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Advisory Opinion Number 99-002
September 17, 1999

Syllabus by the Commission:

(1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a member of the board of county commissioners from being employed by a county hospital organized under Chapter 339. of the Revised Code, unless all of the criteria for the exemption of Division (C) of Section 2921.42 of the Revised Code are met;

(2) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code prohibit a member of a board of county commissioners from authorizing, or using the authority or influence of his office to secure authorization of, a contract for public employment with a county hospital.

(3) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of a board of county commissioners from being employed by a county hospital unless he withdraws, as a county commissioner, from consideration of matters that affect the interests of the hospital.

* * * * *

In your letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes prohibit a member of a board of county commissioners from being employed by a county hospital.

As set forth below, R.C. 2921.42(A)(4) prohibits a member of a board of county commissioners from being employed by a county hospital unless there is an objective showing that he can meet the exception provided by Division (C) of R.C. 2921.42. Most importantly, within that exception, it must be shown that the services the county commissioner will supply to the county hospital are unobtainable elsewhere for the same or lower cost.

Provided that the county commissioner is able to meet the requirements of R.C. 2921.42(C), the prohibitions imposed by R.C. 102.03(D) and (E) require that he withdraw from all matters pending before the board of county commissioners that would affect the hospital from the time he seeks employment with the hospital or is offered a position. If the commissioner accepts employment with the hospital, then he must withdraw from all matters that affect the county hospital while he serves in county office.

Facts

You state that the county hospital is organized under R.C. Chapter 339. You state that the county commissioner is a very competent nurse manager who works in a nearby private hospital. You state that the administrator of the county hospital desires to hire the county commissioner. You state that the county hospital does not receive any money from the county's general funds or other financial support from the county and has not received such public funding or support since at least 1957.

Interest in a Public Contract—R.C. 2921.42(A)(4)

Your attention is directed to R.C. 2921.42(A)(4), which reads:

(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, in R.C. 2921.01(A), for purposes of R.C. 2921.42, to include an elected or appointed officer, or employee, of a political subdivision of the state. A member of a board of county commissioners is a "public official" for purposes of R.C. 2921.42. Ohio Ethics Commission Advisory Opinions No. 80-006 and 87-002. In addition, an employee of a county hospital that is organized under R.C. Chapter 339, is also a "public official" for purposes of R.C. 2921.42. See R.C. 339.02; Att'y Gen. Op. No. 86-067 (a county hospital is a public institution established under state law).

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (G)(1)(a) 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, any political subdivision, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either. A county hospital is a statutorily created instrumentality of a county. Therefore, the proposed employment of a nurse by the county hospital is a public contract under R.C. 2921.42.

In order to be prohibited under R.C. 2921.42, an interest must be definite and direct and may either be pecuniary or fiduciary in nature. Adv. Ops. No. 78-005, 81-008, and 86-002. An employee of a public agency or a political subdivision has a pecuniary interest in a public contract for purposes of R.C. 2921.42(A)(4). Adv. Ops. No. 91-001 and 91-002. If the county commissioner became an employee of the county hospital, he would have an interest in a public contract for purposes of R.C. 2921.42.

The Ethics Commission has held that R.C. 2921.42(A)(4) prohibits an elected officer of a political subdivision from simultaneously holding compensated employment with his own political subdivision because an employment relationship between a political subdivision and a public employee is a "public contract" for purposes of R.C. 2921.42. Adv. Op. No. 91-002 (a city council member is prohibited from holding compensated employment with the city's fire department).

In the instant situation, the county commissioner does not desire to be an employee of the public agency with which he serves, the board of county commissioners. Rather, he desires to be employed by the county hospital, a public agency that is governed by an independent board of trustees. The Ethics Commission has held that a public official is prohibited from being compensated for performing services for a public agency with which he is "connected." Adv. Op. No. 95-004.

Application of R.C. 2921.42(A)(4) to "Connected" Entities

As stated above, 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 or governmental agency or instrumentality with which he is connected." The Ethics Commission has held that to be "connected" with something is to be related to, or associated with, that entity, and that a potential for a conflict exists if a public official enters into a public contract with another public agency which is affected by his authority, discretion, or other official responsibilities. Adv. Op. No. 87-002 (R.C. 2921.42(A)(4) prohibits a county official from contracting with the county as a whole, and not just with the department, agency, office, or board with which he serves). See also Adv. Ops. No. 89-012 and 90-002. The issue becomes whether a county hospital is connected to the board of county commissioners for purposes of R.C. 2921.42(A)(4).

