



OHIO ETHICS COMMISSION

8 East Long Street
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368

April 11, 1997

Informal Opinion 1997-INF-0411-2

Charles L. Pater
Assistant Prosecuting Attorney
Butler County

Dear Mr. Pater:

You have written a letter to the Ethics Commission in which you ask whether the Ohio Ethics Law and related statutes prohibit the Director of Residential and Management Services of the Butler County Mental Health Board (Board) from also serving as the Executive Director of New Avenues, Inc., a nonprofit corporation, in light of the fact that the Board approves New Avenues' application for housing assistance funds and monitors New Avenues' use of these funds to develop permanent housing for the mentally ill of Butler County. In conjunction with your letter, Janice R. Franke, Staff Counsel for the Ohio Department of Mental Health (ODMH) has written a letter to the Ethics Commission requesting an advisory opinion addressing this matter. This advisory opinion considers the facts presented and the questions raised by both letters.

As explained below, the Board's Director of Residential and Management Services is not prohibited from serving as the Executive Director of New Avenues because she serves as Executive Director in her "official capacity" to represent the Board and its interests. Accordingly, the Board's Director of Residential and Management Services is not prohibited from evaluating and approving New Avenues' application for housing assistance funds and monitoring New Avenues' use of these funds.

Facts

You state that, in 1990, New Avenues entered into an agreement with the Board to develop permanent housing for the mentally ill of Butler County. At that time, the Board and the board of directors of New Avenues passed a joint resolution under which the Board would provide New Avenues office space, executive/administrative services and secretarial support. You state that the Executive Director of the Board estimates that the Board has saved \$500,000. over the past seven years by providing this support to New Avenues.

Under the joint resolution, the executive/administrative support consists of a Board administrator who serves as New Avenues' Executive Director with responsibility for New Avenues' day-to-day operations. The Board has designated its Director of Residential and Management Services to serve in this position. The Executive Director of New Avenues receives no compensation from New Avenues, being compensated entirely by the Board.

ODMH, in its letter to the Ethics Commission, recognizes that the motivation for the arrangement between the Board and New Avenues was to improve coordination of mental health housing and achieve valuable efficiencies. ODMH has, however, expressed its concern with having a Board administrator serve as New Avenues' Executive Director because ODMH provides capital grant funds to the Board that, in turn, are used to purchase services from New Avenues. ODMH states that as a condition of a grant from ODMH to the Board, the Board both recommends and monitors the project that is funded by the grant. ODMH is concerned that the arrangement of having the Director of Residential and Management Services serve as the Executive Director of New Avenues implicates the prohibitions imposed by R.C. 2921.42 and R.C. 102.03 (D). Specifically, ODMH is concerned that the Board's Director of Residential and Management Services has a potential conflict of interest because she must evaluate and approve New Avenues' application for housing assistance funds and monitor New Avenues' use of these funds. The question raised by your request and the legitimate concerns of ODMH will be addressed first by discussing the restriction imposed by R.C. 2921.42 (A)(4).

Restriction Imposed by R.C. 2921.42 (A)(4)

R.C. 2921.42 (A)(4) reads:

- (A) No public official shall knowingly do any of the following:
- ...
- (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.

R.C. 2921.01 (A) defines the term "public official" for purpose of R.C. 2921.42 as any elected or appointed officer, employee, or agent of any political subdivision of the state. An employee of a county mental health board is a "public official" for purposes of R.C. 2921.42.

R.C. 2921.42 (A)(4) prohibits a public official from having an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision with which he is employed. Advisory Op. No. 81-003. An interest that is prohibited under R.C. 2921.42 (A)(4) must be definite and direct, and may be either pecuniary or fiduciary. Advisory Ops. No. 78-005 and 81-008. An officer of a non-profit corporation has a definite and direct fiduciary interest in the corporation's contracts. Advisory Ops. No. 81-005 and 87-003.

R.C. 2921.42 (G)(1)(a) defines the term "public contract" as the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of a political subdivision or any of its agencies or instrumentalities. A public contract is created whenever a public agency either purchases services from a provider or acquires services as part of the contractor's responsibility under the contract. Advisory Ops. No. 91-011, 93-009, and 93-012. In the instant situation, ODMH's provision of capital grant funds to the Board and the Board's contract with New Avenues to develop permanent housing for the mentally ill of Butler County are public contracts for purposes of R.C. 2921.42.

