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September 20, 2012 Informal Opinion 2012-INF-0920

Deborah Z. Read, Esq.
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Dear Attorney Read:

On July 3, 2012, the Ohio Ethics Commission received your request for an advisory opinion submitted on behalf of Sharon Sobol Jordan, the President and Chief Executive Officer of the Center for Families and Children (the Center). In your letter, you asked whether the Ethics Law prohibits Ms. Jordan from also serving as a member of the Board of Trustees of the MetroHealth System (MetroHealth), a county hospital in Cuyahoga County.¹

BRIEF ANSWER

The Ethics Law does not prohibit Ms. Jordan from serving as a MetroHealth Trustee while she also serves as the President and Chief Executive of the Center. If the Center and MetroHealth enter into any contracts in the future, Ms. Jordan must meet the exception to the public contract law that is discussed in this opinion. Further, while she serves as a MetroHealth Trustee, Ms. Jordan will be prohibited from:

- Using her authority or influence as a MetroHealth Trustee to secure contracts or other benefits for the Center;
- Accepting compensation from the Center to perform any services on matters before MetroHealth; and
- Disclosing or using any confidential information she acquires from MetroHealth.

KEY FACTS

Center for Families and Children

- Ms. Jordan serves as the President and Chief Executive Officer of the Center for Families and Children, a non-profit organization in Cuyahoga County (county).²

- The Center provides health and human services throughout the county, including behavioral health services, children's services, and youth programs.
- The Center has two affiliated organizations—West Side Ecumenical Ministries³ and El Barrio⁴—that provide additional services.
- The Center and its affiliates have contracts with the county to provide services to county residents.
- The Center receives 11% of its revenues from the county. West Side Ministries receives 21% of its revenues from the county. El Barrio receives 60% of its revenues from the county.

MetroHealth Systems

- MetroHealth is governed by a Board of Trustees whose members are appointed by the County Executive and the senior judges of the county probate and common pleas courts. The appointments are confirmed by the county council.⁵
- The county owns MetroHealth's property and provides \$36 million from a tax levy towards its operation.
- Ms. Jordan has been approached about serving as a Trustee of MetroHealth, a county hospital in the county.
- While the Center and its affiliates do no business with MetroHealth at present, the Center anticipates it will do so in the future.

APPLICABLE ETHICS RESTRICTIONS

If she accepts an appointment as a MetroHealth Trustee, Ms. Jordan will be a "public official," subject to the Ethics Law.⁶ These restrictions will apply to Ms. Jordan as a MetroHealth Trustee:

1. The **public contract restrictions** in R.C. 2921.42(A)(3) and (4) will prohibit Ms. Jordan from:
 - a. Having an interest in MetroHealth contracts with the Center and its affiliates, unless she can meet an exception to the law; and
 - b. Profiting from any public contract authorized by her or by the MetroHealth board of trustees.
2. The **public contract and conflict of interest restrictions** in R.C. 2921.42(A)(1) and 102.03(D) will prohibit Ms. Jordan from using her position as a MetroHealth Trustee to secure contracts or other benefits for the Center or its affiliates;
3. The **representation restriction** in R.C. 102.04(C) will prohibit Ms. Jordan from accepting compensation from the Center or its affiliates to represent their interest before MetroHealth; and
4. The **confidentiality restriction** in R.C. 102.03(B) will prohibit Ms. Jordan from disclosing or using any confidential information she acquires as a MetroHealth Trustee.

PUBLIC CONTRACT RESTRICTIONS

Your first question is whether the Center and its affiliates can continue to have contracts with the county if Ms. Jordan becomes a MetroHealth Trustee. If Ms. Jordan were to be considered “connected” with the county if she becomes a MetroHealth Trustee, the public contract restrictions would apply to her if there are any contracts between the county and the Center and its affiliates.

The Commission has concluded that a county commissioner is “connected” with a county hospital within the county.⁷ The Commission based its conclusion on the county commissioners’ fiscal and oversight responsibilities over a county hospital, including the fact that the hospital must be created by the county commissioners. However, the Commission did not conclude that the hospital’s trustees are connected with the county.

