

Ben Rose, *Chair*
Shirley Mays, *Vice Chair*
Merom Brachman
Betty Davis
Steven Dettelbach
Ann Marie Tracey



OHIO ETHICS COMMISSION
8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368

David E. Freel,
Executive Director

www.ethics.ohio.gov

August 19, 2009

Informal Opinion 2009-INF-0819-1

David Hartley
The Board of Clark County Commissioners

Dear Mr. Hartley:

On March 17, 2009, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you are requesting guidance on behalf of the President of the Clark County Board of Commissioners (Commissioner) and the Director of the County Department of Job and Family Services (DJFS Director). You explained that the Commissioner and DJFS Director are both members of the Board of Directors for the National Association of Counties (Association).

You have asked whether there is a conflict of interest and ethics violation for the Commissioner and DJFS Director if the County Board of Commissioners enters into a contract with the Association and Caremark PCS Health, L.P. (Caremark) to provide a prescription drug card program. The program would enable County residents to buy discounted prescription drugs and pet medications through designated pharmacies.

Brief Answer

As explained below, provided that they can meet an exception set forth in R.C. 2921.42(C), the Ethics Law would not prohibit Commissioner and DJFS Director from serving as members of the Association's Board of Directors while the County has a contract with the Association and Caremark for a prescription drug program for County residents.

Facts

The Association is a nonprofit corporation with a voluntary membership comprised of county governments that contribute to its financial support through dues and service fees. The Association's board has 125 members. Three members are from Ohio, including the two Clark County officials.

One of the benefits the Association offers to its member counties is the ability to offer Caremark's discount prescription card to county residents. In lieu of billing the county a per claim fee for services, Caremark will retain all rebates connected to a resident's use of the card as compensation. The Association does not receive any payments from Caremark or the county as a result of the agreement.

However, the Association does receive benefits from the contract. Because the Association can offer its members the ability to secure the prescription drug program for county residents at no cost, it receives the benefit of increased membership and enhanced goodwill of its existing members. Further, because the Association is a party to the contract, it appears to have endorsed the prescription plan which may bring more customers to Caremark. As a party to the contract, the Association may also face liability if there is a failure to perform the contract.

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

The first matter that must be considered is how the prohibition against having an interest in a public contract, R.C. 2921.42(A)(4), applies to the Commissioner and DJFS Director. County officials are "public officials" subject to R.C. 2921.42(A)(4), which 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 the public official is connected.

The term "public contract" includes any purchase or acquisition of property or services "by or for the use of" the state or any of its political subdivisions. R.C. 2921.42(I)(1)(a). A public contract exists whenever a public agency either purchases services from a provider or acquires services as part of the contractor's responsibility under the contract. Adv. Ops. No. 91-011, 93-009, and 93-012.

The Ethics Commission has held that programs sponsored by a public agency through which it acquires community services that benefit its residents are "public contracts." Adv. Op. No. 2001-02; State v. Lordi, 140 Ohio App.3d 561, 568 (2000), discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001). The County would be acquiring services, for County residents, under a contract with the Association and Caremark for a prescription card program to enable county residents to buy discounted drugs. Any such contract would be a public contract.

The Ethics Commission has held that a public official would have a prohibited "interest" in a public contract if the official's interest is definite and direct, and either financial or fiduciary. Adv. Ops. No. 81-008 and 88-001. An officer, board member, or trustee of a corporation, whether for profit or nonprofit, has a definite and direct fiduciary interest in the corporation's contracts. Adv. Ops. No. 78-006, 86-005, and 89-008. As noted above, the Association has an interest in the profits and benefits of the contract.

As Directors of the Association, the Commissioner and DJFS Director have a fiduciary interest in the contracts of the Association even though they receive no financial benefit from the contracts.¹

R.C. 2921.42(A)(4) prohibits the Commissioner and DJFS Director from having a definite and direct, financial or fiduciary interest in the contracts of the County. If the County were to enter into a contract with the Association and Caremark while the Commissioner and DJFS Director are serving as members of the Association's Board of Directors, the Commissioner and DJFS Director would both have a prohibited fiduciary interest in the public contract. However, the Commissioner and DJFS Director can continue to serve both the County and the Association, if they can show that they can meet the exception in R.C. 2921.42(C).

Exception to R.C. 2921.42(A)(4)—R.C. 2921.42(C)

R.C. 2921.42(C) provides that the R.C. 2921.42(A)(4) does not apply to a public contract in which a public official has an interest provided that official meets four requirements. The requirements are construed against the public official, who has the responsibility of demonstrating that he meets the exception.

The first requirement is: "The subject of the public contract is necessary supplies or services for the political subdivision . . . involved." R.C. 2921.42(C)(1). When a public contract involves a political subdivision's purchase or acquisition of services for its residents the Ethics Commission has concluded that the services being acquired are necessary for the political subdivision. Adv. Ops. No. 85-002, 88-006, and 2001-02.

The second requirement is that the supplies or services are "unobtainable elsewhere for the same or lower cost." R.C. 2921.42(C)(2). The Commissioner and DJFS Director must objectively demonstrate that the County would be unable to obtain a similar or better prescription card program for County residents, for lower cost to the County, than the one that is available from Caremark through the Association.

The Commission understands that the Association did a comprehensive review of available plans to find that one the provided the best benefit to its members at the lowest cost. County officials can meet the exception in R.C. 2921.42(C)(2) if the County has assessed, based on available data, that the plan offered by the Association and Caremark is the most cost-effective program the County can acquire for its citizens.

