

OHIO ETHICS COMMISSION

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June 29, 1999

Informal Opinion 1999-INF-0629

Dan Schneider
Public Children Services Association of Ohio

Dear Mr. Schneider:

You have asked for a clarification of an advisory opinion issued by the Ohio Ethics Commission on March 26, 1999. Specifically, you have asked whether county public service employees can meet the exception to Revised Code Section 2921.42(A)(4), set forth in R.C. 2921.42(C), so that the employees can provide instruction under a contract between the Ohio Department of Human Services (Department) and the Institute for Human Services (IHS).

Previous Opinion

In July of 1998, the Department requested that the Ethics Commission address whether the Ohio Ethics Law and related statutes prohibit employees of county social service agencies from working with a private vendor who has a contract with the Department to provide training services to county employees. In an opinion issued on March 26, 1999, the Commission concluded that R.C. 2921.42(A)(4) prohibits employees of county agencies with official responsibilities for the delivery of social services in the county, under the monitoring and administration of the Department, from working with a private vendor who has a contract with the Department to provide teaching services to county employees, unless the employees are able to meet the exception set forth in R.C. 2921.42(C).

Your question is limited to an interpretation of whether county employees can meet the exception in R.C. 2921.42(C) under the criteria set forth in a letter that you forwarded. The letter, written by Ronald C. Hughes, Director of IHS, and state coordinator for the IHS Ohio Child Welfare Training Program, was attached to the request submitted by the Department.

Exception to the Prohibition—R.C. 2921.42(C)

The exception to the prohibition in R.C. 2921.42(A)(4), set forth in R.C. 2921.42(C), states:

- (C) This section does not apply to a public contract in which a public official, 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 official'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 official, member of his family, or business associate, and the public official 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. Ohio Ethics Commission 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 exception. Adv. Ops. No. 83-004 and 84-011. This opinion will now examine the criteria presented by IHS, in Mr. Hughes's letter, to determine whether county employees can meet the requirements in the exception under those criteria.

Necessary Supplies or Services—Division (C)(1)

The first requirement is that the services provided under the contract are necessary. In this instance, the subject of the contract is training for county employees who provide child welfare services. IHS has stated that its Individual Training Needs Assessment data, and opinion and data from county and state employees, establish that the delivery of child welfare services is very complicated. IHS further states that county child welfare staff have historically been inadequately educated and inadequately trained to provide necessary services to Ohio families and children. Finally, IHS states that it identifies high priority training needs for child welfare staff on a continual basis. It appears, based on the facts that have been presented by Mr. Hughes, on behalf of IHS, that the requirement that the services are necessary is met.

Unobtainable for the Same or Lower Cost—Division (C)(2)

Division (C)(2) requires that the supplies and services be unobtainable elsewhere for the same or lower cost. In order to meet the requirement of Division (C)(2), the employees must be

able to demonstrate, by some objective standard, that the training services they supply are unobtainable elsewhere for the same or lower cost. One indication that this requirement has been met would be if the vendor utilized an open and fair competitive process, open to all qualified candidates, to select trainers. In Mr. Hughes's letter, he has stated that IHS uses an objective and rigorous standardized process to select all trainers.

In addition, the former Director of the Department has stated that IHS believes that current and former county social services employees would provide a high quality of training because these employees possess practical knowledge and experience in these areas. In previous advisory opinions, the Commission has stated that there may be instances where an employee of the public agency is uniquely qualified to provide services to that agency. Adv. Op. No. 88-001. In those instances, the public agency must be able to objectively justify the validity of considering the employee's unique qualifications as part of the selection process. In addition, as stated above, the vendor must conduct an open and fair selection process that is available to all interested and qualified individuals, and not limit its solicitations to employees of county social services agencies.

In this case, it appears that a justified objective of providing practical knowledge and experience is a valid and proper consideration in choosing trainers. Where an employee of a county social services agency possesses the required practical knowledge and experience, and is selected by IHS to provide training through an open and fair selection process that incorporates competitive performance assessment, the requirement of Division (C)(2) is met.

Same or Better Treatment—Division (C)(3)

R.C. 2921.42(C)(3) requires that the public employees provide the same or better services for the Department than they would for any other client in similar transactions. Mr. Hughes has stated that the IHS Child Welfare Training Program is the only transaction of this kind. This assertion does not demonstrate compliance with the requirement in R.C. 2921.42(C)(3).

However, the Commission understands that the IHS uses an advisory committee of state and county employees to recruit trainers for the vendor and to select vendor-qualified trainers for the program. Further, Mr. Hughes has stated that the vendor and committee employ a objective and rigorous selection process to select the trainers. Mr. Hughes also stated that performance of each instructor is assessed by a competitive performance selection process, based on consumer survey scores, and that only the best trainers, based on the objective criteria, are maintained in the pool of trainers. This performance assessment process can demonstrate that the selected county employees are the best to provide the training services and that the trainers provide the same or better training services as those they would provide to any other party. It appears, based on the facts that have been presented by Mr. Hughes, that this requirement is met.

Arm's Length Transaction, Full Knowledge, No Participation—Division (C)(4)

The final provision, in Division (C)(4), requires that the entire transaction be conducted at arm's length, with full knowledge by the Department of its employees' interests, and that the

employees take no part in the deliberations or decisions of the Department with respect to the contract. Mr. Hughes has stated that no individual who had any responsibility related to developing, overseeing, supervising, or evaluating the IHS Child Welfare Training Program would be hired as a training instructor. This would include members of the RFP selection committee and members of the ad hoc evaluation committees. Once again, the Department and vendor must use an open and fair selection process that is available to all interested and qualified individuals, and not limit their solicitations to employees of county social services agencies. Based on the facts Mr. Hughes has presented, and assuming that the selection process is open, fair, and at arm's length, it appears that this requirement is met.

Conclusion

As described in the Commission's March 26, 1999 advisory opinion, R.C. 2921.42(A)(4) generally prohibits a county employee who participates in the delivery of social services from providing training under a Department contract. However, a county employee who participates in the delivery of social services can provide training services under a Department contract if the employee can demonstrate that he meets the exception provided by R.C. 2921.42(C). As set forth above, it appears that the methods used by IHS demonstrate that the county employees selected as trainers by IHS meet the requirements of the exception in R.C. 2921.42(C). The burden of demonstrating compliance with R.C. 2921.42(C) rests on the county employees involved.

The Commission understands that IHS has determined that it will not use, as trainers under the Department contract, any county employee who may be expected to provide training as part of his official duties. This determination is consistent with the restrictions set forth in R.C. 2921.43(A), as discussed by the Commission in its March 26, 1999 advisory opinion. The Commission also understands that IHS, to the extent practicable, has agreed not to use an employee of any county as a trainer for other employees in the same county. The conclusions in this opinion are based, in part, on these understandings.

This informal advisory opinion was approved by the Ethics Commission at its meeting on June 29, 1999. It represents the views of the undersigned, based on the facts presented. It is limited to questions arising under Chapter 102, and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. If you have any further questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

Enclosure: March 26, 1999 opinion to Jacqueline Rómer-Sensky