A county hospital is a separate political subdivision from the county. While the hospital has a duty to provide information to, and receives some of its funds from, the county, the hospital’s trustees have no authority over the operation or administration of the county. Therefore, the hospital’s trustees are not “connected” with the county.⁸ If she were to become a MetroHealth Trustee, Ms. Jordan would not have a prohibited interest in the existing county contracts with the Center and its affiliates. Her service as a MetroHealth Trustee would not affect the Center’s ability to continue to provide services to the county.

However, if she were to become a MetroHealth Trustee, Ms. Jordan will be “connected” with the hospital. Your second question is whether the Center and its affiliates can enter into contracts with MetroHealth if Ms. Jordan becomes a MetroHealth Trustee.

Interest in MetroHealth Contracts

As the President and Chief Executive Officer of the Center, Ms. Jordan has a fiduciary interest in the contracts between MetroHealth and the Center or its affiliates.

While she is a MetroHealth Trustee, R.C. 2921.42(A)(4) will prohibit Ms. Jordan from having an interest in MetroHealth’s public contracts. Any purchase or acquisition of goods or services by MetroHealth is a “public contract.”⁹ Ms. Jordan is prohibited from having any definite and direct interest, of either a pecuniary or fiduciary nature, in MetroHealth’s contracts.¹⁰ This restriction applies even if Ms. Jordan does not participate in the authorization of the contracts.

Therefore, if the Center for Families and Children or its affiliates were to provide goods or services to MetroHealth while she serves as a MetroHealth Trustee, Ms. Jordan would have a prohibited interest in the contract unless she can meet the exception in R.C. 2921.42(C).

Exception in R.C. 2921.42(C)

The exception in R.C. 2921.42(C) has four parts. Ms. Jordan has the responsibility to establish that all four requirements in the exception are satisfied.¹¹

Part One: Necessary Services

The services that MetroHealth acquires from the Center and its affiliates must be necessary for MetroHealth.¹² You explained that the services that the Center and its affiliates will provide to MetroHealth will aid MetroHealth to carry out its public healthcare purposes and mission. Therefore, Ms. Jordan can meet this requirement.

Part Two: Unobtainable Elsewhere for the Same or Lower Cost

The services that the Center and its affiliates provide to MetroHealth must be "unobtainable elsewhere for the same or lower cost."¹³ Competitive bidding is one way to show that goods or services are unobtainable elsewhere for the same or lower cost, but it is not the only way.¹⁴

The Commission has explained that, in order to show that she could meet this requirement, a public official who is employed by a company that provides services to the public agency she serves must show either that:

1. The company is the least costly source of the services; or
2. The company can demonstrate that the services it provides are unique or not available elsewhere.¹⁵

You have explained that the Center and its affiliates have the unique ability to provide health and human services to MetroHealth because:

1. The Center and its affiliates have substantial expertise and depth of experience in their service areas and the geographic regions that they serve;
2. The scale of the Center and its affiliates allows it to provide services to many clients reliably; and
3. The Center provides high-quality services.

If Ms. Jordan can show that MetroHealth cannot acquire the services the Center and its affiliates will provide to it from any other source, either because it is the least costly source or because it is uniquely situated to supply the services for the reasons listed above, she can meet the requirement in R.C. 2921.42(C)(2).

Part Three: Same or Better Treatment

The treatment that the Center and its affiliates accord the hospital is either preferential to or the same as that accorded other customers or clients in similar transactions. If Ms. Jordan can demonstrate that the Center and its affiliates provide the same level of service to MetroHealth as they do to their other clients, she can meet this requirement.

Part Four: Arm's Length Transaction with Full Knowledge and No Participation

In order to meet this requirement, Ms. Jordan must demonstrate that:

- Any MetroHealth contracts were awarded to the Center and its affiliates as a result of arm's length transactions;
- She will not be involved, as a MetroHealth Trustee, in any discussions or decisions regarding its contracts with the Center and its affiliates; and
- MetroHealth's legal counsel is informed about her interest in any contracts awarded to the Center and its affiliates.¹⁶

If MetroHealth has a fair and objective procedure for negotiating contracts with its providers and does not give preference to the Center or its affiliates because Ms. Jordan is connected with them, she will be able to demonstrate that this requirement has been satisfied.¹⁷

If Ms. Jordan is able to meet all four parts of the exception in R.C. 2921.42(C), she would not be in violation of R.C. 2921.42(A)(4). However, Ms. Jordan must comply with other provisions of the Ethics Law while she serves as a member of the MetroHealth board.

