

OHIO ETHICS COMMISSION

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April 6, 2001

Informal Opinion 2001-INF-0406-2

Michael C. Townsend, M.D.
Advanced Surgical Care, Inc.



Dear Dr. Townsend:

In a letter received by the Ethics Commission on January 17, 2001, you ask whether the Ethics Law and related statutes prohibit you from serving on the board of governors of a public hospital due to your activities in the practice of general surgery.

Facts

You state that you practice general surgery in Circleville, Ohio and are employed by Advanced Surgical Care, Inc., a general surgery group. You also state that you practice at Berger Hospital (Hospital), which is a public municipal hospital operating pursuant to Chapter 749. of the Ohio Revised Code, and at the Physicians Ambulatory Surgery Center (Center), a free-standing out-patient surgery center. You further state that you own 5% of the Center and function as its medical director. In addition, you state that your spouse is a physician and, that along with another physician, she has an ownership interest in the Center.

Finally, it has been explained that on December 21, 1999, in your capacity as the Center's Medical Director, you signed a Transfer Agreement with the Hospital. The President and CEO of the Hospital signed on its behalf. Generally, the Transfer Agreement provides that the Hospital agrees to promptly receive patients from the Center whenever a Center physician determines that the needs of a patient exceed the services that the Center can provide.

Brief Answer

As explained below, there is an insurmountable conflict of interest and divided loyalties between your public duties as a member of the Hospital's board of governors and your private financial interests. Accordingly, the prohibitions imposed upon you by R.C. 102.03(D) and (E) prohibit you from serving on the Hospital's board of governors.

Soliciting or Accepting Anything of Value—R.C. 102.03(D) and (E)

Divisions (D) and (E) of R.C. 102.03 read as follows:

- (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 to include any appointed official or employee of any "public agency." R.C. 102.01(B). The term "public agency" is defined to include any institution or instrumentality of a city. R.C. 102.01(C). Therefore, a member of the board of governors of a public municipal hospital that is organized pursuant to R.C. Chapter 749, is an appointed official of a public agency and subject to the prohibitions imposed by R.C. 102.03(D) and (E). See generally Ohio Ethics Commission Advisory Opinion No. 99-002 (a county hospital organized pursuant to R.C. Chapter 339, is a public institution and its employees are subject to the Ohio Ethics Law and related statutes).

The Ethics Commission has held that R.C. 102.03(D) and (E) prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his position to secure anything of value from a party that is regulated by, interested in matters before, or doing or seeking to do business with, the agency he serves, or where the receipt of such a thing of value could otherwise impair his objectivity and independence of judgment with regard to his official decisions and responsibilities. Adv. Ops. No. 86-011, 89-006, and 90-001.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 102.01(G). An ownership interest in a private business and the compensation that is derived from the practice of a profession falls under the definition of "anything of value." Adv. Ops. No. 89-010, 90-002, 90-003, and 92-009. Furthermore, a beneficial or detrimental economic impact of a decision of a public agency is a thing of value for purposes of R.C. 102.03(D) and (E). Adv. Ops. No. 86-007, 90-002, and 92-009.

The Ethics Commission has held that the Ethics Law and related statutes do not prohibit a public official or employee from engaging in private business activity or holding private employment so long as no conflict of interest exists between the public official's or employee's public position and private financial interests. Adv. Ops. No. 84-009, 85-006, 86-008, 87-006, and 99-002. However, R.C. 102.03(D) and (E) prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his office or employment to secure,

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anything of value where the thing of value could impair his objectivity and independence of judgment with respect to his official actions and decisions for the agency with which he serves or is employed. Adv. Ops. No. 80-004, 87-009, and 90-012. The Commission has explained that the limitations and restrictions on the conduct of a public official or employee who wishes to engage in a private business or hold outside employment is dependent on the facts and circumstances of each individual situation. Adv. Ops. No. 77-003 and 89-003.

