



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

September 9, 1991

Informal Opinion 1991-INF-0909

Charles H. Arndt
Executive Director
Ohio Association of County Boards of Mental Retardation
and Developmental Disabilities

Dear Mr. Arndt:

The Ethics Commission is in receipt of your letter dated July 2, 1991. In this letter, you have asked if the Ohio Ethics Law and related statutes prohibit the employees of a county board of mental retardation and developmental disabilities ("MR/DD") from being paid with public funds to provide respite and supported living services to eligible persons who are clients of the MR/DD board.

By way of history, you have explained that county MR/DD boards may provide "direct service" funds to persons with mental retardation or developmental disabilities, or to parents and family members of persons with mental retardation or developmental disabilities, pursuant to the family resource and supported living plans established pursuant to the Ohio Revised Code. See R.C. 5126.11 (providing for reimbursement to clients or families for certain expenses such as respite care) 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). These plans provide for direct payments from the county MR/DD board, of public money, to eligible persons or to parents and family members of eligible persons, in order that they may purchase certain services. The parents and family members may use the public money to contract with and compensate service providers of their choosing, or may receive reimbursement for expenses incurred in contracting with service providers of their choosing.

You have further explained that, in some circumstances, the parents and family members wish to have services provided to their eligible family members by persons who are employed by a county MR/DD board. As you have explained it, the families wish to have services provided to their family members by persons most familiar with their needs and condition. In some instances, the person most familiar with the needs and condition of the client is a professional or service employee of a county board who has worked with the client in his capacity as a board employee. You have further stated that your question does not apply to county board members or county board employees who are management employees or superintendents.

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You have asked if a professional or service employee of a county board is prohibited from receiving compensation for providing services to a client if the family will use board funds to compensate the county employee or receive the funds as reimbursement for the family's payment to the county employee.

Division (A)(4) of R.C. 2921.42 provides as follows:

(A) No public official shall knowingly:

. . .

(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) to include "any elected or appointed officer, or employee, or agent of . . . any political subdivision" of the state. An employee of a county department or board, including the MR/DD board, is considered a "public official" within this definition. See R.C. 5126.02. See Ohio Ethics Commission Advisory Opinion No. 87-006.

A "public contract" is defined in R.C. 2921.42 (E) 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, family resources, or other services for eligible clients by a county MR/DD board is the purchase of services by a political subdivision of the state, and is therefore a public contract.

You have explained that, in the situations about which you have asked, the county MR/DD board will either disburse money directly to the eligible individual, parents, or family members, who may then contract independently with service providers, or will reimburse the eligible individual, parents, or family members for expenses incurred in paying service providers. See R.C. 5126.11, 5126.40, and 5126.43. Although the parents or family members select the particular service provider, the money is provided directly or through reimbursement by the county, and must be used by the individual, parents, or family members for the purpose specified by the county. It may be said that the purchase of services by the parents or family members of eligible persons, using money the county has provided or reimbursed to pay for such services and has specified be used for such services, is the purchase of services by the county, and therefore, is a "public contract" for purposes of R.C. 2921.42 (A)(4).

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The determination of whether a public official has an "interest" in a public contract depends on the facts and circumstances of each situation. See Advisory Opinion No. 89-006. An "interest" which is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary. See Advisory Opinion No. 81-008. In the situation you have described, employees of the county MR/DD board who would provide respite care or supported living services to eligible persons would be compensated for such services. A public employee has a direct pecuniary interest in his or her own compensation for services provided outside his public employment. See Advisory Opinion No. 88-001. See generally Advisory Opinion No. 89-006. Therefore, an employee of a county MR/DD board is prohibited, by R.C. 2921.42 (A)(4), from receiving compensation for providing services to an eligible individual whose parents or family members receive funds from the county board and use the funds directly or through reimbursement to purchase the services from the board employee.

However, Division (C) of Section 2921.42 provides an exception to the prohibition of Division (A)(4). That provision states as follows:

- (C) This section does not apply to a public contract in which a public servant, 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 servant'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;

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- (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 servant, member of his family, or business associate, and the public servant takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

The criteria of Division (C) of R.C. 2921.42 are strictly construed against the public official, and the burden is on the public official to show that he has complied with all four requirements of the section. See Advisory Opinion No. 84-011.

Of particular importance is Division (C)(2) of R. C. 2921.42, which requires that the goods or services be "unobtainable elsewhere for the same or lower cost." The employee of the county board must demonstrate by some objective standard that the services he is providing are unobtainable elsewhere for the same or lower cost. See Advisory Opinions No. 83-004, 89-004 and 90-003.

