

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

June 30, 2005

Informal Opinion 2005-INF-0630

Barbara E. Riley, Director
Ohio Department of Job and Family Services



Dear Director Riley:

In a letter received by the Ohio Ethics Commission on April 28, 2005, you asked for advice about the restrictions that the Ohio Ethics Law and related statutes will impose on you, as the Director of the Ohio Department of Job and Family Services (ODJFS), in light of the fact that your husband is the Executive Director of a non-profit corporation that operates child day-care centers.

Brief Answer

As explained below, you are prohibited from participating, as the Director of ODJFS, in specific matters affecting the non-profit corporation that your husband serves as Executive Director. R.C. 102.03(D) does not prohibit you from participating, as the Director of ODJFS, in matters involving general regulations, licensure requirements, and rate schedules that uniformly apply to or affect all child day-care centers, or a large portion thereof. R.C. 2921.42(A)(1) prohibits you from authorizing, or using your position to secure authorization of, any public contract if your husband has an interest in the contract. However, the Ethics Law does not prohibit the non-profit corporation from providing day-care services to county departments of job and family services or to another entity under contract with ODJFS as long as you have no role in the approval or authorization of the contracts.

Facts

You state that the Governor appointed you to the position of Director of ODJFS on December 18, 2004. Prior to your appointment as Director, you served ODJFS as the Assistant Director and as the Deputy Director for the Office of Children and Families. In both of these prior positions, your responsibilities included the licensing of day-care centers.

You state that, since 1996, your husband has been employed as the Executive Director of a non-profit corporation, the Westside-Eastside Child Care Association (Association), which operates two day-care centers. The Association is governed by a board of directors. Your husband is not a member of the Association's board of directors. While you served as Deputy Director and Assistant Director, you recused yourself from matters involving the Association, which were referred to the ODJFS Chief of Staff, who did not report to you.

ODJFS Responsibilities Concerning Child Day-Care Centers

As explained below, ODJFS is statutorily responsible for establishing licensing standards and reimbursement rates for day-care centers. Much of the regulation requires discretionary decision-making by the Director of ODJFS.

The Director of ODJFS is statutorily required to promulgate rules that will govern day-care centers. R.C. 5104.011(A) to R.C. 5104.05. The rules are subject to notice and public hearing requirements, and are ratified by the Joint Committee on Agency Rule Review. ODJFS rules establishing the licensing standards for day-care centers are promulgated in accordance with R.C. Chapter 119. after taking into account the recommendations by the Ohio Child Day Care Advisory Council. See R.C. 5104.08. Generally, R.C. 5104.011 requires the Director of ODJFS to promulgate administrative rules establishing standards for day-care centers, including qualifications for owners, to guarantee the safety of the children enrolled in the centers. Persons who desire to operate a day-care center can apply for a license to the director of ODJFS. OAC 5101:2-12-04.

The Director of ODJFS is statutorily required to investigate and inspect day-care centers that apply for a license to insure that the requirements of the law are met. R.C.5104.03(B) and (C). The Director of ODJFS can revoke or refuse to renew a license if the operator of the day-care center fails to meet the requirements of the law. R.C. 5104.011(A)(9) and 5104.03(F). You explain that as long as a day-care center meets these licensing standards, ODJFS must license that center. Decisions by ODJFS to deny, revoke, or refuse to renew the license of a day-care center are subject to adjudication hearings. If a child day-care center applies for a license renewal prior to its expiration, then the license continues in effect until ODJFS either renews the license or acts to deny the application. See R.C. 119.06 and 119.091.

In addition to licensing, ODJFS is statutorily designated as the state agency responsible for administering federal and state funding for publicly funded day care in Ohio. R.C. 5104.30. The Director of ODJFS is statutorily required to adopt rules establishing reimbursement ceilings and eligibility requirements for providers of publicly funded day care. R.C. 5104.30(E)(1). The Director can base reimbursement ceilings upon the type of care provided, the ages and special needs of the children served, the hours of operation, and other factors that "the director considers appropriate." R.C. 5104.30(E)(3). ODJFS also has rulemaking authority on other functions related to publicly funded day care. R.C. 5104.38 and 5104.39.

ODJFS sets reimbursement ceilings for county departments of job and family services (CDJFS) to contract with day-care centers based entirely on a statewide market rate survey, in accordance with R.C. 5104.04(B)(3) and 5104.30(E)(1). The rule rates apply uniformly to all providers. You state that, in previous years, ODJFS staff conducted the surveys. However, the Ohio State University conducted the most recent market rate survey under contract with ODJFS.

