

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

February 27, 2007

Informal Opinion 2007-INF-0227

Charles W. Beatty

Dear Mr. Beatty:

In a letter that was received by the Ohio Ethics Commission on September 16, 2006, you asked whether the Ohio Ethics Law and related statutes prohibit you, as a member of the Ohio Developmental Disabilities Council (Council), from also serving as Vice-president of a nonprofit corporation that receives grants from the Council.

In your letter, you stated that you serve as a member of the Council and also as Vice-president of the Arc of Ohio (Arc), a nonprofit 501(c)(3) corporation. Arc does not compensate you for your service as its Vice-president. In your letter, you stated that Arc was in the process of applying to the Council for at least two grants. You stated that you will not be serving on the Council's grant review panels and will not vote to approve the projects selected by the grant review panels. You asked whether these actions as a Council member in matters pertaining to Arc's grant applications are sufficient to meet the requirements imposed upon you by the Ohio Ethics Law and related statutes.

In a telephone conversation with Commission staff on February 23, 2007, you stated that you serve on the Council as a parent of a child with disabilities. You stated that you do not serve on the Council as a representative of one of the principal state agencies concerned with developmental disabilities as specified in 42 U.S.C. 602(b)(3), a representative of a university affiliated program as defined in 42 U.S.C. 6001(19), or a representative of the legal rights service created under section 5123.60 of the Revised Code. You also stated that the Council awarded the grants to Arc in January.

Brief Answer

As explained below, there is a specific exception to the Ethics Law and related statutes contained in R.C. 5123.35(D) and (E) that applies to Council members. In order to meet the exception, a member must serve on the Council as a representative of: (1) certain state agencies concerned with developmental disabilities; (2) certain university affiliated programs; or (3) the legal rights service. Because you do not serve on the Council as a representative of any of these organizations, the exception contained in R.C. 5123.35(D) and (E) does not apply to you.

Accordingly, if you were to serve as an officer or board member of a nonprofit corporation that receives grants from the Council, you would have a prohibited interest in the grants.

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

Division (A)(4) of Section 2921.42 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 or governmental agency or instrumentality with which he is connected.” Members of the Council are “public officials” for purposes this prohibition. Council members are prohibited from having a definite and direct interest in the profits or benefits of a public contract entered into by or for the use of the Council.

Division (G)(1)(a) of Section 2921.42 defines the term “public contract,” as used in that section, to include “the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state.” Grants by governmental agencies are “public contracts,” as defined in R.C. 2921.42(G), because a grant is the purchase or acquisition of services by or for the use of the governmental agency. Ohio Ethics Commission Advisory Opinions No. 82-004 and 85-002.

Trustees and officers of a nonprofit corporation have a definite and direct interest in the contracts of the corporation. Adv. Op. No. 81-008. This interest is usually fiduciary in nature, but could be pecuniary in instances where an officer receives compensation. Thus, members of a government agency are prohibited from serving as trustees and officers of a nonprofit corporation that receives grants from their agency unless an exception to the prohibition can be met. Adv. Op. No. 87-003.

Exception Provided by R.C. 5123.35(D) and (E)

The situation that you have described implicates the exception provided by R.C. 5123.35(D) and (E), which read as follows:

- (D) The Ohio developmental disabilities council may award grants to or enter into contracts with a member of the council or an entity that the member represents if all the following apply:
 - (1) The member serves on the council as a representative of one of the principal state agencies concerned with developmental disabilities as specified in 42 U.S.C. 602(b)(3), a representative of a university affiliated program as defined in 42 U.S.C. 6001(19), or a representative of the legal rights service created under section 5123.60 of the Revised Code.
 - (2) The council determines that the member or the entity the member represents is capable of providing the goods or services specified under the terms of the grant or contract.

- (3) The member has not taken part in any discussion or vote of the council related to awarding the grant or entering into the contract, including service as a member of a review panel established by the council to award contracts or enter into contracts or make recommendations with regard to awarding grants or entering into contracts.
- (E) A member of the Ohio developmental disabilities council is not in violation of Chapter 102. or section 2921.42 of the Revised Code with regard to receiving a grant or entering into a contract under this section if the requirements of division (D) of this section have been met.