In some circumstances, the Ethics Commission has held that the public official or employee is not prohibited from engaging in a private business or holding outside employment provided that he is able to withdraw from consideration of matters that could pose a conflict of interest. For example, in Advisory Opinion No. 86-007, the Commission held that a person who owns a private business that is licensed and regulated by the county board of health is not prohibited from serving as county board of health member if he can abstain from participating in matters before the board that could affect his business or the financial interests of his competitors. See also Adv. Ops. No. 89-006 (Ohio Department of Mental Health officials and employees accepting employment from colleges or universities that receive grants from ODMH), 89-010 (a Department of Agriculture employee selling services to a state institution which is regulated by the Department of Agriculture), and 90-002 (a Department of Agriculture employee owning and operating a plant which is regulated by the Department of Agriculture), and 99-002 (a member of the board of county commissioners being employed by a county hospital organized under Chapter 339. of the Revised Code). However, the Commission has held that such a withdrawal: (1) may not interfere with the official's or employee's performance of his duties; and (2) must be approved by the appropriate officials at his public agency. Id.

In other instances, the Ethics Commission has held that a public official's or employee's private financial interests give rise to an insurmountable conflict of interest and divided loyalties between his public duties and private interests to the extent that R.C. 102.03(D) and (E) prohibit him from engaging in a certain private business or holding outside employment. Adv. Ops. No. 81-007 (an employee of a county recorder's office may not conduct private title searches), 83-007 (an employee of the Board of Cosmetology may not sell products to regulated parties), 88-002 (the President of the Controlling Board may not be employed by a state agency), and 92-008 (a township clerk may not be employed by a bank that receives township funds).

Therefore, the powers and duties of the board of governors of a municipal hospital must be examined in order to determine the extent of the limitations and restrictions imposed upon you in the instant situation.

The Board of Governors of a Municipal Hospital

The board of governors of a municipal hospital organized pursuant to R.C. Chapter 749. is vested with the power to manage and control the hospital. R.C. 749.18 provides that when a county participates in the maintenance and operation of a municipal hospital, a municipal corporation may establish a board of governors to exercise the powers vested under R.C. 749.15 in the municipal director of public safety. See R.C. 749.15 (management and control of

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a municipal hospital is vested in the municipal director of public safety); see also 1951 Op. Att’y Gen. No. 341, p. 139 at 145 (a board of governors which is given authority to manage a municipal hospital is endowed with all the powers of the director of public safety set forth in R.C. 749.15). The board of governors of a municipal hospital is empowered to establish rules for the government of, and the admission of persons to, the hospital; employ a superintendent, physicians, nurses, and such other employees as are necessary, and fix the compensation of all such persons. See R.C. 749.15. In addition, the board of governors may grant to its employees benefits that it determines are customary and usual in the nonprofit hospital field in its community, provide scholarships, tuition reimbursement and other staff development programs, pay reasonable expenses for recruiting physicians into the city if all or part of the city has been designated as an area with a shortage of personal health services, and employ counsel and take legal action to collect delinquent accounts. Id.

Prohibited Activity as a Member of the Board of Governors

As set forth above, you state that you practice at the Center of which you are a 5% owner and serve as Medical Director in addition to practicing at the Hospital. In addition, you state that your spouse is a physician and, that along with another physician, she has an ownership interest in the Center. Thus, it is apparent that, as a practitioner of general surgery, you, your family member, and your business associate would be affected by actions of the Hospital board of governors in at least two ways.

First, you state that you practice at the Hospital. Because the board of governors of a municipal hospital organized pursuant to R.C. Chapter 749. is vested with the power to manage and control the hospital, your practice at the hospital could be affected by the actions of the board of governors. If you were to serve on the board of governors of a Hospital in which you practiced, decisions regarding the employment of, and compensation, for physicians, nurses, and other employees could have a definite and direct impact on your own financial interests by affecting the need for you to provide services at the Hospital.

Secondly, the Center of which you are a 5% owner and for which you serve as Medical Director could be affected by the actions of the board of governors. Such an effect would impact the financial interests of you, your family member, and your business associate. In Advisory Opinion No. 86-007, the Ethics Commission held that an individual serving as a member of a county board of health who owned a private business that was licensed and regulated by the health board could not participate in issues concerning his competitors if his private business were to benefit from the board’s decision regarding competitors.

