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September 29, 2006 Informal Opinion 2006-INF-0929-1

Gregory H. Wehr
[REDACTED]

Dear Mr. Wehr:

On June 20, 2006, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you stated that you are currently employed as a software salesman and consultant for a private company that provides goods and services to county boards of Mental Retardation and Developmental Disabilities (MRDD) and other public and private entities. You plan to seek employment as an MRDD board superintendent. You asked whether the Ethics Law and related statutes will prohibit you, after you are employed as a superintendent of an MRDD board, from continuing to consult and sell software with the private company, either to the county board by which you are employed or MRDD boards in other counties. You have also asked whether the board of MRDD or the taxpayers should know about your private employment activities. Finally, you have asked for guidance on any other prohibited activity.

Brief Answer

At the outset, the Commission notes that the facts you have described raise considerable and significant issues under the Ethics Law and related statutes. While the law does not absolutely prohibit a public official or employee from holding or pursuing unrelated private employment activities, it does limit or prohibit private activity that is closely related to the individual's public service. Your proposed activity falls into the latter category, and the law either significantly limits, or prohibits, much of what you have described.

As explained more fully below, because of the scope of a county MRDD board superintendent's duties and the work your private employer performs, the company could not do business with the county by which you were employed as MRDD superintendent. This would be true regardless of whether you were directly involved, as an employee or consultant, in the company's contracts.

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The law would not absolutely prohibit your private employer from entering into contracts with other MRDD boards and with other public and private entities. However, you would be prohibited from representing your employer, as an employee or consultant in, or receiving any benefit from, its sales to: (1) the Department of MRDD; (2) state-operated developmental centers; and (3) other public agencies or private entities that are doing or seeking to do business with, interested in matters before, or regulated by, the board that employs you. You would also be prohibited from participating, as superintendent, in any matters before the board that affect your private employer, or its clients and customers, including public agencies, even if you were not the salesman on those matters or receiving any benefit from the sales. Finally, you would be prohibited from using your unique access to any professional colleagues, such as other county MRDD superintendents, officials and employees of the Department of MRDD, and private service providers, to secure contracts or other benefits for your private employer.

Facts

In your letter to the Ethics Commission, you stated that you are employed as a software salesman and project consultant for a private company. You stated that your private employer currently provides software products and services to several public agencies, including county MRDD boards, state developmental centers, county intermediate care facilities for the mentally retarded (ICF/MRs), private ICF/MRs, private group homes, and day habilitation providers. You further stated that in your position with the private company, you receive a commission for products you sell, as well as a daily rate for consulting projects.

You stated that you will soon receive your MRDD superintendent certificate. Upon completion, you explained that you will seek employment as a county board of MRDD superintendent. Your first question is whether the Ethics Law will prohibit you, as a county board of MRDD superintendent, from continuing to consult and sell software with the private company, to the county board by which you are employed.

Sales to Employing County Board

The two ethics provisions that are most applicable to your question are the public contract statute, set forth in R.C. 2921.42(A), and the conflict of interest statute, set forth in R.C. 102.03(D) and (E). When you are a superintendent of a county MRDD board, you will be a public official subject to all of these restrictions. R.C. 2921.01(A) and 102.01(B) and (C).

Public Contract Restrictions—R.C. 2921.42(A)(1) and (4)

R.C. 2921.42(A)(1) and (A)(4) provides that no public official shall knowingly:

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

- (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.

The purchase of goods or services, including computer software, by a county board of MRDD, is a "public contract." R.C. 2921.42(G)(1). Ohio Ethics Commission Advisory Opinion No. 96-005. A public official has a prohibited "interest" in a public contract if the official would have a definite and direct interest, of either a financial or fiduciary nature, in the contract. Adv. Ops. No. 81-008 and 88-001. As a salesman or consultant for a private company, you would have an interest in the company's sales if you were to receive a fee or commission from the sales, participate in the negotiation of the sales, or provide any services in relation to the sales. Adv. Ops. No. 80-003, 84-008, and 84-014. The private company by which you are employed or serve as a consultant is your business associate, and has an "interest" in any sales it makes. Adv. Op. No. 84-014.

Therefore, if you were to become a superintendent of an MRDD board, R.C. 2921.42(A)(4) would prohibit you from having an interest in any contract between that MRDD board and your private employer. R.C. 2921.42(A)(1) would prohibit you from authorizing or using your influence regarding public contracts between the county board and the private company. As a consequence, you would be prohibited from participating in any manner, formally or informally, in the consideration, recommendation, or award of any contract between the private company and the county board. Because of the job duties and authority of an MRDD board superintendent described in R.C. 5126.0227, the practical consequence of these restrictions is that it would be impossible for a superintendent to be employed by a company that is doing business with the board by which he is also employed.

