Ben Rose, *Chair*
Merom Brachman
Betty Davis
Diana Swoope

David E. Freel
Executive Director

OHIO ETHICS COMMISSION
William Green Building
30 West Spring Street, L3
Columbus, Ohio 43215-2256
Telephone: (614) 466-7090
Fax: (614) 466-8368

www.ethics.ohio.gov

August 17, 2010

Gregory J. Kowalski, Chief Counsel
Ohio Veterans' Home Agency
3416 Columbus Avenue
Sandusky, Ohio 44870

Dear Mr. Kowalski:

On July 15, 2010, the Ohio Ethics Commission received your request for an advisory opinion. You asked if the Ethics Law and related statutes prohibit physicians who contract with the Ohio Veterans' Home Agency (OVHA) to perform medical services for residents of OVHA facilities from becoming employees of OVHA to provide related services.

Brief Answer

The Ethics Law does not prohibit OVHA from hiring the physicians. However, once the physicians become employees of OVHA, regardless of whether their employment is full time or part time, the physicians will be "public officials or employees" subject to the prohibitions of the Ethics Law.

Specifically, R.C. 2921.42(A)(4) will prohibit a physician employed by OVHA from also having a personal services contract with OVHA unless the physician is able to meet an exception to the law. Even if the physician can meet an exception, the Ethics Law will prohibit the physician from participating, as an OVHA employee, in any matter that affects the physician's contract and from using his or her influence, formally or informally, with other public officials or employees to secure contracts or payments.

Facts

In your letter, you explained that OVHA currently operates two facilities that provide care for eligible disabled veterans, the Sandusky and Georgetown homes. You stated that each facility is required to provide primary care physician services. You noted that the Sandusky home uses a combination of two physicians who are full-time state employees and four contract physicians.

The Georgetown home has three physicians who are full-time employees of Mercy Medical Associates and have family practices at Mercy's Georgetown office. You noted that the physician contracts are within OVHA's direct purchasing authority and are not competitively bid. You indicated that the Georgetown physicians are interested in becoming part-time OVHA employees for the time when they are physically at the facility while remaining under contract for the services they perform away from the facility (i.e. taking calls, directing nursing staff, arranging hospital transfers, conferring with residents' family members, etc.). You stated that OVHA would like to hire the physicians but has concerns about the possible ethical implications of maintaining an employment and contractor relationship with the physicians for the performance of related services.

Sale of Services—R.C. 102.04(B)

You stated that you have reviewed Ohio Ethics Commission Advisory Opinion No. 88-001 which addresses a similar issue except that OVHA would hire its physicians as part-time, not full-time, employees. One of the key considerations in that advisory opinion is R.C. 102.04(B), which provides that no person employed by any department of the state shall sell or agree to sell services to any entity of the state, except through competitive bidding. While there is an exception to this prohibition, the exception would not apply when an employee of a particular state department is selling services to the same department. R.C. 102.04(D).

The Ohio Veterans' Home Agency is created within the Department of Veterans' Services. R.C. 5907.01. Therefore, employees of OVHA are employees of the Department and R.C. 102.04(B) prohibits any employees of OVHA from selling services to the Department. It would seem that, if OVHA were to hire these physicians, R.C. 102.04(D) would prohibit them from selling medical services to OVHA under a separate contract unless the contract is competitively bid.

However, in Advisory Opinion No. 88-001, the Commission concluded that "services," as used in R.C. 102.04(B), does include personal, professional services, such as medical services. Therefore, R.C. 102.04(B) does not apply to the situation you have described.

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

If OVHA hires the physicians, regardless of whether they are full-time or part-time employees, the physicians will be considered "public officials" subject to the prohibitions of R.C. 2921.42(A)(4), which 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 the public official is connected.

R.C. 2921.01. Ohio Ethics Commission Advisory Opinion No. 86-003. A "public contract" includes the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state. R.C. 2921.42(I)(1)(a). Public employment, whether full or part time, is a public contract, and so are personal services contracts. Id. Therefore, OVHA's acquisition of physician services for veterans, either through an employment or an independent contract, is a public contract. See Adv. Op. No. 88-001.

R.C. 2921.42(A)(4) prohibits a public official from having a definite and direct financial or fiduciary interest in a contract entered into by or for the use of a public agency with which he or she is connected. Although the Ethics Law does not define the phrase "with which the public official is connected," the Commission has stated that common usage indicates that to be connected with a public entity is to be related to, or associated with, that entity. See, e.g., Adv. Op. No. 87-002 (a member of a county board of elections is connected with the county that he serves, including any board, commission, bureau, division, or agency of the county.) An OVHA employee is an employee of the Department of Veterans' Services and is "connected" with OVHA and all of the other divisions, committees, and agencies of the Department.

