

OHIO ETHICS COMMISSION

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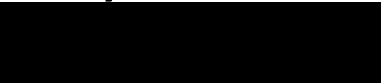


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October 12, 2001

Informal Opinion 2001-INF-1012-2

The Honorable Betty D. Montgomery
Attorney General



William Wilkins
Chairman, Tobacco Use Prevention and Control Foundation
c/o OhioHealth
3555 Olentangy River Road, Suite 4000
Columbus, Ohio 43214

Dear Attorney General and Chairman Wilkins:

You have asked whether the Ohio Ethics Law and related statutes preclude health organizations that advocate reducing the use of tobacco from receiving grants from, or performing services under contract for, the Tobacco Use Prevention and Control Foundation (Foundation) if board members or officers of the health organization also serve on the Foundation's Board of Trustees (Board). You state that several Foundation Board members serve as board members or officers of health organizations that have traditionally waged anti-smoking campaigns as part of their missions.

Brief Answer

As explained below, because of the specific statutory composition and mission of the Foundation, the prohibitions imposed by R.C.2921.42(A)(3) and R.C. 2921.42(A)(4) do not preclude health organizations from receiving grants from, or performing services under contract for, the Foundation if board members or officers of the health organizations also serve on the Foundation Board, provided that that Foundation board members adhere to the restrictions described in this opinion. However, these Foundation Board members are prohibited from personally benefiting from or occupying a position of profit in, and from discussing, deliberating, or voting on the award of, grants or contracts to the health organization that they serve as a board member or officer. In addition, a Board member cannot use his position to secure a grant or contract for a health organization that he serves as a board member or officer with terms that are in disproportion, selective, or differential to the grants and contracts received by other qualified applicants. Finally, a Foundation Board member is prohibited from participating in the Foundation's evaluation of any research or program that was conducted by the health organization that they serve as a board member or officer.

Facts—The Foundation: Purpose and Composition

The Tobacco Use Prevention and Cessation Trust Fund (Trust Fund) is one of the funds created in the State Treasury as a result of the Tobacco Master Settlement Agreement Fund. R.C. 183.03. The Trust Fund was earmarked for use by the Foundation, which is charged with the duty of implementing a plan to reduce tobacco use by Ohioans, with emphasis on youth, minority and regional populations, pregnant women, and others who may disproportionately be affected by the use of tobacco. R.C. 183.04 and R.C. 183.07. The Foundation may provide grants to private and public agencies to carry out research and programs for tobacco use prevention and cessation. R.C. 183.07. The Foundation is required to contract for the independent and objective evaluation of the research and programs that it funds. Id. In addition, the Foundation is required to adopt rules under R.C. Chapter 119. that address conflicts of interest in the research and programs that it funds. Id.

You state that the Foundation intends to create its own anti-smoking media campaign that would require the Foundation to contract with advertising and public relations firms, and consultants. In addition, you state that the Foundation intends to provide grants to governmental and nonprofit agencies to aid in the achievement of its statutorily mandated duties.

The Foundation is governed by a twenty-member board of trustees. Board members serve without compensation but receive reasonable and necessary expenses incurred while conducting Foundation business. R.C. 183.04. Board members and the Board's Executive Director are required to file a public financial disclosure statement with the Ohio Ethics Commission. R.C. 102.02(A) and (B). R.C. 183.04.

The Board is comprised of the Director of Health, Executive Director of the Commission on Minority Health, and the Attorney General who serve as ex officio members. R.C. 183.04(J). Eight members of the Board are required to be health professionals, health researchers, or representatives of health organizations. R.C. 183.04(A). One member must have experience in financial planning and accounting. R.C. 183.04(B). One member must have experience in media and mass marketing. Id. The remaining members are selected in the manner set forth in R.C. 183.04(C) through (I):

- (C) One member, who shall be appointed by the governor from a list of at least three individuals recommended by the American cancer society;
- (D) One member, who shall be appointed by the governor from a list of at least three individuals recommended by the American heart association;
- (E) One member, who shall be appointed by the governor from a list of at least three individuals recommended by the American lung association;

- (F) One member, who shall be appointed by the governor from a list of at least three individuals recommended by the association of hospitals and health systems;
- (G) One member, who shall be appointed by the governor from a list of at least three individuals recommended by the Ohio state medical association;
- (H) One member, who shall be appointed by the governor from a list of at least three individuals recommended by the association of Ohio health commissioners;
- (I) One member, who shall be appointed by the governor from a list of at least three individuals recommended by the Ohio dental association.