In Advisory Opinion No. 88-001, the Ethics Commission was asked if a professional employee of the Ohio Department of Mental Retardation and Developmental Disabilities (Department) could enter into personal service contracts with the Department to provide after-hour and on-call medical services. The Commission held that R.C. 2921.42 prohibited the professional employee from entering into such contract, unless the provisions of Division (C) could be met. The Commission further stated:

The Department has stated that physicians who are regularly employed at developmental centers are uniquely qualified to provide on-call services since they are already familiar with the developmental center facilities and with the residents' individual habilitation plans, so as to be able to provide continuity of care. The Department must be able to justify objectively the validity of considering the ability to provide continuity of care in choosing physicians to provide on-call services, since such a specification would give Department employees an inherent advantage in being awarded the contracts to perform these services. If, however, continuity can objectively be shown by the Department to be a valid and proper consideration, a physician's familiarity with a developmental center and the residents, coupled with an open competitive bidding process, may indicate that a physician who is regularly employed at a developmental center and who is awarded a

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contract through competitive bidding to provide on-call services at the center where he is employed would be able to meet the requirement of Division (C)(2). (Emphasis added.)

You have stated that the county employees in your question may be uniquely qualified to provide respite care and supported living services to eligible individuals because parents and family members wish to hire service providers who are familiar and knowledgeable about the eligible individual's condition. You have stated that the county employees who work with board clients are, in many cases, the persons most familiar and knowledgeable about the clients' condition. Additionally, the county employees who work with the clients may have also developed a personal, therapeutic relationship with them.

If the county MR/DD board employee who wishes to contract with the family members is able to show, in some objective fashion, that he has unique experience and familiarity with the client and the client's condition, that there is no other reasonable alternative, and that the choice of the board employee as service provider best safeguards the client's interests, then he may be able to meet the (C)(2) exception. As stated above, however, the MR/DD board employee must be able to demonstrate these qualifications through some objective showing. Approval of the proposed arrangement by a board employee who is not directly involved in the outside service contract and who is superior to the county employee who will be providing the services, or by the county board itself, may constitute such an objective showing. Such approval would have to be based upon the factors set forth above showing that the board employee is uniquely qualified to provide the services. See generally Advisory Opinions No. 87-003 and 88-001.

The board employee must also be able to show that he has met the requirements of Division (C)(4), set forth above. The arrangement must be conducted at arm's length, and the board must have full knowledge of the employee's provision of services. The board employee may not participate in the deliberations or decisions of the board with respect to the award of funds to the individual, family members, or parents.

If the county board employee is able to objectively demonstrate that the requirements of Division (C) have been met, then R.C. 2921.42 (A)(4) would not prohibit the county board employee from providing services to an eligible person and receiving compensation from funds provided by the county board to the eligible person's family. See Advisory Opinions No. 84-006 and 88-001.

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The county board employee is, however, also bound by Division (A)(3) of R.C. 2921.42, which states 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, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid.

A public official, which is defined to include a public employee, will be deemed to have authorized a public contract where the contract could not have been awarded without the public employee's approval. See Advisory Opinions No. 87-004, 88-008, and 90-003. Therefore, the county MR/DD board employee is prohibited by R.C. 2921.42 (A)(3) from being compensated for providing supported living or respite care services, where the source of his compensation is money paid or reimbursed to the family from board funds, and if such payment of funds to the family was approved or authorized by him. See also R.C. 2921.42 (A)(1) and R.C. 102.03 (D) (discussed below).

If the county MR/DD board employee is able to meet the exception in Division (C), and comply with Division (A)(3) of Section 2921.42, such that he could enter into a service provider relationship with parents or family members who would pay him with funds provided or reimbursed by the county board, the board employee is also bound by R.C. 2921.42 (A)(1). This section provides that no public official shall knowingly:

Authorize, or employ the authority of 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.

This section prohibits an employee of a county MR/DD board from authorizing, discussing, deliberating, or otherwise using the authority or influence of his position, formally or informally, to secure payment or reimbursement of board funds to eligible individuals, parents, or family members where he would be paid directly or through reimbursement from such board funds. See Advisory Opinion No. 88-001. See also R.C. 2921.42 (C)(4) (set forth above) and R.C. 102.03 (D) (discussed below).