¹ R.C. 2921.42(A)(3) prohibits a public official from "occupy[ing] any position of profit in the prosecution of a public contract" which he or his board authorized and which was not let by competitive bidding to the lowest and best bidder. As unpaid members of the Association's Board of Directors, the President and Director do not "occupy [a] position of profit" in its contracts. R.C. 2921.42(A)(3) would apply if the officials received money from, or as a result of, the County's contract with the Association. Adv. Ops. No. 88-008 and 95-007.

The third requirement in the exception is that treatment given to the governmental agency is either “preferential to or the same as that accorded other customers or clients in similar transactions.” R.C. 2921.42(C)(3). The Commissioner and DJFS Director can meet this exception provided that the County will acquire the same prescription drug plan that the Association and Caremark makes available to any participating county.

The final requirement in the exception is that: (1) “the entire transaction is conducted at arm’s length”; (2) the governmental agency has “full knowledge . . . of the interest of the public official”; and (3) “the public official takes no part in the deliberations or decision” of the public agency regarding the public contract. In order for the Commissioner and DJFS Director to show compliance with this requirement, it must be clear that the County’s procedures involved in the selection of a provider for a prescription card program are fair and objective with no preference given to the Association. Adv. Op. No. 2001-02.

Further, the Commissioner and DJFS Director are prohibited from participating in the determination of the eligibility of participants in the program or decisions on matters affecting participants. Adv. Ops. No. 84-011, 85-002, and 88-006. In addition, the County must have full knowledge that the Commissioner and DJFS Director also serve as Directors of the Association. Id.

Provided that the Commissioner and DJFS Director can meet the requirement of the R.C. 2921.42(C) exception, they would not have a prohibited fiduciary interest in the County’s contract with Caremark and the Association.² However, even if the Commissioner and DJFS Director can meet the requirements in R.C. 2921.42(C), there are limits on their actions regarding the contract.

Authorizing Contract to Association—R.C. 2921.42(A)(1)

The Commissioner and DJFS Director are “public officials” subject to R.C. 2921.42(A)(4) and 102.03(D). R.C. 2921.42(A)(1) provides that no public official shall knowingly:

Authorize, or employ the authority or influence of the public official’s office to secure authorization of any public contract in which the public official, a member of the public official’s family, or any of the public official’s business associates has an interest.

² If either of the officials is still a member of the Association board when the contract must be renewed, the official would be required to show, once again, that he or she meets the R.C. 2921.42(C) exception. If, at that time, any other company can offer a prescription drug program for the same or lower cost, the County would have to contract with the other source.

As set forth above, the Commissioner and DJFS Director have a fiduciary interest in the Association. Therefore, R.C. 2921.42(A)(1) prohibits the Commissioner and DJFS Director from voting upon, discussing, or otherwise using the authority or influence of their respective County positions, either formally or informally, to secure authorization of any contract between the County and the Association.³ The Commissioner and DJFS Director are also prohibited from participating in their official capacities in any issue relating to the program while it is being considered by the County and matters that arise after it is entered into, such as a dispute regarding, or a modification to, the terms of the contract.

Securing Benefits for Association—R.C. 102.03(D)

R.C. 102.03(D) provides that:

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.

The term "anything of value" is defined to include money and every other thing of value. R.C. 102.01(G), 1.03. A pecuniary interest in a public contract is a thing of value. Adv. Ops. No. 86-007 and 87-006. In addition, the financial benefit that results from a favorable decision of a public agency is also a thing of value. Adv. Ops. No. 85-012, 90-002, and 90-012.

R.C. 102.03(D) prohibits a public official from participating, formally or informally, in matters that will benefit any party with which he has a close family, economic, or business relationship because the relationship may impair the official's objectivity and independence of judgment. Adv. Ops. No. 88-004, 89-008, and 97-002. R.C. 102.03(D) prohibits the Commissioner and DJFS Director from making use of their unique access to and influence over other County officers and employees to affect their decisions regarding the County prescription card program.

Therefore, while they are serving on the Association's board, R.C. 102.03(D) prohibits the Commissioner and DJFS Director from participating in a matter before the County that would result in a definite and direct financial benefit for the Association even if, as unpaid board members, they receive no definite and direct benefit from the matter.

³ If the contract must be approved by the County commissioners, the commissioner who is a board member of the Association must remove himself from the commissioners' consideration and decisions on the contract. The other two County commissioners can vote to approve the contract without his or her participation. If two of the commissioners were members of the Association, the County would be unable to enter into the contract.

David Hartley
August 19, 2009
Page 6

Disclosure of Confidential Information—R.C. 102.03(B)

Finally, the Commissioner and DJFS Director are subject to R.C. 102.03(B) of the Revised Code, which prohibits them from disclosing or using, without appropriate authorization, any confidential information that they acquired in their capacity as public officials to any party. No time limitation exists for this prohibition. Adv. Op. No. 88-009. For example, R.C. 102.03(B) would prohibit both County officials from using their access to confidential information regarding the prescription card program to gain any kind of favorable advantage for the Association.

Conclusion

As explained above, provided that they can meet an exception set forth in R.C. 2921.42(C), the Ethics Law would not prohibit Commissioner and DJFS Director from serving as members of the Association's Board of Directors while the County has a contract with the Association and Caremark for a prescription drug program for County residents.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on July 14, 2009. 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