



OHIO ETHICS COMMISSION
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Advisory Opinion Number 96-005
November 15, 1996

Syllabus by the Commission:

(1) Provisions of Ohio's Ethics Law and related statutes contained in Division (A)(4) of Section 2921.42 and Division (D) of Section 102.03 of the Revised Code do not prohibit an employee of a county board of mental retardation and developmental disabilities from serving as the executive officer of a non-profit corporation, which was created for the purpose of serving clients of the county board pursuant to an agreement between the county board and the non-profit corporation, if the employee is serving in his official capacity;

(2) A county board of mental retardation and developmental disabilities employee is serving in his official capacity while acting as the executive officer of a non-profit corporation, which was created for the purpose of serving clients of the county board pursuant to an agreement between the county board and the non-profit corporation, if the county board: (a) creates or is a participant in the non-profit corporation; (b) formally designates an officer or employee connected with the county board to represent the county board while serving as the executive officer of the non-profit corporation; (c) formally instructs the designated officer or employee to represent the board and its interests; and if, (d) there are no other conflicts of interest on the part of the designated representative.

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You have asked whether the Ohio Ethics Law and related statutes prohibit a management employee of a county board of mental retardation and developmental disabilities (Board) from serving as an executive officer of a non-profit corporation (Corporation), which was created for the purpose of serving Board clients pursuant to an agreement between the Board and the Corporation.

You state that the Corporation was created several years ago pursuant to state law regarding the incorporation of non-profit corporations. The purpose of the Corporation is to employ Board clients and the Corporation does not employ any other persons. The board members of the Corporation are either appointed by the Board or their appointment is subject to the approval of a majority of the Board's members. The Board employee would receive all of his compensation from the Board, and no compensation from the Corporation.

You have also indicated that you initially submitted this issue to the Attorney General's Office for guidance. Accordingly, in March 1996, the Attorney General issued OAG Opinion No. 96-007 regarding the facts of this situation. The syllabus of that opinion states that:

1. R.C. 5126.03(C) does not prohibit an employee of a county board of mental retardation and developmental disabilities (county MR/DD board), in his official capacity, from serving as an executive officer of a nonprofit corporation created pursuant to R.C. Chapter 1702 that has entered into a contract with the county MR/DD board.
2. In the case of a nonprofit corporation established pursuant to R.C. Chapter 1702, and **provided that there is no violation of a statutory provision subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08**, an employee of a county MR/DD board, in his official capacity, may serve as an executive officer of the nonprofit corporation if: (1) the county MR/DD board has participated in the nonprofit corporation; (2) the county MR/DD board formally designates the position in question to represent the county MR/DD board; (3) the county MR/DD board employee is formally instructed to represent the county MR/DD board and its interests; and (4) there is no other conflict of interest on the part of the particular county MR/DD board employee. (1991 Op. Att'y Gen. No. 91-007, approved and followed.) (Emphasis added.)

The Attorney General does not render advisory opinions interpreting the Ohio Ethics Law and related statutes. Ohio Op. Att'y Gen. Nos. 87-025 and 92-039. Thus, the issue for the Ohio Ethics Commission remaining from your question is whether the Ethics Law and related statutes would prohibit the Board employee from serving, in his official capacity, as an executive officer of the Corporation.

Your attention is initially directed to Division (A)(4) of Section 2921.42 of the Revised Code, which reads:

(A) No public official shall knowingly:

(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 in R.C. 2921.01(A) to include "any elected or appointed officer, or employee, or agent of . . . any political subdivision" of the state. An employee of a county department or board, including an MR/DD board, is considered a "public official" within this definition. R.C. 5126.02(A) and (C). Advisory Op. No. 87-006.

A "public contract" is defined in R.C. 2921.42(E) 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 or any of its political subdivisions." The contractual relationship between the Board and the Corporation, which was established for the purpose of providing employment services for Board clients, is the purchase or acquisition, or a contract for the purchase or acquisition, of services by

a political subdivision of the state, and is, therefore, a public contract. Additional support for this conclusion is found at R.C. 5126.05(D), which states:

Any county board may enter into contracts with other such boards and with public or private, nonprofit, or profit-making agencies or organizations of the same or another county, to provide the facilities, programs, and services authorized or required, upon such terms as may be agreeable, and in accordance with this chapter and Chapter 3323. of the Revised Code and rules adopted thereunder and in accordance with sections 307.86 and 5126.071 of the Revised Code.

The Ethics Commission has held that an interest prohibited by R.C. 2921.42(A)(4) must be both definite and direct, and may be either pecuniary or fiduciary. Advisory Op. No. 81-008. In Advisory Opinion No. 81-003, the Commission held that a board member of a private agency had a fiduciary or pecuniary interest in the contracts of the agency, so that he was prohibited from also serving as a member of a county board of mental retardation and developmental disabilities where the private agency and county board had contractual relationships. An officer or chief administrative official of a corporation also has a fiduciary interest in the contracts of the corporation, and may have a pecuniary interest as well. Advisory Op. Nos. 81-008, 85-009, and 86-005. Therefore, the executive director of a corporation, whether a for-profit or not-for-profit corporation, that provides services to, or for the use of, a county board, or has a contract with the board to provide services, is generally prohibited from serving as a member of the county board.

