



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

Advisory Opinion Number 89-006
June 15, 1989

Syllabus by the Commission:

- (1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits an official or employee of the Ohio Department of Mental Health from providing teaching or training services to a college or university that receives a grant from ODMH where the official or employee would have a definite and direct interest in the grant as a result of his position with the college or university;
- (2) Division (A)(3) of Section 2921.42 prohibits an ODMH official or employee from profiting from a grant authorized by him or by a board or commission of which he is a member where the grant is not awarded through competitive bidding and is not the lowest and best bid;
- (3) Division (A)(1) of Section 2921.42 of the Revised Code prohibits an ODMH official or employee from using the authority or influence of his office, either formally or informally, to secure the award of a grant to a college or university with which he is employed;
- (4) Division (D) of Section 102.03 of the Revised Code prohibits an ODMH official or employee from using the authority or influence of his office to secure for himself employment with a college or university that has applied for or received an ODMH grant;
- (5) Division (E) of Section 102.03 of the Revised Code prohibits an ODMH official or employee from accepting an offer of employment with a college or university that has applied for or received a grant from the Office of Education and Training within ODMH if his duties at ODMH include reviewing or approving OET grants and he is unable to withdraw from consideration of the grant or grant application of his prospective employer;
- (6) Division (D) of Section 102.03 of the Revised Code prohibits an ODMH employee who has accepted a position with a college or university that has applied for or received an OET grant from using his position at ODMH to secure anything of value for the college or university, or for himself in the performance of his duties for the college or university.

* * * * *

In your letter to the Ethics Commission you ask whether the Ohio Ethics Law and related statutes prohibit an employee of the Ohio Department of Mental Health (ODMH) from contracting to provide training or teaching services to a college or university that receives a grant from ODMH.

You have stated that the Office of Education and Training (OET) of ODMH awards grants to college and university graduate level programs in psychology, psychiatry, nursing, and social work on the basis of a competitive review of proposals submitted by the colleges and universities. A four-person review committee evaluates all proposals and makes recommendations as to the award of funds. The Director of ODMH has the final authority to award the grants. You state that the grants awarded by the OET are used for various purposes including student stipends, teaching materials, travel expenses, and faculty costs. You also state that the colleges and universities which receive OET grants have approached OET staff members, including some whose duties include reviewing and approving the award of grants, as well as ODMH staff members outside of OET, to provide training or teaching services. You further state that some college and university departments for which ODMH staff members have been asked to provide training or teaching services receive grants awarded by OET. For purposes of this opinion, it is assumed that the ODMH employees who would provide training or teaching services have no other connection with the college or university.

Division (A)(4) of Section 2921.42 of the Revised Code reads as follows:

(A) No public official shall knowingly do any of the following: . . .

(4) 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.

The term "public official" is defined for purposes of R.C. 2921.42 in R.C. 2921.01(A) to include any elected or appointed officer, or employee of the state. The Department of Mental Health is a statutorily created administrative department of the state with specified statutory duties concerning the care, custody, hospitalization, and treatment of mentally ill persons. See R.C. 121.02(L) and R.C. 5119.02. An official or employee of the Department of Mental Health is, therefore, a public official who is subject to the prohibitions of R.C. 2921.42.

Division (E)(1) of Section 2921.42 defines a "public contract" for purposes of that section to include the "purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state." The Ethics Commission has held that grants by governmental agencies are "public contracts," as defined in R.C. 2921.42(E)(1), since a grant is the purchase or acquisition of services by or for the use of the governmental agency. See Ohio Ethics Commission Advisory Opinions No. 82-004, 85-002, and 87-003. Therefore, grants awarded by ODMH to colleges and universities are "public contracts" for purposes of R.C. 2921.42.

R.C. 2921.42(A)(4) prohibits an ODMH employee from having an "interest" in a grant or other public contract entered into by ODMH or any division thereof. See Advisory Opinion No.

84-008 (holding that on the state level an employee of a state agency is prohibited from having an interest in a public contract with his state agency as a whole regardless of internal administrative organization). An "interest" which is prohibited under R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. See Advisory Opinion No. 81-008. The issue is, therefore, whether an ODMH employee, would have an "interest" in a grant awarded to a college or university by ODMH if the ODMH employee provided training or teaching services to the recipient college or university.

