

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

May 30, 2008

Informal Opinion 2008-INF-0530-2

Devona R. Fountain

Dear Ms. Fountain:

On February 29, 2008, the Ethics Commission received your request for an advisory opinion. In your letter, you explained that you are employed as Director of Community Services for a County Board of MRDD (County Board). You explained that, in that position, you are directly responsible for daily supervision and support for the Service Coordinators who link individuals with developmental disabilities to services in the community.

You have asked whether the Ohio Ethics Law and related statutes prohibit you from maintaining your employment with the County Board if you invest in a residential service provider business that currently has a contract to provide services to the County Board by which you are employed. You have also asked whether you can maintain your employment with the County Board if your husband invests in the residential service provider business.

Brief Answer

As explained below, while you hold your current public position, and exercise authority related to residential service providers in the County, R.C. 102.03(D) and R.C. 2921.42(A)(1) would prohibit you from performing significant aspects of your public employment if you or your husband were to invest in a residential service provider business. For that reason, if either you or your husband were to invest in the business, you would be unable to maintain your current position with the County Board.

Investment in Service Provider Business by Employee or Spouse

At the outset, it should be noted that you have asked about making an investment in the residential services provider business. Your letter did not describe the nature or size of the proposed investment, or whether you or your husband would be officers, or involved in the operation, of the business. In a conversation with Commission staff, you explained that you or your husband would be investing with other individuals and you or he would have a fifty percent interest in the business.

The two questions you have asked raise similar, although not identical, issues. The Ethics Commission has explained that the Ethics Law and related statutes do not prohibit a public employee from having private business interests *provided that* no conflict of interest exists between the employee's public duties and private interests. Adv. Op. No. 96-004. The law also does not absolutely prohibit a person from holding public employment if a member of her family sells goods or services to the agency that employs her. If, however, a public employee's private business interests, or those of her family member, could impair her objectivity and independence of judgment with regard to her official decisions and responsibilities, she would be prohibited from serving as a public employee while she or her family member is engaged in the private business activity.

Applicable Ethics Provisions

In both situations, the provisions that apply are those set forth in R.C. 102.03(D), involving conflicts of interest, and R.C. 2921.42(A)(1), involving public contracts. As an employee of the County Board, you are subject to both of these provisions. R.C. 102.01(B) and (C) and Ohio Ethics Commission Advisory Opinions No. 87-006 and 81-003; R.C. 2921.01(A).

R.C. 102.03(D) states:

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.

"Anything of value" includes the financial impact, whether beneficial or detrimental, of a public agency's decisions. Adv. Ops. No. 85-012, 90-002, and 90-012. The payments that a business receives for providing services to individuals with developmental disabilities under a contract or agreement with the County Board are also within the definition of "anything of value." Adv. Op. No. 96-005.

R.C. 2921.42(A)(1) provides that no public official shall knowingly:

Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public official's business associates has an interest.

A "public contract" includes any purchase or acquisition of goods or services by or for the use of a public agency. R.C. 2921.42(I)(1)(a). A County Board's acquisition of residential services from a provider is a public contract. Adv. Op. No. 96-005.

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 position in which the official serves. Adv. Ops. No. 88-008, 91-009, and 92-017. A County Board employee who participates in the placement of individuals with developmental disabilities with a residential service provider is engaged in the authorization of a public contract. As a direct result of the Board employee’s actions, the County secures or acquires services from a provider who is compensated for providing the services, on behalf of the County, to an individual with developmental disabilities.

Public Official Investing in a Service Provider Business

When a public employee invests in a private business, R.C. 102.03(D) can be implicated if the business is either regulated by or engaged in business activity with, the public agency she serves. R.C. 2921.42(A)(1) will be implicated if the business is selling goods or services to or for the use of the public agency.

The Commission has explained that, if a public employee is in a position to make a decision that results in a definite and direct benefit to her own private business interests, the benefit is a thing of value that will have a substantial and improper influence on the public employee with respect to the performance of her public duties. Adv. Op. No. 92-002. R.C. 102.03(D) prohibits the public employee from using her position to secure the benefit for her private interests. Adv. Op. No. 87-008. Therefore, if a public employee were to engage in private business activity, she would be prohibited from taking any action, within the scope of her public employment, that would definitely and directly affect her private business interests. Id.

As the County Board’s Director of Community Services, you explained that you are responsible for the supervision and support for the Board’s Service Coordinators. The Service Coordinators link individuals with developmental disabilities to services in the community. If you were to become an investor in a residential service provider business, you would be prohibited from participating in any matters before the Board involving the placement of served individuals with residential service providers. The placement of an individual with your own residential service provider would definitely and directly affect your own interests. If the individual were to receive services from the provider business in which you are an investor, you would receive a financial benefit as a result of the placement. Further, if your duties include monitoring the level or quality of services that individuals receive from residential service providers, in order to determine whether the company can continue to provide services, your decisions regarding a business in which you invest, or a competing business, would also affect your own financial interests.

