



THE 131ST OHIO GENERAL ASSEMBLY

JOINT LEGISLATIVE ETHICS COMMITTEE

OFFICE OF THE LEGISLATIVE INSPECTOR GENERAL

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Advisory Opinion 2015-001

Issued: October 6, 2015

Syllabus By The Committee:

1. R.C. 102.04(B) does not prohibit a member of the general assembly from receiving compensation for providing licensed medical services to a state agency.
2. R.C. 102.04(A) prohibits members of the general assembly from receiving compensation for representing, advising, advocating, and consulting on behalf of any person or entity who has a direct or indirect interest at stake in a matter being decided by a state agency.

Jurisdiction & Authority:

The Joint Legislative Ethics Committee ("JLEC" or "the Committee") is the ethics advisory body to the Ohio General Assembly and to its individual members, candidates, and employees.¹ The Committee has the authority to render advisory opinions relative to ethics, conflicts of interest, and financial disclosure under R.C. Chapter 102, or R.C. Sections 2921.42 or 2921.43.² Where the Committee issues a publicly sought advisory opinion, the person to whom the opinion is directed, and those similarly situated to the special set of circumstances presented, may reasonably rely on the opinion and be immune from criminal prosecution, civil suits, or actions for removal from office or employment for a violation of R.C. Chapter 102, or Sections 2921.42 or 2921.43.³

Background & Issue Presented:

A general assembly member is, by trade, a licensed physician. Prior to Member's election to the general assembly and as a part of his medical practice, he entered into a "Disability Evaluators Panel Agreement" ("DEP Agreement" or "Agreement") with the Ohio Bureau of Workers' Compensation ("BWC")—a state agency. Under the DEP Agreement, Member receives compensation for conducting objective medical examinations and file reviews relating to the benefit determinations of injured workers.

¹ R.C. 101.34(A)(8).

² R.C. 102.08(A).

³ R.C. 102.08(C).

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In light of R.C. 2921.42 (unlawful interest in a public contract) and R.C. 102.04 (prohibited additional compensation) may Member continue to contract with the BWC?

Consideration Of The Issue

1. R.C. 2921.42 - Unlawful Interest In A Public Contract.

R.C. 2921.42(A) is a criminal statute that prohibits general assembly members from unlawfully having a personal interest in a state contract.⁴ The purpose of this prohibition is to ensure state agencies stand on equal footing with others in respect to business dealings of the state.⁵ Having an unlawful interest in a public contract is a first degree misdemeanor.⁶

The DEP Agreement is a public contract in which Member has a personal pecuniary interest (compensation for rendering medical services to the BWC).⁷ However, R.C. 2921.42 does not prohibit all dealings in which a public official has some interest—only those where there is a risk private considerations may detract from serving public interests.⁸ There is no violation of R.C. 2921.42(A) where:

- (1) the subject of the contract is necessary services for the state agency involved;
- (2) the services provided are part of a course of dealing established before the public servant assumed office;
- (3) the treatment accorded is similar to others in similar transactions;
- (4) and the entire transaction is conducted at arm's length with full knowledge of government agency and the public official takes no part in the deliberations of the state agency with respect to the contract.⁹

A contract is *necessary* where a government agency acts objectively and reasonably in determining whether particular services are needed, so as to not favor the private interests of a public official.¹⁰ Presumably, contracting with objective medical providers is necessary for the BWC to determine benefits; not to favor Member's private interests.

⁴ No public official shall knowingly do any of the following: [a]uthorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official . . . has an interest; * * * [h]ave an interest in the profits or benefits of a public contract that is not let by competitive bidding if required by law and that involves more than one hundred fifty dollars. R.C. 2921.42(A)(1) & (5), respectively. See also 1995 JLEC Advisory Op. No. 95-006 (*a general assembly member is a "public official" subject to the prohibitions of R.C. 2921.42*); and 2000 JLEC Advisory Op. No. 00-001 (*an interest prohibited under R.C. 2921.42 must be definite and direct and pecuniary in nature*).

⁵ Ohio Rev. Code Ann. § 2921.42 (Lexis Nexis 1996, Volume Two, Committee Comment)

⁶ R.C. 2921.42(E), (unless the official used his or her office to authorize or influence the contract, whereby it is a fourth degree felony).

⁷ A public contract is "a contract for the purchase . . . of . . . services . . . for the use of the state," or any agency thereof. R.C. 2921.42(I)(1)(a), *emphasis added*. See also 1999 JLEC Advisory Op. No. 99-001, citing R.C. 2921.42 and 2913.01 (*services include, inter alia, professional services*). See also 2000 JLEC Advisory Op. No. 00-001 (*a person who receives compensation for services performed would have a definite and direct pecuniary interest in a public contract*).

⁸ See Note 5, *supra*.

⁹ See R.C. 2921.42(C); see also 2000 JLEC Advisory Op. No. 00-001 (*R.C. 2921.42(C) contains four criteria which must be met in order for a public official to be exempt from the prohibition of R.C. 2921.42(A); these criteria are to be strictly applied against the public official and the burden is on the official to demonstrate compliance with the exemption*).

¹⁰ See generally 1988 OEC Advisory Op. No. 88-003, at 4. See 1995 JLEC Advisory Op. No. 95-010, at 2 (*JLEC may, in its discretion, rely on or incorporate OEC Advisory Opinions in rendering an opinion*).

Services are part of an *established course of dealing* where a contract exists prior to and continues after the official's election, without any action of the state agency.¹¹ The DEP Agreement was entered over 16 years prior to Member's election to the general assembly, and continues in effect without action until terminated by either party.¹² As such, it is part of an established course of dealing with the BWC.

