

OHIO ETHICS COMMISSION

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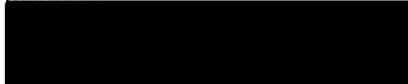


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January 24, 2002 Informal Opinion 2002-INF-0124-3

Frank E. Samuel, Jr., Chairman
Biomedical Research and Technology Transfer Commission



Dear Mr. Samuel:

In a letter received by the Ohio Ethics Commission on December 5, 2001, you have asked several questions regarding the application of the Ethics Law and related statutes to members of the Biomedical Research and Technology Transfer Commission (BRTTC). Essentially, you have asked whether the Ethics Law and related statutes prohibit entities from receiving grants from BRTTC if voting or nonvoting BRTTC board members, or members of their families, have ties to the entities. You have described a variety of connections between the board members and the entities that may request grants from BRTTC.

You have further asked whether, in the event the entities are not prohibited from receiving grants from BRTTC, board members who are connected to the entities are prohibited from participating in matters before BRTCC involving the grants.

Brief Answers

In your letter, you present ten questions to the Commission, which are briefly answered below, in the order you presented them. For a full discussion of the answer to each question, please review the portions of the advisory opinion that are referenced in each brief answer.

- (1) **Is a university precluded from having a grant application approved if a voting BRTTC member also sits on the university's board of trustees?** A voting member of BRTTC who serves on a university's board of trustees would have a prohibited interest in a grant the university received from BRTTC, unless the BRTTC member can meet each of the four requirements of R.C. 2921.42(C). See pp. 6-8, 9-10. You have also requested some guidance on the manner in which BRTTC member may conduct himself in the event the grant proposal ultimately comes before the Commission for approval. Assuming that the university trustee can meet each of the requirements of R.C. 2921.42(C) such that he would not have a prohibited interest in any grant the university receives from BRTTC, he is prohibited from taking any action, formally or informally, to secure a grant or any thing of value for the university. See pp. 13-15.

- (2) **Is a for-profit corporation precluded from having a grant application approved if a voting BRTTC member also sits on the for-profit corporation's board of directors?** A voting member of BRTTC who serves on a corporation's board of trustees would have a prohibited interest in a grant the corporation received from BRTTC, unless the BRTTC member can meet each of the four requirements of R.C. 2921.42(C). See pp. 6-8, 9-10. You have also requested some guidance on the manner in which BRTTC member may conduct himself in the event the grant proposal ultimately comes before the Commission for approval. Assuming that the director of a non-profit corporation can meet each of the requirements of R.C. 2921.42(C) such that he would not have a prohibited interest in any grant the corporation receives from BRTTC, he is prohibited from taking any action, formally or informally, to secure a grant or any thing of value for the corporation. See pp. 13-15.
- (3) **Is an entity precluded from having a grant application approved if a voting BRTTC member is an employee of that entity?** A voting member of BRTTC who is an employee of an entity that receives a grant from BRTTC would not have a prohibited interest in a grant the entity received from BRTTC unless: (1) he takes part in contract negotiations; (2) his salary is based on the proceeds of the contract; (3) he receives a share of the contract's proceeds in the form of a commission or fee; (4) his employment responsibilities include participation in the administration or execution of the contract; or (5) his tenure is dependent upon his employer receiving the award of such contract. If the BRTTC member has an interest in any of the grants received by his employer, he may be able to meet each of the four requirements of R.C. 2921.42(C). See p. 8. See also pp. 9-10, 12-13. You have also requested some guidance on the manner in which the BRTTC member may conduct himself in the event the grant proposal from his employer ultimately comes before the Commission for approval. Assuming that BRTTC member does not have an interest in his employer's contracts, or where he can meet each of the requirements of R.C. 2921.42(C) such that he is not prohibited from having such an interest in his employer's contracts should the employer receives a grant from BRTTC, he is prohibited from taking any action, formally or informally, to secure a grant or any thing of value for his employer. See pp. 13-15.
- (4) **Is an institution precluded from having a grant application approved if a voting BRTTC member sits on an advisory panel for an institution, with the possible result of the BRTTC member's participation on the advisory panel being a grant proposal submitted to the Commission?** With very rare exceptions, a member of an advisory panel of an institution will not have an interest in grants or contracts of the institution. If a BRTTC member serving on an advisory panel would have an interest in the contracts of the institution, the BRTTC member must meet each of the four requirements of R.C. 2921.42(C). See pp. 8-10. Also, R.C. 2921.42(A)(3) prohibits the BRTTC member from receiving compensation, or any other profit, for his work as a member of the

advisory panel with respect to projects that are later funded by BRTTC. See pp. 11-12. If a grant proposal from the institution ultimately comes before the Commission for approval, the BRTTC member is not prohibited from participating in matters affecting the grant proposal unless he has an interest in the grant proposal. If he has an interest in the grant proposal, and can meet the exception in R.C. 2921.42(C) such that he would not have a prohibited interest, the BRTTC member is prohibited from taking any action, formally or informally, to secure a grant or anything of value for the institution. See p. 15.

- (5) **Does the Ethics Law require a BRTTC member who recuses himself from voting on a proposal with which he is directly connected to also refrain from participating in discussion and voting on other proposals?** Generally, the BRTTC member will not be required to refrain from participating on other proposals. However, where the BRTTC member knows or has reason to know that, at the time of the consideration of a particular grant proposal, the denial of such proposal would definitely and directly result in BRTTC's award of a grant in which he, his family member, or his business associate would have an interest, R.C. 2921.42(A)(1) prohibits the BRTTC member from participating in matters before BRTTC involving the grant proposal. See p. 15.
- (6) **Does the Ethics Law prohibit a voting member of BRTTC from advising or consulting with an institution on its project, even though the BRTTC member had no association or interest with the institution, and none was contemplated, prior to the Commission vote?** The BRTTC member is prohibited from receiving payment for advising, or consulting with, an entity on a project where BRTTC authorized funding for the project while the BRTTC member served with BRTTC. See p. 12.
- (7) **Is it significant that the legislature included non-voting members on the BRTTC?** Based on the language contained in the statute describing the composition of BRTTC, the nonvoting members of BRTTC are not prohibited from serving on BRTTC where they have financial or fiduciary ties to entities that receive grants from BRTTC. See pp. 5-6. However, non-voting members of BRTTC are prohibited from participating, either formally or informally, in matters before BRTTC in which they, their family members, or their business associates have a definite and direct interest. See p. 6. See also pp. 13-15.
- (8) **Does a conflict of interest exist if the spouse of a BRTTC staff member is employed in an administrative capacity by a university research foundation, where the foundation, but not the employee, would be responsible for overseeing the administration of a BRTTC grant award?** If the spouse of the BRTTC employee has an interest in a grant awarded to the research foundation, the staff member would be prohibited from participating in the authorization of the grant. See pp. 15-16.

- (9) **Does the Ethics Law place limits on a voting BRTTC member with respect to proposals which seek to advance the technology of intellectual property where the voting member's firm holds the option to, or directly owns, the license rights to the intellectual property from two Ohio universities, and each of these universities submits a proposal for funding by BRTTC?** The Ethics Law prohibits a voting member of BRTTC from occupying a definite and direct position of profit in a grant that was issued by BRTTC while he served on BRTTC. Where the intellectual property in question is not involved in the proposal, the BRTTC member would not occupy a definite and direct position of profit, or have a definite and direct interest, in a grant to the universities, as prohibited by R.C. 2921.42(A)(3) and (A)(4). See p. 12.
- (10) **Does the Ethics Law prohibit a voting BRTTC member from serving as a paid consultant on a funded project subsequent to the approval of a grant application?** If a voting member of BRTTC were to serve as a paid consultant on a funded project subsequent to the approval of a grant application, he would occupy a definite and direct position of profit in a grant that was issued by BRTTC while he served on BRTTC, which is prohibited by the Ethics Law. See p. 12

Facts

In your letter to the Ethics Commission, you explain that BRTTC was established by Am. S.B. No. 192, and that it receives its funding from Ohio's receipts from the Master Settlement Agreement in the tobacco litigation. You cite R.C. 183.24, which provides that the purpose of BRTTC is "to periodically make strategic assessments of the types of state investments in biomedical research and biotechnology in this state that would be likely to create jobs and business opportunities and produce the most beneficial long-term improvements to the public health of Ohioans." Further, as you have noted in your letter, R.C. 183.24 provides that BRTTC is to "establish a competitive process for the award of grants that is designed to fund the most meritorious proposals and, when appropriate, provide for peer review of proposals," and that BRTTC "may make grants to individuals, public agencies, private companies or organizations, or joint ventures for any of a broad range of activities related to biomedical research and technology transfer." Finally, R.C. 183.24 provides that "priority shall be given to proposals that would leverage additional private and public funding resources."