Profiting from a MetroHealth Contract

The Ethics Law prohibits Ms. Jordan, while she serves as a MetroHealth Trustee, from occupying a position of profit in the prosecution of any MetroHealth contract that:

- Was awarded by her or by the Board of Trustees while she was a member; and
- Was not competitively bid.

This restriction applies to Ms. Jordan even if she does not participate in the award of the MetroHealth contracts.¹⁸

Ms. Jordan would occupy a position of profit in the prosecution of a MetroHealth contract if she receives any financial gain or benefit that is definitely and directly related to carrying out and completing any contract authorized by MetroHealth's Board of Trustees.¹⁹ Factors that would indicate that Ms. Jordan is profiting from a contract awarded by her employer are:

1. The establishment or operation of the Center or its affiliates is dependent on the contract;
2. The creation or continuation of Ms. Jordan's position is dependent on the contract;
3. The proceeds of the contract are used by the Center to compensate Ms. Jordan; or
4. Ms. Jordan otherwise profits from the award of the contract.²⁰

One test of the first of these parameters, whether the Center and its affiliates are "dependent" on a MetroHealth contract, is the amount of funding the company or organization receives from the source. Unless there are other facts presented to demonstrate that it is not, the Center will be considered dependent on MetroHealth if MetroHealth were to provide twenty-five or more percent of the Center's funding. If that should occur while Ms. Jordan serves as a MetroHealth Trustee, she would occupy a prohibited position of profit in the Center's MetroHealth contracts.

If, while she serves as a MetroHealth Trustee, the Center and MetroHealth are considering contracts, and those contracts will comprise a significant percentage of the Center's total funding, Ms. Jordan should consult with the Commission for further guidance.

However, provided that none of these factors is present, Ms. Jordan would not occupy a position of profit in future contracts between MetroHealth and the Center or its affiliates and the restriction in R.C. 2921.43(A)(3) would not apply to Ms. Jordan.

USING PUBLIC AUTHORITY OR INFLUENCE TO SECURE CONTRACTS OR BENEFITS

The Ethics Law prohibits Ms. Jordan from using the authority or influence of her public position to benefit her private interests. While she serves as a MetroHealth Trustee, Ms. Jordan will be prohibited from using her public position to secure any benefit for the Center or its affiliates. There are two statutes that apply to Ms. Jordan:

The first is R.C. 2921.42(A)(1), which provides that no public official shall knowingly authorize or employ the authority or influence of her public position to "secure authorization of any public contract" if the official, a member of her family, or any of her business associates has an interest.

As noted above, Ms. Jordan will have a fiduciary interest in any contract between MetroHealth and the Center and its affiliates.²¹ Therefore, R.C. 2921.42(A)(1) will prohibit Ms. Jordan, as a MetroHealth Trustee, from participating, in any manner, formally or informally, in the consideration, recommendation, or authorization of any MetroHealth contracts with the Center or its affiliates.

The other applicable statute is R.C. 102.03(D), which provides:

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.

"Anything of value" includes money, goods, and every other thing of value.²² Any positive or negative financial impact of a decision made by a public entity is a thing of value.²³

If a public official serves as a trustee of a private entity, her objectivity and independence of judgment as a public official could be impaired when matters before her public agency definitely and directly affect the private entity.²⁴ For that reason, R.C. 102.03(D) prohibits the official from participating in matters that affect any private entity she also serves.²⁵ R.C. 102.03(D) prohibits Ms. Jordan, while she serves as a MetroHealth Trustee, from participating in matters before the Board of Trustees that definitely and directly affect the interests of the Center or its affiliates.²⁶

Ms. Jordan will also be prohibited from using her position as a MetroHealth Trustee to secure any benefit for the Center or its affiliates from any other public agency. While she serves as a Trustee, Ms. Jordan may develop close relationships with employees of county agencies other than MetroHealth. She would be prohibited from using relationships she develops as a MetroHealth Trustee to secure any benefits for the Center.

In an e-mail to Commission staff on August 30, 2012, you provided additional information about the county divisions with which the Center and its affiliates have contracts. The Center contracts with the divisions of: (a) Children and Family Services; (b) Office of Reentry; (c) Office of Early Childhood; (d) Office of Health and Human Services; (e) Alcohol, Drug Addiction, and Mental Health Services Board; and (f) Employment and Family Services. While Ms. Jordan is serving as a MetroHealth Trustee, R.C. 102.03(D) will prohibit her from using her position as Trustee to secure benefits for the Center from officials and employees of these county offices.