Official Capacity Exception

In Advisory Opinion No. 96-005, the Ethics Commission addressed this general issue and re-affirmed that while the Ohio Ethics Law generally prohibits a public official from being employed by a non-profit corporation that has a contract with his public agency, an exception exists when a public official is assigned responsibilities by his public agency to perform public services for a non-profit corporation in his official capacity. In the instant situation, the issue becomes whether the Board's Director of Residential and Management Services has a prohibited interest in a public contract for purposes of R.C. 2921.42 (A)(4) by serving as the Executive Director of New Avenues or whether the 'official capacity exception' has been met.

At first glance, it would appear that the Board's Director of Residential and Management Services has a prohibited interest in a public contract for purposes of R.C. 2921.42 by serving as the Executive Director of New Avenues. However, as stated above, the Ethics Commission has held that the prohibition of R.C. 2921.42 (A)(4) does not apply to a public official of a political subdivision who serves a non-profit corporation that contracts with the political subdivision, provided that he serves on the board in his "official capacity" as a designated representative of his political subdivision, in order to represent his political subdivision's interests. Advisory Op. No. 96-005. See also Advisory Ops. No. 82-004, 92-002, and 93-012.

The Ethics Commission has explained that whenever a public official serves on the board of directors of a non-profit corporation in his official capacity, "there would not be a dual interest in which private considerations would distract from his serving the public interest." Advisory Op. No. 84-001. In Advisory Opinion No. 84-001, the Commission established four criteria that must be met in order for a public official to be deemed to serve in his official capacity:

- (1) the governmental entity must create or be a participant in the non-profit corporation;
- (2) any public official or employee connected with the jurisdiction . . . may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity;
- (3) the public official or employee must be formally instructed to represent the governmental entity and its interests;
- (4) there must be no other conflict of interest on the part of the designated representative.

In Advisory Opinion No. 96-005, the Ethics Commission re-visited this holding and re-affirmed that these four criteria must be met in order for a public official to be deemed to serve in his official capacity. See also Att'y Gen. Ops. No. 91-007 and 96-007.

Accordingly, R.C. 2921.42 (A)(4) would not prohibit the Board's Director of Residential and Management Services from serving on as the Executive Director of New Avenues, provided that she is: (1) designated to represent the Board; (2) formally instructed to represent the Board and its interests; and (3) not otherwise subject to a conflict of interest. Advisory Op. No. 96-005.

You state that the Board has participated in the operation of New Avenues since New Avenue was established in 1990. Also, the requirement in the Joint Resolution that the Board provide New Avenues with office space, executive/administrative services and secretarial support evidences a desire that the Board personnel assigned to New Avenues represent the Board's interest in the operation of New Avenues and its management. Furthermore, your statements that New Avenues has no competitor corporation, and that the Director of Residential and Management Services receives no salary from New Avenues and cannot use her position with the Board to procure special favors for New Avenues reduce the potential for conflicts of interest.

Therefore, based on the information that has been provided by both your office and ODMH, it appears that the necessary criteria for determining that the Director of Residential and Management Services is acting in her official capacity when she serves as executive officer of the New Avenues are satisfied. Because the criteria has been satisfied, the Director of Residential and Management Services will not be considered to have a prohibited interest in a public contract if she also serves as Executive Director of New Avenues.

Participation in Matters Affecting New Avenues

As stated above, ODMH, in its letter to the Commission, is concerned that the Board's Director of Residential and Management Services has a potential conflict of interest because she must evaluate and approve New Avenues' application for housing assistance funds and monitor New Avenues' use of these funds. The concern that ODMH has expressed in its request for an advisory opinion is a legitimate one, however, as explained below, under the facts and circumstances in the present situation, the Director of Residential and Management Services does not have a dual interest in which her private considerations could distract her from serving the public interest.

Your attention is directed to R.C. 102.03 (D), which reads:

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 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 board of the county mental health board. Therefore, all officials and employees of a county mental health board are subject to the prohibitions imposed by R.C. 102.03 (D).

The term "anything of value" is defined for purposes of R.C. 102.03 (D) in R.C. 1.03 to include money and every other thing of value. R.C. 102.01 (G) and R.C. 1.03. A definite pecuniary benefit to a person or entity is a thing of value for purposes of R.C. 102.03 (D). In the instant situation, an approval of New Avenues' application for housing assistance funds and a favorable evaluation of New Avenues' use of these funds are things of value for purposes of R.C. 102.03 (D). See Advisory Op. No. 89-006 (award of a grant from ODMH to a college or university that employs an ODMH official or employee) and 93-016 (a beneficial administrative decision is a thing of value for purposes of R.C. 102.03).