Assuming this DEP Agreement is the same or substantially similar to other DEP Agreements, the transaction was conducted at arm's length, and the BWC is fully aware of Member's interest in the contract; then pursuant to R.C. 2921.41(C), Member does not have an unlawful interest in the DEP Agreement.

2. R.C. 102.04(B): Prohibited Additional Compensation - Selling Services To State Agencies

R.C. 102.04(B) prohibits general assembly members from selling *services* to state agencies.¹³ The Joint Legislative Ethics Committee previously defined "*services*" under this provision to include: "only professional services that are similar to goods[;]" for example, "plumbing, carpet cleaning, or copier repair services[.]" as opposed to holding a coaching position with a state university.¹⁴ Under the DEP Agreement, Member provides medical analysis to the BWC. This is not a quasi-tangible good similar to: functional plumbing, a cleaned carpet, a working copier, or an advertising platform; but rather, is a professional service more aligned with teaching at a university. Pursuant to JLEC's prior interpretations of R.C. 102.04(B), Member does not sell a "*service*" to the BWC under the DEP Agreement.

3. R.C. 102.04(A): Prohibited Additional Compensation - Services In Matters Before State Agencies.

R.C. 102.04(A) prohibits general assembly members from receiving any compensation for personally rendering any service in a matter pending before a state agency. Specifically:

[N]o person elected or appointed to * * * the general assembly * * * shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any * * * bureau of the state, excluding the courts.¹⁵

The purpose of R.C. 102.04(A) is to prohibit public officials from receiving compensation for *personally representing clients* before state agencies; its intent is to serve an effective and

¹¹ Id, but Cf: "[i]f, however, the existing contract is, at any time, renewed by action of the [agency], modified, extended, or otherwise changed, then [it] would no longer meet the "continuing course of dealing" exception * * * and any new contracts entered into * * * after [election] would not be part of a continuing course of dealing."

¹² DEP Agreement, at Preamble & Sec. 5.

¹³ [N]o person elected or appointed to an office of * * * the general assembly * * * shall sell or agree to sell, except through competitive bidding, any goods or services to the general assembly or * * * bureau of the state, excluding the courts. R.C. 102.04(B).

¹⁴ 1995 JLEC Advisory Op. No. 95-002, at 2. See also, 1995 JLEC Advisory Op. No. 95-005 (*an assistant coach role at a state university is not a service prohibited by R.C. 102.04(B)*); and 1995 JLEC Advisory Op. No. 95-009 (*providing an advertising platform is a service prohibited by R.C. 102.04(B)*).

¹⁵ R.C. 102.04(A).

impartial government by prohibiting a public official from using the inherent influence of his or her position to personally appear *on behalf of clients* or oneself for a personal benefit.¹⁶ This Committee has issued several advisory opinions relative to R.C. 102.04(A). These opinions provide what constitutes "compensation"¹⁷ and what is a "matter before a state agency,"¹⁸ but none formally define what "*services*" are prohibited by the provision.

Finding that member-attorneys are prohibited from receiving compensation for services performed on special counsel cases, the Committee impliedly defined "*services*" under R.C. 102.04(A) as those akin to: "*advising, consulting, representing or the like.*"¹⁹ Taking this implied definition in light of the provision's intent—to prevent the use of official influence *on behalf of clients* for profit—the Committee concludes the "*services*" prohibited under R.C. 102.04(A) are: those akin to personally representing, advising, advocating, and consulting on behalf of any person or entity who has a direct or indirect interest at stake in a matter being decided by a state agency.

Here, Member conducts independent medical exams and file reviews of injured workers claiming BWC benefits; he then reports his objective findings to the BWC.²⁰ The claimants are not Member's clients; he does not represent their interests before the BWC; he does not advise or consult the claimant on their BWC claim; he does not advocate for the approval or denial of benefit claims. Member has no interest in the outcome of a claimant's claim. Therefore, the services Member provides under the DEP Agreement are not prohibited by R.C. 102.04(A).

Conclusion:

Member does not have an unlawful interest in the DEP Agreement under R.C. 2921.42. Member is not prohibited by R.C. 102.04(B) from rendering the services set forth in the DEP Agreement. The services Member renders under the DEP Agreement are not akin to: representing, advising, advocating, or consulting on behalf of any person or entity who has an interest at stake in a matter being decided by a state agency, and therefore are not prohibited by R.C. 102.04(A).

¹⁶ See 2007 OEC Advisory Op. No. 07-003, at 2, emphasis added; citing *OEC Advisory Ops. 89-014, 90-012, and 90-002*. See 1995 JLEC Advisory Op. No. 95-010, at 2 (*JLEC may, in its discretion, rely on or incorporate OEC Advisory Opinions in rendering an opinion*). See also 1996 JLEC Advisory Op. 96-003 at 3-4 ("*members/employees may be associated with an employer who represents clients before the General Assembly without personally representing those clients.*")

¹⁷ See 1995 JLEC Advisory Op. No. 95-014 (*compensation includes any financial benefit directly or indirectly received*); see also R.C. 102.02(A) (*compensation means money, thing of value, or financial benefit*).

¹⁸ See 1995 JLEC Advisory Opinion No. 95-002 (*a matter includes any case, proceeding, application, determination, issue, question, or the proposal, consideration, or enactment of statutes, or constitutional amendments*).

¹⁹ See 1995 JLEC Advisory Op. No. 95-006, at 5, *emphasis added* (*where a member's law firm is awarded a special counsel contract from the Attorney General's Office, a member is prohibited from being compensated for performing any work on the underlying legal matter, if it before a state agency other than the courts*). See also 1999 Advisory Op. 99-001 (*a member from being appointed as a compensated Special Counsel*). The Committee has not addressed whether a member, who is an employee of a person appointed as a Special Counsel, may render legal services relative to an underlying legal matter before the courts.

²⁰ See DEP Agreement, Sec. 3.