Organization of a County Hospital

A county hospital is organized pursuant to R.C. Chapter 339. R.C. 339.01(B) authorizes a board of county commissioners to "purchase, acquire, lease, appropriate, and construct a county hospital or hospital facilities thereof." A county hospital is governed by a board of county hospital trustees who are appointed by the board of county commissioners and the senior county probate and common pleas judges. R.C. 339.02(C). The board of county commissioners, acting with the judges, may remove a hospital trustee, for cause, before the trustee's term of service is completed. R.C. 339.02(F).

The board of county hospital trustees has the management and control of the hospital, including the employment of an administrator whose title, salary, and other benefits shall be determined by the hospital trustees. R.C. 339.06(F). Among the responsibilities of the hospital administrator is the duty to acquire the services of necessary personnel for the hospital. Id. The board of county hospital trustees establishes the wage and salary schedule for the county hospital. Id.

Despite the fact that this particular county hospital has received no public funding or support since 1957, it must be noted that R.C. Chapter 339. establishes a number of fiscal connections between a board of county commissioners and a county hospital.

For example, R.C. 339.06(B) states that the board of county hospital trustees is required, by the first day of November each year, to submit its proposed budget for the ensuing fiscal year to the board of county commissioners for approval. Also, R.C. 339.06(B) states that the board of county commissioners shall approve the county hospital's budget by the first day of December and the board of county hospital trustees may not expend such funds until the board of county commissioners has granted its approval. Furthermore, R.C. 339.06(B) states that the board of county commissioners has the authority to require the board of county hospital trustees to revise the hospital budget.

R.C. 339.06(D) states that moneys that are appropriated by the board of county commissioners or from special levies enacted by the board of county commissioners for the operation of the county hospital are paid to the board of county hospital trustees on warrant from the county auditor and approved by the board of county commissioners. R.C. 339.06(D) also states that within ninety days following the fiscal year's end, the board of county hospital trustees are required to file an annual report on revenues and expenditures with the board of county commissioners. R.C. 339.06(H) states that the board of county hospital trustees has the authority to secure professional liability insurance for hospital employees and the board of county commissioners is required to assist in obtaining this insurance. See Jeffrey v. Johnson, 23 Ohio Misc. 338 (C.P. Paulding Cty. 1970) (a board of county commissioners may be required by a writ of mandamus to pay the premiums for professional liability insurance secured by the board of county hospital trustees).

Even if some of the fiscal connections described above are disregarded because this particular hospital does not receive public funding or support, it is apparent that a myriad of "connections" exist between a board of county commissioners and a county hospital organized under R.C. Chapter 339. Therefore, because a county hospital is connected to the board of county commissioners for purposes of R.C. 2921.42(A)(4), the county commissioner is prohibited from being employed by a county hospital.

Exception to the Prohibition—R.C. 2921.42(C)

Division (C) of Section 2921.42 sets forth an exemption to the prohibition of Division (A)(4). In order to meet the exemption provided by R.C. 2921.42(C), four requirements must be met. R.C. 2921.42(C) states:

(C) This section does not apply to a public contract in which a public official, member of his family, or one of his business associates has an interest, when all of the following apply:

(1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;

(2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision or governmental agency or instrumentality involved;

(3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;

(4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of his family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

Each of the criteria of Division (C) is a question of fact which, when applied to the circumstances of an individual case, will determine whether a particular transaction fits within the exception. Adv. Ops. No. 80-003 and 82-007. The criteria of Division (C) are strictly construed against the public official, and the burden is on the official to demonstrate that he is in compliance with the exception. Adv. Ops. No. 83-004 and 84-011.

Division (C)(2) is of particular note, and requires that the services that are the subject of the public contract be "unobtainable elsewhere for the same or lower cost." Adv. Op. No. 83-004. One indication that this requirement has been met would be where an open and fair competitive bidding process has been held and the official has submitted the lowest bid. Id.

With respect to employment, this requirement may be particularly difficult to meet. Whether an individual's services are "unobtainable elsewhere for the same or lower cost" is determined by the facts and circumstances of each individual situation. Adv. Op. No. 93-008. Valid and proper considerations must determine whether an individual's services are "unobtainable elsewhere for the same or lower cost." Adv. Ops. No. 84-002 and 88-001.

