

OHIO ETHICS COMMISSION

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March 26, 1999

Informal Opinion 1999-INF-0326-3

Debra Belinky, Legal Counsel
Ohio Department of Mental Health

Dear Ms. Belinky:

You have asked about the application of the Ethics Law to a research study proposal that has been submitted to the Ohio Department of Mental Health (ODMH), for grant funding, by the Wright State University Department of Psychiatry (WSU). You have stated that four of the co-investigators on the study are employed by ODMH at the Dayton Mental Health Center (DMHC). You have asked whether the Ethics Law and related statutes prohibit these four ODMH employees from being compensated for their work on the research study from the proceeds of an ODMH grant.

As explained more fully below, R.C. 2921.42(A)(4) prohibits the four ODMH employees from receiving payment for services from the proceeds of an ODMH grant, unless the employees are able to demonstrate that they meet the exemption in R.C. 2921.42(C). The most salient aspect of that exemption, in the question that you have presented, requires that the services provided by the grant recipient are unobtainable elsewhere for the same or lower cost. One indicator of this requirement is that a grant applicant is the only qualified applicant for funding to conduct research in an area that has been identified as a research priority for ODMH.

There are several other sections of the Ethics Law that condition the activities of the employees. R.C. 102.03(D) and (E) prohibit an ODMH employee from soliciting, accepting, or using his position to secure payments for services provided from a party that is doing or seeking to do business with, interested in matters before, or regulated by, his public agency. Since WSU, as a grant recipient, would be both interested in matters before and doing business with ODMH, these ODMH employees are prohibited from accepting payment for services from WSU, unless the employees can completely withdraw from participating in any matters that affect the interests of WSU. Finally, R.C. 102.04(B) prohibits an ODMH employee from selling services to another state agency, unless the services are sold pursuant to a competitive bid, or the employee complies with the exemption set forth in R.C. 102.04(D).

Facts

Project

You have stated that the Department of Psychiatry at Wright State University (WSU) has submitted a proposal, to ODMH, for grant funding to conduct a study entitled "How Accurate are Determinations of Competence to Stand Trial?" In conversations with Ethics Commission staff, Dee Roth, Chief of the Office of Program Evaluation and Research, explained that Douglas Mossman, M.D., who is a part-time employee at the Dayton Mental Health Center (DMHC), wrote the proposal. Ms. Roth has also explained that Dr. Jerald Kay, who is the Chair of the Department of Psychiatry, and who will devote five percent of his time as the Principal Investigator of the project, approved the project at WSU. You have stated that Dr. Kay will not be compensated for his time on the project. Ms. Roth explained that the total cost of the proposal was \$43,596 at the time it was initially approved, but that the cost has increased since that time. You have stated that the study seeks to use a number of expert raters and new, sophisticated statistical estimation procedures to determine the overall accuracy of competency determinations. The study also seeks to determine whether a procedure to rate three independent variables, theorized to be components of competence, will improve raters' overall concurrence of their judgments.

Ms. Roth has stated that ODMH develops research priorities by the use of 16 different constituency groups. You have stated that a study involving persons with mental illnesses who are involved with the criminal justice system has been a continual priority for ODMH, because the responsibilities of ODMH include rendering judgments to the courts about competence to stand trial and restoring persons to competence. You have stated that ODMH currently has very limited knowledge of the overall accuracy of competency judgments, or of how to improve the process of competency determinations. You stated that this proposal is the only one on this topic you received in response to the most recent stated ODMH priorities, and one of only two proposals in this area that you received in the past several years. Finally, you state that you feel certain that there is no other university that would be interested in undertaking this study.

Employees

You have stated that there are seven co-investigators engaged in the proposal. Four of the seven are employed by ODMH at DMHC. The co-principal investigator on the study is Douglas Mossman, M.D., who is, as stated above, a part-time employee at DMHC. Dr. Mossman will be compensated for 300 hours of work on the study at \$60 per hour, from the grant proceeds. Dr. Mossman is also an unsalaried faculty member at WSU, and serves as an associate clinical professor and Director of Forensic Psychiatry. Douglas S. Lehrer, M.D., is the full-time Assistant Medical Director at DMHC, and will be compensated for 75 hours of work on the study at \$60 per hour. I. William McIntosh, Ph.D., is the full-time Director of Psychology at DMHC, and will be compensated for 75 hours of work on the study at \$60 per hour. Thomas O. Martin, Ph.D., is a part-time employee at DMHC, and will be compensated for 75 hours of work on the study at \$60 per hour.