A determination as to whether a public official has an "interest" in a contract with his own governmental agency depends on the facts and circumstances of each particular situation. See Advisory Opinion No. 84-009. The Ethics Commission has held that an employee of a firm, who has neither an ownership interest nor a fiduciary interest as an officer of the firm, is not generally considered to have an "interest" in the contracts entered into by his employer. See Advisory Opinion No. 78-006. However, an employee who has an ownership interest in or who is a director, trustee, or officer of his employer is considered to have an interest in his employer's contracts. See Advisory Opinions No. 78-006, 81-008, and 86-005. Furthermore, an employee is considered to have an interest in his employer's contracts if the employee takes part in contract negotiations, if his salary is based on the proceeds of the contract, if he receives a share of the contract's proceeds in the form of a commission or fee, or if his employment responsibilities include participation in the administration or execution of the contract. See Advisory Opinions No. 78-006, 82-003, and 86-005. Also, an employee may be deemed to have an interest in a contract of his employer where the employee's tenure is dependent upon his employer receiving the award of such contract. In the instant situation, an ODMH employee who is employed by a college or university that receives an ODMH/OET grant would have an interest in the grants or other contracts entered into by ODMH if his position and duties at the college or university are analogous to the situations described above.

Therefore, an employee of ODMH is prohibited by R.C. 2921.42 from providing teaching or training services to a college or university that receives a grant from ODMH through OET, if: (1) his responsibilities at the college or university include preparing, submitting, or negotiating grants with ODMH; (2) he would perform work or receive compensation under the grant; (3) his tenure, compensation, or other benefits received from the college or university would be based or dependent upon the ODMH/OET grant; or (4) the facts otherwise indicate that he would have a definite and direct pecuniary or fiduciary interest in the ODMH/OET grant as a result of his position with the college or university.

Division (A)(3) of Section 2921.42 provides that no public officials shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid.

As stated above, a four-person review committee evaluates all proposals and makes recommendations as to the award of funds and the Director of ODMH has the final authority to

award the grants. An ODMH/OET grant to a college or university will be considered to be "authorized" by an ODMH official or employee, or committee within the ODMH for purposes of R.C. 2921.42(A)(3) where the grant would not have been awarded without the officials or committee's approval See Advisory Opinion No. 87-004. Therefore an ODMH official is prohibited by R.C. 2921.42(A)(3) from profiting from the award of a grant which he or a board or commission of which he is a member approved, unless the grant was competitively bid and was the lowest and best bid. An ODMH employee who holds outside employment with a college or university which is a grant recipient will be deemed to profit from that grant, where: (1) the establishment or operation of the department or program within the college or university with which he serves is dependent upon receipt of the grant; (2) the creation or continuation of the officials position with the recipient is dependent upon the award of the grant; (3) the grant funds would be used by the recipient to compensate the ODMH employee or as a basis for the officials compensation; or (4) he would otherwise profit from the award of the grant. See Advisory Opinions No. 87-004 and 88-008.

Division (A)(1) of Section 2921.42 provides:

(A) No public official shall knowingly do any of the following:

(1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

A public officials outside employer is considered to be his "business associate" for purposes of R.C. 2921.42(A)(1). See Advisory Opinions No. 78-006 and 81-001. An ODMH employee who provides training or teaching services to a college or university which is the recipient of an ODMH/OET grant is prohibited by R.C. 2921.42 from discussing, deliberating, or otherwise using his authority or influence as an ODMH employee, either formally or informally, to secure the award of a grant to the college or university with which he is employed. If a subordinate of an ODMH employee who provides training or teaching services at a recipient college or university participates in the process in which grants are awarded to colleges and universities, then R.C. 2921.42(A)(1) would prohibit the ODMH employee from exercising his authority or influence, including supervision or general oversight, over a subordinate on a proposal submitted by his employing college or university. The subordinate's action must be reviewed independently by an ODMH official or employee who is not under the supervision of the ODMH official or employee providing teaching or training services, and who is not employed by the college or university that has submitted a proposal for, or has received, an ODMH/OET grant. See generally Advisory Opinion No. 85-002.

Divisions (D) and (E) of Section 102.03 of the Revised Code read as follows:

(D) No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his 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 him with respect to his duties.

The term "public official or employee" is defined for purposes of R.C. 102.03 in R.C. 102.01(B) and (C) to include any person who is appointed to an office or is an employee of any department of the state. An official or employee of ODMH is therefore subject to the prohibitions of R.C. 102.03.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money, the promise of future employment, and every other thing of value. See R.C. 102.03(G). Employment with a college or university to provide training or teaching services and the compensation attendant thereto, fall within the definition of "anything of value." See Advisory Opinion No. 88-002. A public official or employee is prohibited by R.C. 102.03(D) and (E) from accepting, soliciting, or using his position to secure anything of value that would directly benefit his personal or private pecuniary interests, where the thing of value is of such character as to manifest a substantial and improper influence upon the public official or employee with respect to his duties. See Advisory Opinions No. 80-007, 85-006, 86-003, 86-007, and 88-004. The issue becomes whether employment with a college or university that receives an ODMH/OET grant and the compensation attendant thereto are of such character as to manifest a substantial and improper influence upon an employee of ODMH with respect to his duties.