Title TV-A Head Start Plus Program

In accordance with R.C. 3301.33, the Title TV-A Head Start Plus Program is currently administered by the Ohio Department of Education (ODE) in accordance with an interagency agreement entered into with ODJFS. ODE approves, contracts with, and reimburses day-care providers in connection with these programs and ODJFS provides federal Title TV-A funds to ODE in order to reimburse day-care providers. R.C. 3301.35. However, as of June 30, 2005, the Title TV-A program will be replaced with the Early Learning Initiative Program.

Early Learning Initiative

On July 1, 2005, the Early Learning Initiative (ELI) Program will replace the Title TV-A Head Start and Title TV-A Head Start Plus programs. Pursuant to the proposed language of R.C. 206.09.54 and 206.67.12, contained in the biennial Budget Bill, ODE will establish ELI program guidelines, select ELI agencies, and designate the number of eligible children the agencies serve. ODE will manage the application process for ELI agencies and ODE will select which agencies participate and how many children may participate at each agency. ODE and ODJFS will enter into joint contracts with ELI agencies. ODJFS will reimburse the ELI agencies for providing services to children according to statewide rates. ELI agencies then have full authority to select individual day-care and other providers to perform ELI services.

You state that you expect the YMCA of Central Ohio to apply to ODE to be an ELI agency. If approved by ODE, the YMCA would enter into a contract with ODE and ODJFS. The YMCA would then be responsible for the selection of the organizations it utilizes to deliver ELI services to eligible children. You state that the YMCA of Central Ohio is likely to contract with at least 22 day-care centers, including the Association, to provide ELI services in Franklin County. However, ODJFS has no control over the YMCA in its selection of day-care centers to provide ELI services.

Conflict of Interest Prohibition—R.C. 102.03(D)

The general conflict of interest prohibitions are found in R.C. 102.03(D), which reads:

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.

As Director of ODJFS, you are a "public official or employee," as that term is defined in R.C. 102.01(B) and (C), and are subject to the prohibitions of 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. 1.03, 102.01(G). Ohio Ethics Commission Advisory Opinions No. 82-002 and 89-003. The beneficial or detrimental economic impact of a regulatory decision by a public agency is a thing of value for purposes of R.C. 102.03. Adv. Ops. No. 85-012, 90-002, and 90-012.

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of her office to secure anything of value that is of such a character as to manifest a substantial or improper influence upon her with respect to her duties. As explained below, the thing of value that results from a decision by a public agency does not have to accrue to the public official or employee herself in order for it to have a substantial and improper influence upon the official or employee. The prohibition imposed by R.C. 102.03(D) serves the public interest in effective, objective, and impartial government by preventing the creation of a situation that may impair the objectivity and independence of judgment of a public official or employee, and, therefore, the effectiveness of the political subdivision with which she serves. Adv. Ops. No. 89-014 and 90-002. The application of R.C. 102.03(D) is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 87-007 and 89-003.

When originally enacted, R.C. 102.03(D) prohibited a public official or employee from using his or her official position to secure anything of value for himself or herself "that would not ordinarily accrue to [the official] in the performance of his or her official duties, if the thing is of such character as to manifest a substantial and improper influence upon the official with respect to his or her duties. The Ethics Commission interpreted this language to prohibit a public official or employee from participating in matters that would benefit the public official's or employee's personal financial interests. Adv. Ops. No. 79-003, 80-007, and 85-006. The Commission also concluded that a public official or employee is prohibited from acting on matters that affect the property, business, or other financial interests of her spouse or her employer, if the official herself would derive some personal benefit as a result of her actions. Adv. Ops. No. 79-008, 80-003, and 84-010.

In 1986, the General Assembly deleted the requirement that the thing of value had to "ordinarily accrue" to the public official or employee in the performance of her official duties before the prohibition was implicated, thereby broadening the scope of the prohibition imposed by R.C. 102.03(D). R.C. 102.03(D), in its amended form, prohibits a public official or employee from participating in matters that will benefit parties with whom she has a close family, economic, or business relationship because these relationships may impair the public official's objectivity and independence of judgment. Adv. Ops. No. 88-004, 89-008, and 97-002. However, R.C. 102.03(D) still requires that the thing of value, whether it is secured for the official or for someone else, be of such a character as to manifest a substantial and improper influence upon her with respect to her duties. Id.

