



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 94-001
February 18, 1994

Syllabus by the Commission:

(1) Division (D) of Section 102.03 of the Revised Code does not prohibit the members of the boards of county commissioners who serve on the board of directors of a private, non-profit corporation that contracts with and receives funding from a joint-county alcohol, drug addiction, and mental health service district from participating in the appointment of members to the board of the joint-county service district;

(2) The prohibitions imposed by the Ethics Law and related statutes do not prohibit a county commissioner from serving on the board of directors of a private, non-profit corporation which contracts with his political subdivision, provided that he serve in his "official capacity;" however, Division (D) of Section 102.03 of the Revised code and Division (A) (1) of Section 2921.42 of the Revised Code restrict the official actions of a county commissioner who serves on the board of directors of a private, non-profit corporation which contracts with and receives funding from a joint-county alcohol, drug addiction, and mental health service district;

(3) Division (D) of Section 102.03 of the Revised Code and Division (A) (1) of Section 2921.42 of the Revised Code prohibit members of the boards of county commissioners who serve on the board of directors of a private, non-profit corporation which contracts with and receives funding from a joint-county alcohol, drug addiction, and mental health service district from acting, formally or informally, to secure funding for the non-profit corporation from the joint-county district.

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You ask whether the Ohio Ethics Law and related statutes prohibit the county commissioners who serve on the board of directors of a private, non-profit corporation which receives funding from a joint-county alcohol, drug addiction, and mental health service district (joint-county service district) from participating in the appointment of members of the board of the joint-county service district.

You state that, in the instant situation, four counties comprise the joint-county service district. One county commissioner from each of the four counties also serves on the board of directors of a private, non-profit corporation which receives funding from the joint-county service district and provides mental health services within the joint-county service district. The bylaws of the non-profit corporation require that the board of the non-profit corporation consist of not less than eight or more than twelve members. The bylaws require that each of the four

counties have equal representation on the board. It has been explained that there is no provision in the bylaws which requires that these representatives be county commissioners; however, traditionally, the boards of county commissioners of the four counties have each recommended that one commissioner from each county serve on the board of the non-profit corporation as a representative of their county.

You also state that the non-profit corporation, and the arrangement whereby county commissioners serve on its board of directors, were established before the statutory creation of mental health service districts. You further state that the county commissioners who serve on the board of directors of the private, non-profit corporation are not compensated for their service on the board, but are reimbursed for expenses.

Authority and Composition of the Joint-county service District Board

The board of a joint-county service district is charged with serving as the community mental health planning agency for counties within its jurisdiction, including evaluating the need for mental health programs and facilities. See R.C. 340.03 (A)(1). The board of a joint-county service district may contract for services with public and private agencies. See R.C. 340.03 (A) (6) (a) . In deciding to contract with an agency, the board must consider the cost effectiveness of services provided, the quality and continuity of care, and may review cost elements, including salary costs, of the services to be provided. *Id.* You state that, in this instance, the joint-county district has entered into contracts with nine service providers for the provision of alcohol, drug addiction, and mental health services.

The governing board of an alcohol, drug addiction, and mental health service district consists of eighteen members; four are appointed by the director of mental health, four are appointed by the director of alcohol and drug addiction services, and ten members are appointed by the board of county commissioners. See R.C. 340.02. Board members may be reappointed, but statutorily imposed restrictions must be followed. *id.* In a joint-county service district, the board of county commissioners of each participating county appoints members of the board in the same proportion as the county's population bears to the district; each county appoints at least one member. *id.* Any member of the joint-county service district board may be removed from office by the appointing authority for neglect of duty, misconduct, malfeasance, or other reasons specified by statute. *Id.*

You state that, in the instant situation, the joint-county service district operates with funds raised by local taxes levied by the board of the joint-county district. See R.C. 5705.01 and 5705.03. However, the boards of commissioners of the counties which comprise the joint-county service district are authorized to appropriate funds to the joint-county service district for the provision of mental health and alcohol and drug addiction services, programs, and facilities. See 340.07. See also R.C. 5705.221 (the boards of commissioners of the participating counties may request voter approval of an additional tax levy to fund the joint-county district).

Appointment of Joint-County Service District Board Members by County Commissioners

Your question whether a county commissioner who serves on the board of directors of the non-profit corporation described may participate in the appointment of members of the board of the joint-county service district implicates the prohibition imposed by R.C. 102.03 (D), which reads:

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.

A county commissioner is a public official for purposes of R.C. 102.03 (D). See Ohio Ethics Commission Advisory Ops. No. 88-003 and 89-004. Payments made by the joint-county service district board to the private, non-profit corporation for the provision of mental health services fall within the definition of "anything of value." See Advisory Op. No. 88-009.

