

OHIO ETHICS COMMISSION

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December 17, 1999

Informal Opinion 1999-INF-1217-2

Victor V. Vigluicci
Portage County Prosecuting Attorney

Dear Mr. Vigluicci:

In your letter received by the Ethics Commission on October 7, 1999, you ask about the prohibitions that the Ohio Ethics Law and related statutes impose upon a member of the Board of County Commissioners of Portage County (Board) with respect to his private business dealings. Specifically, you ask whether there are any restrictions on the commissioner with respect to Classic Health Care, a company with which the county may enter into a contract for the administration of the county's nursing home.

You included, with your request for an advisory opinion, a letter that the commissioner sent to you in which he explains his private business relationships. This advisory opinion is written incorporating the facts presented in your request and the letter from the commissioner.

As explained below, given the facts that you have set forth, the prohibitions imposed upon the county commissioner by the Ohio Ethics Law and related statutes do not preclude the Board from contracting with Classic Health Care for the administration of the county's nursing home and the commissioner is not prohibited from participating in the award of the contract to Classic Health Care. However, if Classic Health Care plans to sub-contract the administration of the county's nursing home to companies with which the county commissioner has a private business relationship or if there is an on-going customer-client relationship between Classic Health Care and the companies with which the county commissioner has a private business relationship, then you should contact this Office for the issuance of an advisory opinion that would provide an analysis and answer reflecting such facts.

Facts—The County Nursing Home and Classic Health Care

You state that the Board desires to enter into a two-year contract with a company known as Classic Health Care for the administration of the county's nursing home. You also state that a company, Geo-Health Services, which is owned by an individual named Dr. Robert Dickson, has performed services in the past for Classic Health Care.

Facts—The County Commissioner and Geo-Health Services

The commissioner, in his letter, describes his private business relationships with Dr. Dickson and Geo-Health Services. The commissioner states that Dr. Dickson is the sole proprietor of Geo-Health Services, and that he has no ownership interest in Geo-Health Services. The commissioner states that he performed computer-based applications for Dr. Dickson in 1995, 1996, and 1997. The commissioner received \$6,000 and \$1,500, respectively, in the form of checks from Geo-Health for performing these services.

The commissioner also states that he and Dr. Dickson planned the development of a retirement community. The commissioner and Dr. Dickson decided that the commissioner's role in bringing the plans for the retirement community to fruition would be to have the commissioner contact interested individuals and companies and organizing them into a team for the project. Dr. Dickson designated the commissioner to be Vice-President of Geo-Health Services in order to represent Geo-Health Services to potential companies and individuals who might be interested in the retirement community. In 1997, Dr. Dickson and the commissioner entered into a partnership with a nursing home operator in the Cleveland area and began to seek a location for the planned retirement community. In the fall of 1999, Dr. Dickson and the commissioner founded University Retirement Communities, LLC to facilitate the community's development. The commissioner states that, although he held the title of Vice-President of Geo-Health Services, the title exists only on paper and he has never held any ownership interest in, nor participated in the operations of, the company.

Facts—Geo-Health Services and Classic Health Care

The Commissioner states that Dr. Dickson informed him that, in December 1998, Geo-Health Services concluded a fifteen-month contract with Classic Health Care. Under the contract, Geo-Health Services was under retainer to inform Classic Health Care of market opportunities. Classic Health paid Geo-Health Services a thousand dollars per month for these services. The commissioner also states that Dr. Dickson has conducted work for Classic Health Care in the past.

The commissioner states that he did not know of Geo-Health's retainer relationship with Classic Health Care because Dr. Dickson never informed him of Geo-Health's business affairs. The commissioner states that he never received any financial benefit from the retainer paid to Geo-Health by Classic Health Care. Furthermore, it appears from the facts that the commissioner has presented that, while Geo-Health Services had been under retainer to Classic Health Care and Dr. Dickson has conducted work for Classic Health Care, there is no on-going customer-client relationship between Classic Health Care and either Geo-Health and University Retirement Communities, LLC.

Interest in a Public Contract—R.C. 2921.42(A)(4)

Your attention is directed to R.C. 2921.42(A)(4), which provides that no public official shall knowingly “[h]ave 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, in R.C. 2921.01(A), for purposes of R.C. 2921.42, to include an elected or appointed officer or employee of a political subdivision of the state. A member of a board of county commissioners is a “public official” for purposes of R.C. 2921.42. Ohio Ethics Commission Advisory Opinion No. 88-003.

