



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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January 18, 1990

Informal Opinion 1990-INF-0118

Mary A. Haller
Executive Assistant to the Director
Ohio Department of Aging

Dear Ms. Haller:

You have asked about the application of the Ohio Ethics Law and related statutes with respect to the Alzheimer's Disease Task Force (Task Force).

As you have indicated in your letter, S.B. 256 imposed upon the Department of Aging the duty to administer the Alzheimer's Disease Research Program. As part of this program, the Director of the Department of Aging is required by R.C. 3701.181 to award grants to medical institutions for the purposes of providing diagnostic services, conducting research, and conducting training programs. The Director is also required by R.C. 3701.181 to adopt rules governing the applications for grants, the review of applications, the awarding of grants, and the purposes for which grants may be used.

The Alzheimer's Disease Task Force is created pursuant to R.C. 3701.181(C) "to assist the director of aging with the rules for [the Alzheimer's Disease Research] program and with the awarding of grants." The Task Force consists of eleven members who are appointed by the Governor. Two of the members must represent the Alzheimer's Disease and Related Disorders Association, Inc.; five of the members must be physicians; two members must be Ohio scientists who are experts in Alzheimer's research; and two members must be scientists from outside Ohio who are experts in Alzheimer's research. The Director or her designee is an ex officio, nonvoting member of the Task Force.

You have stated in your letter that, "because of the high level of expertise regarding appointees, the pool of potential appointees [to the Task Force] is limited. Consequently, many of the current appointees have direct or indirect relationships with grantee organizations." You have also indicated that the Department lacks the scientific and medical expertise to objectively make decisions concerning grant awards without advice, and relies heavily on the advice of the Task Force.

Division (A)(1) of Section 2921.42 of the Revised Code prohibits a public official from authorizing, or employing "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." Division (A)(4) of Section 2921.42 prohibits a public official from having "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 "public official" is defined for purposes of R.C. 2921.42 in R.C. 2921.01(A) to include any elected or appointed officer, employee, or

agent of the state. Divisions (D) and (E) of Section 102.03 prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his position to secure anything of value that is of such character as to manifest a substantial and improper influence upon him with respect to his duties. The term "public official or employee" is defined for purposes of Chapter 102. in R.C. 102.01(B) and (C) to include any person who is elected or appointed to an office or is an employee of any department or board of the state. These statutory provisions generally restrict a public official or employee from having an interest in grants awarded by the public agency with which he is connected, or from serving with an organization which has an interest in grants awarded by his public agency. See, e.g., Ohio Ethics Commission Advisory Opinion No. 87-003. These statutes also restrict the ability of a public official to use his position to secure a contract, grant, or other benefit for himself, his private employer, or business associates. See, e.g., Advisory Opinions No. 87-003, 88-004, 88-005, and 88-008. The determinative issue, therefore, is whether members of the Task Force are public officials or employees for purposes of Section 102.03 or Section 2921.42.

In Advisory Opinion No. 85-005, the Ethics Commission held that a member of the Technical Advisory Committee to the Coal Development Office is not a public official or employee for purposes of R.C. Chapter 102. or R.C. 2921.42. The opinion states that in determining that a position is a public office, the "essential requirement" is that the law confers on the position certain duties that involve the exercise of the sovereign power of the state. In explaining what is meant by "sovereign power," the opinion quotes the Ohio Supreme Court case of State ex. rel. Landis v. Butler, 95 Ohio St. 157 (1917), as follows:

If specific statutory independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with the independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state. *Id.* at 160.

The opinion also cites Advisory Opinion No. 75-004 which states: "it becomes apparent that 'sovereign power' is a concept meant to imply that the exercise of duty entrusted to one by virtue of statute or some other public authority. These duties . . . involve some discretionary, decision-making qualities." The Ethics Commission found in Advisory Opinion No. 85-005 that the role of the Technical Advisory Committee was merely advisory and did not involve the exercise of the sovereign power of the state, and therefore, members of the Committee were not public officials for purposes of Chapter 102. or R.C. 2921.42.