Based upon the information that you submitted, a Board employee who served as an executive officer of the Corporation would have a direct, fiduciary interest in the contracts of the Corporation. (It is unnecessary to consider whether the Board employee would have any pecuniary interest in the contract, because you have stated that the Board employee would be compensated solely by the Board for his duties and responsibilities to the Corporation.) It would appear, then, that the Board employee would have a prohibited interest, pursuant to R.C. 2921.42(A)(4), in a public contract with the Corporation if he served as the Corporation's executive officer. However, the Ethics Commission has held that the prohibition of R.C. 2921.42(A)(4) is inapplicable to a public official of a political subdivision who serves on the board of directors of a non-profit agency that contracts with the political subdivision, if he serves on the board in his "official capacity," as a representative of the political subdivision and in order to represent the political subdivision's interests. Advisory Op. Nos. 82-004, 83-010, and 84-001.

The Ethics Commission has explained that whenever a public official serves on the board of directors of a non-profit corporation in his official capacity, he continues to pursue the interests of his public entity and, therefore, "there would not be a dual interest in which private considerations would distract from his serving the public interest." Advisory Op. No. 84-001. In Advisory Opinion No. 84-001, the Ethics Commission set out four criteria that must be met in order for a public official to be deemed to serve with a non-profit corporation in his official capacity. The criteria are as follows:

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, including a council member, 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; and

4. There must be no other conflict of interest on the part of the designated representative.

Advisory Op. No. 84-001. See also Advisory Op. Nos. 82-004, 83-010, and 88-005.

In the instant situation, you have stated that the Corporation's board members are either appointed by the Board or their appointment is subject to a majority-vote approval by the Board. You have also stated that the Corporation's management staff is subject to the approval of the Board's Superintendent. These factors would meet the first of the above requirements.

You have also stated that the Board employee would serve as executive officer of the Corporation pursuant to the contract executed between the two entities. According to OAG 96-007, the Board will designate the employee to serve in his official capacity as an executive officer of the Corporation. Supplementing this is the fact that the employee will receive no compensation from the Corporation, but instead will remain an employee of the Board, receiving all of his compensation from the Board while working as an executive officer of the Corporation. These factors would meet the second of the above requirements.

Based upon the information that you submitted, it would appear that the Board employee would be instructed to represent the Board and its interests while acting as the Corporation's executive officer, and that the Board employee has no other conflicts of interest. These are the final two factors that must be met for the Board employee to be acting in his official capacity while serving as the Corporation's executive officer. Therefore, in the situation you have described, it appears that the necessary criteria for determining that the Board employee is acting in his official capacity, when he serves as executive officer of the Corporation, have been met. If the criteria have been met, the Board employee will not be considered to have a prohibited interest in a public contract if he also serves as executive officer of the Corporation. Advisory Op. No. 88-005.

Your attention is also brought to R.C. 102.03(D), which states that:

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.

R.C. 102.03(D) would generally prohibit a county board employee from discussing or participating in any matter that would benefit a corporation of which he is an executive officer, since the benefit accruing to the Corporation would be of such a character as to manifest a substantial and improper influence upon him with respect to his duties. In Advisory Opinion No. 88-005, however, the Commission adopted the four criteria set forth in Advisory Opinion 84-

001, which had been previously applied to the prohibition of R.C. 2921.42(A)(4), as the requirements that must also be met before a public official may be considered to serve on the board of a private agency in his official capacity without violating R.C. 102.03(D).

In this instance, the board employee is serving as the corporation's executive officer in his official capacity, and is representing the interests of the Board as executive officer. Any benefit accruing to the Corporation from the Board, such as a modification of the existing contract or a new contract, would not be of such a character as to manifest a substantial and improper influence upon the Board employee with respect to his official duties, since he is serving as the Corporation's executive officer as a part of his official duties. Benefits accruing to the Corporation as a result of the Board employee's service as executive officer would not accrue to the Board employee's personal benefit or to the benefit of any party with which the Board employee is connected in his personal capacity. Instead, the benefit would accrue to an agency that the Board employee had been charged to serve as part of his official responsibilities. Therefore, the benefit accruing to the Corporation would not be of such a character as to manifest a substantial and improper influence upon the Board employee with respect to his public duties. R.C. 102.03(D) would not prohibit the Board employee from participating as the Corporation's executive officer in decisions regarding the contract between the Board and the Corporation. This conclusion is based on the assumption that the Board has properly designated the employee to serve in his official capacity as executive officer of the Corporation.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Provisions of Ohio's Ethics Law and related statutes contained in Division (A)(4) of Section 2921.42 and Division (D) of Section 102.03 of the Revised Code do not prohibit an employee of a county board of mental retardation and developmental disabilities from serving as the executive officer of a non-profit corporation, which was created for the purpose of serving clients of the county board pursuant to an agreement between the county board and the non-profit corporation, if the employee is serving in his official capacity; and (2) A county board of mental retardation and developmental disabilities employee is serving in his official capacity while acting as the executive officer of a non-profit corporation, which was created for the purpose of serving clients of the county board pursuant to an agreement between the county board and the non-profit corporation, if the county board: (a) creates or is a participant in the non-profit corporation; (b) formally designates an officer or employee connected with the county board to represent the county board while serving as the executive officer of the non-profit corporation; (c) formally instructs the designated officer or employee to represent the board and its interests; and if, (d) there are no other conflicts of interest on the part of the designated representative.


Jack Paul DeSario, Chair
Ohio Ethics Commission