The Ethics Commission has held that Division (D) of Section 102.03 of the Revised Code prohibits a public official or employee from using the authority or influence of his office or employment to secure anything of value or the promise or offer of anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the agency with which he serves, or where the thing of value could impair the officials or employee's objectivity and independence of judgment with respect to his professional actions and decisions for the agency which he serves. See Advisory Opinions No. 79-002, 79-006, 80-004, 84-009, 84-010, 87-006, and 87-009. In the instant situation, a college or university which applies for or receives an ODMH/OET grant is a party that is interested in matters before, or doing or seeking to do business with ODMH. Therefore, Division (D) of Section 102.03 would prohibit an ODMH official or employee from using the authority or influence of his office or employment at ODMH to secure for himself employment with a college or university which applies for or receives an ODMH/OET grant.

The issue becomes whether there are circumstances in which the acceptance of an offer of employment and the compensation attendant thereto by an ODMH official or employee from a college or university which applies for or receives an ODMH/OET grant would be of such character as to manifest a substantial and improper influence upon the ODMH official or employee with respect to his duties in a situation where the ODMH official or employee has not used the authority or influence of his position with ODMH to secure employment with the recipient college or university.

Division (E) of Section 102.03 of the Revised Code prohibits a public official or employee from accepting anything of value, including outside employment, from a party that is

interested in matters before, regulated by, or doing or seeking to do business with the agency with which he serves. See Advisory Opinion No. 86-011. Furthermore, a public official is prohibited by Division (E) from holding outside employment where such employment could impair his objectivity or independence of judgment with regard to his official decisions and responsibilities. See Advisory Opinions No. 87-006 and 88-002. The application of R.C. 102.03(E) is dependent on the facts and circumstances of each individual situation. See Advisory Opinions No. 87-008 and 89-003.

You have stated that there are ODMH staff members, both inside and outside the OET, who have no official responsibilities, including supervision or oversight, involving the review and approval of ODMH/OET grants to colleges and universities. In such a circumstance, an ODMH staff member who accepted an offer of employment from a recipient college or university would not be subject to an inherent conflict of interest since he does not have the authority to make an official decision or participate in any discussion or deliberation as an ODMH employee which would affect the recipient college or university. The interests of the college or university are not dependent upon the officials or employee's official responsibilities. Therefore, an ODMH employee or official who does not participate in the review or approval of OET grants is not prohibited by R.C. 102.03(E) from accepting a teaching or training position with a college or university that receives an OET grant or a department within the college or university that receives a grant.

An ODMH staff member within OET who has the authority to participate in the review or approval of the ODMH/OET grants would be subject to an inherent conflict of interest impairing his independence and objectivity of judgment with regard to his official decisions and responsibilities if he were to accept an offer of employment from a recipient college or university. The promise of future employment could affect the officials recommendations or decisions with regard to a grant to his potential or future employer, and thus is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to his duties. Therefore, an ODMH official or employee who has the authority or duty to participate in the review or approval of OET grants may not accept a teaching or training position with a college or university that has applied for or received an OET grant unless he withdraws from the consideration of that grant prior to acceptance of or negotiation for, the position. See Advisory Opinion No. 87-004. See also Advisory Opinions No. 82-002 and 86-006. Such withdrawal may not interfere with the officials or employee's performance of his duties at ODMH or ODMH's operations, and must be approved by the appropriate officials at ODMH.

In sum, an official or employee of ODMH is prohibited by R.C. 2921.42 and R.C. 102.03(E) from accepting a teaching or training position at a college or university that has received an OET grant or within a college or university department that has received a grant if: (1) he would perform work or receive compensation under the grant or he would otherwise have an interest in the grant as a result of his position with the college or university; or (2) his duties at ODMH include reviewing or approving OET grants and he is unable to withdraw from consideration of the grant or grant application of his prospective employer.

If an ODMH official or employee is not prohibited from accepting a position with a college or university and proceeds to negotiate or accept such employment, his conduct will be further conditioned by R.C. 102.03(D). He is prohibited from making recommendations or otherwise using his position with ODMH, formally or informally, to secure anything of value for the college or university with which he is seeking or has accepted employment. See Advisory Opinion No. 87-004. Also, an ODMH employee is prohibited from: (1) using ODMH time, facilities, or resources to perform work for a college or university; (2) receiving compensation for services rendered on projects that he has recommended in his official capacity with ODMH; (3) rendering services for compensation that are his duty to provide as an ODMH employee; (4) refraining from rendering any service or otherwise performing his duties with ODMH in order to secure a position with a college or university; and (5) recommending the college or university to ODMH as a future or continuing grant recipient. See Advisory Opinions No. 84-012 and 84-013. See also R.C. 2921.43 (prohibiting a public servant from soliciting or accepting any compensation or supplement to perform his official duties).