The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official or employee from discussing or participating in any matter that would benefit a corporation, either for-profit or not-for-profit, of which he is a board member, officer, or employee, because the benefit accruing to the corporation would be of such a character as to manifest a substantial and improper influence upon him with respect to his duties by impairing his objectivity and independence of judgment. Advisory Ops. No. 81-008, 88-004, and 89-008. However, in Advisory Opinion No. 88-005, the Commission adopted the four criteria set forth in Advisory Opinion 84-001, which had been previously applied to the prohibition of R.C. 2921.42(A)(4), as the requirements that must also be met before a public official may be considered to serve on the board of a private agency in his official capacity without violating R.C. 102.03 (D). See also Advisory Op. No. 96-005.

As stated above, when a public official serves in his "official capacity," the official has been designated by the appropriate authority of his political subdivision to represent the interests of his political subdivision. The Ethics Commission held in Advisory Opinion No. 84-001 that under such circumstances, "there would not be a dual interest in which private considerations [of the official] would distract from his serving the public interest."

In this instance, the Director of Residential and Management Services is serving as New Avenues' Executive Director in her official capacity, and is representing the interests of the Board. Any benefit accruing to New Avenues from the Board, such as an approval of New Avenues' application for housing assistance funds and favorable evaluations regarding New Avenues' use of these funds would not be of such a character as to manifest a substantial and improper influence upon the Director of Residential and Management Services with respect to her official duties as a Board employee, since she is serving as New Avenues' Executive Director as a part of her official duties. Benefits accruing to New Avenues as a result of her service as New Avenues' Executive Director do not accrue to her personal benefit or to the benefit of any party with which she is connected in her personal capacity. Instead, the benefit would accrue to a non-profit corporation that she had been charged to serve as part of her official responsibilities. See Advisory Op. No. 96-005. Therefore, the benefit accruing to New Avenues would not be of such a character as to manifest a substantial and improper influence upon the Director of Residential and Management Services with respect to her public duties. Accordingly, R.C. 102.03 (D) would not prohibit her from participating in decisions of the Board that would affect New Avenues. This conclusion is based on the assumption that the Board has properly designated her to serve in her official capacity as the Executive Director of New Avenues.

It must be stressed that R.C. 2921.42 (A)(1) prohibits a public official from authorizing, or using his authority or influence to secure authorization of, a public contract in which he, a family member, or a business associate has an interest. R.C. 2921.42 (A)(1) prohibits all public officials, including those who serve on the board of a corporation in their "official capacity," from participating in the authorization of a public contract if they, their family members, or business associates have a definite and direct pecuniary or fiduciary interest in the public contract. For example, in the instant situation, the Director of Residential and Management Services is not prohibited from participating in the consideration of a grant that will benefit New Avenues, however, she would be prohibited from participating in the award of the grant to New Avenues if she knew that the grant would fund New Avenues' purchase of services from a company that was owned by a family member.

Conclusion

As explained above, the Board's Director of Residential and Management Services is not prohibited from serving as the Executive Director of New Avenues because she serves as Executive Director in her "official capacity" to represent the Board and its interests. Accordingly, the Board's Director of Residential and Management Services is not prohibited from evaluating and approving New Avenues' application for housing assistance funds and monitoring New Avenues' use of these funds.

The concerns expressed by ODMH are not without merit. The Ethics Commission recognizes that public agencies that are involved in the provision of needed services for the citizens of the state must be extremely diligent to avoid conflicts of interest where private considerations of public officials and employees could interfere with the public agency properly serving the public interest. As explained above, the Ethics Commission recognizes that a determination of whether a conflict of interest exists is dependent on the facts and circumstances of each individual situation. If any changes in the relationship between the Board and New Avenues are contemplated, such as the provision of compensation or benefits from New Avenues to the Director of Residential and Management Services that would ordinarily be precluded by law, then the Ethics Commission should be consulted, because these changes would affect the holding of this advisory opinion.

As a final matter, you state in your letter that the Revised Code permits the Board to own residential property in its own name, but sometimes it is more advantageous for the Board to contract with a nonprofit corporation for housing services. The specific manner by which the Board meets its statutorily mandated duty is for the determination of the Board rather than the Ethics Commission. However, it must be stressed that by whatever means the Board achieves its goals, the restrictions imposed by the Ohio Ethics Law and related statutes must be considered to ensure that the private considerations of public officials and employees do not interfere with the ability of a public agency to properly serve the public interest.

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This informal advisory opinion was approved by the Ethics Commission at its meeting on April 11, 1997. The opinion 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. If you have any further questions, please feel free to contact this Office again.

Very truly yours,


John Rawski
Staff Attorney

cc:
Janice R. Franke