It must be noted that while R.C. 183.04(C)-(I) requires the enumerated organizations to recommend likely candidates for service on the Foundation Board to the Governor, the statute does not limit their recommendations to individuals who have no relationship with the organizations. See Columbus Suburban Coach Lines Inc. v. Public Utilities Comm., 20 Ohio St. 2d 125, 127 (1969) (“[i]n determining legislative intent . . . give effect to the words used, [do] not . . . insert words not used”). It is clear from R.C. 183.04 that the legislative intent of the General Assembly in establishing the Foundation and specifying its composition is that health organizations, representing both governmental and nonprofit agencies, which have traditionally waged anti-smoking campaigns, will actively participate in the operation of the Foundation.

Profiting from and Interest in a Public Contract—R.C. 2921.42(A)(3) and (A)(4)

Your attention is first directed to R.C.2921.42(A)(3), which provides 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, unless the contract was let by competitive bidding to the lowest and best bidder.

The term “public official” includes any elected or appointed officer, or employee, or agent of the state or any political subdivision. R.C. 2921.01(A). The Ethics Commission has explained that members of state boards and commissions are “officers” for purposes of R.C. 2921.01(A) if their board or commission exercises the “sovereign power” of government. In Advisory Opinion No. 77-004, the Commission held that “[s]overeign power includes the exercise of a duty entrusted to one by virtue of statute or some other public authority, a duty that is not merely clerical, but that involves discretionary, decision-making qualities.”

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As explained above, the Board has final, discretionary, decision-making authority in meeting the Foundation's statutorily established duty of implementing a plan to reduce tobacco use by Ohioans, and therefore, the Board exercises the sovereign power of government. Therefore, its members are state officers for purposes of R.C. 2921.01(A) and subject to the prohibitions imposed by R.C. 2921.42.

The term "public contract" includes any purchase or acquisition of property or services by or for the use of the state or any political subdivision. R.C. 2921.42(G)(1). The Ethics Commission has held that a grant from a governmental entity to an individual, public or nonprofit agency that is designed to provide a service for the grantor is a public contract for purposes of the prohibitions of R.C. 2921.42. See Ohio Ethics Commission Advisory Opinions No. 89-006, 89-008, and 92-014. A public contract is considered to be authorized by a public official or board if the contract could not have been awarded without the approval of the official, the position he holds, or the board upon which he serves. See Adv. Op. No. 87-004.

In the instant situation, contracts entered into by the Foundation with advertising and public relations firms, and consultants to create an anti-smoking media campaign and grants provided by the Foundation to governmental and nonprofit agencies to aid in the achievement of its statutorily mandated duties are "public contracts" for purposes of R.C. 2921.42.

R.C. 2921.42(A)(3) prohibits a public official from profiting from a public contract, including a grant, authorized by the board upon which he serves unless the contract was let by competitive bidding to the lowest and best bidder. The Ethics Commission has held that, because grants are not let by competitive bidding, a public board member is prohibited from profiting from a grant authorized by the board during service to the board and for one year thereafter even if the official abstains from the proceeding and decision to award the grant or loan. Adv. Op. No. 88-006.

The prohibition of R.C. 2921.42(A)(4) is also applicable to your question. 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.

As stated above, a member of the Foundation's Board is a public official for purposes of R.C. 2921.42. As also stated above, a direct purchase of services by, or a grant from, the Board is a public contract. A prohibited "interest" in a public contract must be definite and direct, and may be either pecuniary or fiduciary in nature. Adv. Op. No. 89-008. Therefore, R.C. 2921.42(A)(4) prohibits a public official from having an interest in the award of a direct purchase of services by, or a grant from, the Board from the public agency he serves.

Before determining the application of R.C. 2921.42(A)(3) and (A)(4) to the Board members, it is necessary to examine the responsibilities of the Board and its statutorily mandated goal.

Specific Statutory Composition of the Foundation—Legislative Intent

When interpreting the Ohio Ethics Law and related statutes, the Ethics Commission follows the rules of statutory interpretation codified in the Revised Code. R.C. 1.47 states that when interpreting a statute, it is presumed that the General Assembly intended the entire statute to be effective to achieve a just and reasonable result feasible of execution. In addition, R.C. 1.49 states that the consequences of a particular construction may be considered in interpreting a statute. See also Adv. Op. No. 89-001.

As stated above, the Foundation is statutorily charged with the unambiguous mandate of implementing a plan to reduce tobacco use by Ohioans. Therefore, the reduction of tobacco use by Ohioans is the just and reasonable result that the General Assembly intended to achieve when it created the Foundation.

It is clear from R.C. 183.04 that the legislative intent of the General Assembly in establishing the Foundation and describing its composition is to require that health organizations, including specifically listed governmental and nonprofit agencies, which have traditionally waged anti-smoking campaigns, will actively participate in the operation of the Foundation. The General Assembly's clear intent for allowing service that might otherwise constitute a conflict of interest was to augment and coordinate the efforts of these organizations with the Foundation to achieve the common goal of promoting good health by reducing tobacco use by Ohioans.

