

OHIO ETHICS COMMISSION

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November 29, 2002

Informal Opinion 2002-INF-1129

Luceille Fleming, Director
Ohio Department of Alcohol and
Drug Addiction Services



Dear Ms. Fleming:

In a letter received by the Ohio Ethics Commission on June 14, 2002, you have asked several questions regarding the application of the Ethics Law and related statutes to employees of the Ohio Department of Alcohol and Drug Addiction Services (ODADAS) who also serve with non-profit organizations.

Brief Answer

As explained more fully below, R.C. 2921.42(A)(4) generally prohibits officials and employees of ODADAS from serving as board members, officers, or other fiduciaries of non-profit organizations that receive grants from ODADAS unless, as discussed below, an exception to the prohibition can be met. Officials and employees of ODADAS are not prohibited from being members or volunteers of, or serving in an advisory capacity for, non-profit organizations provided that such employees do not have a financial interest in funds provided by ODADAS to the non-profit organizations they serve.

In addition, if the ODADAS employee can meet the exception in R.C. 2921.42(C), and serve as an officer, board member, or other fiduciary of a non-profit organization that receives funds from ODADAS, the Ethics Law prohibits the employee from participating in the award of a grant to the non-profit organization.

Facts

In your letter to the Ethics Commission, you explain that staff at all levels within ODADAS are frequently asked to join non-profit organizations whose missions relate to the treatment or prevention of alcohol and other drug addiction. You state that these organizations are both local and national. You also state that ODADAS has always encouraged staff to join professional and other service organizations and to take leadership roles in those organizations.

You explain that, for some staff, the work of the non-profit organizations relates directly to their work at ODADAS. You also explain that, for others, the non-profit organizations are organizations related to the treatment or prevention of alcohol and other drug addiction and are of interest to staff but not directly related to their jobs at ODADAS.

You state that ODADAS has the authority to provide funding for non-profit organizations. You further state that such funding for the organizations may be in the form of grants used to offset some of the organizations' costs for conferences and trainings both in, and outside of, Ohio. You explain that ODADAS may, in some cases, pay travel expenses for employees to attend and make presentations at these conferences and trainings pursuant to their leadership role in the non-profit organization.

You ask whether an ODADAS employee is prohibited from serving as an officer, board member, committee chair, or in any other decision-making capacity for a non-profit organization that receives funds from ODADAS. You also ask whether an ODADAS employee is prohibited from serving in an advisory capacity for a non-profit organization that receives funds from ODADAS. Finally, you ask whether, in the event they are permitted to serve on non-profit organizations, ODADAS employees may do so on state time and at state expense.

Having a Financial or Fiduciary Interest in an ODADAS Grant—R.C. 2921.42(A)(4)

Your questions implicate 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.

R.C. 2921.01(A) defines the term "public official" for purpose of R.C. 2921.42 as any elected or appointed officer, employee, or agent of the state or any political subdivision thereof. Therefore, officials and employees of ODADAS are "public officials" who are subject to the prohibitions of R.C. 2921.42.

R.C. 2921.42(A)(4) prohibits a public official from having an interest in the profits or benefits of a public contract entered into by or for the use of the public agency with which he is employed. Ohio Ethics Commission Advisory Opinion No. 81-003. An interest that is prohibited under R.C. 2921.42(A)(4) must be definite and direct, and may be either pecuniary or fiduciary. Adv. Ops. No. 78-005 and 81-008. An officer of a non-profit corporation has a definite and direct fiduciary interest in the corporation's contracts. Adv. Ops. No. 81-005 and 87-003. Also, a board member, committee chair, or any other individual who serves in a decision-making capacity for a non-profit organization has a definite and direct fiduciary interest in the corporation's contracts. See Adv. Ops. No. 81-003 (board member), 81-008 (board member), and 88-008 (chief administrative official). See also Greater Cleveland Council Boy Scouts of America v. Williams, Cuyahoga App. No. 40020, unreported, 1979 Ohio App. LEXIS 11010 (July 26, 1979) (committee chair).

R.C. 2921.42(G)(1)(a) defines the term "public contract" as the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of a political subdivision or any of its agencies or instrumentalities. In the instant situation, the issuance of grants, by ODADAS, to non-profit organizations, to offset the costs for conferences and trainings are public contracts for purposes of R.C. 2921.42(A)(4). State v. Lordi, 140 Ohio App.3d 561, 568 (2000), discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001).