R.C. 102.03 (D) prohibits a public official or employee from using his official authority or influence to secure anything of value, either for himself or for any other party if the thing of value is of such a character as to manifest a substantial and improper influence upon him with respect to his official duties by impairing his objectivity and independence of judgment as a public official or employee. See Advisory Ops. No. 80-003, 86-007, 87-004, 88-004, and 89-005. R.C. 102.03 (D) prohibits a public official from participating in deliberations, voting, or otherwise using his official position with regard to the interests of an organization where he is an officer or board member of the organization. R.C. 102.03 (J); Advisory Op. No. 89-005. Therefore, a county commissioner who serves on the board of the non-profit corporation described is prohibited from using the authority or influence of his county office to secure anything of value from the joint-county service district board for the corporation.

A purchaser-vendor relationship exists between a joint-county alcohol, drug addiction, and mental health service district and a provider of mental health services, such as the described non-profit corporation. The interests of the parties engaged in a purchaser-vendor relationship are potentially adversarial. See Greene County Guidance Ctr., Inc. v. Green-Clinton Community Mental Health Bd., 19 Ohio App. 3d 1 (Greene County 1984) (a mental health care provider unsuccessfully sought an injunction against a mental health board to prevent the termination of a contract for the provision of services and to prevent the mental health board from contracting with another provider) . See also Advisory Op. No. 87-006 (since a county board of mental retardation and developmental disabilities monitors and evaluates residential service providers, plans and set priorities among all services providers, and reviews proposals from and recommends providers, a county board and a service provider may often stand in adversarial positions).

In the instant situation, it is possible that a board of directors of a joint-county service district, in evaluating the need for mental health programs and facilities within its jurisdiction, may decide that the programs and facilities currently acquired from a provider of mental health services duplicate, such as the described non-profit corporation, duplicate, or do not sufficiently

meet, the needs of their clients and may decide to terminate its contract with the provider or not renew the contract. Furthermore, the non-profit corporation competes in the market-place with other service providers to secure funding from the joint-county board. See Advisory Op. No. 83-010. Therefore, it is obvious that the joint-county service district board and non-profit corporation stand in potentially adversarial positions.

However, in order to be prohibited by R.C. 102.03 (D), the action of the county commissioner must result in a definite and direct pecuniary benefit for the corporation. It is recognized that county commissioners who serve on the board of the non-profit corporation could be predisposed to having individuals serve on the joint-county service district board who support or advocate that the joint-county service district acquire services from the non-profit corporation. However, the potential appointment of an individual who may have a predisposition to support the non-profit corporation does not, in and of itself, result in a definite and direct pecuniary benefit for the non-profit corporation. Therefore, R.C. 102.03 (D) does not prohibit the county commissioners who serve on the board of directors of a private, non-profit corporation which contracts with and receives funding from a joint-county alcohol, drug addiction, and mental health service district from participating in the appointment of members to the board of the joint-county district.

Restrictions upon Commissioners in Using Their official Authority to Benefit the Non-Profit Corporation

Even though county commissioners are not prohibited from participating in the appointment of members to the board of the joint-county service district, R.C. 102.03 (D) does restrict the use of their official authority and influence in matters relating to the operation of the non-profit corporation.

In Advisory opinion No. 89-004, the Ethics Commission held that R.C. 102.03 (D) prohibits a county commissioner, who is a partner in an insurance agency, from using the authority or influence of his office to secure contracts or subcontracts for his insurance agency from a regional transit authority, since the board of county commissioners has the power to appoint and remove members of the board of trustees of the regional transit authority, and to appropriate moneys to the transit authority. As explained above, the boards of county commissioners have the power to appoint and remove members of the joint-county board, appropriate moneys to the joint-county service district, request voter approval of a tax levy to benefit the joint-county service district, and the county commissioners exercise some control over the operation of the joint-county service district. In the instant situation, members of the boards of county commissioners who serve on the board of directors of a private, non-profit corporation which receives funding from the joint-county service district have a fiduciary relationship with the non-profit corporation. These county commissioners face an inherent conflict of interest and potentially divided loyalties and, as a consequence, may use the authority or influence of their office to secure contacts and funding for the non-profit corporation.

Therefore, as a result of the power and authority which the boards of county commissioners have over members of the board of the joint-county service district, and the ability to appropriate funds to the board of the joint-county service district and request voter

approval of a tax levy to benefit the joint-county service district, R.C. 102.03 (D) prohibits the county commissioners who serve on the board of directors of a private, non-profit corporation which contracts with and receives funding from a joint-county alcohol, drug addiction, and mental health service district from acting to secure funding for the non-profit corporation from the joint-county district. See also R.C. 2921.42 (A)(1) (discussed below).

Restrictions Upon Commissioners in Matters Relating to Public Contracts

R.C. 2921.42 imposes prohibitions upon public officials with regard to public contracts. Your attention is directed to R.C. 2921.42 (A)(1) and (4) which read:

(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; . . .