The term “public contract” is defined for purposes of R.C. 2921.42 in Division (G)(1)(a) to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of any political subdivision, or any agency or instrumentality of either. The proposed county contract with Classic Health Care for the administration of the county’s nursing home would be a public contract for purposes of R.C. 2921.42.

R.C. 2921.42(A)(4) prohibits a county official or employee from having an interest in the profits or benefits of a public contract entered into by the county he serves. Adv. Op. No. 88-003. The Ethics Commission has held that an official or employee has a prohibited “interest” in a public contract with his political subdivision if he would have a definite and direct interest, of either a pecuniary or fiduciary nature, in the contract. Adv. Ops. No. 81-008 and 88-001. An individual who holds an ownership interest in, or an office with, a corporation is considered to have an “interest” in the public contracts of the corporation. Adv. Ops. No. 78-006, 86-005, and 89-006.

As set forth above, the commissioner was named the Vice-President of Geo-Health Services. However, this title is immaterial to the question presented. The commissioner was given this title and identified himself in this manner to the business community. In addition, the commissioner is co-founder, with Dr. Dickson, of University Retirement Communities, LLC.

As stated above, the Commission has concluded that a person who is a fiduciary of a private corporation has an interest in the contracts of that corporation. A person who has the title of vice-president in a corporation, and performs duties for the corporation that are consistent with the title, is an officer of the corporation. As an officer, the vice-president is a fiduciary of the corporation and has an interest in the contracts of the corporation.

However, in the situation you have described, it is unclear whether the commissioner performs the duties of an officer of Geo-Health Services. If the commissioner holds the title of Vice-President of Geo-Health Services, and perform the duties of an officer of the Geo-Health Services, he would be considered a fiduciary of Geo-Health Services such that he would have an interest in its contracts for purposes of R.C. 2921.42. From the facts provided, it is unclear whether the Commissioner is an officer of Geo-Health Services such that he has an interest in the contracts of Geo-Health Services.

By contrast, the Commissioner has stated that he is a co-founder of University Retirement Communities, LLC. As such, the commissioner is considered to have an "interest" in the contracts of University Retirement Communities, LLC for purposes of R.C. 2921.42. Thus, the commissioner would have a definite and direct interest in any contract entered into between the Board and University Retirement Communities, LLC.

As stated above, the Board desires to enter into a two-year contract with a company known as Classic Health Care for the administration of the county's nursing home. The county neither desires nor contemplates doing business with Geo-Health Services or University Retirement Communities, LLC. The fact that Geo-Health Services has performed services for Classic Health Care in the past does not create a relationship between Geo-Health and Classic Health Care such that the commissioner would have a definite and direct interest in the contracts of Classic Health Care.

Therefore, the county commissioner does not have an interest, which would be prohibited by R.C. 2921.42(A)(4), in the proposed contract between the Board and Classic Health Care for the administration of the county's nursing home.

Authorizing a Public Contract—R.C. 2921.42(A)(1)

The issue becomes whether the commissioner may participate in the Board's decision to award the contract to Classic Health Care.

R.C. 2921.42(A)(1) provides that no public official shall knowingly:

Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

R.C. 2921.42(A)(1) 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, a member of his family, or any of his business associates has an interest." Adv. Ops. No. 78-002, 85-015, and 92-008, respectively.

The Commission has held that a public official will be deemed to have "authorized" a public contract, for the purposes of R.C. 2921.42, where the contract could not have been awarded without the approval of the public official or the position in which he serves. Adv. Ops. No. 87-004, 88-008, 90-010, and 92-012. Accordingly, R.C. 2921.42(A)(1) prohibits a public official from voting, discussing, deliberating, or otherwise participating in any part of his public agency's decision-making process with respect to the implementation, continuation, or changes in the term and conditions, of a public contract in which either he or a business associate has an interest. Adv. Op. No. 92-003.

The term "business associate" is not statutorily defined for purposes of R.C. 2921.42. The Ethics Commission has held that a business associate relationship exists whenever parties act together to pursue a common business enterprise. Adv. Ops. No. 84-013 (a firm is a business associate of an agency or representative), 85-004 (business partners are business associates), and 92-008 (a bank is a business associate of its employees and board members). The Commission has also determined that some business connections are too limited to be considered a "business association." For example, in Advisory Opinion No. 93-001, the Commission concluded that, absent facts indicating otherwise, an owner of a small number of shares of stock in a bank is not a business associate of the bank.

