

# OHIO ETHICS COMMISSION



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Informal Opinion 2002-INF-1021-1

Gregory A. White  
Lorain County Prosecuting Attorney



Dear Mr. White:

In a letter that the Ethics Commission received on August 19, 2002, you ask whether the members of the board of trustees and the executive director of a community action agency (CAA) created under R.C. Sections 122.68 and 122.69 are subject to the prohibitions imposed by the Ohio Ethics Law and related statutes.

## **Brief Answer**

As explained below, the members of the board of trustees and the executive director of a CAA created under R.C. Sections 122.68 and 122.69 are not subject to the Ohio Ethics Law prohibitions contained within R.C. Chapter 102. However, the members of the board of trustees and the executive director of a CAA are "agents of the state," and thus, "public officials" for purposes of R.C. Chapter 2921. subject to the prohibitions imposed by R.C. 2921.42 and R.C. 2921.43.

## **Community Action Agency—R.C. 122.66**

A Community Action Agency is a private nonprofit agency or organization that the Office of Community Services (OCS) within the Department of Development (DOD) has designated to receive community development block grant (CDBG) funds. R.C. 122.66(D). The function of a CAA is to expend and distribute CDBG funds to alleviate the causes of poverty within a specific designated geographical service area. R.C. 122.66(D)-(F).

### **Jurisdiction of the Ethics Commission**

The Ohio Ethics Commission administers, interprets, and assists in the enforcement of the Ohio Ethics Law and related statutes, Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. R.C. 102.02, 102.06, and 102.08. The Ohio Ethics Law and related statutes include prohibitions against public officials and employees misusing their official positions for their own personal benefit, the benefit of their family members or business associates, or where there is otherwise a conflict of interest.

These statutes contain definitions that determine whether an individual is subject to the prohibitions. Because definitions within these two Chapters of the Revised Code differ, an individual may be subject to some, but not all, of the prohibitions found in R.C. Chapter 102. and R.C. Sections 2921.42 and 2921.43. Ohio Ethics Commission Advisory Opinion No. 93-017 (stating that a teacher, instructor, professor, or other kind of educator who does not perform administrative duties is subject to R.C. 102.04, 2921.42, and 2921.43, but is not subject to the provisions in R.C. Chapter 102. that refer to "public officials and employees"). The Ethics Commission must use the statutory definitions within R.C. Chapter 102. and R.C. Chapter 2921. to determine whether the members of the board of trustees and the executive director of a CAA are subject to the Ethics Laws and related statutes.

### **"Public Official or Employee"—R.C. 102.01(B)**

R.C. 102.01(B) defines the term "public official or employee" for purposes of R.C. Chapter 102. as "any person who is elected or appointed to an office or is an employee of any public agency." R.C. 102.01(C) defines the term "public agency" as:

[T]he general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, township, and the five state retirement systems, or any other governmental entity.

As stated above, the CAA is organized as a nonprofit corporation. A CAA is not a department, division, institution, board, commission, authority, bureau, or other instrumentality of the state, or a political subdivision. The Ethics Commission has addressed the general issue of whether the Ohio Ethics Laws and related statutes apply to persons who are members of the board of trustees of a non-profit corporation. Adv. Ops. No. 75-013 and 75-019. In Advisory Opinion No. 75-013, the Commission stated:

The provisions of Chapter 102 of the Revised Code apply to "public officials and employees" and "persons elected or appointed to an office or employed by" an agency of the state, county, township, municipal corporation or other governmental entity. The governmental or public agencies referred to in Chapter 102 of the Revised Code are entities created by the Constitution or legislative bodies of the state, county, township, or municipal corporation.

Non-profit corporations formed under Section 1702.04 of the Revised Code can be distinguished from these public or governmental agencies in that the non-profit corporations, by virtue of Section 1702.04 of the Revised Code are created by:

“(A) Any person, singly or jointly with others, and without regard to residence, domicile or state of incorporation, may form a corporation by signing and filing with the secretary of state articles of incorporation, . . .”