Divisions (A) and (B) of Section 102.04 read:

(A) Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

(B) Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall sell or agree to sell, except through competitive bidding, any goods or services to the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

Division (B) of Section 102.04 prohibits an ODMH employee from selling, except through competitive bidding, any services to any instrumentality of the state, which would include a state college or university. Division (A) prohibits an ODMH employee from receiving compensation from any college or university for personally rendering any service in any case, proceeding, application, or other matter that is before ODMH or any other department, agency, or entity of the state. Division (D) of Section 102.04 provides an exception to the prohibitions of Division (A) and (B) and is available to nonelected officials and public employees. Both of the following criteria must be met before the exception will apply:

(1) The agency to which the official or employee wants to sell the goods or services, or before which the matter that involves the rendering of his services is pending, is an agency other than the one with which he serves;

(2) Prior to rendering the personal services or selling or agreeing to sell the goods or services, he files a statement with the appropriate ethics commission, with the public agency with which he serves, and with the public agency before which the matter is pending or that is purchasing or has agreed to purchase goods or services.

Division (D) specifies the information which must be contained in the statement filed pursuant to that provision, including a declaration that the official or employee disqualifies himself for two years from participating in any matter involving any public official or employee of the agency before which the matter is pending or to which goods or services are to be sold. Division (E) emphasizes this disqualification, as follows:

(E) No public official or employee who files a statement or is required to file a statement under division (D) of this section shall knowingly fail to disqualify himself from any participation as a public official or employee of the agency with which he serves in any matter involving any official or employee of an agency before which a matter for which he rendered personal services was pending or of a public agency that purchased or agreed to purchase goods or services.

Division (A) of Section 102.03 of the Revised Code provides, in pertinent part:

No present or former public official or employee shall, during his public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which he personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion As used in this division, "matter" includes any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments. As used in this division, "represent" includes any formal or informal appearance before, or any written or oral communication with any public agency on behalf of any person. (Emphasis added.)

An ODMH employee who contracts to provide training or teaching services at a college or university which receives an ODMH/OET grant is prohibited by R.C. 102.03(A) from representing his employing college or university or any other person before ODMH or any other public agency on any matter in which he personally participated as an ODMH employee. See Advisory Opinion No. 87-001.

Division (B) of Section 102.03 reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the

information was received and preserving its confidentiality is necessary to the proper conduct of government business.

An ODMH employee who provides teaching and training services to a college or university which receives an ODMH/OET grant is prohibited from disclosing confidential ODMH information to his employing college or university or any other party, or using such confidential information, without appropriate authorization. No time limitation exists for this prohibition, and it is effective while the employee serves with ODMH and after he leaves ODMH. See Advisory Opinion No. 88-009.

This advisory 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.

Therefore, it is the opinion of the Commission, and you are so advised, that: (1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits an official or employee of the Ohio Department of Mental Health from providing teaching or training services to a college or university that receives a grant from ODMH where the official or employee would have a definite and direct interest in the grant as a result of his position with the college or university; (2) Division (A)(3) of Section 2921.42 prohibits an ODMH official or employee from profiting from a grant authorized by him or by a board or commission of which he is a member where the grant is not awarded through competitive bidding and is not the lowest and best bid; (3) Division (A)(1) of Section 2921.42 of the Revised Code prohibits an ODMH official or employee from using the authority or influence of his office, either formally or informally, to secure the award of a grant to a college or university with which he is employed; (4) Division (D) of Section 102.03 of the Revised Code prohibits an ODMH official or employee from using the authority or influence of his office to secure for himself employment with a college or university that has applied for or received an ODMH grant; (5) Division (E) of Section 102.03 of the Revised Code prohibits an ODMH official or employee from accepting an offer of employment with a college or university that has applied for or received a grant from the Office of Education and Training within ODMH if his duties at ODMH include reviewing or approving OET grants and he is unable to withdraw from consideration of the grant or grant application of his prospective employer; (6) Division (D) of Section 102.03 of the Revised Code prohibits an ODMH employee, who has accepted a position with a college or university that has applied for or received an OET grant, from using his position at ODMH to secure anything of value for the college or university, or for himself in the performance of his duties for the college or university.


Richard D. Jackson, Chairman
Ohio Ethics Commission