You explain that BRTTC, as part of its mission, has conducted a strategic assessment of the biomedical research and biotechnology developments status within Ohio. You state that BRTTC intends to award grants by the second quarter of 2002 to "entities that further its mission." You explain that, as part of the grant-issuing process, BRTTC will engage the services of an independent contractor from outside of Ohio to establish and conduct an impartial review of grant proposals. You state that the contractor will then recommend to the Commission those grant proposals that hold the greatest merit, as determined by disinterested peer evaluators, and that best conform to the criteria established by the General Assembly. You explain that BRTTC has approximately \$30M available to award in grants for the cycle ending June 30, 2002, and that it intends to make a few

awards of relatively large sums (i.e., \$5M to \$10M grants). You note that R.C. 183.24 requires that the Commission adopt rules under R.C. Chapter 119. "regarding conflicts of interest in the awarding of grants."

Members of BRTTC

R.C. 183.20 provides that BRTTC shall consist of twenty-five members as follows:

- (A) The chancellor of the board, director of development, director of health, and executive director of the commission on minority health, who shall serve as ex officio members;
- (B) The director of budget and management, who shall serve as an ex officio member, or the director's designee;
- (C) Twelve members, who shall not be or represent potential recipients of grants from the commission, appointed as follows:
 - (1) Six members, appointed by the governor, at least two of whom are experts in commercializing the results of biomedical research;
 - (2) Two members appointed by the speaker of the house of representatives;
 - (3) One member appointed by the minority leader of the house of representatives;
 - (4) Two members appointed by the president of the senate;
 - (5) One member appointed by the minority leader of the senate.
- (D) Eight nonvoting members appointed by the governor, representing Ohio's biomedical research institutions. (Emphasis added.)

Application of Ethics Law and Related Statutes to Nonvoting BRTTC Members

R.C. 183.20(C) provides that the twelve voting members of BRTTC "shall not be or represent potential recipients of grants from the commission." In setting forth the composition of the voting membership of BRTTC, the General Assembly has made it clear that voting members cannot be grantees or representatives of grantees. The restriction contained within R.C. 183.20(C) is significant in that it applies only to voting members of BRTTC. In setting forth the requirements for the nonvoting members of BRTTC, R.C. 183.20(D) does not impose a similar restriction. Further, R.C. 183.20(D) provides that the nonvoting members are to be "representing Ohio's biomedical research institutions."

In interpreting a statute, a court first examines its express terms. Freedom Rd. Found. v. Ohio Dept. of Liquor Control (1997), 80 Ohio St.3d 202, 206, 685 N.E.2d 522, 525. Second, a court gives effect to the words used and does not insert words not used. State ex rel. Cuyahoga Cty. v. State Personnel Bd. of Review (1998), 82 Ohio St.3d 496, 499, 696 N.E.2d 1054, 1056. The Ethics Commission adheres to these same basic rules of statutory construction.

Applying these rules of statutory construction to the statutes applicable to the situation you have described, the Commission concludes that, based on the clear language employed by the legislature in R.C. 183.20(D), and a lack of a prohibition similar to that found in R.C. 183.20(C), the nonvoting members of the BRTTC are not prohibited from serving on BRTTC where they have financial or fiduciary ties to entities that receive grants from BRTTC. On the other hand, the language of R.C. 183.20(C) supports the conclusion that voting members of BRTTC are prohibited, based on the application of R.C. 2921.42(A)(4), from serving on BRTTC where they have financial or fiduciary ties to entities that receive grants from BRTTC unless the voting members can meet each of the four requirements of R.C. 2921.42(C), as described below.

Accordingly, it would not be appropriate for the Commission to conclude that provisions of the Ethics Law and related statutes prohibit an entity with which a nonvoting member of BRTTC has financial or fiduciary ties from receiving a grant from BRTTC. However, this limited exception based on legislative intent cannot be applied so freely as to permit nonvoting members to use their influence in any way in matters affecting the financial interests of the entities that they serve. In summary, R.C. 2921.42(A)(4) does not prohibit an entity with which a nonvoting member of BRTTC is connected from receiving a grant from BRTTC. R.C. 2921.42(A)(1) and 102.03(D) do prohibit a nonvoting member from participating in a matter that affects the interests of such an entity in the same manner as these statutes prohibit a voting member from participating in such a matter.

Application of Ethics Law and Related Statutes to Voting BRTTC Members

In your letter to the Ethics Commission, you have specifically asked the Commission to interpret the phrase in R.C. 183.20(C) which provides that the voting members of BRTTC "shall not be or represent potential recipients of grants from the Commission." While the Ethics Commission does not have the statutory authority to apply R.C. 183.20(C) to the situations you have described, it appears that the General Assembly intended that voting members would not be grantees or representatives of grantees. The application of the provisions of law within the Ethics Commission's jurisdiction, as described below, appears to be consistent with the restriction set forth in R.C. 183.20(C).