You have stated that the Center does not compete with the Hospital because the Center “functions specifically as a free standing out-patient surgery center” and that the Hospital “[does] not have such a facility and [is] not engaged in the practice of free standing out-patient surgery.” The Commission understands, from a telephone conversation between staff and counsel for the Hospital, that while the Hospital does not have a “free standing out-patient surgery center” it, nevertheless, engages in the practice of out-patient surgery and provides the same kind of

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services to patients as the Center. Notwithstanding the fact that the Hospital does not provide out-patient surgery specifically in a "free-standing" facility, because the Center and the Hospital both engage in the practice of out-patient surgery, it is likely that the Center is in competition with the Hospital.

In addition, there is no reason that the Hospital's board of governors cannot decide that it would be in the Hospital's best interests to compete with the Center in this manner in the future. The board of governors of the Hospital is the decision-making authority that would determine whether the Hospital should offer out-patient ambulatory surgery in a free-standing facility or offer other competing services.

In addition, it is apparent that competition between the Hospital and the Center extends beyond the treatment of patients. The presence of two health service facilities in a rural area, such as Circleville, could result in competition between the Hospital and the Center for the employment of physicians, nurses, and other employees. Such competition for personnel could affect the decisions of the board of governors in fixing the compensation, benefits, and staff development programs of Hospital employees and recruiting physicians into the city. The competition for recruiting physicians could be enhanced if all or part of the city has been designated as an area with a shortage of personal health services.

Accordingly, because of the competition between the Center and the Hospital, the Center could be affected by the decisions of the board of governors of the Hospital. Thus, R.C. 102.03(D) and (E) would prohibit you, as a member of the board of governors of the Hospital, from participating in deliberations, discussions, or voting on, among other things: (1) rules for the government of, and the admission of persons to, the Hospital; (2) the employment of a superintendent, physicians, nurses, and such other employees; (3) fixing the compensation and benefits of Hospital employees; (4) determining the need to provide scholarships, tuition reimbursement and other staff development programs; and (5) determining the reasonable expenses for recruiting physicians into the city if all or part of the city has been designated as an area with a shortage of personal health services.

It is readily apparent that if you were to serve as a member of the board of governors of the Hospital, the prohibitions of R.C. 102.03(D) and (E) would require you to withdraw entirely from the management and control of the Hospital. As set forth above, the Ethics Commission has held that a withdrawal by a public official or employee to avoid violating R.C. 102.03(D) and (E) may not interfere with the official's or employee's performance of his duties. Therefore, in the instant situation, your private financial interests give rise to an insurmountable conflict of interest and divided loyalties between your public duties and private interests, and the prohibitions imposed upon you by R.C. 102.03(D) and (E) prohibit you from serving on the Hospital's board of governors. See also Att'y Gen. Op. No. 90-012 (a nurse employed by a municipal hospital is prohibited under common-law compatibility analysis from simultaneously serving as a member of the board of governors of that hospital).

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Finally, you have indicated that, on January 12, 2001, you signed the Berger Health System Conflicts of Interest and Confidentiality Policy, which states in pertinent part:

The following are common situations involving a conflict of interest and as such are not permitted:

- Providing consulting or managerial services to any organization doing business with the [Berger] Health System, seeking to do business with the Health System or which is a competitor of the Health System.

While the Ethics Commission cannot interpret the Hospital's Conflict of Interest Policy, it does note the similarity of the above provision with the prohibitions imposed by R.C. 102.03(D) and (E) set forth above.

Conclusion

As explained above, there is an insurmountable conflict of interest and divided loyalties between your public duties as a member of the Hospital's board of governors and your private financial interests. Accordingly, the prohibitions imposed upon you by R.C. 102.03(D) and (E) prohibit you from serving on the Hospital's board of governors.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 6, 2001. 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 questions or desire additional information, please contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney