Housing is a "public servant" and thus subject to the prohibitions imposed by R.C. 2921.43 need not be addressed.

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This advisory opinion was approved by the Ethics Commission at its meeting on November 17, 1995. 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, and does not purport to interpret other laws or rules. The Commission apologizes for the delay in responding to your request, and regrets any inconvenience this delay may have caused.

If you have any questions, or wish to request a formal advisory opinion, please feel free to contact this Office again.

Very truly yours,



John Rawski
Staff Attorney