Having an Interest in a BRTTC Grant—R.C. 2921.42(A)(4)

The situations you have described and questions you have posed involving board members who have various ties to entities that would receive grants from BRTTC implicates R.C. 2921.42(A)(4), 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" includes any person who is an elected or appointed officer of the state. R.C. 2921.01(A). The Ethics Commission has explained that members of state boards and commissions are officers for purposes of R.C. 2921.01(A) if their board or commission exercises the "sovereign power" of government. In Advisory Opinion No. 77-004, the Commission held that "[s]overeign power includes the exercise of a duty entrusted to one by virtue of statute or some other public authority, a duty that is not merely clerical, but that involves discretionary, decision-making qualities."

As noted above, BRTTC has the statutory authority to "make grants to individuals, public agencies, private companies or organizations, or joint ventures for any of a broad range of activities related to biomedical research and technology transfer." R.C. 183.24. Based on the nature of its statutory authority, BRTTC exercises the "sovereign power" of government. Therefore, its members are appointed state officers subject to the prohibitions of R.C. 2921.42.

The term "public contract" includes any purchase or acquisition of property or services by or for the use of any political subdivision. R.C. 2921.42(G)(1). The Commission has stated that a public agency's acquisition of property or services through its issuance of a grant or a loan is a public contract. Adv. Ops. No. 85-002, 87-003, 89-006, and 92-014. Therefore, BRTTC's issuance of a grant is a public contract.

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. Ops. No. 81-008 and 92-017. R.C. 2921.42(A)(4) prohibits a public official from having a definite and direct pecuniary or fiduciary interest in a public contract with his own governmental agency. Adv. Ops. No. 99-004 (fiduciary interest) and 2000-02 (pecuniary interest).

In your letter to the Ethics Commission, you have described several situations where members of BRTTC have various ties to entities that may receive grants from BRTTC. In order to clearly state whether the individuals in the several situations you have described would have a prohibited interest in a BRTTC grant, it is necessary to examine the situations more fully.

Member of a University Board of Trustees or a For-Profit Corporation Board of Directors

You have described two separate situations in which one voting BRTTC member sits on the board of trustees of a university that applies for a grant from BRTTC and one voting member sits on the Board of Directors of a for-profit corporation that applies for a grant. The Ethics Commission has concluded that a member of a governing board of a private or public agency has a fiduciary interest in the contracts of the agency. See Adv. Ops. No. 81-003 (private agency) and 99-004 (public agency). Therefore, a member of a public board would have a fiduciary interest in the contracts of the board. In the situation you have described, a BRTTC member who sits on the board of trustees of a university that receives a grant from BRTTC has a prohibited interest in that grant

unless the BRTTC member can meet the exception provided by R.C. 2921.42(C), as discussed below.

Further, a member of the governing board of a for-profit corporation may have both a fiduciary and a pecuniary interest in the contracts of the agency. Adv. Op. No. 81-003. Therefore, a BRTTC member who sits on the board of directors of a for-profit corporation that receives a grant from BRTTC has a prohibited interest in that grant unless the BRTTC member can meet the exception provided by R.C. 2921.42(C), as discussed below.

Employee of a Grant Applicant

You have described a situation involving a voting BRTTC member who is an employee of an entity that applies for a grant from BRTTC. The Commission has stated that an employee does not have an interest in his employer's contracts unless one or more of the following situations applies: (1) the employee takes part in contract negotiations; (2) his salary is based on the proceeds of the contract; (3) he receives a share of the contract's proceeds in the form of a commission or fee; (4) his employment responsibilities include participation in the administration or execution of the contract; or (5) the employee's tenure is dependent upon his employer receiving the award of such contract. Adv. Ops. No. 86-005, 89-006, and 89-008. For example, a member of the faculty of a particular university college or department would not have an interest in a contract or grant awarded to another college or department of the university, unless one of these five factors were present. If any of these five situations exists, the employee would have a prohibited interest in his employer's grant from BRTTC, unless he can meet the exception provided by R.C. 2921.42(C), as discussed below.

Member of an Advisory Panel to a Grant Applicant

You have described a situation involving a voting BRTTC member who is a member of an advisory panel for an institution that submits a grant proposal to BRTTC. In most cases, an individual who serves on an advisory panel for an institution would not have either a pecuniary or fiduciary connection to the institution, and would not have a prohibited interest in a grant issued by BRTTC to the institution.

In some rare cases, where an individual who serves as an advisor to a board has been entrusted with the power to make binding decisions on behalf of the board, or has been given the same powers as those held by board members, then the advisor would act in a fiduciary capacity on behalf of the board and would have a fiduciary interest in the board's contracts. See 2000 Op. Att'y Gen. No. 00-015 (the prohibition against having a fiduciary interest prevents an individual from holding "positions of authority" with two entities that contract with one another). See also Adv. Op. No. 88-002.