Thus, although the activities and functions of a non-profit corporation may be of a public nature, the [non-profit] corporation is not a governmental agency for purposes of Chapter 102 of the Revised Code.

The prohibitions of Chapter 102 of the Revised Code, therefore, do not apply to persons participating through non-profit corporations in services to their community. (Emphasis added).

The Court, in N.Z. v. Lorain Head Start (Jan. 12, 2000), Lorain App. No. 96 CV 116729, 2000 Ohio App. LEXIS 185, held that the Lorain County CAA was not a “political subdivision” for purposes of the immunity provisions of R.C. 2744.02. The Court explained:

[D]esignation as a “community action agency” is a status conferred upon a nonprofit entity that operates in addition to the entity’s existence as a nonprofit corporation: designation as a community action agency does not create an organization, and the continuing existence of the nonprofit entity operates independent of that designation. Although this status is conferred by the state, the organizations themselves cannot be said to be creatures of the state as required by R.C. 2744.01(F) . . . . LCAA is a nonprofit organization with the additional designation as a community action agency. It is not an agency created by the state and, accordingly, it is not a political subdivision entitled to the benefit of the immunity provided by R.C. 2744.02. (Emphasis added).

The members of the Lorain County CAA Board of Trustees are appointed pursuant to a process set forth in the by-laws of the Lorain County CAA. See By-laws Article IV Section 11: Board of Trustees/Vacancies. The Chief Executive Officer (CEO) of the Lorain County CAA is appointed by the Lorain County CAA Board of Trustees. See By-laws Article XI: Administration. The CEO of the Lorain County CAA exercises duties and authority that are delegated to him by the Lorain County CAA Board of Trustees. Id.

Therefore, a CAA is not a “public agency” for purposes of Chapter 102., because it is not an entity created by the Constitution, or a legislative body of the state, county, township, or municipal corporation. Because a CAA is not a “public agency” for purposes of Chapter 102., members of the board of trustees and the executive director are not elected or appointed to an office, or serve as an employee, of any public agency for purposes of R.C. 102.01(B). The members of the board of

trustees and the executive director of a CAA are not subject to the prohibitions imposed upon "public officials and employees" by R.C. Chapter 102.

**R. C. 102.04—"Elected or Appointed" Persons**

R.C. 102.04 does not use the term "public official or employee" for purposes of determining who is subject to its prohibitions. R.C. 102.04(A) and (B) impose prohibitions upon "[a] person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts." R.C. 102.04(C) imposes a prohibition upon any person "who is elected or appointed to an office of or employed by a county, township, municipal corporation, or any other governmental entity, excluding the courts."

As set forth above, a member of the board of trustees of a CAA is not "appointed to an office of or employed by . . . any department, division, institution, instrumentality, board, commission, or bureau of the state." As explained above, OCS does not create a CAA. The CAA is a nonprofit corporation designated to receive funds from OCS. As previously discussed, a CAA is not a "department, division, institution, instrumentality, board, commission, or bureau of the state." Because a CAA does not fall within the definition of the entities enumerated in R.C. 102.04, the prohibitions imposed by R.C. 102.04 do not apply to the members of the board of trustees or the executive director of a CAA.

**"Public Official" Definition of R.C. 2921.01—Officer, Employee, or Agent of the State**

R.C. 2921.42 applies to any "public official." The term "public official" is defined, for purposes of R.C. Chapter 2921., as:

[A]ny elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and including without limitation legislators, judges, and law enforcement officers.  
(Emphasis added.)

See R.C. 2921.01(A).

As explained above, CAA board members and the executive director are not elected or appointed to an office, and do not serve as an employee of the state, a county, city, village, township, or any other governmental entity. However, as set forth above, the definition of the term "public official" includes "agents" of the state.

