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December 3, 2009

Informal Opinion 2009-INF-1203

Lewis C. George
Chief Legal Counsel
Office of Legal and Acquisition Services
Department of Job and Family Services
[REDACTED]

Dear Mr. George:

On October 27, 2009, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you asked whether the Ethics Law and related statutes would prohibit the award of grants from the Ohio Department of Job and Family Services (ODJFS) to: (1) the Cuyahoga County Commissioners; or (2) the Harrison, Carroll, and Tuscarawas (HARCATUS) Head Start Agency. The grants will fund programs to unite fathers and children, an objective of the Ohio Commission on Fatherhood (OCF). Two members of the OCF have connections with organizations that may receive grants.

The Ohio Ethics Commission commends you and the members of the OCF for raising your question. When contracts are awarded and grant funds are expended, the Ethics Law and related statutes apply to protect the interests of the public. An opinion will confirm that both the letter and the spirit of the law are met.

Brief Answer

As explained more fully below, because the authority of the OCF is limited to providing advice and making recommendations, the members of the OCF are not public officials subject to the Ethics Law and related statutes. For that reason, the Ethics Law and related statutes do not prohibit organizations with which members of the OCF are connected from seeking or accepting funding from programs on which the OCF provided advice. However, members of the OCF who are otherwise public officials or employees are subject to the law in their other roles.

Facts

By way of history, you have explained that, on July 31, 2009, ODJFS issued the request for grant applications on behalf of the OCF. The grants will fund nine regional providers to administer programs that create stronger relationships between fathers and their children. Thirty-eight applications were submitted to ODJFS, which used a competitive process to review and score the proposals. A team of three ODJFS employees, including the Executive Director of the OCF, was created to evaluate the applications and recommend, to the ODJFS Director, which programs will receive grants and the amounts of the grants. The OCF's role in the process is to provide general guidance about the framework of the program.

The OCF was established in 1999 and codified in R.C. 5101.34. There are nineteen members of the OCF, of which fourteen serve because of other public positions they hold. Five representatives of the general public are appointed by the Governor. Your questions involve two of these appointed members.

You have explained that one member of the Ohio Commission on Fatherhood (OCF) is a Cuyahoga County Commissioner. One of the grant applications was submitted by a county employee on behalf of the county commissioners. Another member of the OCF, who is an employee of The Ohio State University (OSU) Extension Office, signed an Extension Office letter in support of the grant application submitted by HARCATUS. The Extension Office was listed as a community partner with which HARCATUS would work in implementing its program. Further, the OCF member's name was listed as a person with whom the prospective program director has collaborated in the past.

You have explained that the Executive Director of the OCF is an ODJFS employee, but is "hired by" and reports to the OCF. R.C. 5101.341 provides that ODJFS has the responsibility to provide staff and other support services to the OCF, and gives no authority to OCF regarding the employment of staff. In a telephone conversation with Commission staff, you clarified that members of the OCF participate in the interviews of candidates for the Executive Director position and make recommendations about the candidates, but do not have any authority regarding hiring, job continuation, compensation, benefits, performance evaluations, or other aspects of the Executive Director's employment.

Authority of the OCF

In May 2001, the Ohio Ethics Commission reviewed the authority of the OCF as set forth in R.C. 5101.34. In an informal advisory opinion dated May 10, 2001, the Commission concluded that:

- (1) Based on OCF's advisory statutory authority, its members are not public officials subject to the provisions of R.C. Chapter 102. and R.C. 2921.42; and

- (2) Because they are not public officials, the conflict of interest and public contract laws do not prohibit members of the OCF from participating in matters that affect public or private entities with which they are otherwise affiliated.

The laws on which the Commission's May 2001 opinion was based have not been amended in the intervening years. A copy of the May 2001 opinion is attached and the Commission's analysis and conclusions in the opinion are included in this opinion as if restated here.

Therefore, the Ethics Law and related statutes do not prohibit organizations with which the two OCF members are affiliated from submitting responses to the ODJFS request for grant applications. Further, the law does not prohibit the OCF members from participating in the commission's discussion or recommendations, if any, on those grant applications.