For example, the Ethics Commission has stated that R.C. 102.03(D) prohibits a public official or employee from using her authority or influence, formally or informally, to secure anything of value for members of her family, including her spouse. See Adv. Ops. No. 89-008, 90-004, and 92-012. The Commission has explained that, if a thing of value definitely and directly accrued to a public official's family member as a result of the official's decisions, the thing of value would manifest a substantial and improper influence upon the official with respect to the performance of her public duties because of the relationship between the official and her family member. Adv. Op. No. 90-005. Compare Adv. Ops. No. 86-010 and 92-002 (R.C. 2921.42(A)(1) prohibits public officials from authorizing public contracts in which their family members have an interest.).

As noted above, the restriction in R.C. 102.03(D) applies when a thing of value is a definite and direct result of a decision. When the thing of value is the economic impact that would occur from a decision of a public entity, the prohibition of R.C. 102.03(D) does not apply if the economic impact is indirect. Adv. No. Op. 93-016. In that case, the thing of value that results from the decision would not be of "such as character as to manifest a substantial and improper influence" upon a public official in the performance of her duties. In Advisory Opinion No. 88-004, the Commission stated:

[A] city council member may participate or vote on general legislation which provides a uniform benefit to all citizens within the city, or a large portion thereof, but may not participate in matters which provide a particular and definite pecuniary benefit to property in which he, or, as discussed below, certain other parties, [business associates] have an interest. (Emphasis added).

Advisory Opinions No. 85-006 and 88-004 are enclosed for your reference.

Where decisions before you, as the Director of ODJFS, would have a definite and direct beneficial or detrimental economic impact on the Association that your husband serves as Executive Director, the economic impact of the decisions is of such a character that it could manifest a substantial and improper influence upon you in the course of your duties. R.C. 102.03(D) prohibits you from participating, formally or informally, with respect to decisions that would have a definite and direct beneficial or detrimental economic impact upon the Association that your husband serves as Executive Director.

However, where decisions before you, as the Director of ODJFS, would affect the Association in the same manner that they would affect all, or a large portion, or the other day-care centers in the state, the economic impact of the decisions is not of such a character that it could manifest a substantial and improper influence upon you in the course of your duties. R.C. 102.03(D) does not prohibit you from participating, as the Director of ODJFS, in matters involving general regulations, licensing, licensure requirements, and rate schedules that uniformly apply to or affect the Association in common with all, or a large portion, of the day care centers in Ohio. It must also be clear that all other officials and employees of ODJFS who exercise regulatory, licensing, and other oversight over the Association perform their duties regarding the

Association in the same manner as any other day-care center in the State. Any favoritism or differential treatment of the Association by ODJFS officials or employees would raise additional issues under R.C. 102.03(D) and (E).

In summary, R.C. 102.03(D) prohibits you from participating, as the Director of ODJFS, in matters before ODJFS that definitely and directly affect the Association that your husband serves as Executive Director in a manner that is unique to the Association, such as an ODJFS investigation on a specific complaint that could lead to the Association losing its licenses. R.C. 102.03(D) does not prohibit you from participating, as the Director of ODJFS, in matters before ODJFS involving general regulations, license renewals, licensure requirements, and rate schedules that uniformly affect all day-care centers, or a large portion thereof. If the inspection of the Association's centers or the renewal of the Association's licenses moves from being routine matters and becomes a specific review, or are handled in any preferential manner, an insurmountable conflict of interest would result because of the definite and direct benefit or detriment that could result for the Association. At that time, R.C. 102.03(D) would require that you resign from your position as Director of ODJFS as long as your husband continues as Executive Director of the Association.

Withdrawal From Issues Creating a Conflict Under R.C. 102.03(D)

In some instances, the Ethics Commission has stated that, in order to avoid violating R.C. 102.03(D), a public official may withdraw from participating in a matter. See also Adv. Ops. No. 83-001, 85-002, and 89-006. However, some high-level public officials and employees are charged with unique authority from which they cannot withdraw. Adv. Op. No. 92-004. Because they cannot withdraw from the performance of their official duties, it is impossible for these officials and employees to pursue certain kinds of private activity. If you were to withdraw from matters that would result in a definite and direct financial benefit or detriment to the corporation that your husband serves as Executive Director, then such a withdrawal would interfere with the performance of your unique duties as a high-level public officer. As the Director of ODJFS, you are ultimately responsible for all matters under the authority of the Department.

As explained above, if any matter before ODJFS definitely and directly affects the Association, in a manner that is selective or disproportionate from the way it affects all other day-care centers in the state, R.C. 102.03(D) prohibits you from participating in those matters. Because you are unable to withdraw from participating in those matters, in such a case, R.C. 102.03(D) would require that you resign from your position as Director of ODJFS as long as your husband continues as Executive Director of the Association.