Because the word "agent" is not statutorily defined for purposes of R.C. 2921.42, the Ethics Commission has relied upon judicial interpretation of the word "agent." The Commission has held that an individual is an "agent" of the state when the state has empowered him, or the board that he serves, to act on the state's behalf and to bind the state. Adv. Ops. No. 85-005, 92-001, and 92-007. In Advisory Opinion No. 92-001, the Ethics Commission stated:

A person is an "agent of the state," and thus, a "public official" as defined in Division (A) of Section R.C. 2921.01 of the Revised Code, when: (a) the person has the power to act on behalf of and bind the state by his actions; (b) the state has the right to control the actions of the person; and (c) the actions of the person are directed toward the attainment of an objective sought by the state.

An agreement creating the agency relationship may be express or implied. Ross v. Burgan, 163 OS 211 (1955). In this instance, the relationship between the state and a designated CAA is statutorily established. R.C. 122.68.

As stated above, a designated CAA receives CDBG funds from the state through OCS for the attainment of an objective that the state seeks—the alleviation of the causes of poverty within its specific designated geographical service area. The state, acting through the General Assembly, has enacted statutes that specifically empower a designated CAA to act on behalf of and bind the state with regard to its use and distribution of CDBG funds.

The state, through OCS, exercises control over the operations of a CAA in several ways. The state has a degree of fiscal oversight and control over a CAA. For example, R.C. 122.69(B)(3) requires that a CAA that receives an OCS designation must limit the number of trustees to not less than fifteen nor more than thirty-three members and must meet specified federally mandated standards. In addition, a CAA is required to annually submit to OCS a program plan and budget for use of CDBG funds. R.C. 122.69(B)(2). After providing notice and hearing pursuant to Chapter R.C. 119., the director of DOD may rescind the designation of a CAA if he finds that the CAA is not in compliance with any or all of the provisions of R.C. 122.69. R.C. 122.701(B)(1).

The Court, in State, ex rel. Toledo Blade v. Economic Opportunity Planning Association of Greater Toledo, 61 Ohio Misc.2d 631 (CP, February 22, 1990) held that a CAA, the Economic Opportunity Planning Association of Greater Toledo (EOPA), was subject to the Ohio Public Meetings Law, R.C. 121.22 and the Ohio Public Records Law, R.C. 149.43. The Court held:

EOPA functions essentially as a state agency for the purpose of operating programs that are developed and approved by state government for the benefit and welfare of residents of the state. Certainly, if the programs that EOPA operated with state funds were operated directly by the Department of Development, rather than by EOPA in response to delegation, the local agency and its board would be public bodies. That the state has chosen, pursuant to specific state statutes, to designate EOPA as an agency eligible to receive state funds and operate programs with those funds, and to delegate to EOPA what are essentially state functions, does not, and as a matter of law cannot, shield those programs and the decisions of the board from public review. In this connection, EOPA's status as a private, non-profit corporation is entirely irrelevant.

It must be noted that the court held that even though the EOPA is subject to the Ohio Public Meetings Law, it does not lose its status as a "private, non-profit corporation."

Therefore, in the instant situation, the state, acting through the General Assembly, has statutorily empowered a CAA to act on behalf of and bind the state with regard to its use and distribution of CDBG funds to attain the state's desired objective of alleviating the causes of poverty within the state. The state, through OCS and the DOD, has the right to control the actions of a CAA as they pertain to the use and distribution of CDBG funds. Thus, a member of the CAA's board of trustees is an "agent of the state" who is subject to the prohibitions imposed by R.C. 2921.42.

#### **"Public Servant" Definition of R.C. 2921.01—Performing Ad Hoc Governmental Functions**

R.C. 2921.43 also falls within the Ethics Law, and this statute applies to "public servants." R.C. 2921.43(A) prohibits a public servant from accepting compensation, other than allowed by law, to perform his official duties. R.C. 2921.43(A) also prohibits a "person," which is defined in R.C. 1.59 to include an individual, corporation, partnership, association, or other similar entity, from promising or giving to a public servant any compensation, other than allowed by law, to perform any act in his public capacity or generally perform the duties of his public position. Adv. Ops. No. 89-012, 89-013, 89-014, and 90-001.