In order to meet the requirement of Division (C)(2), the county commissioner must be able to demonstrate, by some objective standard, that the services he will supply to the county hospital as nurse manager are unobtainable elsewhere for the same or lower cost. The application from the county commissioner must be considered in the same manner as those submitted by all other applicants for the position. The county commissioner cannot be given any greater consideration than any other candidate. Assuming that the application from the commissioner is not given any greater precedence, this requirement must be met by the objective showing that the county commissioner possesses a higher level of education and broader experience. If the county commissioner possesses an exceptional educational background and experience, it may be argued that he would provide a superior quality of service to that the other applicants could provide at the same rate of pay.

The number of qualified nurses who respond to the job offering is also a factor. In a situation where few trained and experienced nurses apply for employment as nurse manager, it may be easier to demonstrate that, among the applicants, the county commissioner is uniquely qualified for the position. Conversely, if many qualified and experienced nursing professionals apply for the job, it would mitigate against the argument that the county commissioner is the most-qualified candidate for the available position.

The Commission has stated that, in some rare instances, a public official may be uniquely qualified to provide services to his own, or a connected, public agency. See Adv. Op. No. 88-001 (the continuity of patient care and familiarity with a developmental center may be a valid and proper consideration enabling a physician who is employed by the Department of Mental Retardation and Developmental Disabilities to enter into a personal services contract with MRDD to provide after-hours medical services). In such a circumstance, the public official and the public agency must be able to objectively justify the validity of considering the employee's unique qualifications as part of the selection process.

In the instant situation, the hospital must conduct an open and fair selection process that is available to all interested and qualified individuals, and not limit its solicitations to county officials and employees. If, after such an open and fair selection process, it can be demonstrated that the Commissioner is the best and most-qualified person for the position, he meets the requirement in R.C. 2921.42(C)(2). But see Adv. Op. No. 90-007 (it may be extremely difficult to demonstrate that legal services provided by a firm in which a public official, or his law partner, has an interest would be "unobtainable elsewhere for the same or lower cost.") See also Adv. Ops. No. 78-001 and 84-002.

The county commissioner must also meet all the other criteria of Division (C). Another significant criterion within R.C. 2921.42(C) is Division (C)(4), which requires that the hospital administrator's decision to hire the county commissioner as a nurse manager be an arms-length transaction in which the board of county hospital board of trustees and the administrator know of the county commissioner's interest in the contract for employment. In addition, the county commissioner must take no part in the deliberations or decisions with respect to a public contract for his employment with the hospital.

The county commissioner must also meet the requirements of Divisions (C)(1) and (C)(3). Division (C)(1) requires an objective showing that the services of a nurse manager are necessary for the operation of the hospital. Division (C)(3) requires that the county commission perform the services of nurse manager for the county hospital in a manner either preferential to or the same as he would accord to other employers in similar situations.

Authorization of a Public Contract—R.C. 2921.42(A)(1)

Assuming that all of the criteria of Division (C) of Section 2921.42 can be established, so that a county commissioner may properly be employed by a county hospital, the prohibitions of R.C. 2921.42(A)(1) must be observed. R.C. 2921.42(A)(1) prohibits a public official from authorizing or employing the authority or influence of his office to secure authorization of a public contract in which either he or a business associate has an interest. As explained above, the

county commissioner would have a personal pecuniary interest in a public contract if he were an employee of the county hospital. In addition, a public official's outside employer is considered to be his "business associate" for purposes of R.C. 2921.42(A)(1). Adv. Ops. No. 78-006, 81-001, and 89-008.

Therefore, R.C. 2921.42(A)(1) would prohibit the county commissioner from using his authority or influence, formally or informally, to secure, for himself, an employment contract with the county hospital. See also R.C. 2921.42(C)(4) (discussed above). The county commissioner is prohibited from discussing, deliberating, recommending, or otherwise using the authority or influence of his office, formally or informally, to secure employment for himself at a county hospital.

In addition, if the county hospital were ever to receive any funds or assistance from the board of county commissioners, such funds and assistance would be deemed a public contract, and R.C. 2921.42(A)(1) would prohibit a county commissioner who is employed by a county hospital from voting, discussing, deliberating, participating in necessary legislation, or otherwise using his authority or influence as a county commissioner, either formally or informally, to secure funds or assistance for the county hospital. See also R.C. 102.03(D) and (E) (set forth below) and R.C. 2921.42(C)(4) (set forth above); Adv. Op. No. 89-006.

Use of Authority to Secure a Position—R.C. 102.03(D) and (E)

Provided that the county commissioner is able to meet the requirements of R.C. 2921.42(C), he must also meet the prohibitions imposed by R.C. 102.03(D) and (E), which read as follows:

(D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

(E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is an elected officer of a political subdivision. R.C. 102.01(B) and (C). A member of the board of county commissioners is, therefore, subject to the prohibitions of R.C. 102.03(D) and (E). Adv. Op. No. 88-003.

