

OHIO ETHICS COMMISSION

Santiago Feliciano, Jr.
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368

Website: <http://www.ethics.state.oh.us>

April 14, 2000

Informal Opinion 2000-INF-0414-3

David J. Boyd, Esq.
David J. Boyd Co., L.P.A.

Dear Mr. Boyd:

In a letter received by the Commission on August 19, 1999, you ask whether the Ohio Ethics Law and related statutes prohibit your client, an employee of the Ohio Department of Mental Retardation and Developmental Disabilities (Department), from entering into a personal services contract with the Department.

As explained below, a Department employee whose assigned duty is to perform dental services at a developmental center is prohibited from entering into a personal services contract with the Department to perform dental services at another developmental center unless the dental services are sold through competitive bidding and the employee submitted the lowest bid and meets all the provisions of R.C. 2921.42(C). The employee is prohibited from using his official position in any way to secure authorization of the proposed contract and from using working relationships developed while performing his public duties to secure a favorable decision by another public official or employee.

It must be noted that your question specifically involves a future contract, but that you also mention actions that have already taken place. The Commission has stated that it will render an advisory opinion only in response to a hypothetical question or a question that involves prospective conduct. Ohio Ethics Commission Advisory Opinions No. 75-037 and 94-002. The Commission has explained that its function in rendering an advisory opinion is not a fact-finding process and it cannot, in an advisory opinion, determine whether a public official or employee has violated a criminal law. Id. Therefore, the conclusions of this advisory opinion do not apply to any activity that has already taken place.

Facts

You state that your client, Dr. Stephen J. Doelker, D.D.S., is a dentist who is a civil service employee of the Department with the assigned duty to perform dental services for residents at the Department's Mt. Vernon Developmental Center in Mt. Vernon, Ohio. You state that Dr. Doelker desires to enter into a two-year personal services contract with the Department to perform additional dental services for residents at the Department's Southwest Ohio Developmental Center in Batavia, Ohio. You state that the contract would be let by competitive bidding.

The Director of the Department, Kenneth W. Ritchey, sent a letter, received by the Commission on March 23, 2000, in which he provided additional information about the cost of the provision of dental services for residents at the Department's developmental centers. Director Ritchey states that the Department does not have an on-site dentist at its Montgomery and Tiffin Developmental Centers. Instead, the Department uses local dentists who provide dental services to the residents and bill Medicaid for their services. In addition, Director Ritchey states that while Dr. Doelker seeks a contract from the Southwest Developmental Center to provide dental services for the residents for \$58.00 per hour, the Department receives dental services for less than \$58.00 per hour from on-site dentists at six of its developmental centers other than the Southwest Developmental Center. This advisory opinion is based on the facts presented by your letter and the supplemental information provided by Director Ritchey.

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

Your attention is directed to Division (A)(4) of Section 2921.42 of the Revised Code, which provides that no public official shall knowingly:

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.

The term "public official" is defined for purposes of R.C. Chapter 2921. in R.C. 2921.01(A) to include any employee of the state. A dentist who is employed at a developmental center operated by the Department is a "public official" as defined in R.C. 2921.01(A), and, thus, is subject to the prohibition of R.C. 2921.42(A)(4). Ohio Ethics Commission Advisory Opinion No. 88-001.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (G)(1)(a) 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. A personal service contract entered into between the Department and a dentist for the provision of dental services for residents at a developmental center is a "public contract" for purposes of R.C. 2921.42(A)(4), because the contract is for the purchase of dental services by the state.

An "interest" which is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. Adv. Op. No. 81-008. A dentist who contracts with the Department to provide dental service for residents of a developmental center would have a definite and direct pecuniary interest in the public contract between the Department and himself. Under the facts presented, Dr. Doelker would not provide services to the Department's Southwest Ohio Developmental Center as part of his assigned duties as a Department employee at the Mt. Vernon Developmental Center, but rather as a duty under a personal services contract with the Department.

R.C. 2921.42(A)(4) prohibits a public official from having an interest in a public contract with the governmental agency with which he is connected. Adv. Ops. No. 87-002, 89-004, and 92-006. In Advisory Opinion No. 89-004, the Commission held:

It is apparent that the purpose of R.C. 2921.42 is best served if the statute is interpreted as prohibiting a public official from doing business with all political subdivisions, governmental agencies, and instrumentalities with which he is connected. (Emphasis added.) R.C. 2921.42(A)(4) prohibits a public official from having an interest in a public contract with the governmental agency with which he is connected.

The Commission has held that, at the state level, a public official's department is the governmental agency with which he is connected. Adv. Op. No. 84-008 (an employee of the Bureau of Vocational Rehabilitation within the Rehabilitation Services Commission is connected with both the Bureau and the Commission). See also Adv. Op. No. 86-005. A dentist employed by the Department, who contracted with the Department to provide dental services at a developmental center other than the one to which he is assigned as a Department employee, would have a definite and direct, pecuniary interest in the profits or benefits of a contract entered into by the governmental agency or instrumentality with which he is connected. Adv. Op. No. 88-001.

Therefore, R.C. 2921.42(A)(4) prohibits a dentist who is employed at the Mt. Vernon developmental center from entering into a personal service contract with the Department to provide dental services to residents of the Southwest Ohio Developmental Center. The fact that the developmental centers have separate administrative offices is irrelevant for purposes of R.C. 2921.42(A)(4), as the prohibition is against a Department employee contracting with the Department as a whole.

Exception to the Restriction of R.C. 2921.42(A)(4)

R.C. 2921.42(C) provides an exception to R.C. 2921.42(A)(4), as follows:

- (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. (Emphasis added.)

Each of the provisions in Division (C) is a question of fact which, when applied to the circumstances of the individual situation, will determine whether a particular transaction fits within the exception. Adv. Ops. No. 80-003 and 88-008. The criteria of Division (C) are strictly construed against the public official, and the official must show compliance with all four requirements in the exemption. Adv. Ops. No. 83-004, 84-011, and 88-008. As stated in Advisory Opinion No. 84-011:

[T]he application of the exemption [provided in Division (C) of Section 2921.42] 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 governmental entity with which she serves unless the contract is the best or only alternative available to the governmental entity. (Emphasis added.)

Application of Division (C)(2) of R.C. 2921.42

Division (C)(2) of R.C. 2921.42 is of particular importance. Division (C)(2) requires that the supplies or services be furnished to the governmental agency as part of a continuing course of dealing established prior to the public official's becoming associated with the agency or be unobtainable elsewhere at the same or lower cost. Because the proposed contract is for a new two-year term, the "continuing course of dealing exception" need not be addressed. See Adv. Op. No. 88-008.

Where the "continuing course of dealing exception" cannot be met, a public official must be able to show by some objective standard that the services he would provide to a governmental agency with which he is connected are "unobtainable elsewhere for the same or lower cost." Adv. Op. No. 84-006. The Commission stated in Advisory Opinion No. 83-004:

[F]actors such as the availability and adequacy of notice to potential competitors, the openness and fairness of the bidding process, and the conditions of the market must be considered in determining whether the public official complies with Division (C)(2) of Section 2921.42 of the Revised Code.

Furthermore, the Commission stated in Advisory Opinion No. 84-011:

The criterion that the goods or services be "unobtainable elsewhere 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.

It is important to note that in order for a public official to sell property or services to a public agency with which he is connected, the official must offer to provide the property or services at the lowest price. Adv. Op. No. 88-001. If the public agency is able to obtain the goods or services from any other source at a lower cost, or the same cost, the agency must purchase the goods or services from the other source before it may purchase the goods or services from its own employee. Adv. Op. No. 84-011. The Commission has held that whether a particular transaction meets the criteria of R.C. 2921.42(C) depends on the facts and circumstances of the individual situation. Ad. Op. No. 79-005.

The information provided by Director Ritchey, set forth above, regarding the Department's provision of dental services for residents at the Department's developmental centers illustrates that local market conditions may affect both the means by which the Department arranges for the services and the amount it pays to dentists for their services. One indication that Dr. Doelker's dental services are "unobtainable elsewhere for the same or lower cost" is that the contract between the Department and Dr. Doelker for dental services at the Southwest Ohio Developmental Center is competitively bid in an open and fair process and Dr. Doelker submitted the lowest bid. Adv. Ops. No. 82-007 and 83-004. It must be clear that the competitive bidding process must be open to all interested and qualified parties and specifications and requirements must not have been drawn to favor any particular party. Adv. Ops. No. 88-001¹ and 89-004. Further, while a public official can use a competitive bidding process as part of the demonstration that he meets R.C. 2921.42(C)(2), the Ethics Law does not require a competitive bid, and does not require that the public agency enter into a contract with the lowest bidder. As stated above, a public official should not have an interest in a public contract with the public agency he serves unless the contract is the best or only alternative available to the governmental entity. Adv. Op. No. 84-011.

Application of Other Divisions of R.C. 2921.42

If Dr. Doelker can meet the criterion of Division (C)(2), he must, in addition, comply with the other provisions of R.C. 2921.42(C).