In this instance, the Alzheimer's Disease Task Force has no statutory authority to act independently with regard to the disposition of public funds, or to otherwise exercise the sovereign power of the state. The Task Force has the statutory authority to make recommendations to the Director with regard to the adoption of rules governing the grant process, R.C. 3701.181(A), and to "assist" the Director with respect to the rules and the awarding of grants, R.C. 3701.181(C). You have indicated that, as a practical matter, the Director heavily relies on the expertise and recommendations of the Task Force. As a matter of law, however, the authority to award grants and promulgate rules

establishing standards for awarding grants lies with the Director. R.C. 3701.181(A) states that "the director of aging shall annually award grants" to the appropriate organizations and for the proper purposes, and further states that "the director, upon the recommendations of the Alzheimer's disease task force . . . shall adopt rules" governing the application for, and awarding of, grants. The Task Force has no final decision-making authority as to whether a grant request will be approved for funding or as to the adoption of rules governing the award of grants. Because the role of the Task Force is advisory and not the exercise of the sovereign power of the state, a member of the Task Force is not a public official for purposes of Chapter 102. or Section 2921.42. See Advisory Opinion No. 85-005. Furthermore, it is apparent that a member of the Task Force does not hold an employment relationship with the state. See Advisory Opinions No. 75-022 and 85-005. Therefore, members of the Task Force are not public officials or employees who are subject to Chapter 102. or Section 2921.42.

As noted above, the prohibitions of Chapter 102. and Section 2921.42 apply generally to public officials and employees. However, the remaining statute under the jurisdiction of the Ethics Commission, Section 2921.43, applies generally to "public servants." The term "public servant" is defined for purposes of R.C. 2921.43 in R.C. 2921.01(B) to include any public official and "any person performing ad hoc a governmental function, including without limitation a juror, member of a temporary commission, master, arbitrator, advisor, or consultant." In this instance, the members of the Task Force are acting as advisors or consultants to the Director of Aging with regard to the expenditure of public funds. Therefore, members of the Board are public servants under R.C. 2921.43. Although your questions do not directly implicate R.C. 2921.43, it should be noted that Division (A) of Section 2921.43 prohibits a public servant from soliciting or accepting any compensation, other than as allowed by law, for performing his official duties or as a supplement to his public compensation. Division (B) prohibits a public servant from soliciting or accepting anything of value in consideration of appointing any person to a public office or employment or affecting the status of any public employee with respect to any material aspect of his employment.

Although it has been concluded that members of the Task Force are not subject to Chapter 102. or Section 2921.42, the cautionary language of the Ethics Commission in Advisory Opinion No. 85-005 with regard to the members of the Technical Advisory Committee to the Coal Development Office of the Department of Development is equally applicable in this instance and bears repeating:

It should be noted that the Committee, as well as a number of other boards and commissions created by the General Assembly in recent years, is required to have representation of certain business, labor, governmental, educational, and environmental interests that can provide necessary support, expertise, or resources to the Department. Many times, these individuals represent institutions that are likely to seek participation in the same programs on which their representatives advise the government. This may create an inherent conflict of interest, particularly when the board or commission is required to recommend the expenditure of public funds in the form of loans or grants. It would create the appearance of impropriety for a Committee member to participate in formal or informal discussions or vote on any proposal in which he or his institution has an interest. In addition, it may appear to the general public or to unsuccessful

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applicants competing for funds that Committee members or their institutions receiving funding from the Coal Development Office or the Department of Development had an unfair advantage in the process.

Therefore, members of the Task Force should abstain from participating in matters which would benefit their own interests or the interests of the organizations with which they serve.

This informal advisory opinion was approved by the Ethics Commission at its meeting on January 18, 1990, and is based on the facts presented. The opinion 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. Should you require further assistance, do not hesitate to contact me.

Sincerely,



Melissa A. Warheit
Executive Director

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