The county employee is also bound by the provisions of R.C. 102.03 (D). That section provides:

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

A "public official or employee" is defined, for purposes of Chapter 102., to include any person who is an employee of a county board. See R.C. 102.01 (B) and (C). An employee of a county MR/DD board is a "public official or employee" as that term has been defined for purposes of R.C. Chapter 102. See R.C. Chapter 5126.

The term "anything of value" is defined, for purposes of R.C. 102.03 (D), in R.C. 1.03, to include money, goods, any promise of future employment, and every other thing of value. See R.C. 102.01 (G) and R.C. 1.03. A definite, pecuniary benefit to a person is considered a thing of value under R.C. 102.03 (D). See Advisory Opinions No. 79-008, 85-006, and 86-007. The compensation a county employee would receive for services provided to eligible clients falls within the definition of "anything of value" for purposes of R.C. 102.03 (D). See generally Advisory Opinion No. 89-010.

Division (D) of R.C. 102.03 prohibits a public employee from using his official authority or influence to secure anything of value, for himself or anyone else, if the thing of value is of such a character as to manifest a substantial and improper influence upon him with respect to his official duties. The Commission has held that R.C. 102.03 (D) prohibits a public official with private business interests from performing his official duties in a manner which would provide an economic advantage to his private interests. See generally Advisory Opinion No. 90-003.

A county MR/DD board employee holds a position of influence over the individuals who depend upon him for the performance of his public duties. The MR/DD employee has the responsibility to fulfill his mandated official duties in an objective and impartial manner. See Advisory Opinion No. 90-003. A county board employee is prohibited from using his official authority or influence over board clients or their parents or family members in any respect in order to secure a position as a service provider. See Advisory Opinions No. 90-003 and 90-007. The county employee would be prohibited from recommending that the eligible individual receive services if he would apply to provide the services. See generally Advisory Opinion No. 90-007. If the county board employee does recommend that the eligible individual receive services, he is prohibited, by R.C. 102.03 (D), from providing the services to the eligible individual. See Advisory Opinion No. 90-007. The county employee is prohibited from performing his duties or acting in any way as a public employee to create the need for his own services or

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to secure the position. The county board employee is prohibited, by R.C. 102.03 (D), from: (1) using county time, facilities, or resources to perform work for private clients; (2) receiving compensation for services that he has recommended in his official capacity with the county board; (3) refraining from performing his duties for the county board in order to secure private clients; and (4) recommending that any of his private clients or their families receive funds or reimbursement from the county. See Advisory Opinion No. 89-006. He is also prohibited from rendering services for compensation that are his duty to provide as a county board employee. This is prohibited by R.C. 102.03 (D), as well as R.C. 2921.43, which prohibits a public servant from receiving additional or supplemental compensation for the performance of his official duties. Id.

R.C. 102.04 (C) would also prohibit a board employee from receiving compensation for personally rendering any service on any matter which is before the board or another county agency. R.C. 102.03 (A) would prohibit a county board employee from representing any person before any public agency on any matter in which he personally participated as a county employee.

You have stated that your question does not apply to county employees who are management employees or superintendents. If, however, any of the employees included in your question are in a supervisory position, they are also prohibited, by R.C. 102.03 (D), from using their authority or influence over other board employees to secure a service provider position with clients of the board. See Advisory Opinion No. 90-003.

R.C. 102.03 (D) would also prohibit a county MR/DD board employee from participating in any discussions, decisions, recommendations, or other activities of the MR/DD board or its other employees regarding services to be provided to clients with whom the employee is working as a service provider. See Advisory Opinions No. 79-008, 86-006, and 90-003. The county MR/DD board employee is prohibited from using his position as a board employee in any way to secure any benefit, including board funds as payments or reimbursements, for clients, or their families for whom he works as a service provider. See Advisory Opinions No. 87-004 and 86-006.


Finally, a county board employee is prohibited, by R.C. 102.03 (B), from disclosing any confidential information he acquired in his position with the county MR/DD board to any other person, and from using such information, without appropriate authorization. See Advisory Opinion No. 89-006. This prohibition has no time limit, and is applicable during the employee's public employment, and after. Id.

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Revised Code Section 5126.03, which falls outside the Ethics Commission's authority, addresses the issue of board employees also serving as employees of service providers contracting with the county MR/DD board. You may wish to seek interpretation of R.C. 5126.03 and whether it applies to the activity which is described in your question.

This informal advisory opinion was approved by the Ethics Commission at its meeting on August 21, 1991, and is based upon the facts presented. It is rendered with respect 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 require additional information, or wish to request a formal advisory opinion, please contact me.

Sincerely,


Jennifer A. Hardin
Staff Attorney