Therefore, R.C. 2921.42(A)(4) prohibits officials and employees of ODADAS from serving as board members, officers, or other fiduciaries of non-profit organizations that receive grants from ODADAS unless, as discussed below, an exception to the prohibition can be met. Officials and employees of ODADAS are not prohibited from serving in an advisory capacity for a non-profit organization provided that such employees do not have a financial interest in funds awarded by ODADAS to the non-profit organization they serve,¹ in which case such employees would also need to meet an exception to R.C. 2921.42(A)(4).

Exception Provided by R.C. 2921.42(C)

Division (C) of Section 2921.42 provides an exception to the prohibition of Division (A)(4), and would permit an ODADAS employee to serve in a fiduciary role with a non-profit organization that receives a grant from ODADAS, if 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 servant'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;

¹ An ODADAS employee would have a financial interest in a grant issued to the non-profit organization he serves in an advisory capacity in the following situations: (1) his responsibilities at the non-profit organization include preparing, submitting, or negotiating grants with ODADAS; (2) he would perform work or receive compensation under the grant; (3) his tenure, compensation, or other benefits received from the non-profit organization would be based or dependent upon the ODADAS grant; or (4) the facts otherwise indicate that he would have a definite and direct pecuniary or fiduciary interest in the ODADAS grant as a result of his position with the non-profit organization. Adv. Op. No. 89-006.

- (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 servant, member of his family, or business associate, and the public servant takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

Whether a particular transaction meets the criteria of Division (C) depends upon the facts and circumstances of each individual case. See Adv. Op. No. 87-003. The criteria are strictly construed against the public official, and the burden is on the official to demonstrate that he is in compliance with all of the requirements of the exception. See Adv. Ops. No. 83-004 and 84-011.

It is of particular importance that an ODADAS employee be able to demonstrate that he is in compliance with Division (C)(2) of Section 2921.42, which requires that the supplies or services that would be provided to the non-profit organization in return for receipt of the grant "are unobtainable elsewhere for the same or lower cost." If it can objectively be shown that the service being offered by the non-profit organization is unique or not available elsewhere, or is not available elsewhere at the same or lower cost, then the requirement of Division (C)(2) may be met. See Adv. Op. No. 87-003. Although the services provided by the non-profit organizations in the situation you have described would generally not be provided through a competitive bidding process, selection through an open and fair competitive bidding process is an indication that this prong of the exception is met. See Adv. Ops. No. 83-004, 87-003, and 88-001.

Division (C)(1) requires that ODADAS must be able to reasonably and objectively demonstrate that the services provided by the non-profit organizations are necessary services for ODADAS, and Division (C)(3) requires that the treatment accorded ODADAS by the non-profit organization that provides services under the grant is either preferential to, or the same as, that accorded to other parties to which the non-profit organization provides similar services.

Division (C)(4) requires that the transaction be conducted at arm's length, with knowledge by ODADAS that its employee serves in a fiduciary role with the non-profit organization, and that the ODADAS employee take no part in the deliberations or decision of ODADAS with respect to the grant awarded to the non-profit organization that he serves in a fiduciary role. See also R.C. 2921.42(A)(1) and 102.03(D) (discussed below).

Official Capacity Exception

There is a second exception to the prohibition of R.C. 2921.42(A)(4) that may be met in the situation that you have described. The Ethics Commission has recognized an "official capacity" exception to the prohibition imposed by R.C. 2921.42(A)(4) in instances where a public official of an agency that awards a contract or grant to another agency also serves with the recipient agency in his official capacity as a representative of the awarding agency's interests. See Adv. Ops. No. 83-010, 84-001, and 93-012. See also Adv. Op. No. 92-002.

The Ethics Commission has explained that whenever a public official serves in a fiduciary role with a non-profit corporation in his official capacity, "there would not be a dual interest in which private considerations would distract from his serving the public interest." Adv. Op. No. 84-001. In Advisory Opinion No. 84-001, the Commission established four criteria that must be met in order for a public official to be deemed to serve in his official capacity:

- (1) the governmental entity must create or be a participant in the non-profit corporation;
- (2) any public official or employee connected with the jurisdiction . . . may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity;
- (3) the public official or employee must be formally instructed to represent the governmental entity and its interests;
- (4) there must be no other conflict of interest on the part of the designated representative.

See also Adv. Op. No. 96-005; Ohio Att'y Gen. Ops. No. 91-007 and 96-007. It should be noted that the "official capacity" exception is not a routine or unimportant determination, but one that is used to recognize significant public policy interactions between the public and private sector.

