

OHIO ETHICS COMMISSION

Merom Brachman
Commission Chair

David E. Freel
Executive Director



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

Web Site: <http://www.ethics.state.oh.us>

December 14, 2001

Informal Opinion 2001-INF-1214-1

Trevor O. Jones, Chairman and CEO
BIOMECC, Inc.



Dear Mr. Jones:

In your letter to the Ethics Commission, you ask whether the prohibition that the Ohio Ethics Law and related statutes impose upon you as a member of the board of trustees of Cleveland State University (CSU) precludes CSU from entering into a partnership with a biomedical start-up corporation in which you have an ownership and fiduciary interest to secure grants and engage in joint research.

You state that you were appointed to the CSU board of trustees in 2001. You also state that you are the founder, chairman, CEO, and shareholder of BIOMECC, a biomedical start-up corporation. You state that BIOMECC has secured development grants from the National Aeronautics and Space Administration (NASA) and the State of Ohio Technology Action Fund (SOTAF) and, in the past two years, has secured over 25 Small Business Innovative Research Grants (SBIR) from the National Institutes of Health (NIH). You state that the SBIR grants have been in collaboration with not-for-profit institutions such as The Cleveland Clinic Foundation, Case Western Reserve University, and The University of Toledo.

You state that since becoming a CSU trustee, you have urged CSU to enter into partnerships with small companies for the purpose of securing SBIR grants from NIH to increase outside-funded research. You state that you would like CSU to enter into a partnership with BIOMECC to secure SBIR grants and engage in joint medical research. You state that SBIR regulations would require BIOMECC to be the prime contractor and CSU to be a subcontractor. In addition, you state that if CSU were to secure SBIR grants and engage in joint research with BIOMECC, it would enhance the prestige of CSU and infuse revenue at a time when the state's educational budget is being reduced.

Brief Answer

As explained below, the prohibitions that R.C. 2921.42(A)(3) and R.C. 102.03(D) impose upon you as a member of the board of trustees of CSU precludes CSU from entering into a partnership with BIOMECC to secure grants and engage in joint research. However, the Ethics Law does not prohibit CSU from partnering with small businesses in which you have no ownership or fiduciary interests to pursue NIH grants as you have recommended.

R.C. 3345.14—Application of Exception for Entrepreneurship

Before addressing your question, it is necessary to determine whether R.C. 3345.14, and the rules adopted by the CSU board of trustees pursuant to Division (D) of R.C. 3345.14, are applicable to your question. In 2000, the General Assembly amended R.C. 3345.14 to include a provision that boards of trustees of state universities can adopt rules to set forth circumstances under which an employee of the university may have a financial interest in discoveries or inventions made or created by that employee or in patents issued to that employee. R.C. 3345.14(D). However, in R.C. 3345.14(E), the General Assembly has clearly indicated that such rules apply only to "employees" of the university and that, in implementing the rules, all members of the college or university board of trustees shall be governed by Chapter 102. and sections 2921.42 and 2921.43 of the Revised Code. R.C. 3345.14(D)(2)(c) and (E). Therefore, in order to answer your question, it is necessary to look to the Ohio Ethics Law and related statutes, rather than any rules adopted by CSU.

R.C. 2921.42(A)(3)—Position of Profit in a Public Contract

R.C. 2921.42(A)(3) reads:

(A) No public official shall knowingly do any of the following:

. . .

(3) During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

The term "public official" is defined, for purposes of R.C. 2921.42 in R.C. 2921.01(A), to include any appointed officer of the state. A state college or university is an instrumentality of the state. R.C. 3345.011 ("state university" means a public institution of higher education which is a body politic and corporate"); Wolf v. Ohio State University Hosp., 170 Ohio St. 49 (1959). Therefore, as a member of the board of trustees of CSU, you are a "public official" for purposes of R.C. 2921.42(A)(3). Ohio Ethics Commission Advisory Opinion No. 95-004.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (G)(1)(a) of that section and includes the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of "the state or any of its political subdivisions, or any agency or instrumentality of either." R.C. 2921.42(G). The proposed partnership between CSU and BIOMECH to secure SBIR grants from NIH and engage in joint research falls within the definition of a "public contract" because CSU would be acquiring the services of BIOMECH to secure the grants and to perform medical research services.

The Ethics Commission has held that the position of profit which a public official occupies in the prosecution of a public contract for purposes of R.C. 2921.43(A)(3) must be definite and direct. Adv. Op. No. 92-013. A public official occupies a position of profit in a public contract when he will realize a pecuniary advantage, gain, or benefit, which is a definite and direct result of the public contract. Adv. Op. No. 92-017.