You have stated that all four employees have written permission from the Chief Executive Officer at DMHC to perform these activities, and that they have outlined procedures by which they will document that no work on the research project will take place during their regular work hours at the hospital. Finally, you have stated that these individuals had no participation or influence on the decision to fund this grant. The research program, which is administered by the Office of Program Evaluation and Research, is an open competition for all universities in Ohio. Grant proposals are initiated by investigators, in response to the issuance of a general set of research priorities by the Department.

You stated that the team of seven co-investigators is "uniquely qualified" to perform the study. The four ODMH employees are all specialists in forensic psychiatry. Dr. Mossman has published numerous articles on forensic psychiatry, and on Receiver Operating Characteristics (ROC) analysis, which is the new, highly sophisticated analysis technique that is the centerpiece of the study. You have stated that Dr. Mossman will be overseeing the project, developing the database, and running the ROC analyses. The other three ODMH employees were selected specifically for their expertise with public system forensic patients and their years of experience in the field. They will be reviewing selected case studies and making expert judgments about competency to stand trial in accordance with criteria specified in the research proposal.

Your question raises issues under several provisions in the Ohio Ethics Law and related statutes. First, your question raises issues under the public contract law, R.C. 2921.42. Second, your question implicates the outside employment aspects of the general conflict of interest law, R.C. 102.03(D) and (E). Finally, your question implicates the influence peddling prohibitions contained in R.C. 102.04(B). This opinion will consider these prohibitions in the order listed above.

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

The public contract law is set forth in R.C. 2921.42. R.C. 2921.42(A)(4) provides that no public official shall knowingly:

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 for purposes of R.C. 2921.42 in R.C. 2921.01(A) to include any elected or appointed officer or employee of the state. The Department of Mental Health is a statutorily created administrative department of the state with specified statutory duties concerning the care, custody, hospitalization, and treatment of mentally ill persons. See R.C. 121.02(L) and R.C. 5119.02. An official or employee of the Department of Mental Health is, therefore, a public official who is subject to the prohibitions of R.C. 2921.42.

Division (G)(1)(a) of Section 2921.42 defines a "public contract" for purposes of that section 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." The Ethics Commission has held that grants

by governmental agencies are "public contracts," as defined in R.C. 2921.42(G)(1)(a), since a grant is the purchase or acquisition of services by or for the use of the governmental agency. Ohio Ethics Commission Advisory Opinions No. 82-004, 85-002, 87-003, and 89-006. Therefore, grants awarded by ODMH to colleges and universities are "public contracts" for purposes of R.C. 2921.42.

R.C. 2921.42(A)(4) prohibits an ODMH employee from having an "interest" in a grant or other public contract entered into by ODMH or any division thereof. Adv. Op. No. 84-008 (holding that an employee of a state agency is prohibited from having an interest in a public contract with any part of his state agency, regardless of internal administrative organization). Therefore, an employee of a DMHC is prohibited from having an interest in a contract with any division, department, or institution of ODMH, including, but not limited to, DMHC.

An "interest" which is prohibited under R.C. 2921.42 must be definite and direct and may be either pecuniary or fiduciary in nature. Adv. Op. No. 81-008. The issue, therefore, is whether an ODMH employee would have an "interest" in a grant awarded to WSU by ODMH if an ODMH employee performed research study services for WSU.

A determination as to whether a public official has an "interest" in a contract with his own governmental agency depends on the facts and circumstances of each particular situation. Adv. Op. No. 84-009. In Advisory Opinion No. 89-006, the Ethics Commission examined a situation similar to the one you have presented. In that opinion, the Commission was asked if an ODMH employee, who wished to provide teaching services to a state university, would have a prohibited interest in a grant between ODMH and the university. The Commission concluded that the ODMH employee would have a prohibited interest in the grant if:

(1) [H]is responsibilities at the college or university include preparing, submitting, or negotiating grants with ODMH; (2) he would perform work or receive compensation under the grant; (3) his tenure, compensation, or other benefits received from the college or university would be based or dependent upon the ODMH/OET grant; or (4) the facts otherwise indicate that he would have a definite and direct pecuniary or fiduciary interest in the ODMH/OET grant as a result of his position with the college or university.

Adv. Op. No. 89-006 (emphasis added).

In the situation you have set forth, the four ODMH employees would be performing work and receiving compensation under the grant between ODMH and WSU. In addition, their compensation is dependent upon WSU's receipt of the grant. Therefore, the ODMH employees would have a prohibited interest in the grant.

