



OHIO ETHICS COMMISSION

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Advisory Opinion Number 96-006

November 151996

Syllabus by the Commission:

(1) The Ohio Ethics Law and related statutes do not prohibit an individual who is a client of a county MR/DD board from serving on the board provided that the board follows the statutory procedure established by the General Assembly in Section 5126.032 of the Revised Code to determine that the board member does not receive any preferential treatment or an unfair advantage over other eligible clients;

(2) Division (D) of Section 102.03 of the Revised Code and Division (A)(1) of Section 2921.43 of the Revised Code do not prohibit an individual with disabilities who serves as a member of a county MR/DD board from receiving, from the county MR/DD board, necessary transportation and the services of a personal care attendant to enable the board member to attend and participate in board meetings and functions.

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You ask whether the Ohio Ethics Laws and related statutes prohibit: (1) an individual who is a client of a County Board of Developmental Disabilities (board) from serving on the board; (2) a board member with disabilities from receiving transportation, which is paid by the board, to attend board meetings and functions; and (3) a board member with disabilities from receiving the services of a personal care attendant, who is paid by the board, to enable the board member to attend board meetings and functions. In your request for an advisory opinion, you state that initially you had a question regarding the implication of the Ethics Law and related statutes in a situation where the adult daughter of a board member is employed by a supported living provider who contracts with the board. However, you also state that this question has been "clearly answered" by precedent established by the Ethics Commission. See Advisory Ops. No. 88-005 and 92-012. Accordingly, this particular question is not addressed in this advisory opinion.

In the instant situation, provisions of R.C. Chapter 5126., in addition to the Ohio Ethics Law and related statutes, will be relevant to your questions. See R.C. 5126.03 (4)(B) ("questions relating to the existence of a conflict of interest shall be submitted to the local prosecuting attorney and the Ohio ethics commission for resolution.") See also Advisory Op. No. 87-006.

As explained below, an individual who is a client of a county MR/DD board is not prohibited from serving on the board, provided that the board follows the statutory procedure established by the General Assembly in Section 5126.032 of the Revised Code to determine that the board member with disabilities does not receive any preferential treatment or unfair

advantage over other eligible clients. Also, an individual with disabilities who serves as a member of a county MR/DD board is not prohibited from receiving, from the county MR/DD board, necessary transportation and the services of a personal care attendant to enable the board member to attend and participate in board meetings and functions.

The issue whether the Ohio Ethics Laws and related statutes prohibit an individual who is a client of the board from serving on the board will be addressed first.

R.C. 5126.02 establishes, in each county, a board of mental retardation and developmental disabilities (MR/DD). A county MR/DD board is comprised of seven members appointed by the board of county commissioners and the probate judge of the county. R.C. 5126.02 (A)(1). The following section, R.C. 5126.03, prohibits certain individuals from serving on a county MR/DD board. The list of individuals who are prohibited from serving on a county MR/DD board does not specifically include a person who is eligible to receive services from the county MR/DD board. However, as explained below, R.C. 5126.032 implicitly recognizes that a member of the county MR/DD board may be an individual who is also eligible for services from the board.

All county MR/DD board members must be "interested and knowledgeable in the field of mental retardation and other allied fields." R.C. 5126.02 (A)(1). County MR/DD board members are appointed for four years and serve without compensation, but are reimbursed for necessary expenses incurred in the conduct of board business, including expenses incurred within the county. R.C. 5126.02 (A)(2) and (A)(5).

County MR/DD boards provide "direct service" funds to persons with mental retardation or developmental disabilities, or to parents and family members of persons with mental retardation and developmental disabilities, pursuant to the family resource and supported living plans established by the Ohio Revised Code. R.C. 5126.11 (providing for reimbursement to clients or families for specified expenses) and R.C. 5126.40 and 5126.43 (allowing direct payments for supported living to an individual with mental retardation or developmental disabilities, or to another person on that individual's behalf). An individual who meets the requirements to receive services from either a county MR/DD board or an entity under contract with a county MR/DD board is known as "eligible person" R.C. 5126.032.

The statutory procedure established by the General Assembly in R.C. 5126.032 recognizes that there may be instances where a member of a county MR/DD board will be in the class of individuals who are eligible to receive services from the board. R.C. 5126.032 provides a procedure that a county MR/DD board must follow if a board member is eligible to receive services from the county board. The procedure provides safeguards against a county MR/DD board member receiving any preferential treatment or unfair advantage over other eligible clients. The prohibitions imposed by the Ohio Ethics Law and related statutes must be examined before addressing the exception provided by R.C. 5126.032.

Prohibition Imposed by R.C. 2921.42 (A)(4)

Your attention is first directed to Division (A)(4) of Section 2921.42 of the Revised Code, which 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.

R.C. 2921.42 (A)(4) prohibits a public official from having an interest in a public contract entered into by or for the use of the political subdivision with which he is connected. The term "public official" is defined in R.C. 2921.01 (A) to include "any elected or appointed officer, employee, or agent of . . . any political subdivision" of the state. A member of a county department, including a county MR/DD board, is a public official for purposes of R.C. 2921.42 (A)(4). Advisory Op. No. 81-003.

R.C. 2921.42 (G)(1) defines the term "public contract" for purposes of R.C. 2921.42 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 purchase of supported living, or other services for eligible individuals by a county MR/DD board is the purchase of services by a political subdivision of the state, and is therefore a public contract. In the instant situation, the services of a personal care attendant, who is paid by the board, is a "public contract" for purposes of R.C. 2921.42.

For purposes of the prohibitions imposed by R.C. 2921.42, a prohibited "interest" must be definite and direct and may be either pecuniary or fiduciary in nature. Advisory Op. No. 81-008. The Ethics Commission has held that an individual who receives a benefit from a political subdivision has a definite and direct interest in, and directly profits from, a public contract. Advisory Ops. No. 83-005, 91-001, and 92-013. In the instant situation, an eligible individual who receives services from the county MR/DD board will have a definite and direct interest in a contract with the county MR/DD board.

Prohibition Imposed by R.C. 2921.42 (A)(3)

Division (A)(3) of Section 2921.42 of the Revised Code provides that no public official 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, unless the contract was let by competitive bidding to the lowest and best bidder.

The Ethics Commission has held that a public contract will be deemed to have been "authorized" by a public official, legislative body, board, or commission for purposes of R.C.

2921.42 (A)(3), where the public contract could not have been awarded without the public official's or entity's approval. Advisory Ops. No. 87-004, 88-006, and 92-013.

A public official who is a member of a legislative body, commission, or board is bound by the prohibition imposed by R.C. 2921.42 (A)(3) even if he, as a member of the board, abstains from deliberating, voting upon, or otherwise authorizing the public contract. Advisory Ops. No. 87-008, 88-008, and 91-011. In the instant situation, an eligible person who receives supported living services from a county MR/DD board occupies a definite and direct position of profit in the prosecution of the public contract for purposes of R.C. 2921.42 (A)(3). See generally Advisory Ops. No. 88-006, 91-011, and 92-013.

Therefore, in the instant situation, R.C. 2921.42 (A) (3) prohibits a county MR/DD board member, during his service on the county MR/DD board and for one year thereafter, from occupying a position of profit from funds awarded by the county MR/DD board even if, as a member of the county MR/DD board, he abstains from deliberating, voting upon, or otherwise authorizing the furnishing of services to himself. See Advisory Op. No. 88-006 (R.C. 2921.42 (A)(3) prohibits a city officer or employee who must approve the sale of property under a land reutilization program, or who serves on a legislative body, board, or commission, which must approve the sale, including the board of control, from purchasing the property where there is no competitive bidding).

Exception Provided by R.C. 5126.032

The procedure established in R.C. 5126.032 recognizes that there may be instances where a member of a county MR/DD board will be eligible to receive services from the board. R.C. 5126.032 (D) provides a procedure that a county MR/DD board must follow if a board member is eligible to receive services from the county board.

Annually, the chairman of a county MR/DD board appoints three members of the county board to an ethics council. R.C. 5126.032 (B). The superintendent of the county MR/DD board serves as a nonvoting member of the ethics council. Id. The county MR/DD board's ethics council reviews each direct services contract certified to it. R.C. 5126.032 (E)(1). If the direct services contract would result in payment to a board member, then the county MR/DD board's ethics council shall determine whether the eligible person who receives services under the contract stands to receive any preferential treatment or unfair advantage over other eligible persons. Id. If the county MR/DD board's ethics council determines that the eligible person stands to receive any preferential treatment or unfair advantage over other eligible persons, then the county MR/DD board's ethics council shall recommend that the county MR/DD board not enter into the contract. Id. The county MR/DD board shall not enter into any contract that is not recommended by the county MR/DD board's ethics council. R.C. 5126.032 (G) reads:

A county board member . . . is not in violation of the restrictions on Chapter 102. and sections 2921.42 and 5126.03 of the Revised Code with regard to a direct services contract entered into with a county board if the requirements of this section have been met. (Emphasis added.)

Therefore, provided that the county MR/DD board follows the statutory procedure established by the General Assembly in R.C. 5126.032, the Ohio Ethics Laws and related statutes do not prohibit an individual who is a client of the board from serving on the board.

It is apparent that the statutory procedure established by the General Assembly in R.C. 5126.032 recognizes that there may be instances where a member of a county MR/DD board will be in the class of individuals who are eligible to receive services from the board. In addition, R.C. 5126.032 provides safeguards against a county MR/DD board member receiving any preferential treatment or unfair advantage over other eligible persons. The procedure in R.C. 5126.032 appears to be a recognition, by the General Assembly, of holdings by the Ethics Commission that, under certain circumstances, a public official or employee who receives a benefit as a result of official action taken by his or her public agency is not in violation of the Ethics Law and related statutes, provided that the benefit that the official or employee receives "is not selective, differential, or in disproportion to the benefit provided to other[s]" who are eligible to receive a benefit from his or her public agency. Advisory Op. No. 92-013.

Therefore, R.C. 2921.42 (A)(3) and (A)(4) do not prohibit an individual who is a client of a county MR/DD board from serving on the board, provided that the county MR/DD board follows the statutory procedure established in R.C. 5126.032 to determine that the board member does not receive any preferential treatment or unfair advantage over other eligible clients.

You have also asked whether the Ohio Ethics Laws and related statutes prohibit a board member with disabilities from receiving transportation, which is paid by the board, to attend board meetings and functions and the services of a personal care attendant, who is paid by the board, to enable the board member to attend board meetings and functions.

The members of a county MR/DD board serve without compensation, but are reimbursed for necessary expenses incurred while conducting board business. R.C. 5126.02 (A)(5). The members of a county MR/DD board are required to attend at least one in-service training session that is provided by or approved by the department of MR/DD. R.C. 5126.02 (A)(5)(B).

Prohibition Imposed by R.C. 2921.43 (A)(1)

Your attention is directed to R.C. 2921.43 (A)(1) which reads:

(A) No public servant shall knowingly solicit or accept and no person shall knowingly promise or give to a public servant either of the following:

(1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform his official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation;

(2) Additional or greater fees or costs than are allowed by law to perform his official duties.

The term "public servant" is defined for purposes of R.C. 2921.43 to include a public official and thus includes a member of a county MR/DD board.

In the instant situation, the county MR/DD board desires to pay for transportation and the services of a personal care attendant to a board member with disabilities so that he may attend board meetings and functions. These payments for transportation and personal care services are not provided in return for the performance of the county MR/DD board member's official duties, or for any act within his public capacity, or as a supplement to his public compensation. Rather, the county MR/DD board is making payments for the transportation and the services of a personal care attendant in order that an individual with disabilities is able to meaningfully perform his public duties as a member of the county MR/DD board.