A physician employed part-time by OVHA would have a definite and direct financial interest in a public contract under which he or she was paid by OVHA to provide additional physician services to veterans. Therefore, R.C. 2921.42(A)(4) prohibits a physician employed part-time by OVHA from also providing services to OVHA under a personal service contract unless he or she can meet each of the four requirements of R.C. 2921.42(C), described below.

Exception—R.C. 2921.42(C)

R.C. 2921.42(C) provides that R.C. 2921.42(A)(4) does not apply to a public contract in which a public official has an interest when all four requirements in the exception can be met. The criteria are strictly construed against the public official who must show compliance with them. Adv. Ops. No. 83-004 and 84-011. The Ethics Commission has explained that the application of the (C) exception must be consistent with the underlying principle in R.C. 2921.42: "[A] public official should not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity." (Emphasis added). Id. All four requirements in R.C. 2921.42(C) must be met, and they are:

(1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;

(2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision or governmental agency or instrumentality involved;

(3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;

(4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of the public official's family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

Necessary Services—R.C. 2921.42(A)(1)

Provided that, as you stated, OVHA is required by state and federal law to provide primary care physician services to eligible veterans, contracts for physician services would be considered necessary and the physicians would be able to meet the requirement in R.C. 2921.42(C)(1) with regard to the services they provide to OVHA.

Continuing Course of Dealing or Unobtainable Elsewhere—R.C. 2921.42(C)(2)

R.C. 2921.42(C)(2) requires that the services an OVHA physician would provide to OVHA under a personal service contract are either "unobtainable elsewhere for the same or lower cost," or are furnished as part of a "continuing course of dealing" established before the physician was hired by OVHA.

Continuing Course of Dealing

A continuing course of dealing is a contractual agreement between the parties that existed *prior to* the time that the official assumed his or her public position. Adv. Ops. No. 82-007, 84-006, and 88-008. According to your letter, the Georgetown home contract physicians are not currently OVHA employees. If one of these physician is hired by OVHA, the physician could meet the "continuing course of dealing" requirement in Division (C)(2) with respect to a contract that is in place at the time the physician begins his or her job with the OVHA *provided that* automatic renewal is a term of the existing contract and the terms or conditions of the contract do not change after the physician is hired by OVHA. Adv. Op. No. 88-008. However, if a renewal of the contract requires some action by OVHA, or the contract is modified, revised, extended or otherwise changed after the physician begins his or her employment with OVHA, the resulting agreement would be considered a new contract, and the physician could not meet the "continuing course of dealing" exception.

If the physician cannot meet the "continuing course of dealing" exception, then the physician would be required to demonstrate that OVHA cannot acquire the services he or she provides under contract from any other source for the same or lower cost.

Unobtainable Elsewhere for the Same or Lower Cost

The requirement that the goods or services be "unobtainable elsewhere for the same or lower cost" must be demonstrated by an objective standard. As stated in Advisory Opinion No. 84-011:

> The criterion that the goods or services be "unobtainable for the same or lower cost" requires that a public official or employee be at a disadvantage when attempting to do business with his governmental entity, and that an equally qualified applicant who is not a [public official] must receive preference.

One way a physician employed by OVHA can show that the services he or she provides to OVHA under a personal service contract are "unobtainable elsewhere for the same or lower cost," is if the physician provides his or her services for the lowest price as determined by some fair and impartial process in which OVHA uses an objective price comparison and provides adequate notice to other suppliers of the same services. It must be clear that the physician is not involved, in any way, in securing quotes from other suppliers or using his or her relationship with other OVHA officials and employees to secure information about other quotes or to influence the selection or decision on the acquisition of the services in question.

Another way to show that the services an official provides to his or her public agency are "unobtainable elsewhere" is that the public official and the public agency can objectively justify the validity of considering the official's unique qualifications as part of the selection process. The Commission has stated that, in some rare instances, a public official may be uniquely qualified to provide services to his or her own public agency. See Adv. Op. No. 88-001. OVHA must also make every reasonable effort to open the process of selecting contract physicians to all interested and qualified parties and not have drawn specifications and requirements to favor any particular person. Adv. Ops. No. 83-004 and 89-004.

For example, in Advisory Opinion No. 88-001, the Commission was asked whether the Ethics Law prohibited physicians, who were employed at developmental centers operated by the Department of Developmental Disabilities, from entering into personal service contracts with the Department to provide on-call medical services. The Commission stated that if continuity of care could objectively be shown by the Department to be a valid and proper consideration, a physician's familiarity with a developmental center and the residents, coupled with an open competitive bidding process, may indicate that a physician who is regularly employed at a developmental center and who is awarded a contract through competitive bidding to provide on-

call services at the center where he is employed would be able to meet the requirement of Division (C)(2).