Exemption to Public Contract Restriction—R.C. 2921.42(C)

R.C. 2921.42(C), however, creates an exemption to the prohibition in R.C. 2921.42(A)(4), and provides:

- (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.

The application of each of the provisions of R.C. 2921.42(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, 88-008, and 89-006. The criteria of Division (C) are strictly construed against the public official, who must show compliance with all of the requirements of the exemption. Adv. Ops. No. 83-004, 84-011, 88-008, and 90-003.

Divisions (C)(2) and (C)(4) are of particular note. Division (C)(2) requires that the supplies and services be unobtainable elsewhere for the same or lower cost, or furnished as part of a continuing course of dealing entered into prior to the ODMH employees "becoming associated" with ODMH. The grant in this question arose after the employees were employed by ODMH, the "continuing course of dealing" provision would not apply to your question.

The employees may be able to demonstrate compliance with (C)(2), if the services supplied by WSU, in the form of the research study, are unobtainable elsewhere for the same or lower cost. The employees must demonstrate compliance by some objective standard. An open and fair competitive bidding process is one indication that the requirement has been met. Your question, however, involves a grant, which is not competitively bid. With respect to grants, the Commission has stated that a public official can demonstrate compliance with the requirement in R.C. 2921.42(C)(2) where all other qualified applicants for a particular grant have received funding, sufficient funds are available to fund the grant in which the employees are interested, and the money will lapse if not used within a specified period of time. Adv. Op. No. 84-011.

You have stated that research regarding persons with mental illnesses who are involved with the criminal justice system has been a continual priority for ODMH, based upon ODMH's responsibilities to render judgments to the courts about competence to stand trial and to restore persons to competence. You have stated that ODMH currently has very limited knowledge of the overall accuracy of competency judgments, or of how to improve the process of competency determinations. You stated that this proposal is the only one you have before you on this topic currently, and that ODMH believes that there is no other university in Ohio that would be interested in undertaking this study. Finally, you have stated that this research is highly important to ODMH and that it is unobtainable elsewhere, because of the unique qualifications of the research team.

Based upon the facts you have presented, the research services that will be provided by WSU to ODMH may meet the requirement that they be unobtainable elsewhere for the same or lower cost and, thus, may fall within the R.C. 29214.2(C)(2) exemption. However, the burden is on the public employees, as in all cases, to sufficiently prove that the facts of this case demonstrate compliance with the requirement in R.C. 2921.42(C)(2).

You should also take note of R.C. 2921.42(C)(4), which requires that the entire grant-issuing transaction be conducted at arm's length, with full knowledge by ODMH of its employees' interests, and that the employees take no part in the deliberations or decisions of ODMH with respect to the grant. You have stated that these individuals had no participation or influence on the decision to fund this grant. The research program, which is administered by the Office of Program Evaluation and Research, is an open competition for all universities in Ohio. Grant proposals are initiated by investigators, in response to the issuance of a general set of research priorities by the Department. Once again, based on the facts presented, it appears that this requirement may be met. The burden of demonstrating compliance with the requirement in R.C. 2921.42(C)(4) rests on the ODMH employees involved.

There are two other requirements in R.C. 2921.42(C). R.C. 2921.42(C)(1) requires that the services are necessary. You have stated that a study involving persons with mental illnesses who are involved in the criminal justice system has been an ongoing priority for ODMH. Further, you have stated that the proposal that is the subject of your question is one of only two in this area that you have received in the last several years. It appears, based on the facts that you have presented, that the requirement that the services are necessary may be met. R.C. 2921.42(C)(3) requires that the ODMH employees provide the same or better services for ODMH than they would for any other client in similar transactions. The Commission assumes that the grant proposal contains performance measures that may allow the ODMH employees to show that the study services provided to ODMH are the same or better than the services they would provide to any other party. The ODMH employees also bear the burden of demonstrating compliance with both of these requirements.

In sum, R.C. 2921.42(A)(4) prohibits these four ODMH employees from receiving payment for research services provided to WSU from the proceeds of an ODMH grant, unless the employees are able to demonstrate that they meet the exemption in R.C. 2921.42(C). The most salient aspect of that exemption requires that the services provided by the grant recipient

are unobtainable elsewhere for the same or lower cost. One indicator of this requirement is that a grant applicant is the only qualified applicant for funding to conduct research in an area that has been identified as a research priority for ODMH.