R.C. 2921.42(C)(1) requires that the dental services of Dr. Doelker as an on-site dentist are a necessary purchase for the Department and the Southwest Ohio Developmental Center. The information provided by Director Ritchey, set forth above, states that its Montgomery and Tiffin Developmental Centers do not have on-site dentists but use local dentists who provide

¹ R.C. 102.04(B), which is discussed in Advisory Opinion No. 88-001, is not applicable in the situation you have presented, because the dental services are professional services and you have stated that the contract would be awarded on the basis of a competitive bid.

dental services to the residents and bill Medicaid for their services. However, Director Ritchey also states that the Department uses on-site dentists at six other developmental centers. A determination of the means by which the Department arranges for dental services for residents at its developmental centers is a matter within the discretion of the Department.

Division (C)(3) requires that the treatment provided by Dr. Doelker to the Department is as good as or better than the treatment that he provides to his other clients or customers. Finally, Division (C)(4) requires that the transaction be conducted at arm's length, with full knowledge of the Department of the interest of Dr. Doelker and requires that he take no part in the deliberations and decisions of the Department with respect to the contract. See also R.C. 2921.42(A)(1) (discussed below).

Other Applicable Prohibitions

If Dr. Doelker can meet the exception provided by R.C. 2921.42(C), and the Department chooses to enter into a contract with him, other provisions of the Ethics Law and related statutes will also condition his conduct.

R.C. 2921.42(A)(1) prohibits a public official from authorizing or using the authority or influence of his public position to secure a public contract in which he has an interest. See R.C. 2921.42(C)(4) (set forth above). In this instance, R.C. 2921.42(A)(1) prohibits Dr. Doelker from using his official position in any way to secure authorization of the proposed contract. Accordingly, Dr. Doelker is prohibited from discussing, deliberating, recommending, or otherwise using the authority or influence of his official position, either formally or informally, to secure approval of a contract between the Department and himself. Adv. Ops. No. 85-009 and 89-006. See also R.C. 2921.42(C)(4) (set forth above).

Division (D) of R.C. 102.03 is also relevant to your question. This section prohibits a public employee from using the authority or influence of his public position, formally or informally, to secure anything of value, if the thing of value is of such a character as to manifest a substantial and improper influence upon him with respect to his official duties. Adv. Ops. No. 80-003 and 88-004. The Ethics Commission has consistently held that the Ohio Ethics Law does not prohibit public officials and employees from engaging in outside business activity so long as no actual conflict of interest exists between the public official's or employee's public position and private interests. Adv. Ops. No. 85-006, 86-007, 86-008, and 87-006. However, the Ethics Commission has recognized that a public official or employee will develop working relationships by cooperating with other public officials and employees while performing his official duties. Adv. Op. No. 90-002. R.C. 102.03(D) prohibits a public official or employee who engages in outside business activity from using working relationships developed while performing his public duties to secure a favorable decision by another public official or employee affecting his private financial interests. Adv. Op. No. 96-004. Therefore, R.C. 102.03(D) prohibits Dr. Doelker from formally or informally using his relationships with other Department officials and employees to affect their decisions regarding the proposed personal services contract.

As a final matter, it must be noted that an advisory opinion issued pursuant to R.C. 102.08 is based upon the facts presented and provides immunity to the person who is the subject of the opinion, and others similarly situated, from criminal prosecution, civil liability, and actions for removal from office provided that they comply with the conditions set forth in the opinion. However, an advisory opinion construing the Ohio Ethics Law and related statutes does not compel a public agency, under those statutes, to accommodate the private interests of the public official or employee. See Adv. Op. No. 90-002. In Advisory Opinion No 89-010, the Commission held:

An employee of an administrative department of the state owes his responsibility to the exercise of the public trust by performing the tasks assigned to him by his employing agency. This duty must not be impaired by a public employee's concern for his own personal interests. . . . There may be instances where a state agency is willing to accommodate the personal interests of its employees . . . [however] [t]he state agency's determination whether such action is possible or desirable is a matter within the discretion of the affected agency.

In this instance, it is within the Department's discretion to enter into supplemental contracts with its employees. This opinion does not opine as to the requirements of statutes beyond the authority of the Ethics Commission.

Conclusion

As explained above, a Department employee whose assigned duty is to perform dental services at a developmental center is prohibited from entering into a personal services contract with the Department to perform dental services at another developmental center unless the dental services are sold through competitive bidding and the employee submitted the lowest bid and meets all the provisions of R.C. 2921.42(C). The employee is prohibited from using his official position in any way to secure authorization of the proposed contract and from using working relationships developed while performing his public duties to secure a favorable decision by another public official or employee.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 14, 2000. 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 questions or desire additional information, please contact this Office again.

Very truly yours,



John Rawski
Staff Attorney

Enclosure: Advisory Opinion No. 88-001