The result that the General Assembly intended by creating the Foundation—the reduction of tobacco use by Ohioans—would be hindered rather than helped if the prohibitions imposed by R.C. 2921.42(A)(4) and R.C. 2921.42(A)(3) were to be applied to the Foundation Board members without consideration of the specific statutory composition and mission of the Foundation. Such an interpretation would preclude the governmental or nonprofit health organizations that the Foundation Board members serve from receiving grants from, or performing services under contract for, the Foundation. The inability to receive grants from, or contract with, the Foundation would inhibit the organizations' ability to wage anti-smoking campaigns and, thus, the achievement of the result that the General Assembly intended by creating the Foundation.

Accordingly, because of the specific statutory composition and mission of the Foundation, R.C. 2921.42(A)(3) and R.C. 2921.42(A)(4) do not prohibit an individual from serving as a member of the Foundation Board if he holds a position as a board member, officer, or employee of a governmental or private health organization in light of the fact that his health organization secures grants from, or perform services under contract for the Foundation.

R.C. 2921.42(A)(3) and (A)(4) does prohibit a Foundation board member who also serves as a board member, officer, or employee of a governmental or private health organization that receives grants or contracts from the Foundation from personally benefiting from, or occupying a position of profit in, the prosecution of the grant or contract. The Foundation board member who served as an employee of an organization that received a grant or contract would be prohibited, for example, from being paid directly from the grant or contract proceeds. Adv. Op. No. 89-006. Further, R.C. 2921.42(A)(1) and R.C. 102.03(D), as discussed below, will limit these officials from participating in some matters.

Authorizing a Grant or Loan—R.C. 2921.42(A)(1)

The instant situation also implicates provisions of the Ethics Law and related statutes that prohibit a public official from participating in a matter in which he, a family member, or a business associate, has a definite and direct financial or fiduciary interest. R.C. 2921.42(A)(1) provides that no public official shall knowingly:

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

R.C. 2921.42(A)(1) prohibits a Board member from voting, discussing, deliberating, or using his position, in any way, with respect to a grant awarded by the Foundation in which he, his family member, or his business associate, has a financial or fiduciary interest.

In the instant situation, if a Board member serves as a board member or officer of, or has any other fiduciary connection with, a governmental or nonprofit agency that desires to secure grants from, or perform services under contract for, the Foundation, R.C. 2921.42(A)(1) prohibits the Board member from voting upon, discussing, or otherwise using the authority or influence of his public position, either formally or informally, to secure authorization of a grant or contract for the governmental or nonprofit agency from the Foundation. This includes a bar upon the Board member's participation in any issue relating to the grant or contract after it is entered into, such as a dispute regarding, or modification to, the terms of the grant or contract.

In addition, 2921.42(A)(1) prohibits a Board member from participating, in any way, in the consideration or award of the grant or loan to a family member or business associate. The Ethics Commission has held that for purposes of R.C. 2921.42, a business association is created whenever persons join together, formally or informally, to pursue a common business purpose. Adv. Op. No. 86-002. See also Adv. Ops. No. 84-009 (consultants engaged by a corporation), 85-004 (partners in limited and general partnerships), 89-008 (employers and employees), 89-015 (partners or associates in a law firm), and 93-001 (stockholders capable of affecting the corporation's management or operation).

Therefore, if a Foundation Board member is employed by a governmental or non-profit agency specified in R.C. 183.04 that desires to secure grants from, or perform services under contract for, the Foundation, R.C. 2921.42(A)(1) prohibits the Board member from voting upon, discussing, or otherwise using the authority or influence of his public position, either formally or informally, to secure authorization of a grant or contract for the governmental or nonprofit agency from the Foundation. This includes a bar upon the Board member's participation in any issue relating to the grant or contract after it is entered into, such as a dispute regarding, or modification to, the terms of the grant or contract.

Prevention of Conflicts of Interest—R.C. 102.03(D)

Also relevant to your questions is R.C. 102.03(D), which provides the following:

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.

For purposes of Chapter 102. of the Revised Code, "public official or employee" is defined as "any person who is elected or appointed to an office or is an employee of any public agency." R.C. 102.01(B).

As used in the definition of "public official or employee," "public agency" includes the general assembly, all courts, any department, division, institution, board commission, authority, bureau or other instrumentality of the state. R.C. 102.01(C). The Foundation Board members exercise final, discretionary, decision-making authority, and, therefore, the Foundation is a "public agency" as that term is used in the definition of "public official or employee." Also, the Foundation Board members are state officers, as stated above, and are therefore "appointed to an office . . . of a public agency" and subject to the prohibitions of R.C. Chapter 102., including the prohibition of R.C. 102.03(D).