Authorizing ODJFS Contracts—R.C. 2921.42(A)(1)

R.C. 2921.42(A)(1) prohibits a public official from authorizing, or using the authority or influence of her position to secure a public contract in which her spouse has a definite and direct interest. The Director of ODJFS is a public official for purposes of R.C. 2921.42(A)(1).

R.C. 2921.01(A). The provision of public funds to a non-profit organization in return for services is a "public contract" for purposes of R.C. 2921.42. Adv. Op. No. 84-001. An interest that is prohibited under R.C. 2921.42(A)(4) can be either fiduciary or pecuniary. Adv. Ops. No. 78-005 and 81-008. A compensated officer of a nonprofit corporation has a definite and direct pecuniary and fiduciary interest in the corporation's contracts. Adv. Op. No. 81-008 and 87-003.

Therefore, R.C. 2921.42(A)(1) prohibits you, as the Director of ODJFS, from authorizing, or using your position to secure authorization of any ODJFS contract, to the Association your husband serves as Executive Director. R.C. 2921.42(A)(1) prohibits you from approving, recommending, or taking any other action to secure a contract for the Association.

As set forth above, it is the Franklin County DJFS, not ODJFS, that contracts with the Association to provide publicly funded day-care services for families that meet the eligibility requirements. If you were to have any role, as the Director of ODJFS, in the approval or authorization of contracts by the county DJFS, or if ODJFS were to consider directly contracting with the Association for publicly funded day-care services, then R.C. 2921.42(A)(1) will prohibit you from approving the contract. You would also be prohibited from delegating your authority to authorize or approve the contract to any ODJFS employee.

In addition, as part of the Early Learning Initiative, ODE and ODJFS will enter into joint contracts with ELI agencies and ODJFS will reimburse the early learning agencies for providing services to children according to statewide rates. In the instant situation, the YMCA of Central Ohio is expected to apply to ODE to be an ELI agency in Franklin County. The selection of ELI agencies is controlled by ODE, rather than ODJFS. If approved by ODE, then the YMCA would contract with ODE and ODJFS. The YMCA is expected to contract with the Association to provide ELI services in Franklin County.

As Director of ODJFS, you are prohibited from using your position in anyway to approve the YMCA of Central Ohio to be an ELI agency, and from participating, in any way, in the YMCA's selection of the Association to provide ELI services. If you were to have any role, as the Director of ODJFS, in the approval of the YMCA as an ELI agency or the selection of the Association, by YMCA, to provide ELI services, then R.C. 2921.42(A)(1) will apply to you. In that case, R.C. 2921.42(A)(1) would prohibit you from exercising this authority, and would prohibit you from delegating your authority to another employee of ODJFS regarding the contracts.

If a situation arose that would require ODJFS to enter into a public contract for day-care services with the Association, such that your husband would have a definite and direct interest in the contract as Executive Director of the Association, then the prohibition imposed by R.C. 2921.42(A)(1) would require you to resign from your position as Director of ODJFS if your husband were to continue as Executive Director of the Association before ODJFS entered into the contract. In that case, you should contact the Commission for further guidance.

Barbara E. Riley
June 30, 2005
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Conclusion

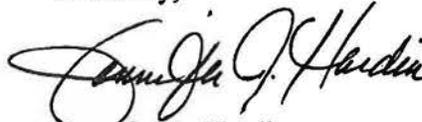
As explained above, you are prohibited from participating, as the Director of ODJFS, in specific matters affecting the non-profit corporation that your husband serves as Executive Director. R.C. 102.03(D) does not prohibit you from participating, as the Director of ODJFS, in matters involving general regulations, licensure requirements, and rate schedules that uniformly apply to or affect all child day-care centers, or a large portion thereof. R.C. 2921.42(A)(1) prohibits you from authorizing, or using your position to secure authorization of, any public contract if your husband has an interest in the contract. However, the Ethics Law does not prohibit the non-profit corporation from providing day-care services to county departments of job and family services or to another entity under contract with ODJFS as long as you have no role in the approval or authorization of the contracts.

If any situation should arise where the Association would be definitely and directly affected by a decision of ODJFS, in a manner that differs from the affect of the decision on other day-care centers, the Ethics Law and related statutes would prohibit you from continuing to serve as the Director of ODJFS while your husband continues as the Executive Director of the Association.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on June 2, 2005. The Commission commends you for seeking guidance on these matters.

The opinion is based on the facts presented. It 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 this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

Enclosures: Advisory Opinions No. 85-006 and 88-004