Therefore, in the first two situations you describe, the board members would have an interest in any grant awarded by BRTTC to the entities with which they are connected. Whether the BRTTC board members in the third and fourth situations you describe would have an interest in a grant awarded by BRTTC depends on the specific facts. Any BRTTC member who has a

pecuniary or fiduciary interest in the contracts of BRTTC by virtue of his position with an entity that receives grants from BRTTC would have a prohibited interest in any contract, including a grant, issued by BRTTC to the entity that he serves. There is, however, an exception to R.C. 2921.42(A)(4), set forth in R.C. 2921.42(C), as discussed below, that the BRTTC member may be able to meet.

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

R.C. 2921.42(C) provides the following exception to the prohibition of R.C. 2921.42(A)(4):

- (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 case, 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 exception. Adv. Ops. No. 83-004, 84-011, and 88-008. Divisions (C)(2) and (C)(4) are of particular note. Division (C)(2) requires that the supplies or services obtained through the grant be unobtainable elsewhere at the same or lower cost, or furnished as part of a continuing course of dealing. Division (C)(4) requires that the transaction be conducted at arm's length, that BRTTC has full knowledge of a member's interest in a BRTTC grant, and that the BRTTC member take no part in the deliberations and decisions of BRTTC with respect to the grant.

Continuing Course of Dealing or Unobtainable Elsewhere—R.C. 2921.42(C)(2)

Division (C)(2) can be met by showing a continuing course of dealing established before the BRTTC member became connected with BRTTC. However, in the situation you have described, because the BRTTC members' service on the board predated the issuance of grants to the entities with which they are affiliated, the continuing course of dealing prong of Division (C)(2) cannot be met. Therefore, a BRTTC member who has a prohibited interest in a grant issued by BRTTC must show by some objective standard that the services provided in return for the issuance of the grant are "unobtainable elsewhere for the same or lower cost."

In order to meet the unobtainable elsewhere prong of the exception, a BRTTC member must show that BRTTC has accepted and approved applications for grants in a fair and open process in which all interested and qualified applicants for grant money, to perform a specific service, have an equal opportunity to be considered. Adv. Op. No. 2001-02. If BRTTC can and will fully support all interested and qualified applicants for grants to perform those services, a BRTTC member may be able to demonstrate that the services are unobtainable elsewhere for the same or lower cost. See generally Adv. Op. No. 93-008. If BRTTC has determined that it requires a particular service, through a fair and objective process, and the only application for a grant to perform that service comes from an entity with which a BRTTC member has a financial or fiduciary relationship, the BRTTC member may also be able to demonstrate that BRTTC would be unable to obtain that particular service from any other source for the same or lower cost.

Full Knowledge and No Participation—R.C. 2921.42(C)(4)

Division (C)(4) requires that the transaction be conducted at arm's length, that BRTTC has full knowledge of a member's interest in one of its grants, and that the BRTTC member takes no part in the deliberations and decision of BRTTC with respect to its issuance of a grant in which he has an interest. As discussed below, the BRTTC member cannot vote, discuss, deliberate, or use his position, in any way, with respect to any BRTTC grant in which he has an interest. See also R.C. 2921.42(A)(1).

Other Requirements of R.C. 2921.42(C)

Where a BRTTC member can meet the requirements imposed by Divisions (C)(2) and (C)(4), he must, in addition, comply with the other provisions of R.C. 2921.42(C). R.C. 2921.42(C)(1) requires that the services are necessary purchases for BRTTC. Division (C)(3) requires that the treatment provided by the entity with which the BRTTC member is affiliated, to BRTTC, is as good as, or better than, the treatment provided by the entity to its other clients or customers in similar transactions. If all of the requirements of R.C. 2921.42(C), as discussed in this opinion, are met, the provisions of R.C. 2921.42(A)(4) do not apply to a BRTTC grant in which a BRTTC member has an interest.

Profiting From a BRTTC Grant—R.C. 2921.42(A)(3)

Several of the situations you have presented in your letter to the Ethics Commission also implicate R.C. 2921.42(A)(3), which provides that no public official shall knowingly:

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.

As stated above, a member of BRTTC is subject to the prohibitions of R.C. 2921.42. As is also stated above, BRTTC's acquisition of services through the issuance of a grant is a public contract for purposes of the prohibitions of R.C. 2921.42.