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. See R.C. 102.01(G). A pecuniary interest in a grant or public contract is a thing of value under R.C. 102.03(D). Adv. Ops. No. 86-007 and 87-006. In addition, the benefit that results from a favorable evaluation is also a thing of value for purposes of R.C. 102.03(D).

R.C. 102.03(D) prohibits a public official or employee from acting, formally or informally, to secure a thing of value that could manifest a substantial and improper influence upon the public official or employee with respect to that person's duties. Adv. Ops. No. 88-004 and 91-004. The Ethics Commission has held that a determination of whether a thing of value could manifest a substantial and improper influence upon a public official or employee with

respect to that person's duties is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 87-008 and 88-004.

The Ethics Commission has held that R.C. 102.03(D) prohibits a public official or employee from participating in matters that will benefit himself, or parties with whom he has a close family, economic, or business relationship because the relationships may impair the public official's objectivity and independence of judgment. Adv. Ops. No. 88-004, 89-008, and 97-002. For example, in Advisory Opinion No. 89-008, the Ethics Commission held that R.C. 102.03(D) prohibits a member of a city council from voting, deliberating, participating in discussions, or otherwise using his official authority or influence with regard to secure a tax abatement for his private employer, because the relationship between the public official and his private employer is such that the council member's objectivity and independence of judgment could be impaired by the relationship.

Thus, if a Foundation Board member serves as a board member, officer, or employee of, or has any other fiduciary connection with, a governmental or nonprofit agency, and his organization desires to secure grants from, or perform services under contract for the Foundation, then R.C. 102.03(D) prohibits him from voting upon, discussing, or otherwise using the authority or influence of his public position, either formally or informally, to secure authorization of a grant or contract for his health organization from the Foundation. This includes a bar upon the Board member's participation in any issue relating to the grant or contract after it is entered into, such as a dispute regarding, or modification to, the terms of the grant or contract or securing a grant or contract for a governmental or nonprofit agency that a Foundation Board member serves as a board member or officer with terms that are in disproportion, selective, or differential to the grants and contracts received by other qualified applicants. Adv. Op. No. 96-004.

Filing a Financial Disclosure Statement

As a final matter, it is apparent from the General Assembly's decision to include the Foundation Board members in the class of public officials and employees who are required by R.C. 102.02(A) to file a public financial disclosure statement that the General Assembly acted with full awareness of the restrictions imposed by the Ethic Law and related statutes when they created the Foundation. Ordinarily, the financial disclosure statements of members of uncompensated state boards and commissions are confidential. See R.C. 102.02(B).

In the case of the Foundation, the General Assembly determined that its members should be required to file financial disclosure statements that are available for public inspection even though the members of the board are not compensated for their service. R.C. 102.02(A) and (B). The public disclosure of a Board member's financial interests, which would include the names under which the Board member and his immediate family members do business, sources of income, investments, and fiduciary interests protects the public interest while advancing the Foundation's statutory mandated goal by enabling the Foundation to augment and coordinate its efforts with health organizations that have traditionally waged anti-smoking campaigns.

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Conclusion

As explained above, the prohibitions imposed by R.C.2921.42(A)(3) and R.C. 2921.42(A)(4) do not preclude health organizations from receiving grants from, or performing services under contract for, the Foundation if board members or officers of the health organizations also serve on the Foundation Board, provided that that Foundation board members adhere to the restrictions described in this opinion. However, these Foundation Board members are prohibited from personally benefiting from or occupying a position of profit in, and from discussing, deliberating, or voting on the award of, grants or contracts to the health organization that they serve as a board member or officer. In addition, a Board member cannot use his position to secure a grant or contract for a health organization that he serves as a board member or officer with terms that are in disproportion, selective, or differential to the grants and contracts received by other qualified applicants. Finally, a Foundation Board member is prohibited from participating in the Foundation's evaluation of any research or program that was conducted by the health organization that they serve as a board member or officer.

The conclusion of this advisory opinion is based and dependent entirely on the recognition that the Foundation was created to achieve the goal of reducing the use of tobacco by Ohioans. Nothing in this advisory opinion should be construed as relieving a Board member from the restrictions described above that prohibit a public official from participating or voting in matters in which he, a family member, or a business associate, would derive a definite and particular personal financial benefit.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 12, 2001. The Commission commends you for requesting guidance before taking any actions that could be prohibited by the Ethics Law.

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,



David E. Freel
Executive Director

cc: Members, Tobacco Use Prevention and Control Foundation
Kent Shimeall, Assistant Attorney General