Other Public Contract Prohibitions

There are two other considerations under the public contract law that should be noted. R.C. 2921.42(A)(1) prohibits a public official from authorizing a public contract, including a grant, in which the official has an interest. R.C. 2921.42(A)(3) prohibits a public official, for one year from the time he left office, from occupying a position of profit in the prosecution of a public contract that he authorized, unless the contract was let by competitive bidding. You have stated that the employees in your question have no role in the authorization of research grants by ODMH. It appears, therefore, that these two provisions are not applicable to your question. If, however, any of the four employees participates, in any way, in the authorization or approval of the grant application or the administration of the grant by ODMH, please contact this office for more information about R.C. 2921.42(A)(1) and (A)(3).

Outside Employment—R.C. 102.03(D) and (E)

Assuming that the ODMH employees are able to meet the requirements of R.C. 2921.42(C), such that the exemption to R.C. 2921.42(A)(4) applies, Divisions (D) and (E) of R.C. 102.03 will also condition their actions. These sections provide:

- (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.

The term "public official or employee" is defined for purposes of R.C. 102.03 in R.C. 102.01(B) and (C) to include any person who is appointed to an office or is an employee of any department of the state. An official or employee of ODMH is, therefore, subject to the prohibitions of R.C. 102.03. Adv. Op. No. 89-006.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money, the promise of future employment, and every other thing of value. R.C. 102.01(G). Compensation paid to an individual for research services he provides would fall within the definition of "anything of value." Adv. Ops. No. 88-002 and 89-006.

~~A public official or employee is prohibited by R.C. 102.03(D) and (E) from accepting, soliciting, or using his position to secure anything of value that would directly benefit his personal or private pecuniary interests, where the thing of value is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to his duties. Adv. Ops. No. 80-007 and 88-004. The issue becomes whether the compensation received by ODMH employees for performing research study services from a college or university that receives an ODMH grant are of such a character as to manifest a substantial and improper influence upon the employees with respect to their duties.~~

The Ethics Commission has held that Division (D) of Section 102.03 of the Revised Code prohibits a public official or employee from using the authority or influence of his office or employment to secure anything of value or the promise or offer of anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the agency with which he serves, or where the thing of value could impair the official's or employee's objectivity and independence of judgment with respect to his professional actions and decisions for the agency that he serves. Adv. Ops. No. 79-002 and 87-009. In the instant situation, a college or university that applies for, or receives, an ODMH grant is a party that is interested in matters before, or doing or seeking to do business with ODMH. Therefore, Division (D) of Section 102.03 would prohibit an ODMH official or employee from using the authority or influence of his office or employment at ODMH to secure compensation for services provided to a college or university that applies for, or receives, an ODMH grant.

Division (E) of R.C. 102.03 prohibits a public employee from accepting anything of value, including payment for services, from a party that is interested in matters before, regulated by, or doing or seeking to do business with the agency with which he serves. Adv. Op. No. 89-006. Furthermore, a public official is prohibited by Division (E) from private business opportunities where such private activity could impair his objectivity or independence of judgment with regard to his official decisions and responsibilities. Adv. Ops. No. 87-006 and 96-004. The application of R.C. 102.03(E) is dependent on the facts and circumstances of each individual situation. Adv. Op. No. 89-006.

You have stated that these ODMH employees have no participation or influence over the award of this grant. You have also stated that the research program is administered by the Office of Program Evaluation and Research. The employees in your question work for DMHC, rather than for the Office of Program Evaluation and Research. It is important that the employees have no involvement with ODMH with respect to the award and ODMH administration of the grant. An ODMH employee or official who does not participate in the review or approval of grants is not prohibited by R.C. 102.03(E) from accepting compensation for research services from a university or a department within the university that receives a grant. Adv. Op. No. 89-006.

If the ODMH employee is not prohibited from accepting compensation to perform research study services from WSU, his conduct will be further conditioned by R.C. 102.03(D) and (E). He is prohibited from making recommendations or otherwise using his position with ODMH, formally or informally, to secure anything of value for WSU. Adv. Op. No. 87-004. Also, an ODMH employee is prohibited from: (1) using ODMH time, facilities, or resources to

perform work for WSU; (2) receiving compensation for services rendered on projects that he has recommended in his official capacity with ODMH; (3) rendering services for compensation that are his duty to provide as an ODMH employee; (4) refraining from rendering any service or otherwise performing his duties with ODMH in order to secure the compensation from WSU; and (5) recommending the university to ODMH as a future or continuing grant recipient. Adv. Ops. No. 84-012 and 84-013. See also R.C. 2921.43 (prohibiting a public servant from soliciting or accepting any compensation or supplement to perform his official duties).