As set forth above, the members of a county MR/DD board serve without compensation, but are reimbursed for necessary expenses incurred while conducting board business. If an individual who is serving on the board requires transportation and the services of a personal care attendant in order to attend board meetings and function, the transportation and services are "necessary" expenses that he incurs due to his disability and, thus will not constitute prohibited compensation for purposes of R.C. 2921.43 (A). If, however, the county MR/DD board sought to pay any board member for a duty or act required to be performed in his or her official capacity as a member of the county MR/DD board, then such payment would fall within the prohibitions of R.C. 2921.43 (A)(1). See Advisory Op. No. 92-014 (compensation is defined as payment for services; esp., wages or remuneration). In addition, see Advisory Ops. No. 89-012, 91-010, and 92-015 (compensation is prohibited when it is provided for: (1) performing a duty, act, or service required in his official capacity as a public servant; (2) the general performance of his public duties; or (3) as a supplement to his public compensation.)

Prohibition Imposed by R.C. 102.03 (D) and (E)

Your attention is also directed to R.C. 102.03 (D) and (E), which read:

(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.

The term "anything" of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money, goods and chattels, and every other thing of value. R.C. 1.03, 102.01 (G). The Ethics Commission has held that gifts and gratuities constitute things of value for purposes for R.C. 102.03. Advisory Ops. 86-003 and 92-015.

The Ethics Commission has consistently held that R.C. 102.03 (D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his

position to secure anything of value, or the promise or offer of anything of value, as consideration for services that are his duty to perform as part of his official duties. Advisory Ops. No. 84-012, 85-014, and 92-015. However, in the instant situation, the payments for transportation and personal care services are not provided as consideration for a service that the county MR/DD board member is required to perform as part of his official duties. Rather, the county MR/DD board is making payments for the transportation and the services of a personal care attendant in order that an individual with disabilities is able to perform his public duties as a member of the county MR/DD board. As stated above, R.C. 5126.032 (G) provides that a county board member is not in violation of Chapter 102. and sections 2921.42 and 5126.03 of the Revised Code with regard to a direct services contract entered into with a county board if the requirements of R.C. 5126.032 have been met. Therefore, because the transportation and services are "necessary" expenses that the county MR/DD board member incurs due to his disability, the payment of these expenses by the county MR/DD board are not of an improper character for purposes of R.C. 102.03 (D) and (E). However, it must be noted that the prohibitions imposed by R.C. 102.03 (D) and (E) are applicable where the county MR/DD board member **does** seek or obtain any preferential treatment or unfair advantage over other eligible clients.

Generally, the statutory procedure established by the General Assembly in R.C. 5126.032 recognizes that there may be instances where a member of a county MR/DD board will be in the class of individuals who are eligible to receive services from the board. In light of this recognition, R.C. 5126.032 provides a procedure that a county MR/DD board must follow if a board member is eligible to receive services from the county board, while upholding the prohibitions of the Ethics Law and related statutes. This procedure provides a limited exception but protects the public interest against a county MR/DD board member receiving any preferential treatment or unfair advantage over other eligible clients.

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, 2921.43, and 5126.03 of the Revised Code, and does not purport to interpret other laws or rules.

Therefore, it is opinion of the Ohio Ethics Commission, and you are so advised, that: (1) The Ohio Ethics Law and related statutes do not prohibit an individual who is a client of a county MR/DD board from serving on the board provided that the board follows the statutory procedure established by the General Assembly in Section 5126.032 of the Revised Code to determine that the board member does not receive any preferential treatment or an unfair advantage over other eligible clients; and (2) Division (D) of Section 102.03 of the Revised Code and Division (A)(1) of Section 2921.43 of the Revised Code do not prohibit an individual with disabilities who serves as a member of a county MR/DD board from receiving, from the county MR/DD board, necessary transportation and the services of a personal care attendant to enable the board member to attend and participate in board meetings and functions.


Jack Paul DeSario, Chair
Ohio Ethics Commission