There is an exception to these prohibition, set forth in R.C. 2921.42(C). However, in order to meet that exception, you would have to comply with all four requirements in the statute. One provision, set forth in R.C. 2921.42(C)(4), is that you take no part in the deliberations and decision of the county board with respect to the contract. Adv. Op. No. 2000-02. This provision would require that neither you, nor any board employee you supervise in the matter, could participate, in any way, in the deliberations or decisions of the board regarding these contracts. Once again, because of the duties of the superintendent, it would be impossible for you to meet this requirement in the exception. For that reason, any MRDD board that employs you as superintendent would be unable to make any new purchases from the company that also employs you.¹

¹ While the law would prohibit your employer from selling any goods or services to the county board after you were hired as superintendent, the exception in R.C. 2921.42(C) would permit the company to continue to provide goods or services under any contract that was in place before you were hired by the board. Advisory Opinion No. 88-008, which more fully explains the application of the exception to pending contracts, is attached to this opinion.

You should also note R.C. 5126.0228(B)(1): "Except as provided in division (C) of Section 5126.033 of the Revised Code, none of the following individuals may be employed by a county board of mental retardation and developmental disabilities: (1) An employee of an agency contracting with the county board." The Commission does not have jurisdiction to interpret this provision. However, it may prohibit you from being employed by a county board while you continue as an employee of a company that is contracting with the board. For guidance about R.C. 5126.0228(B)(1), you should contact the legal advisor for the county board.

Conflict of Interest Provisions

The conflict of interest provisions, set forth in R.C. 102.03(D) and (E), 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.

"Anything of value" includes money and every other thing of value. R.C. 102.01(G). Any compensation or commission you receive from a public contract while employed by the private company would fall within the definition of "anything of value." R.C. 1.02(G). In the situation you have described, you would receive a thing of value from any contracts between the private company and any public agency if you receive a commission or other benefit in connection with the software sales. Adv. Ops. No. 86-005, 89-006, and 89-008. Any benefit the company receives from the sale of goods or services is also a thing of value.

R.C. 102.03(D) and (E) prohibit a public official from soliciting or using his position to secure anything of value for himself, and also for his outside employer. Adv. Op. No. 91-006. As superintendent, you would play a role in all activities of the board. In this instance, you would have a conflict of interest both because of the benefit you would receive from the contract and the benefit your outside employer would receive from the contract. Adv. Op. No. 88-009. Therefore, because of the scope of the superintendent's authority, R.C. 102.03(D) and (E) would prohibit your employer from selling goods or services to a board by which you were employed, even if you do not receive a benefit from the sales.

If you were to be hired by a county board that entered into a contract with your private employer before you were hired, R.C. 102.03(D) and (E) would prohibit you from reviewing or acting upon the existing contract. Adv. Op. No. 88-009. R.C. 102.03(D) and (E) would prohibit

you from discussing, deliberating, or taking any action regarding the current contract or other work you performed for your private employer, and from soliciting any benefit for your employer, including payments or other benefits related to the existing contract. See also R.C. 2921.42(A)(1).

Sales to Other County Boards of MRDD or the Department of MRDD

You have also asked whether the Ethics Law and related statutes prohibits you from continuing to consult and sell software with the private company to other county boards of MRDD.

R.C. 2921.42(A)(4) would not prohibit you from having an interest in the public contracts of public agencies with which you are not connected. However, R.C. 2921.42(A)(1) would prohibit you from authorizing, or using your public position to secure authorization, of any public contract in which you or a business associate has an interest. As noted above, your private employer is your business associate. R.C. 2921.42(A)(1) is not limited to public contracts entered into by the agency with which you serve. You are prohibited from using your position to secure any public contract.

As a county board superintendent, you would be responsible for the board's interaction with other county boards and, more importantly, with the Department of MRDD. For that reason, you would serve in a position of authority relative to those parties. R.C. 2921.42(A)(1) would prohibit you from using your authority with any other county board of MRDD or the Department of MRDD to secure public contracts from those agencies for your private employer.

For example, you would be prohibited from using your unique access to county superintendents and other professional colleagues to promote or advertise your employer's products. You would be prohibited from discussing your private business interests, or the interests of your employer, with any other public official or employee while you are engaged in the performance of your public duties.

Further, R.C. 102.03(D) and (E) would prohibit you from soliciting or using your position to secure any benefit, including any contracts, for yourself or your private employer. Adv. Ops. No. 83-007 and 93-014. R.C. 102.03(D) and (E) prohibit a public official or employee seeking any contracts, fees, or other benefits from any party that is interested in matters before, regulated by, or doing or seeking to do business with his own public agency. Adv. Ops. No. 83-007 and 93-014. For a county MRDD board superintendent, this would include the Department of MRDD. It could include other county boards of MRDD.