A public official is considered to have "authorized" a public contract for purposes of R.C. 2921.42(A)(3) where the public contract could not have been awarded without the approval of the public official, the board of which he is a member, or the position on which he sits. Adv. Ops. No. 87-004, 92-008, and 92-012. Therefore, a member of BRTTC will be considered to have authorized any contract that was awarded pursuant to the approval of BRTTC while he was a member thereof, regardless of whether the board member abstained from matters before BRTTC involving the authorization of the contract. R.C. 2921.42(A)(3) prohibits any BRTTC member from profiting from any contract that was awarded by BRTTC while he was a member thereof unless the contract is awarded pursuant to competitive bidding to the lowest and best bidder.

R.C. 2921.42(A)(3) does not require that a public official "[h]ave an interest in the profits or benefits of a public contract," but prohibits a public official from "occupy[ing] any position of profit in the prosecution of a public contract," under specific circumstances. See Adv. Op. No. 92-013. Therefore, the issue is whether any of the individuals in the situations you have described would "occupy a position of profit" in a grant issued by BRTTC.

Position of Profit

The Ethics Commission has stated that the position of profit that a public official occupies in the prosecution of a public contract for purposes of R.C. 2921.42(A)(3) must be definite and direct. See 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. Ops. No. 92-013 and 92-017. You describe four situations where R.C. 2921.42(A)(3) may be applicable.

First, you have described a situation involving a BRTTC member who would sit on an advisory panel to an institution, and the institution may submit a grant proposal to BRTTC as a result of the advisory panel's participation. Generally, a person who serves on an advisory panel to an institution would not occupy a position in grants or contracts of the institution. However, R.C. 2921.42(A)(3) would prohibit the BRTTC member from receiving compensation, or any other

profit, for his work as a member of the advisory panel with respect to projects that are later funded by BRTTC.

Second, you have described a situation where a BRTTC member's firm holds the option to, or directly owns, the license rights to intellectual property from two Ohio universities, and each of these universities submits a proposal for funding by BRTTC. You state that the proposal will seek to advance the technology of the intellectual property. In Advisory Opinion No. 90-005, the Ethics Commission stated that an individual who has an ownership interest in a company occupies a position of profit in the contracts of that company. Here, while the BRTTC member's company does not have a direct contractual relationship with BRTTC, its contractual relationship with the universities would be directly affected by the funding that BRTTC would provide to the universities. Therefore, based on the situation as you have described it, the BRTTC member would occupy a definite and direct position of profit in BRTTC's grant to the universities, which would be prohibited by R.C. 2921.42(A)(3) where the BRTTC member served on BRTTC at the time it authorized the issuance of funds to the universities. In addition, unless he can meet the exception set forth in R.C. 2921.42(C), as described above, R.C. 2921.42(A)(4) prohibits the BRTTC member from having a definite and direct financial interest in a BRTTC grant. In the situation you have described, the BRTTC member would have such a financial interest in a BRTTC grant.

You have asked whether the result of the application of the law would be the same where the intellectual property is not involved in the proposal. In response to your follow-up question, where the intellectual property is not involved in the proposal, the BRTTC member would not occupy a definite and direct position of profit, or have a definite and direct interest, in a grant to the universities, as prohibited by R.C. 2921.42(A)(3) and (A)(4).

Third, you have described a situation where a BRTTC member would serve as a paid consultant on a funded project subsequent to BRTTC's approval of a grant application. Again, R.C. 2921.42(A)(3) prohibits the BRTTC member from receiving payment for advising, or consulting with, an entity on a project where BRTTC authorized funding for the project while the BRTTC member served with BRTTC. In addition, unless he can meet the exception set forth in R.C. 2921.42(C), as described above, R.C. 2921.42(A)(4) prohibits the BRTTC member from having a definite and direct financial interest in a BRTTC grant, regardless of whether he served on BRTTC at the time the grant was awarded. In the situation you have described, the BRTTC member would have such a financial interest in a BRTTC grant.

Finally, the situation that you have described involving the BRTTC member who serves as an employee of an entity that applies for a grant from BRTTC could implicate R.C. 2921.42(A)(3) if the employee would occupy a position of profit in the grant issued to his employer. The employee would occupy a position of profit in a grant issued to his employer where: (1) the establishment or operation of the company with which he serves is dependent upon receipt of the grant; (2) the creation or continuation of the employee's position with the company is dependent upon the award of the grant; (3) the grant moneys would be used by the company to compensate the employee or as a basis for the employee's compensation; or (4) the employee would otherwise profit from the grant. Adv. Ops. No. 87-004 and 88-008. R.C. 2921.42(A)(3) prohibits the employee from profiting, in any of the ways described above, from a grant that was authorized by

BRTTC while he was a member thereof. In addition, as stated above, R.C. 2921.42(A)(4) prohibits the employee from having an interest in a grant authorized by BRTTC unless he can meet the exception provided by R.C. 2921.42(C).