In the instant situation, as set forth above, the commissioner joined with Dr. Dickson for a business purpose by becoming Vice-President of Geo-Health Services and becoming a co-founder with Dr. Dickson of University Retirement Communities, LLC. Accordingly, Dr. Dickson is the "business associate" of the commissioner for purposes of R.C. 2921.42(A)(1).

As stated above, the Board desires to enter into a two-year contract with a company known as Classic Health Care for the administration of the county's nursing home. The county neither desires nor contemplates doing business with Geo-Health Services or University Retirement Communities, LLC. The fact that Geo-Health Services has been paid, in the past, for performing services for Classic Health Care does not make Classic Health Care a "business associate" of the commissioner.

Therefore, the prohibition imposed upon the county commissioner by R.C. 2921.42(A)(1) does not prohibit the commissioner from participating in the Board's decision to award the contract to Classic Health Care for the administration of the county's nursing home.

General Conflicts of Interest—R. C. 102.03(D) and (E)

Your question raises the application of the general conflicts of interest provisions of the Ethics Law, set forth in Chapter 102., R.C. Sections 102.03(D) and (E), which read:

- (D) No public official or employee shall use or authorize the use of the authority or influence of 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 the public official or employee with respect to that person's 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 the public official or employee with respect to that person's duties.

R.C. 102.01(B) defines a "public official or employee" for purposes of R.C. Chapter 102. as any person who is elected, appointed to an office, or is an employee of any public agency. R.C. 102.01(C) defines the term "public agency" to include any department or division of a city. Thus, a member of a board of county commissioners is a "public official or employee" for purposes of R.C. 2921.42. Adv. Op. No. 88-003.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 102.01(G). The proceeds realized from payment for services under a contract is a thing of value for purposes of R.C. 102.03(D) and (E).

The Ethics Commission has held that R.C. 102.03(D) and (E) prohibits a public official or employee from soliciting, accepting, or using the authority or influence of his position to secure a thing of value for either himself or another party where the relationship between the public official or employee and the other party is such that his objectivity and independence of judgment could be impaired with regard to the matters that affect the interests of that party. The Ethics Commission has held that public officials and employees are prohibited from participating in decisions that directly affect the private pecuniary interests of the public official or employee making the decision, his business associates, or family members. Adv. Ops. No. 88-004, 88-005, 89-005, and 89-008.

As stated above, the Board desires to enter into a two-year contract with a company known as Classic Health Care for the administration of the county's nursing home. The county neither desires nor contemplates doing business with Geo-Health Services or University Retirement Communities, LLC. The fact that Geo-Health Services has performed services for Classic Health Care in the past does not mean that the commissioner has such a relationship with Classic Health Care that the commissioner's objectivity and independence of judgment could be impaired with regard to the matters that affect the interests of Classic Health Care. In addition, you have set forth no facts that suggest that the private pecuniary interests of either the commissioner or Dr. Dickson will be definitely and directly affected if Classic Health Care secures the contract with the county to administer the county's nursing home.

Therefore, the prohibition imposed upon the county commissioner by R.C. 102.03(D) and (E) do not prohibit the commissioner from participating in the Board's decision to award the contract to Classic Health Care for the administration of the county's nursing home.

Conclusion

As explained above, given the facts that you have set forth, the prohibitions imposed upon the county commissioner by the Ohio Ethics Law and related statutes do not preclude the Board from contracting with Classic Health Care for the administration of the county's nursing home and the commissioner is not prohibited from participating in the award of the contract to Classic Health Care. However, if Classic Health Care plans to sub-contract the administration of the county's nursing home to the companies with which the county commissioner has a private business relationship or if there is an on-going customer-client relationship between Classic

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Health Care and the companies with which the county commissioner has a private business relationship, then you should contact this Office for the issuance of an advisory opinion that would provide an analysis and answer reflecting such facts.

The Ethics Commission approved this informal advisory opinion at its meeting on December 17, 1999. The opinion is based on the facts presented and 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, please feel free to contact this Office again.

Sincerely,

A handwritten signature in black ink that reads "John Rawski". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

John Rawski
Staff Attorney