The term "anything of value" is defined in R.C. 1.03 to include money, goods and chattels, any promise of future employment, and every other thing of value. R.C. 102.01(G). The promise of employment from the county hospital administrator to the county commissioner is within the definition of "anything of value" for purposes of R.C. 102.03(D) and (E). The Ethics Commission has also stated that the benefit or detriment that results from a decision by a public agency is within the definition of anything of value. Adv. Ops. No. 86-007 and 93-016. In this

instance, despite the fact that the county hospital does not, at this time, receive public funding from the county, the board of county commissioners has the statutory authority to decide matters affecting the operation of the county hospital.

Conflict of Interest—Withdrawal During Job Seeking

The Ethics Commission has stated that R.C. 102.03(D) and (E) prohibit a public official from soliciting, accepting, or using his position to secure employment from a public agency that is regulated by or interested in matters pending before the public agency that he serves. Adv. Op. No. 82-002. Therefore, the county commissioner is prohibited from seeking or accepting employment from the county hospital because it is, as explained above, connected with the county and, thus, would be interested in matters before the board of county commissioners. However, the Ethics Commission has held that a public official is not prohibited from soliciting or accepting employment, from an interested party, if the official or employee is able to withdraw from matters that affect that party. Id. Accordingly, when the county commissioner first seeks employment with the hospital, or is offered a position from the administrator, he must, at that point, withdraw from all matters pending before the board of county commissioners that would affect the hospital.

Withdrawal After Accepting Employment

Once a public official or employee has accepted the promise of future employment from an outside party, the Ethics Commission has stated that R.C. 102.03(D) prohibits the official from using the authority or influence of his position with his public agency to secure anything of value for his outside employer. Adv. Op. No. 89-008 and 91-009. The Ethics Commission has held that an employer holds a position of power and authority over the hiring, compensation, discipline, and termination of its employees. Adv. Op. No. 89-008. Therefore, a public official who is in the position of making an official decision regarding the interests of his employer would have an inherent conflict of interest impairing the official's objectivity and independence of judgment. Adv. Ops. No. 80-003, 88-005, and 89-008. As stated above, the Ethics Commission has concluded that an official decision that affects an outside employer is within the definition of anything of value. Adv. Ops. No. 86-007, 90-003, and 93-016. Therefore, R.C. 102.03(D) and (E) do not prohibit the county commissioner from being employed by the county hospital, provided that he is able to withdraw from all matters that affect the interests of the hospital while he serves in county office.

It must be noted that the withdrawal of a public official from matters that affect his outside employer may be detrimental to the functioning of his public agency. For example, R.C. 339.14(B) requires that the sale of hospital property be approved by the unanimous vote of the board of county commissioners. Where one county commissioner abstains from the vote of the board, the unified vote of the remaining two board members constitutes a "unanimous vote." See State ex rel. Dry Ridge Dev. Co. v. Hamilton County Bd. Of Comm'rs, 30 Oh. App. 3d 217 (1986). In that case, the Court of Appeals held:

In the case on review, the third commissioner was physically present but abstained from voting on the proposition. Under that circumstance we find that a unanimous vote was cast. To abstain from voting is to withhold a vote either pro or contra the proposition under consideration. Among those voting all were of a like mind and the number of those voting was sufficient to constitute a quorum. Since no negative vote was cast on the resolution to deny the recommendation . . . and since a quorum was present and voting, it is our conclusion that the vote of the board was unanimous.

Therefore, the abstention of the board member in your question would not compromise the ability of the county commissioners to sell hospital property pursuant to R.C. 339.14(B). The remaining two county commissioners could act unanimously to sell hospital property.

However, if another member of the board of county commissioners were also required to withdraw from matters affecting the hospital due to a personal interest, or one affecting a family member or business associate, then, the remaining commissioner acting alone would not meet the unanimous requirement of R.C. 339.14(B). In such a case, the county would be unable to act on the sale of hospital property. See Att’y Gen. Opinion No. 99-004 (Where two members of a three member board are required to abstain because of conflicts of interest, the third member, acting alone, cannot take an action that requires a "unanimous" vote of the board.)