Participating in Matters Involving BRTTC Funding—R.C. 2921.42(A)(1) and 102.03(D)

The questions you have posed involving whether voting members of BRTTC would be prohibited from participating in funding matters before BRTTC that would affect the financial interests of the entities with which they or their family members serve implicates R.C. 2921.42(A)(1) and 102.03(D). 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.

As stated above, a member of BRTTC is subject to the prohibitions of R.C. 2921.42(A)(1). As also stated above, BRTTC's acquisition of services through the issuance of a grant is a public contract for purposes of the prohibitions of R.C. 2921.42.

R.C. 2921.42(A)(1) prohibits a public official from "authorizing" a public contract in which either he, a family member, or a business associate has an interest, or employing the "authority or influence of his office" to secure authorization of a public contract in which he, his family member, or his business associate has an interest. The exact actions prohibited by R.C. 2921.42(A)(1) turn on what constitute actions that "authorize" and "employ the authority or influence of his office." Adv. Op. No. 98-004.

The Commission has stated 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 position in which the official serves. See 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 continuation, implementation, or terms and conditions of a public contract in which either he, his family member, or his business associate has an interest. Adv. Op. No. 92-003. The prohibition extends beyond the initial award of the public contract and prohibits a public official from participating in any matter or decision that would affect the continuation, implementation, or terms and conditions of the public contract. See generally Adv. Ops. No. 82-003, 89-005, and 92-012. These matters and decisions include, but are not limited to, the authorization and approval of the grant to the entity with which he is connected, and the renewal, modification, termination, or renegotiation of the grant's terms.

R.C. 2921.42(A)(1) also prohibits a public official from employing the "authority or influence of his office" to secure authorization of a public contract in which he, his family member, or his business associate has an interest. A public official is prohibited from exercising the power and influence inherent in his public position to affect the decisions of other public officials and

employees, particularly those employees in subordinate positions, in matters involving a contract or grant in which he, his family member, or his business associate has an interest. Adv. Op. No. 94-002. See also R.C. 102.03(D), set forth below.

Therefore, where a BRTTC member, his family member, or his business associate has a financial or fiduciary interest in a BRTTC grant, the BRTTC member must abstain from participating and voting in official proceedings of BRTTC regarding that grant. The BRTTC member is prohibited from discussing, deliberating or recommending that BRTTC authorize the provision of funds to an individual or entity where the BRTTC member, his family member, or his business associate has an interest in the provision of funds. R.C. 2921.42(A)(1) would prohibit BRTTC members from participating in the authorization of grants, regardless of whether they could meet the exception provided by R.C. 2921.42(C).

R.C. 102.03(D) is also applicable to your questions regarding the participation of BRTTC members in certain matters. R.C. 102.03(D) provides:

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.

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." As stated above, members of BRTTC are appointed officers of the state. The Commission has stated that a person who is an appointed officer is appointed to an office. See Adv. Op. No. 92-001. Therefore, members of BRTTC are appointed to an office of the state and are subject to the prohibitions of R.C. 102.03.

A definite and direct pecuniary benefit, such as that which would accrue to an entity as a result of receiving a grant from BRTTC, is considered to be a thing of value under R.C. 102.03(D). Adv. Ops. No. 79-008, 86-007, and 89-005. In the situations you have described, the relationship between a BRTTC member and an entity that he serves as an officer, employee, or board member is such that the BRTTC member's objectivity and independence of judgment could be impaired with respect to the interests of the entity. Therefore, R.C. 102.03(D), as well as R.C. 2921.42(A)(1), prohibits a BRTTC member from using the authority or influence of his official position with regard to any matter that would provide a definite and direct pecuniary or fiduciary benefit to him or the entity that he serves as an officer, employee, or board member. These matters include, but may not be limited to, matters involving the provision of funds to the entity the BRTTC member serves and matters involving the provision of funds to other entities where the BRTTC member knows or has reason to know that the decision regarding whether to provide funds to the other entity would directly affect the financial interests of the entity that he serves.

In addition, 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. R.C. 102.03(D) prohibits a public official or employee who engages in outside employment or business activity from using relationships developed while performing his public duties to secure a favorable decision or action by another public official or employee regarding his private interests or the interests of his business associates. Adv. Op. No. 96-004.

A BRTTC member has access to BRTTC members and other officials and employees which is unique to that enjoyed by individuals who do not serve in such office. R.C. 102.03(D) prohibits a BRTTC member from using his unique position and access, as an appointed member of BRTTC, and his working relationship with other public officers and employees, to secure a BRTTC grant or any other thing of value for him or the entity that he serves as an officer. A BRTTC member is prohibited from formally and informally recommending or lobbying for the entity that he serves as an officer, employee, or board member, and from taking any other formal or informal action to persuade BRTTC officials and employees to approve the provision of funding, contracts, or other things of value to him or the entity he serves as an officer, employee, or board member.