Sale of Services to Other State Agencies—R.C. 102.04(B)

Division (B) of Section 102.04 reads:

Except as provided in division (D) of this section, no 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, shall sell or agree to sell, except through competitive bidding, any goods or services to the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

Division (B) of Section 102.04 prohibits an ODMH employee from selling, except through competitive bidding, any services to any instrumentality of the state, which would include a state university. Division (D) of Section 102.04 provides an exception to the prohibitions of Division (B) and is available to nonelected officials and public employees. Both of the following criteria must be met before the exception will apply:

- (1) The agency to which the official or employee wants to sell the goods or services, or before which the matter that involves the rendering of his services is pending, is an agency other than the one with which he serves;
- (2) Prior to rendering the personal services or selling or agreeing to sell the goods or services, he files a statement with the appropriate ethics commission, with the public agency with which he serves, and with the public agency before which the matter is pending or that is purchasing or has agreed to purchase goods or services.

Division (D) specifies the information that must be contained in the statement filed pursuant to that provision, including a declaration that the employee disqualifies himself for two years from participating in any matter involving any public official or employee of the agency before which the matter is pending or to which goods or services are to be sold. Division (E) emphasizes this disqualification, as follows:

No public official or employee who files a statement or is required to file a statement under division (D) of this section shall knowingly fail to disqualify himself from any participation as a public official or employee of the agency with which he serves in any matter involving any official or employee of an agency

before which a matter for which he rendered personal services was pending or of a public agency that purchased or agreed to purchase goods or services.

In order for the employees in your question to sell research study services to WSU, they must either sell the services by competitive bidding, or complete the statement described in R.C. 102.04(D). The ODMH employees must then completely withdraw from any decision-making that affects any officials or employees of WSU for two years.

Finally, Division (A) of Section 102.03 of the Revised Code provides, in pertinent part:

- (1) No present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

...

- (5) As used in divisions (A)(1), (2), and (3) of this section, "matter" includes any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments. . . . As used in division (A) of this section, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person.

An ODMH employee who provides research services for a university which receives an ODMH grant is prohibited by R.C. 102.03(A)(1) from representing the university or any other person before ODMH or any other public agency on any matter in which he personally participated as an ODMH employee. Adv. Ops. No. 87-001 and 89-006.

Conclusion

As set forth more fully above, R.C. 2921.42(A)(4) prohibits the four ODMH employees from receiving payment for services from the proceeds of an ODMH grant, unless the employees are able to demonstrate that they meet the exemption in R.C. 2921.42(C). The most salient aspect of that exemption, in the question that you have presented, requires that the services provided by the grant recipient are unobtainable elsewhere for the same or lower cost. One indicator of this requirement is that a grant applicant is the only qualified applicant for funding to conduct research in an area that has been identified as a research priority for ODMH.

There are several other sections of the Ethics Law that condition the activities of the employees. R.C. 102.03(D) and (E) prohibit an ODMH employee from soliciting, accepting, or using his position to secure payments for services provided from a party that is doing or seeking to do business with, interested in matters before, or regulated by, his public agency. Since WSU, as a grant recipient, would be both interested in matters before and doing business with ODMH, these ODMH employees are prohibited from accepting payment for services from WSU, unless the employees can completely withdraw from participating in any matters that affect the interests of WSU. Finally, R.C. 102.04(B) prohibits an ODMH employee from selling services to another state agency, unless the services are sold pursuant to a competitive bid, or the employee complies with the exemption set forth in R.C. 102.04(D).

Finally, although you have not asked about the application of the law to them, it must be noted that there are two other state employees who will receive compensation under the ODMH grant. You have stated that Dr. Marshall Kapp, Professor of Community Health and Psychiatry at WSU, and Dr. Solomon Fulero, Professor and Chair of the Department of Psychology at Sinclair Community College, will both be paid as consultants on the proposal. Because they are persons employed by institutions of the state, Drs. Kapp and Fulero must also comply with the parameters of the Ethics Law, particularly R.C. 102.04(B), discussed above. It appears that the exemption in R.C. 102.04(D), also discussed above, would apply for both Dr. Kapp and Dr. Fulero. Please advise Dr. Kapp and Dr. Fulero to contact the Commission if they would like further information about the restrictions or exemption.

This opinion was approved by the Ethics Commission at its meeting on March 26, 1999. It is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. I apologize for the delay in responding to your request, and regret any inconvenience that may have resulted from the delay. If you have any further questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

Enclosures: Blank R.C. 102.04(D) Statements