In addition, although the Ethics Law and related statutes do not absolutely prohibit the county commissioner from accepting employment with the county hospital, so long as he meets the requirements of R.C. 2921.42(C) and the prohibitions imposed by R.C. 102.03(D) and (E), such employment may create the appearance of impropriety. In rendering this opinion, the Ethics Commission is not opining as to the appearance or advisability of the proposed employment. The creation of a detrimental effect upon the functioning of his public agency or an appearance of impropriety should be factors that a public official considers when he contemplates an offer of outside employment.

Conclusion

As set forth above, R.C. 2921.42(A)(4) prohibits a member of a board of county commissioners from being employed by a county hospital unless there is an objective showing that he can meet the exception provided by Division (C) of R.C. 2921.42. Most importantly, it must be shown that the services the county commissioner will supply to the county hospital are unobtainable elsewhere for the same or lower cost.

Provided that the county commissioner is able to meet the requirements of R.C. 2921.42(C), the prohibitions imposed by R.C. 102.03(D) and (E) require that he withdraw from all matters pending before the board of county commissioners that would affect the hospital from the time he seeks employment with the hospital or is offered a position. If the commissioner accepts employment with the hospital, then he must withdraw from all matters that affect the county hospital while he serves in county office.

You stated that your concerns include the prohibitions imposed by R.C. 2921.43 and R.C. 102.04(C). R.C. 2921.43 generally prohibits a public official from receiving supplemental

compensation for performing his official duties. R.C. 102.04(C) prohibits a county official or employee from receiving compensation for rendering services in cases, proceedings, applications, or other matters pending before a county agency, department, board, bureau, commission, or other instrumentality, excluding the courts. The employment of a county commissioner by a county hospital as a nurse manager neither involves supplemental compensation for performing official duties nor compensation for rendering services in a matter pending before a county instrumentality. Therefore, R.C. 2921.43 and R.C. 102.04(C) are inapplicable to your question and need not be addressed.

Issues Outside the Ethics Commission's Jurisdiction—Compatibility

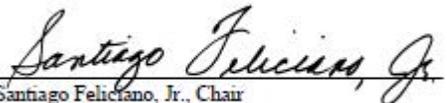
The Ethics Commission's advisory authority is limited to interpreting R.C. Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code. R.C. 102.08. Your question also raises the issue of "compatibility" of public positions—that is, whether one person may simultaneously hold two public positions. This opinion does not address the issue of compatibility. Any issue of compatibility involving a county official should be directed to the county prosecutor.

You should, however, be aware that the Office of the Attorney General utilizes seven criteria, that have been derived from case law over a period of time, to determine the "compatibility" of public positions. 1979 Ohio Op. Att'y Gen. No. 79-111. One of these criteria is whether there is a conflict of interest between the two public positions. The Ethics Commission has the unique authority to issue advisory opinions regarding conflicts of interest arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43. If the potential for a conflict of interest arising under the Ethics Law and related statutes exists in a compatibility question before the Attorney General, the issue is referred to the Ethics Commission. See 1998 Ohio Op. Att'y Gen. No. 98-017 (the policy of the Office of the Attorney General is to refrain from issuing opinions on questions that are within the Ethics Commission's exclusive jurisdiction). See also 1997 Ohio Op. Att'y Gen. No. 97-044 and 1987 Ohio Op. Att'y Gen. 87-025. However, an advisory opinion rendered by the Ethics Commission interpreting Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code is not the same as a determination of compatibility. Adv. Op. No. 91-002. See also 1990 Ohio Op. Att'y Gen. No. 90-037.

Another factor that is considered in determining compatibility is whether an empowering statute of one of the positions limits permissible outside employment. In this instance, it would be necessary to examine R.C. 305.27, which prohibits a county commissioner from being "concerned, directly or indirectly, in any contract for work to be done . . . for the county." The county prosecutor is the appropriate authority to consider a compatibility question involving a county commissioner and to review matters arising under R.C. 305.27 or any other statutory provision outside the Ohio Ethics Law and related statutes.

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 (A)(4) of Section 2921.42 of the Revised Code prohibits a member of the board of county commissioners from being employed by a county hospital organized under Chapter 339. of the Revised Code, unless all of the criteria for the exemption of Division (C) of Section 2921.42 of the Revised Code are met; (2) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code prohibit a member of a board of county commissioners from authorizing, or using the authority or influence of his office to secure authorization of, a contract for public employment with a county hospital; and (3) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of a board of county commissioners from being employed by a county hospital unless he withdraws, as a county commissioner, from consideration of matters that affect the interests of the hospital.


Santiago Felicifano, Jr., Chair
Ohio Ethics Commission