Application of R.C. 2921.42(A)(1) and 102.03(D) to Specific Situations

In your letter to the Ethics Commission, you ask whether a member of BRTTC should refrain from participating in discussion and voting on proposals aside from those with which he has a direct connection. In response to your question, R.C. 2921.42(A)(1) and 102.03(D) prohibit a BRTTC member from participating, either formally or informally, in any grant proposal if he, a family member, or a business associate has a definite and direct interest in the outcome of the decision. Where the BRTTC member knows or has reason to know that, at the time of the consideration of a particular grant proposal, the denial of such proposal would definitely and directly result in BRTTC's award of a grant in which he, his family member, or his business associate would have an interest, R.C. 2921.42(A)(1) prohibits the BRTTC member from participating in matters before BRTTC involving the grant proposal.

You have also asked whether a BRTTC member who sits on an advisory panel for an institution that submits a grant proposal to BRTTC, as described above, is prohibited from participating in matters before BRTTC involving that grant proposal. As stated above, R.C. 2921.42(A)(1) prohibits a BRTTC member from participating in the authorization of a grant in which he, a family member, or a business associate has an interest. Therefore, if the BRTTC member would have a fiduciary relationship with the institution as an advisor to the institution, such that he would have an interest in the contracts of the institution, as discussed above, R.C. 2921.42(A)(1) would prohibit him from participating in the authorization of a grant to the institution.

Application to BRTCC Staff Member

You have asked whether a BRTTC staff member is prohibited from participating in a matter where the spouse of the staff member is employed in an administrative capacity by a university

research foundation that would be responsible for overseeing the administration of, but not directly administering, a BRTTC grant award. R.C. 2921.42(A)(1) prohibits a BRTTC staff member from participating in the authorization of a contract, including a grant, in which a family member has an interest. R.C. 102.03(D) prohibits a BRTTC staff member from using his position in any way to secure anything of value, including a grant, for a family member. Therefore, assuming that the staff member has the authority to participate in the administration and award of BRTTC grants, the staff member would be prohibited from participating in the authorization of a grant where: (1) his spouse takes part in grant negotiations on behalf of the research foundation; (2) his spouse's salary is based on the proceeds of the grant; (3) his spouse receives a share of the grant's proceeds in the form of a commission or fee; (4) his spouse's employment responsibilities include participation in the administration or execution of the grant; or (5) his spouse's tenure with the research foundation is dependent upon the award of such grant.

Conclusion

As explained more fully above, based on the explicit legislative directive in R.C. 183.20(C) and (D), nonvoting members of BRTTC are not prohibited from having a financial or fiduciary interest in a grant issued by BRTTC. However, R.C. 2921.42(A)(1) and 102.03(D) restrict the actions of a nonvoting member of BRTTC with respect to entities with which he has fiduciary or financial ties in the same manner that these statutes restrict the actions of a voting member of BRTTC.

Voting members of BRTTC are subject to the provisions of the Ethics Law and related statutes, as well as the restriction set forth in R.C. 183.20(C) which is consistent with the application of the Ethics Law and related statutes. R.C. 2921.42(A)(4) prohibit any voting member of BRTTC from having an interest in grants awarded by BRTTC, unless he can meet the exception set forth in R.C. 2921.42(C). R.C. 2921.42(A)(3) prohibits a BRTTC member from occupying a definite and direct position of profit in a BRTTC grant authorized by BRTTC while he is a member thereof.

R.C. 2921.42(A)(1) prohibits a voting or non-voting BRTTC member, or BRTTC staff member, from using his position to secure authorization of a grant in which he, his family member, or his business associate has a definite and direct financial or fiduciary interest. In addition, R.C. 102.03(D) prohibits a BRTTC member, or BRTTC staff member, from using his position to secure a definite and direct financial or fiduciary benefit for himself, his family member, or his business associate. Brief answers to the question you presented are found at the beginning of this opinion.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 24, 2002. The Commission commends you for requesting prospective guidance on behalf of the members of the Biomedical Research and Technology Transfer Commission.

Frank E. Samuel, Jr.

January 24, 2002

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The opinion 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. If you have any questions or desire additional information, please feel free to contact me or Jennifer Hardin, Chief Advisory Attorney.

Sincerely,

A handwritten signature in black ink, appearing to read "David E. Freel". The signature is written in a cursive style with a large initial "D" and "F".

David E. Freel
Executive Director