In order to meet this exception, you must show that all three of the requirements in R.C. 5123.35(D) apply. You may be able to meet the requirement in R.C. 5123.35(D)(3) because you will not participate in any of the Council's deliberation or decision-making regarding the grants. However, you explained that you do not serve on the Council as a representative of one of the agencies described in R.C. 5123.35(D)(1). For that reason, even though you may be able to meet some of the requirements in R.C. 5123.35, you are unable to show that all three apply.

Therefore, because all three requirements of R.C. 5123.35(D) cannot be met, the exception does not apply to you. R.C. 2921.42(A)(4) prohibits you from having an interest in any contracts or grants awarded by the Council, regardless of whether you participate in the award. If you were to serve as an officer or board member of an organization that is receiving a contract or grant from the Council, you would have a prohibited interest in the contract or grant.

While you are effectively prohibited from serving as Vice-president of a nonprofit corporation that receives grants from the Council, you would not be prohibited from volunteering for the organization in a position that is unrelated to the grants or contracts it receives from the Council. Compare R.C. 2921.42(A)(1) (a public official is prohibited from participating in the authorization or award of a contract or grant to a nonprofit organization of which he is an officer or board member) with R.C. 102.03(J) (a public official is not prohibited from participating in matters before his public agency that affect a non-profit organization of which he is a mere member or volunteer, as long as he has not taken a particular role, for the organization, on the matter before the public agency).

Conclusion

As explained above, there is a specific exception to the Ethics Law and related statutes contained in R.C. 5123.35(D) and (E) that applies to Council members. In order to meet the exception, a member must serve on the Council as a representative of: (1) certain state agencies concerned with developmental disabilities; (2) certain university affiliated programs; or (3) the legal rights service. Because you do not serve on the Council as a representative of any of these organizations, the exception contained in R.C. 5123.35(D) and (E) does not apply to you. Accordingly, if you were to serve as an officer or board member of a nonprofit corporation that receives grants from the Council, you would have a prohibited interest in the grants.

Charles W. Beatty
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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on February 23, 2007. The Commission commends you for requesting guidance before taking any actions that could be prohibited by law.

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 contact this Office again.

Sincerely,

A handwritten signature in black ink that reads "John Rawski". The signature is written in a cursive style with a large initial "J" and a distinct "R".

John Rawski
Advisory Staff Attorney

417 Cloverwood Dr.
Mason, Ohio 45040
September 25, 2006

Ohio Ethics Commission
8 East Long Street, 10th Floor
Columbus, Ohio 43215

Dear Sir:

I am writing to request a formal opinion with respect to the following issue – Does the Ohio Ethics Law and related statutes prohibit a member of the Ohio Developmental Disabilities Council from also serving as a board member or officer of agencies that receive grants from the Ohio Developmental Disabilities Council when the board member or officer is not paid for his services with the agency and will not experience any personal financial gain or any gain for members of his family if the agency receives the contract?

A related question is this – Can the Council member who is also a board member or officer cure any potential conflict of interest by abstaining from a vote both in his role as a Council member and in his role as a board member or officer of the agency?

This matter was considered in an informal opinion letter issued by the Ohio Ethics Commission on October 11, 1991. Since that time, there have been changes both in Federal Law and in State Law.

Further, I have some concern that an informal opinion may not be considered to have sufficient weight or to give sufficient notice as to the opinion of the Ethics Commission.

For all of these reasons, I respectfully request that the issue be considered and a formal determination made.

The following may be relevant to how expeditiously you consider this request. I am currently a member of the Ohio DD Council. I am also an unpaid volunteer serving as Vice President of the Arc of Ohio, a non-profit 501 C (3) organization, which is in the process of applying for at least 2 DD Council grants.

Grant reviews and selections will take place in early November with the grant projects actually beginning in January 2007. I will not be serving on any of the grant review panels, and I will not in any way have to vote to approve the projects selected by the grant review panels.

I have not participated in any way in the decision by the Arc of Ohio to apply for the DD Council Grants.

Thank you for your consideration.

Sincerely,



Charles W. Beatty
Phone: 513-398-4923
E-mail: cwbeatty@msn.com

OHIO ETHICS COMMISSION
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Cc: Mr. David Zwyer, Executive Director Ohio Developmental Disabilities Council
Mr. Gary Tonks, Executive Director The Arc of Ohio