In some situations, a public official or employee who engages in private employment or business activity may be able to withdraw from consideration of matters as a public official or employee that could pose a conflict of interest. Adv. Ops. No. 89-006 and 89-010. A public official's or employee's withdrawal from consideration of issues concerning parties who are

interested in matters before, regulated by, or doing or seeking to do business with his own public agency may be accomplished only if such a withdrawal: (1) does not interfere with the official's or employee's performance of his assigned duties; and (2) is approved by his employing agency. Adv. Op. No. 90-002.

In order for you to represent your employer or benefit from the sale of goods or services by your private employer to the Department of MRDD (for state-operated developmental centers) or county boards of MRDD or ICF/MRs, you would have to be able to withdraw fully, as an MRDD superintendent, from any exercise of your authority in matters related to the client or customer. Because of the scope of the authority of a county board superintendent, it would be impossible for you to withdraw effectively from matters before the board involving the Department. It may be impossible for you to withdraw effectively from matters before the board involving other county boards of MRDD or county ICF/MRs.

Therefore, R.C. 102.03(D) and (E) would prohibit you from representing your employer on, or otherwise benefiting from, sales of its goods or services to the Department of MRDD or any state-operated Developmental Centers. R.C. 102.03(D) and (E) would prohibit you from representing your employer on, or otherwise benefiting from, sales of its goods or services to any county board of MRDD or county ICF/MR, unless you were able to withdraw fully from matters affecting those parties, or there were no matters affecting those parties before the county board by which you were employed.

Other Issues

You have asked for guidance about any other activities that may be prohibited with regard to your proposed continued private employment. Your involvement in the company's sales to private sector parties may raise additional issues under the Ethics Law.

As noted above, R.C. 102.03(D) and (E) would prohibit you from soliciting, accepting, or using your position to secure anything of value, including contracts for the sale of goods or services, for yourself or your employer, unless you were able to fully withdraw from any job duties or exercise of authority related to the parties from which you are soliciting or accepting the thing of value. R.C. 102.03(D) and (E) would prohibit you from authorizing, approving, voting upon, discussing, deliberating, recommending, or otherwise using the authority or influence inherent in your position to secure a contract for your employer from any party that is doing or seeking to do business with, regulated by, or interested in matters before the county by which you were employed. Adv. Ops. No. 88-004, 89-005, and 97-002.

Because of the scope of the authority of a county board superintendent, it would be impossible for you to withdraw effectively from matters before the board involving its providers. For example, if your private employer were to sell goods or services to a private ICF/MR or group home that provides services to the MRDD board by which you were employed, R.C. 102.03(D) and (E) would prohibit you from benefiting from the sales, and from using your position in any

way to secure the sales. As the county board superintendent, you would be directly responsible for matters involving these parties and would be unable to withdraw from your duties and responsibilities affecting them.

It may be possible for you to assist your employer with sales to its other private clients or customers, as long as they are not doing or seeking to do business with, regulated by, or interested in matters before any county that were to employ you. However, while engaged in those activities, R.C. 102.03(D) would prohibit you from:

- (a) using public time, facilities, personnel, or resources in conducting your private employment, including using public equipment to conduct demonstrations for clients;
- (b) using your official title or identification on private business cards or other written materials;
- (c) using your relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding your private interests or the interests of your employer;
- (d) discussing, deliberating, or voting on any matter involving your or your employer's private interests;
- (e) receiving compensation for providing services rendered on projects that you have recommended in your official capacity;
- (f) participating in decisions or recommendations regarding your employer's competitors; and
- (g) using your public position or authority in any other way to secure a benefit for yourself or your outside employer.

Adv. Op. No. 96-004.

You have also asked whether the county board, or the taxpayers, should be informed of your private business activities. In order to comply with the Ethics Law and related statutes, you would have to inform your prospective public employer, before you are employed, of your private business activities, and to keep them informed after you are employed. It is not necessary for you to make any further disclosure to the taxpayers in the county.

Conclusion

As explained more fully above, because of the scope of a county MRDD board superintendent's duties and the work your private employer performs, the company could not do business with the county by which you were employed as MRDD superintendent. This would be true regardless of whether you were directly involved, as an employee or consultant, in the company's those contracts.

The law would not absolutely prohibit your private employer from entering into contracts with other MRDD boards and with other public and private entities. However, you would be prohibited from representing your employer, as an employee or consultant in, or receiving any benefit from, its sales to: (1) the Department of MRDD; (2) state-operated developmental centers; and (3) other public agencies or private entities that are doing or seeking to do business with, interested in matters before, or regulated by, the board that employs you. You would also be prohibited from participating, as superintendent, in any matters before the board that affect your employer, or its clients and customers, including public agencies, even if you were not the salesman on those matters or receiving any benefit from the sales. Finally, you would be prohibited from using your unique access to any professional colleagues, such as other county MRDD superintendents, officials and employees of the Department of MRDD, and private service providers, to secure contracts or other benefits for your private employer.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 29, 2006. 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

Enclosure: Advisory Opinion No. 88-008 and 96-004