

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

May 30, 2008

Informal Opinion 2008-INF-0530-1

John E. Hill

Dear Mr. Hill:

On February 29, 2008, the Ethics Commission received your request for an advisory opinion. You ask whether the Ohio Ethics Law and related statutes prohibit you, after you retire from your position as Superintendent of the Muskingum County Board of MRDD (County Board), from purchasing a residential service provider business that currently has a contract to provide services to clients of the County Board.

Brief Answer

As explained below, you are prohibited, while serving as Superintendent and for one year after you leave the position, from purchasing a residential service provider business that currently has a contract to provide services to clients of the County Board.

Facts

In your letter, you explained that you are the Superintendent of the County Board. Your employment contract with the County Board expires December 31, 2009. However, you contemplate retiring early and purchasing a residential service provider business that currently has a contract to provide services to the County Board.

You also state that the Board is a member of a council of governments - the Mid-east Ohio Regional Consortium (Consortium). You serve as a member of the Consortium's Board of Directors and, in this position, you are involved in setting the policies and procedures by which the Consortium operates. The Consortium negotiates with residential service providers on behalf of member counties.

The residential service provider that you are considering purchasing currently provides services to the County Board through a contract with the Consortium. You explain that, as Superintendent, you supervise County Board staff members who participate in the negotiations and routinely approve the rates that have been negotiated. In addition, you state that you supervise staff of the County Board that places residents in the homes owned by the service provider.

You state that, as Superintendent, you rarely have any role in determining rates for a particular provider. You state that you may approve a supervisor's recommendation of a rate, but never participate in the details of the rate negotiations. Finally, you state that you have never been solicited by or offered any unfair influence for the provider whose business you contemplate purchasing.

Profiting From a Public Contract—R.C. 2921.42(A)(3)

As the Superintendent of the County Board, you are a "public official" and subject to the prohibitions of R.C. 2921.42(A)(3), which provides that no public official shall knowingly:

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

A "public contract" includes the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for a political subdivision of the state. R.C. 2921.42(I)(1)(a). The current contract between the provider and the Consortium to provide residential services to clients of the County Board is a "public contract" because the County Board, through its agreement with the Consortium, acquires services for its clients in order to implement the duties and functions that the County Board is statutorily required to perform. See R.C. 5126.13(A). You have explained in a telephone conversation with Commission staff, that these services are not provided pursuant to a competitively bid contract.

The prohibition of R.C. 2921.42(A)(3) is pertinent whenever a public official, during or within one year of leaving public service, seeks employment, consulting contracts, or business opportunities, from a party that provides goods and services to the public agency he serves, if he will occupy a "position of profit" in the contract. Ohio Ethics Commission Advisory Opinion No. 2001-02.

The Ethics Commission has explained that a public official will be deemed to "occupy [a] position of profit" in a public contract whenever he receives a fee or compensation that would be paid from, or is dependent upon, the contract, or the official would receive some other profit or benefit from the contract. Adv. Ops. No. 88-008 and 95-007. If you were to become the owner of a service provider that currently has a contract to provide services to the County Board, you would occupy a position of profit in the contract.

The Ethics Commission has explained that a public official or board "authorizes" a contract where the contract could not have been awarded without the approval of the official, or the office or position in which the public official serves, or the board on which he sits. Adv. Ops. No. 88-008, 91-009, and 92-017. This prohibition applies even if the public official does not take any action with respect to the award of the contract. Adv. Op. No. 2000-02.

The duties of a County Board Superintendent are generally to administer the County Board's work; recommend beneficial changes to the Board's programs and services; employ personnel and approve the payment of their compensation; and consult with specified public agencies and with individuals, agencies, or organizations providing services supported by the County Board. See R.C. 5126.0227.

You state that you rarely have any role in determining rates for a particular provider or participate in the details of the rate negotiations. However, as Superintendent, you: (1) supervise County Board staff members who participate in the negotiations and who place residents in the homes owned by the service provider;¹ (2) routinely approve the rates that have been negotiated; and (3) may approve a supervisor's recommendation of a rate.

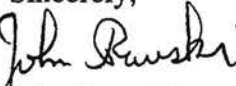
Because you are the Superintendent of the County Board, any contract entered into by or for the use of the County Board could not have been awarded without approval by you or an employee subordinate to you.

Therefore, R.C. 2921.42(A)(3) prohibits you from purchasing the residential service provider business within a year after you retire from the County Board, because you would occupy a position of profit in the business's current contracts to provide services for clients of the County Board

Conclusion

As explained above, you are prohibited, while serving as Superintendent and for one year after you leave the position, from purchasing a residential service provider business that currently has a contract to provide services to clients of the County Board.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on May 29, 2008. 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,

John Rawski
Staff Attorney

¹ See R.C. 5126.032 (The Superintendent or his designated employee shall certify to the County Board's Ethics Council each proposed direct services contract before the contract would be entered into and provide information to the Ethics Council necessary for it to make its determinations).