The OCF Executive Director is a member of a three-employee panel reviewing the grant applications, including applications submitted by the organizations with which the OCF members are affiliated. Because the OCF has no authority to hire or otherwise affect the employment of the Executive Director, the Ethics Law does not prohibit the OCF Executive Director from participating in the review or making recommendations regarding grants submitted by organizations with which members of the OCF are affiliated.

OCF Members

As noted above, two of the grant applications were submitted by organizations with which a member of the OCF is connected. These two OCF members, in their other public capacities, are subject to the Ohio Ethics Law and related statutes by virtue of these public positions.

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.

R.C. 102.03(D) and (E) provide:

- (D) 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.

- (E) No public official or employee shall solicit or accept 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.

A "public contract" includes any purchase or acquisition of property or services by or for the use of any public agency. R.C. 2921.42(I)(1)(a). The Ethics Commission has held that, when a public agency awards grants and acquires services in return, the grants are "public contracts." Ohio Ethics Commission Advisory Opinion No. 2001-02; 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). ODJFS grants to fund programs that create stronger relationships between fathers and their children fall within the definition of public contract. The proceeds of a grant would also be "anything of value" for purposes of R.C. 102.03(D) and (E).

R.C. 2921.42(A)(1) would prohibit any public official from using his public position to secure authorization of any grant in which the official has an interest. An interest must be definite and direct, but can be either financial or fiduciary. A public official or employee has a definite and direct financial interest in any contracts or grants from which the official or employee receives a personal benefit. Adv. Op. No. 89-006.

R.C. 102.03(D) and (E) prohibit the official from using his public position to secure, and from soliciting, anything of value if the official or any person with whom the official has close family, economic, or fiduciary connection will receive a definite and direct benefit from the thing of value. Adv. Op. No. 87-003. Therefore, if an official were to personally benefit from any grant awarded to a public agency he serves, R.C. 2921.42(A)(1) and R.C. 102.03(D) and (E) would prohibit that person from soliciting or using his or her public position in any way to secure authorization of the grant.

For example, you have stated that a prospective grantee, HARCATUS, lists the OSU Extension as a community partner with whom the prospective grantee would work in implementing its program. HARCATUS also lists the name of the OCF member who is an Extension employee as someone with whom the prospective grantee has collaborated in the past.

R.C. 2921.42(A)(1) and 102.03(D) and (E) would prohibit the Extension employee from taking any action to secure the grant for HARCATUS if the Extension employee, or his family members or business associates, would personally benefit from the grant. By contrast, if HARCATUS were to work with the Extension office or the Extension employee, in his capacity as an OSU employee, neither R.C. 2921.42(A)(1) nor 102.03(D) and (E) would prohibit the employee from signing a letter of support for the applicant.

With respect to the county commissioner, an elected governing board member has a fiduciary interest in grants awarded to the public agency he serves. Adv. Op. No. 99-004. However, the board member's fiduciary interest is not prohibited unless he or she also serves as a public official or employee of the public agency that has awarded the grant. Further, R.C.

2921.42(A)(1) does not prohibit a governing board member from requesting or participated in the application process for grant funds from another public agency, unless he or she also serves in a decision-making position with the agency that is awarding the grant.

Therefore, because the county commissioner is not an officer or employee of ODJFS, and has no authority, as a member of the OCF, regarding the award of the grants at issue, neither R.C. 2921.42 nor 102.03(D) or (E) prohibits the county he serves from applying for one of the grants. Further, neither statute prohibits the county commissioner from participating in the county's decision to pursue the grant.

Conclusion

As explained more fully above, because the authority of the OCF is limited to providing advice and making recommendations, the members of the OCF are not public officials subject to the Ethics Law and related statutes. For that reason, the Ethics Law and related statutes do not prohibit organizations with which members of the OCF are connected from seeking or accepting funding from programs on which the OCF provided advice. However, members of the OCF who are otherwise public officials or employees are subject to the law in their other roles.

The Ohio Ethics Commission commends you and the members of the OCF for raising your question. When contracts are awarded and grant funds are expended, the Ethics Law and related statutes apply to protect the interests of the public. An opinion will confirm that both the letter and the spirit of the law are met.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on December 2, 2009. 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