In Advisory Opinion No. 92-013, the Ethics Commission explained that the word "profit" in R.C. 2921.42(A)(3) connotes a pecuniary gain or benefit. See also Adv. Op. No. 93-001. The Ethics Commission has held that, for purposes of R.C. 2921.42(A)(3), a public official is deemed to profit from a public contract where: (1) the establishment or operation of the company with which he serves is dependent upon the award of the public contract; (2) the creation or continuation of the public official's position with the company with which he serves is dependent upon the award of the contract; (3) the proceeds from the contract would be used by the company to compensate the official or serve as a basis for the official's compensation; or (4) he would otherwise profit from the contract. Adv. Ops. No. 87-004 and 88-008. The Commission has determined that under these criteria, a person with an ownership interest in a business occupies a position of profit in the contracts of the business for purposes of R.C. 2921.42(A)(3). Adv. Op. No. 90-003.

You have stated that you are the founder, chairman, CEO, and shareholder of BIOMECH. It is apparent that, as a result of the positions you hold in BIOMECH, you occupy a position of profit in BIOMECH's contracts for purposes of R.C. 2921.42(A)(3).

A legislative body, commission, or board will be deemed to have authorized a public contract for purposes of R.C. 2921.42(A)(3) where the contract could not have been awarded without the board's approval. Adv. Op. No. 87-008. Accordingly, the statutory proscription applies to a public official who serves on a legislative body, commission, or board regardless of whether he participates in discussions or votes on the public contract as a member of the legislative body, commission, or board. Adv. Ops. No. 88-006, 88-008, and 91-005.

A contract is considered to be "authorized" by a public official, employee, or entity when the contract could not have been awarded without the approval of the individual, the position the individual holds, or the board on which the individual serves. Adv. Op. No. 87-004. R.C. 2921.42(A)(3) prohibits a university trustee from occupying a position of profit in the award of any university contracts, that are not competitively bid and awarded to the lowest and best bidder, if he authorized the contracts, or if they were authorized by the board of trustees, even if he abstained from the authorization. Adv. Op. No. 90-005. See also 1971 Op. Att'y Gen. No. 71-020 (holding that a Youngstown State University trustee was prohibited, by the statute that preceded R.C. 2921.42, from having an interest in the lease of real property to the university, even if he abstained from the vote of the trustees on the transaction).

R.C. 3344.03 provides that the board of trustees of CSU shall do all things necessary for the creation, proper maintenance, and successful and continuous operation of the university. Thus, in the instant situation, the CSU board of trustees would be required to decide whether to enter into partnerships with small companies for the purpose of securing SBIR grants from NIH

to increase outside-funded research. Because a partnership between CSU and BIOMECC cannot be entered into without the approval of the board of trustees of CSU, then R.C. 2921.42(A)(3) would preclude the formation of the proposed partnership unless the choice of selecting BIOMECC as a partner for securing SBIR grants from NIH to engage in medical research was a result of competitive bidding and BIOMECC had made the lowest and best bid.

It appears unlikely that the formation of the proposed partnership between CSU and small companies for the purpose of securing SBIR grants from NIH is the type of relationship that readily lends itself to competitive bidding. Therefore, the prohibition that R.C. 2921.42(A)(3) imposes upon you as a member of the board of trustees of CSU precludes CSU from entering into a partnership with BIOMECC.

Use of Position to Secure Anything of Value—R.C. 102.03(D)

In addition to R.C. 2921.42(A)(3), your question also implicates R.C. 102.03(D), which reads as follows:

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.

The term "public official or employee" is defined for purposes of R.C. 102.03 to include any appointed official or employee of any "public agency." R.C. 102.01(B). The term "public agency" is defined to include any institution or instrumentality of the state. R.C. 102.01(C). A state university is a public agency as that term is defined in R.C. 102.01(C). Adv. Op. No. 77-005. Therefore, a member of the board of trustees of a state university is an appointed official of a public agency and subject to the prohibitions imposed by R.C. 102.03(D).

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). An ownership interest in a private business and the income that is derived from the operation of the business falls under the definition of "anything of value." Adv. Ops. No. 89-010, 90-003, and 92-009. Furthermore, any beneficial or detrimental economic impact that results from a decision of a public agency is a thing of value for purposes of R.C. 102.03(D) and (E). Adv. Op. No. 90-002.