If you were to invest in a residential service provider business in the County, R.C. 102.03(D) would prohibit you from linking individuals with any residential services and from supervising employees who perform these duties. The Ethics Commission has explained that, in certain instances, a public employee may be able to withdraw from matters that create a conflict

of interest under the Ethics Law. Adv. Ops. No. 89-006 and 96-004. However, as the Director of Community Services, it would be difficult, if not impossible, for you to withdraw from all decisions or actions, including the supervision of Board employees, regarding the placement of served individuals seeking residential services. For that reason, the practical effect of the restriction in R.C. 102.03(D) is that you are prohibited from investing in a residential provider business located in the County while you continue your current public employment.

The practical effect of R.C. 2921.42(A)(1) would be the same. As the Director of Community Services for the County Board, you supervise employees who link individuals with services. Depending on the nature and scope of your activities in each situation, you may be authorizing contracts between service providers and the Board. If you were to invest in a residential service provider business, it would be impossible for you to withdraw from the residential placements of individuals with disabilities in order to avoid a violation of R.C. 2921.42(A)(1).

Even if you could withdraw, R.C. 2921.42(A)(4) prohibits you from merely having an interest in a contract entered into by or for the use of the County Board. R.C. 2921.42(A)(4) prohibits a public official from selling goods or services to the public agency with which she is connected, unless she can meet a four-part exception. R.C. 2921.42(C). One requirement of the exception is that the goods or services to be provided by the official are "unobtainable elsewhere" for the same or lower cost. R.C. 2921.42(C)(2). The Commission has explained that the underlying purpose of this requirement is to permit a public official to have an interest in a contract with her public agency only in those limited situations where the contract is the best or only alternative for the agency. Adv. Op. No. 88-001.

In the situation you have described, you would be unable to show that residential services are "unobtainable elsewhere" for the same or lower cost. Depending on the nature of the facility and the agreements between the facility and its residents, which take into account the amount of each resident's earned and unearned income, at least some part of the reimbursement for services the business receives for residential services will be paid by the County. The number of these variables, and the fact that, as an investor in the residential service provider business, you would be unable to control or predict them, suggest that it would be impossible for you to meet the "unobtainable elsewhere" requirement in R.C. 2921.42(C)(2). Accordingly, R.C. 2921.42(A)(4) prohibits you from investing in a residential service provider business that has a contract with the County Board.

Family Member Investing in a Service Provider Business

The prohibition in R.C. 102.03(D) also applies if a public employee's family member is an investor in a business that is regulated by or doing business with the agency she serves. R.C. 2921.42(A)(1) applies if the business sells goods or services to or for the use of the agency.

The Commission has explained that R.C. 102.03(D) prohibits a public employee from taking actions within the scope of her public service to secure a thing of value for a close family member, such as her husband, where the thing of value is of such a character as to manifest a substantial and improper influence on the employee with respect to her public duties. Adv. Op. No. 98-002. The relationship between a public employee and her husband is so close that her objectivity and independence of judgment would be impaired if she were to make decisions or recommendations, or otherwise take action, on any matters before her public agency that would result in a definite and direct benefit or detriment to a business in which her husband is an investor. See Adv. Op. No. 90-005 (R.C. 102.03(D) prohibits a school board member from using his position of authority over school district employees to secure contracts for a company owned by the board member or his close family members).

As the County Board's Director of Community Services, your duties include supervision of the employees who match individuals with residential services in the County. If your husband were to become an investor in a residential service provider, then any decision or action made by you, including the supervision of Board employees, that resulted in the placement of served individuals either with his business or with one of his competitors would result in him realizing a definite and direct financial benefit or detriment.

R.C. 2921.42(A)(1) also prohibits a public official from making decisions in matters that affect her family member. Specifically, Division (A)(1) prohibits a public official from authorizing contracts if a "member of [her] family" has an interest in the contract. In this situation, R.C. 2921.42(A)(1) would prohibit you, in your public position, from taking any action to secure placements of individuals in a service provider business in which your husband is an investor. The placement of individuals would result in payments from the County Board to a business in which your husband is an investor.

The Ethics Commission has explained that, in certain instances, a public employee may be able to withdraw from the performance of her public duties in order to avoid a violation of R.C. 102.03(D). It must be clear that the employee's withdrawal does not affect her ability to perform her public job or hinder the public agency's ability to deliver necessary services. Adv. Ops. No. 89-006 and 96-004. Also, a public employee may be able to abstain or remove herself from the authorization of public contracts in which a family member has an interest. It must be evident that another official or employee, at a level above the employee, is available to authorize contracts if the employee withdraws.

Because of the day-to-day requirements of your job with the County Board, it would be impossible for you to effectively perform the duties of your public position if you were to withdraw from decisions or actions, including the supervision of Board employees and authorization of contracts, regarding the residential services provided to individuals with developmental disabilities in the County. Accordingly, if your husband were to invest in a service provider business, both R.C. 102.03(D) and R.C. 2921.42(A)(1) prohibit you from

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maintaining your employment with the County Board in a position with authority that can affect your husband's financial interests.

Conclusion

As explained above, while you hold your current public position, and exercise authority related to residential service providers in the County, R.C. 102.03(D) and R.C. 2921.42(A)(1) would prohibit you from performing significant aspects of your public employment if you or your husband were to invest in a residential service provider business. For that reason, if either you or your husband were to invest in the business, you would be unable to maintain your current position with 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,

A handwritten signature in black ink that reads "John Rauski". The signature is written in a cursive, slightly slanted style.

John Rauski
Staff Attorney