(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.

A county commissioner is a "public official" who is subject to the prohibitions imposed by R.C. 2921.42. See Advisory Op. No. 89-004. The funding of a non-profit corporation which provides mental health services to a joint-county service district is a public contract for purposes of R.C. 2921.42. See R.C. 2921.42 (F) (1) (a "public contract" includes the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of a political subdivision).

R.C. 2921.42 (A)(1) prohibits a public official from authorizing, or using the authority or influence of his office to secure authorization of, a public contract in which he has a definite and direct pecuniary or fiduciary interest. See Advisory Op. No. 81-008. The county commissioners who serve as board members of the non-profit corporation have a fiduciary interest in the contracts of the non-profit corporation. Therefore, R.C. 2921.42 (A)(1), as well as R.C. 102.03 (D), prohibits the county commissioners who serve on the board of directors of a private, non-profit corporation which contracts with and receives funding from a joint-county alcohol, drug addiction, and mental health service district from acting, formally or informally, to secure funding for the non-profit corporation from the joint-county district.

Division (A)(4) of Section 2921.42 prohibits a public official from having an interest in a public contract entered into by or for the use of "the political subdivision or governmental agency or instrumentality with which he is connected." Since the boards of county commissioners have power and authority over members of the board of the joint-county service district and the ability to appropriate funds to the board of the joint-county service district and request voter approval of a tax levy to benefit the joint-county district, the boards of county commissioners are "connected" with the joint-county service district. See Advisory Op. No. 89-004 (a county commissioner is "connected" with a regional transit authority which is coextensive

with the boundaries of his county). Therefore, Division (A) (4) prohibits the county commissioners from having a fiduciary interest in a non-profit corporation which receives funding from the joint-county service district and provides mental health services within the joint-county district unless they serve on the board of the non-profit corporation in their "official capacity" or if the exceptions of Division (C) of R.C. 2921.42 can be met.

"Official Capacity" Service on Non-Profit Corporation Board

The Ethics Commission has held that the prohibition imposed by the Ethics Law and related statutes do ' not apply to a public official of a political subdivision who serves on the board of directors of a non-profit agency in his "official capacity" in order to represent his political subdivision's interests since "there would not be a dual interest in which private considerations would distract from his serving the public interest." Advisory Op. No. 84-001. The Ethics Commission has recognized that political subdivisions may create or become participants in managing a non-profit corporation as a means to provide necessary services to the citizens of the political subdivision. see Advisory Ops. No. 83-010 (community development), 84-010 (paramedic services) , and 92-012 (hospital services) . See also Att'y Gen. Op. No. 79-055 (a statutorily created public body may participate in the establishment or operation of a non-profit corporation only if the power do so is expressly conferred by statute or necessarily implied from powers which are expressly granted).

In Advisory opinion No. 84-001, the Commission set forth four criteria which must be met in order for a public official to be deemed to serve on the board of a non-profit corporation in his official capacity:

- (1) the governmental entity must create or be a participant in the non-profit corporation;
- (2) any public official or employee connected with the jurisdiction . . . may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity;
- (3) the public official or employee must be formally instructed to represent the governmental entity and its interests;
- (4) there must be no other conflict of interest on the part of the designated representative.

See also Advisory Ops. No. 82-004, 83-010, 92-002, and 93-012; Att'y Gen. Op. No. 91-007.

As stated above, the non-profit corporation and the arrangement whereby county commissioners serve on its board of directors, were established before the statutory creation of mental health service districts. See Advisory Op. No. 93-012 (describing a similar situation involving a city and a hospital organized as a non-profit corporation). However, the bylaws do not require county commissioners to serve on the board of the non-profit corporation.

While it has been stated that traditionally the boards of county commissioners of the four counties have each recommended that one representative of their board of county commissioners serve on the board of the non-profit corporation, there is no representation that a county commissioner serving on the non-profit corporation is formally designated to do so and to represent the interests of the county which he serves as a commissioner. Even if it were assumed that the boards of county commissioners became participants in the non-profit corporation in order to ensure that the citizens of the four counties would have access to mental health services and that county commissioners were designed to serve on the board of the non-profit corporation in their official capacity as representatives of their respective counties in order to represent the interests of their counties, the "official capacity" exception would not alter the prohibitions imposed by R.C. 102.03 (D) and R.C. 2921.42 (A)(1) due to the different interests of the joint-county service district and the non-profit corporation.