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his office to secure anything of value for himself, or any person, business, or other entity, if the relationship between the official and that person or other entity is such that the official's objectivity or independence of judgment could be impaired with respect to matters that affect the interests of that party. Adv. Ops. No. 87-009, 89-008, and 90-012. The Ethics Commission has determined that a public official or employee is not absolutely prohibited from engaging in private business activity or holding private employment so long as no conflict of interest exists between the public official's or employee's public position and private financial

interests. Adv. Ops. No. 84-009, 85-006, 86-008, and 87-006. The Commission has explained that the limitations and restrictions on the conduct of a public official or employee who engages in a private business or who holds outside employment is dependent on the facts and circumstances of each individual situation. Adv. Ops. No. 77-003 and 89-003.

In circumstances where a public official or employee is able to withdraw from consideration of matters that could pose a conflict of interest, the Ethics Commission has concluded that the public official or employee is not prohibited from engaging in a private business or holding outside employment. For example, in Advisory Opinion No. 86-007, the Commission held that a person who owns a private business that is licensed and regulated by the county board of health is not prohibited from serving as a member of the county board of health because he can abstain from participating in matters before the board that could affect his business or the financial interests of his competitors. See also Adv. Op. No. 89-006 (Ohio Department of Mental Health officials and employees accepting employment from colleges or universities that receive grants from ODMH), and Adv. Op. No. 89-010 (a Department of Agriculture employee selling services to a state institution which is regulated by the Department of Agriculture). However, the Ethics Commission has held that such a withdrawal: (1) may not interfere with the official's or employee's performance of his duties; and (2) must be approved by the appropriate officials at his public agency. Id.

In circumstances where a public official's or employee's private financial interests create an insurmountable conflict of interest and divided loyalties between his public duties and private interests, and withdrawal is not possible, the Commission has concluded that R.C. 102.03(D) prohibits him from engaging in a certain private business or holding outside employment. Adv. Ops. No. 81-007 (an employee of a county recorder's office may not conduct private title searches), 83-007 (an employee of the Board of Cosmetology may not sell products to regulated parties), 88-002 (the President of the Controlling Board may not be employed by a state agency), and 92-008 (a township clerk may not be employed by a bank that receives township funds).

In the instant situation, if CSU were to partner with BIOMECH, then R.C. 102.03(D) would prohibit you from voting, discussing, deliberating, formally or informally lobbying, or taking any other official action with respect to any matter concerning SBIR grants from NIH pending before the board of trustees of CSU that affect either your personal financial interests in BIOMECH or the interests of other small businesses that are competitors for partnership arrangements with CSU using SBIR grants from NIH to conduct biomedical research. In addition, you would be prohibited from participating in matters that directly affected CSU employees who were either engaged in research with BIOMECH or with another company that could compete with BIOMECH in conducting similar biomedical research.

Thus, your withdrawing from all matters concerning SBIR grants from NIH could substantially interfere with the performance of your duties as a member of the board of trustees of CSU and thus, create an insurmountable conflict of interest and divided loyalties between your public duties and private financial interests to the extent that the prohibition that R.C. 102.03(D) imposes upon you precludes CSU from entering into a partnership with BIOMECH.

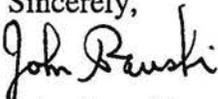
In addition, the Ethics Commission has explained that 102.03(D) prohibits an official or employee who engages in private outside employment or business activity from receiving fees for providing services rendered on projects that he has recommended in his official capacity. Adv. Op. No. 96-004. A public official or employee who advocates that his public agency proceed with a project is prohibited by R.C. 102.03(D) from receiving future compensation, employment, consulting fees, or any other thing of value from his public agency on the same project regardless of whether he resigns or retains his public position. Id. See also Adv. Ops. No. 84-012, 84-013, and 85-013. In the instant situation, because you advocated that CSU proceed with creating partnership arrangements with small companies to engage in joint medical research using SBIR grants from NIH, R.C. 102.03(D) prohibits you from deriving a financial benefit that would result from CSU entering into a partnership with BIOMECH.

Conclusion

As explained above, the prohibitions that R.C. 2921.42(A)(3) and R.C. 102.03(D) impose upon you as a member of the board of trustees of CSU precludes CSU from entering into a partnership with BIOMECH to secure grants and engage in joint research. However, the Ethics Law does not prohibit CSU from partnering with small businesses in which you have no ownership or fiduciary interests to pursue NIH grants as you have recommended.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on December 14, 2001. The Commission commends you for requesting guidance before taking any actions that could be prohibited by the Ethics Law.

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.

Sincerely,

John Rawski
Staff Attorney