REPRESENTATION AND CONFIDENTIALITY

There are two other provisions in the law that will apply to Ms. Jordan if she is appointed to the MetroHealth Board of Trustees.

The representation restriction in R.C. 102.04(A) prohibits Ms. Jordan from receiving compensation from any person to perform services on matters that are before MetroHealth.²⁷ She cannot accept compensation from the Center or its affiliates to perform any services for them on matters that are before MetroHealth. For example, if the Center is negotiating any contractual relationships with MetroHealth, the Center's board of directors will have to assign an employee other than Ms. Jordan to represent its interests in those negotiations.

Second, R.C. 102.03(B) will prohibit Ms. Jordan from disclosing or using any confidential information acquired during her service as a MetroHealth Trustee.²⁸ She cannot disclose that confidential information to the Center or its affiliates. If the MetroHealth Trustees are discussing, in executive session, confidential information that involves a contractual relationship with the Center and its affiliates, Ms. Jordan should not be present for those discussions.²⁹ The other Trustees have an obligation to inform Ms. Jordan when the discussions about the Center are concluded so that she can rejoin the executive session.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 20, 2012. The Commission is sending a copy of the opinion to the County Executive and General Counsel for MetroHealth so that all parties are aware of the restrictions that will apply to Ms. Jordan if she is appointed to a position on the MetroHealth Board of Trustees.

The 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. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's Web site: www.ethics.ohio.gov

¹ County hospitals are organized and operate under provisions established in R.C. Chapter 339.

² Center for Families and Children is a tax-exempt charity as described in 26 USC 501(c)(3).

³ West Side Ecumenical Ministries is a 501(c)(3) tax-exempt charity of which the Center is the sole member. The Center appoints the members of the Ministries' board and approves significant actions it might take.

⁴ El Barrio is a 501(c)(3) nonprofit corporation organized as a workforce development organization. The county enters into contracts with El Barrio to provide workforce development activities pursuant to R.C. 307.982. West Side Ministries is the sole member and parent company of El Barrio.

⁵ Cuyahoga County has adopted a charter form of government, and is governed by an elected county council and county executive.

⁶ R.C. 102.01(B) and (C); 2921.01(A).

⁷ Ohio Ethics Commission Advisory Opinion No. 99-002.

⁸ This opinion does not consider or reach any conclusions about whether county officials and employees are "connected" with MetroHealth.

⁹ R.C. 2921.42(I)(1)(a).

¹⁰ Adv. Op. No. 87-003.

¹¹ Adv. Op. No. 2009-06.

¹² R.C. 2921.42(C)(2).

¹³ R.C. 2921.42(C)(2). A public official can also meet the requirement in R.C. 2921.42(C)(2) if the services are provided as part of a continuing course of dealing established before the official became associated with the agency. In this situation, Ms. Jordan cannot meet this aspect of the exception because the Center and its affiliates are not doing business with MetroHealth at this time.

¹⁴ Adv. Ops. No. 87-003 and 90-003.

¹⁵ Adv. Op. No. 87-003.

¹⁶ R.C. 2921.42(C)(4).

¹⁷ Adv. Op. No. 84-011.

¹⁸ Adv. Op. No. 88-008.

¹⁹ Adv. Op. No. 2009-05.

²⁰ Adv. Ops. No. 87-004 and 88-008.

²¹ See Adv. Op. No. 92-004.

²² R.C. 1.03, 102.01(G).

²³ Adv. Op. No. 2007-01.

²⁴ See Adv. Ops. No. 88-009. See also Adv. Op. No. 76-005 (The Commission has explained that it is unnecessary that the thing of value actually has a substantial and improper influence on the official provided that it is of such a character that it could have such influences.).

²⁵ Adv. Ops. No. 91-006 and 2007-01.

²⁶ Adv. Op. No. 88-008 (when a public official is a member of a board, the rest of the board can make decisions from which she must withdraw to avoid a conflict of interest).

²⁷ Adv. Op. No. 2007-03.

²⁸ Adv. Op. No. 88-009.

²⁹ Adv. Op. No. 2008-02.