R.C. 2921.01(B) defines the term "public servant," as used in R.C. 2921.43, to include: any public official as defined in R.C. 2921.01(A); any candidate for public office; and "[a]ny person performing ad hoc a governmental function, including without limitation a juror, member of a temporary commission, master, arbitrator, advisor, or consultant."

Therefore, because the members of the board of trustees of a CAA who are "public officials" are subject to Section 2921.42 of the Revised Code, they are also "public servants" for purposes of R.C. 2921.43. See State v. Cooper, Cuyahoga App. No. 72655, unreported, 1997 Ohio App. LEXIS 5319 (November 26, 1997) (an employee of a private company that conducts statutorily mandated vehicle emission tests under a state contract acts as an "agent of the state" and is therefore a "public servant" as defined in R.C. 2921.01 for purposes of R.C. 2921.02, the state bribery statute).

#### **Executive Director**

The By-laws of the Lorain County CAA enable its board of trustees to delegate duties and authority to the Chief Executive Officer of the Lorain County CAA. See By-laws Article XI: Administration. No elected or appointed officer of a political subdivision may serve as the executive director. Id. By exercising powers delegated to her by the board of trustees, the executive director would also act on behalf of and bind the state with regard to the functioning of the CAA. See Monarch Construction Co. v. Ohio School Facilities Commission, 118 Ohio Misc.2d 296, 2002-Ohio-2957 (contracts approved by an executive director in the name of the state commission that he serves are void if he lacks the proper authority to exercise the powers of the commission).

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Thus, because the executive director of a CAA could be delegated to exercise the powers of the board of trustees of the CAA, the executive director is also an "agent of the state" who is subject to the prohibitions imposed by R.C. 2921.42 of the Revised Code and a "public servant" who is subject to the prohibitions imposed by R.C. 2921.43.

### Conclusion

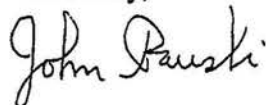
As explained above, the members of the board of trustees and the executive director of a CAA created under R.C. Sections 122.68 and 122.69 are not subject to the Ohio Ethics Law prohibitions contained within R.C. Chapter 102. However, the members of the board of trustees and the executive director of a CAA are "agents of the state," and thus, public officials, who are subject to the prohibitions imposed by R.C. 2921.42 and R.C. 2921.43.

While statutory definitions are necessary to ensure precise application of law, they can, as in this instance, appear to result in conflicting results. However, the definitions found in R.C. Chapter 102. and R.C. 2921.01 do not conflict with one another. Rather the definitions found in R.C. Chapter 102. determine who is subject to the prohibitions of that chapter based upon how the entity she serves is created; the definitions found in R.C. 2921.01 determine who is subject to the prohibitions of R.C. 2921.42 and 2921.43 based upon the functions of the entity she serves.

As a final note, the Ethics Commission, in addressing a similar issue in Advisory Opinion No. 85-005, cautioned members of the Technical Advisory Committee to the Coal Development Office that, even though they were not subject to Chapter 102. or Section 2921.42, their participation in matters that could advance their private interests or the interests of the institutions that they privately served could create an appearance of impropriety. The same caution applies to the members of the CAA board and its executive director. In addition, because the CAA is a nonprofit corporation, members of a CAA board of trustees are governed by their statutory restrictions regarding conflicts of interest for officers of not-for-profit corporations. R.C. 1702.30 and 1701.301.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 21, 2002. The opinion is based on the facts presented and 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. If you have any questions or desire additional information, please contact this Office again.

Sincerely,



John Rawski  
Staff Attorney