As explained above, whenever a public official or employee serves on the board of directors of a non-profit corporation in his "official capacity," the official or employee acts as a representative of the political subdivision in order to represent the political subdivision's interests and there is no dual interest in which private considerations distract from the public interest. However, in the instant situation, due to the establishment of the joint-county alcohol, drug addiction, and mental health service district, the boards of commissioners of the four counties no longer contract with the non-profit corporation for the provision of mental health services; rather, the joint-county board contracts with the non-profit corporation. The interests of the joint-county service district board and the non-profit corporation may differ and are potentially adversarial. Also, the county commissioners do not serve on the board of the non-profit corporation in order to represent the interests of the joint-county service district board; they serve to represent the interests of the county commissioners. Thus, even if the county commissioners serve on the board of the non-profit corporation in their "official capacity," R.C. 102.03 (D) and R.C. 2921.42 (A) (1) would still prohibit the county commissioners from acting, formally or informally, to secure funding for the non-profit corporation from the joint-county service district.

Division (C) of R.C. 2921.42 provides an exception to the prohibition of R.C. 2921.42 (A) (4). R.C. 2921.42 (C) establishes four requirements which must be met before the non-profit corporation may receive funding from the joint-county district and provide mental health services within the joint-county district. Generally, Division (c) requires that the services be necessary and unavailable elsewhere for the same or lower cost, the vendor give the governmental entity preferential or the same treatment accorded to other parties in similar transactions, and the public official who has an interest in the public contract must take no part in the deliberations and decision with respect to the contract. See Advisory Op. No. 89-004.

Whether a particular transaction meets the criteria of Division (C) depends upon the facts and circumstances of each individual situation. See Advisory Ops. No. 87-003 and 92-004. The criteria are strictly construed against the public official and the burden is on the official to demonstrate that he is in compliance with all of the requirements imposed by Division (C). See Advisory Ops. No. 83-004, 84-011, and 92-004.

It must be stressed that even if the exception of Division (C) is met in order that a county commissioner may serve on the board of directors of a private, non-profit corporation which

contracts with and receives funding from a joint-county alcohol, drug addiction, and mental health service district, the restrictions imposed by R.C. 2921.42 (A) (1) and R.C. 102.03 (D) , the county commissioners are still prohibited from using their official authority or influence to secure funding for the non-profit corporation.

Appointment of the Private, Non-Profit Corporation's Board Members

You also ask whether the Ohio Ethics Laws and related statutes prohibit the county commissioners who serve on the board of directors of the private non-profit corporation from participating in the appointment of members of the board of directors of the non-profit corporation.

The Ohio Ethics Commission is without the authority to apply the prohibitions imposed by the Ohio Ethics Law and related statutes to matters which are strictly limited to the internal organization and actions of a private non-profit corporation even if the non-profit corporation receives funding from a political subdivision. See generally Advisory Op. No. 93-012. The manner in which the members are appointed to the non-profit corporation's board of directors is an issue for determination of the non-profit corporation's legal advisor.

Confidentiality Restrictions

Finally, Division (B) of Section 102.03 of the Revised Code prohibits the county commissioners who serve on the board of directors of a private, non-profit corporation which contracts with and receives funding from a joint-county alcohol, drug addiction, and mental health service district from disclosing or using, without proper authorization, information acquired by them in the course of their official duties that either is confidential by statutory provision or has been clearly designated to them as confidential when such designation is warranted and necessary for the proper conduct of government business. See Advisory Op. No. 92-012. It is important to note that no time limit exists for this prohibition and it is effective while he presently serves as a county commissioner and after leaving office. See Advisory Op. No. 88-009. However, it must be stressed that the non-profit corporation may not impose the prohibitions of R.C. 102.03 (B) upon the county commissioners with regard to that information by designating, in the interests of the corporation, the information as confidential. See Advisory Op. No. 92-012.

Summary

This advisory 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.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (D) of Section 102.03 of the Revised Code does not prohibit the members of the boards of county commissioners who serve on the board of directors of a private, non-profit corporation that contracts with and receives funding from a joint-county alcohol, drug addiction, and mental health service district from participating in the appointment of members to the board

of the joint-county service district; (2) The prohibitions imposed by the Ethics Law and related statutes do not prohibit a county commissioner from serving on the board of directors of a private, non-profit corporation which contracts with his political subdivision, provided that he serve in his "official capacity;" however, Division (D) of Section 102.03 of the Revised Code and Division (A)(1) of Section 2921.42 of the Revised Code restrict the official actions of a county commissioner who serves on the board of directors of a private, non-profit corporation which contracts with and receives funding from a joint-county alcohol, drug addiction, and mental health service district; and (3) Division (D) of Section 102.03 of the Revised Code and Division (A)(1) of Section 2921.42 of the Revised Code prohibit members of the boards of county commissioners who serve on the board of directors of a private, non-profit corporation which contracts with and receives funding from a joint-county alcohol, drug addiction, and mental health service district from acting, formally or informally, to secure funding for the non-profit corporation from the joint-county district.


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Ohio Ethics Commission