Accordingly, R.C. 2921.42(A)(4) would not prohibit an employee of ODADAS from serving in a fiduciary role with a non-profit organization that receives a grant from ODADAS provided that ODADAS created or is a participant in the organization, and the employee is: (1) designated to represent ODADAS; (2) formally instructed to represent ODADAS and its interests; and (3) not otherwise subject to a conflict of interest. Adv. Op. No. 96-005.

Authorizing an ODADAS Contract—R.C. 2921.42(A)(1)

Even where an exception to the prohibition of R.C. 2921.42(A)(4) can be met, so that an employee of ODADAS can serve as an officer, board member, or other fiduciary of a non-profit organization that receive funds from ODADAS, the prohibitions of Division (A)(1) of Section 2921.42 must still be observed. R.C. 2921.42(A)(1) prohibits an ODADAS employee from authorizing, or using the authority or influence of his position with ODADAS to secure authorization of, an ODADAS grant to the non-profit organization he serves. The ODADAS employee is prohibited from taking any official action, including discussions, deliberation, or making recommendations to ODADAS, regarding the award of grants to the non-profit organization he serves in a fiduciary role. The ODADAS employee is also prohibited from exercising the power and influence inherent in his public position to affect the decisions of other ODADAS officers and employees to approve the award of grants to the non-profit organization that he serves as an officer or other fiduciary. See also R.C. 102.03(D) and (E), set forth below.

Securing or Soliciting a Thing of Value for a Non-Profit—R.C. 102.03(D) and (E)

R.C. 102.03(D) and (E), which prohibit a public official or employee from soliciting, or using the authority or influence of his office or employment to secure, anything of value that is of such character as to manifest a substantial and improper influence upon him with respect to his duties, also apply in this situation. R.C. 102.03(D) and (E) prohibit a public official from participating in any matter that would provide a benefit to an organization that he serves as an officer or in another fiduciary role. See Adv. Ops. No. 89-005 and 90-012. R.C. 102.03(D) and (E) would, therefore, also prohibit an employee of ODADAS from participating in the award of a grant to a non-profit organization if he served as an officer, board member, or other fiduciary of the non-profit organization.

An employee of ODADAS has access to other officials and employees of ODADAS that is unique to that enjoyed by individuals who do not serve in such a position of employment. R.C. 102.03(D) and (E) prohibit an ODADAS employee from using his unique position and access, as an ODADAS employee, and his working relationships with other public officers and employees, to solicit, or affect, the approval of grants for the non-profit organizations he serves in a fiduciary role. See Adv. Op. No. 2001-02. An ODADAS employee is prohibited from formally and informally recommending or lobbying for the non-profit organization he serves in a fiduciary role, and from taking any other formal or informal action to persuade ODADAS officials and employees to authorize or approve grants for the non-profit organization.

Restrictions Imposed by Provisions Outside of the Ethics Law

You have asked whether ODADAS employees are permitted to serve on non-profit organizations on state time and at state expense. There is nothing in the Ethics Law and other statutes that prohibits a state agency from paying the travel expenses of employees attending meetings and conventions related to the mission of the state agency and there is no other conflict of interest present. Where the Ethics Law and related statutes do not prohibit an ODADAS employee from serving with a non-profit organization, there may be other provisions of state or federal law that place restrictions on such service. Your agency counsel or assistant attorney general can assist you in reviewing this matter.

Conclusion

As explained above, R.C. 2921.42(A)(4) prohibits officials and employees of ODADAS from serving as board members, officers, or other fiduciaries of non-profit organizations that receive grants from ODADAS unless, as discussed above, an exception to the prohibition can be met. Officials and employees of ODADAS are not prohibited from being members or volunteers of, or serving in an advisory capacity for, non-profit organizations provided that such employees do not have a financial interest in funds provided by ODADAS to the non-profit organizations they serve.

If the ODADAS employee can meet the exception in R.C. 2921.42(C), and serve as an officer, board member, or other fiduciary of a non-profit organization that receives funds from ODADAS, the Ethics Law prohibits the employee from participating in the award of a grant to the non-profit organization. Even where the Ethics Law and related statutes do not prohibit an ODADAS employee from serving on a non-profit organization, there may be other provisions of law that place restrictions on such service.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 13, 2002. The Commission commends you for seeking guidance from the Commission on behalf of ODADAS and its employees.

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 contact this Office again.

Sincerely,

A handwritten signature in cursive script, reading "Jennifer A. Hardin".

Jennifer A. Hardin
Chief Advisory Attorney