You indicated that physician contracts are not competitively bid. You stated that it has been difficult to find expert reliable physician services to meet the needs of the Georgetown home residents because Brown County, where the home is located, is relatively small and has a small physician population. You also stated OVHA is happy with its three current contractor physicians and has no reasonable alternative presently. If OVHA and the physician can show that the services provided by the physician can meet the test set forth in Advisory Opinion No. 88-001, the physician could meet the (C)(2) exception.

Same or Better Treatment—R.C. 2921.42(C)(3)

The third requirement, R.C. 2921.42(C)(3), is that the OVHA physician treats OVHA either better than or the same as he or she would treat other customers or clients in similar transaction.

Arm's Length Transaction—R.C. 2921.42(C)(4)

Finally, R.C. 2921.42(C)(4) requires that the entire transaction is conducted at arm's length, that OVHA has full knowledge that the physician has an interest in the contracts, and that the physician takes no part in OVHA's decisions regarding the contract.

In an arm's length transaction: (1) both the physician and OVHA act voluntarily, without compulsion or duress; (2) the transaction occurs in an open market; and (3) both the physician and OVHA act in their own self-interest. *Walters v. Knox Cty. Bd. of Rev.* (1989), 47 Ohio St.3d 23, 25.

If the physician is unable to meet any of the four requirements in R.C. 2921.42(C), he or she would be prohibited from having a personal service contract with OVHA while also being an employee of OVHA.

Other Considerations

Even if a physician could meet the requirements of R.C. 2921.42(C), other provisions of the Ethics Law would prohibit the physician from participating, as an OVHA employee, in any matter that would affect his or her personal service contracts or his or her private practice.

R.C. 2921.42(A)(1) prohibits an OVHA physician from authorizing, or employing the authority or influence of his or her public position to secure authorization of OVHA's acquisition of a contract in which the physician has an interest. The physician is also prohibited from using the authority or influence of his or her public position, in any way, to secure a contract for him or herself, or payments for services rendered under the contract. If a physician who is a partner in a

private practice becomes an employee of OVHA, he or she will be prohibited from taking any action, within the scope of his or her public employment, to create additional contracts for the private business.

Additionally, R.C. 102.03(D) and (E) would prohibit an OVHA physician from soliciting, accepting, or using the authority or influence of his or her public position 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 physician with respect to his or her public duties. The money or other compensation that the physician would receive from the services that he or she would provide under the contract with OVHA would be a thing of value. For example, an OVHA physician would be prohibited from using his or her unique connection with the OVHA staff in any manner that would provide an economic advantage for the physician, including securing access to information on other physician's competing for OVHA contracts.

General Restrictions on Outside Employment or Business Activity

You indicated that the physicians are also employed full-time by Mercy Medical Associates and have family practices at Mercy's Georgetown office. The Ethics Law does not absolutely prohibit a public official or employee from engaging in private employment or business activity provided that there is neither a conflict of interest between his or her public duties and private financial interests nor a misuse of the authority or influence of his or her public office or employment. Adv. Op. No. 96-004. For example, an OVHA physician would be prohibited from referring residents of the Georgetown home to Mercy Medical Associates or otherwise using his or her position with OVHA to acquire patients for his or her private practice.[1] The physician would also be prohibited from participating in matters before OVHA that would affect Mercy Medical Associates or the physician's private practice. For example, if a resident of the Georgetown home was a patient of the physician in his or her private practice, the physician would be prohibited from reviewing, approving, or taking official action based upon his prior treatment of the resident.

Whenever private employment or business activity is not prohibited, the Ethics Law imposes general restrictions on all public officials and employees who engage in private employment or business activity. These restrictions are described in Ohio Ethics Commission Advisory Opinion No. 96-004, which is attached to this advisory opinion.

[1] It is important to note that if there are any public contracts between Mercy and OVHA, the physicians would be prohibited from having fiduciary or financial interest in those contracts unless they could meet exception in R.C. 2921.42(C), described above.

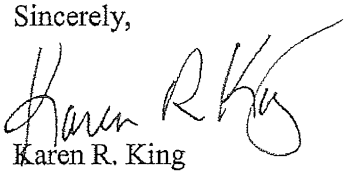
Conclusion

The Ethics Law does not prohibit OVHA from hiring the physicians. However, once the physicians become employees of OVHA, regardless of whether their employment is full time or part time, the physicians will be "public officials or employees" subject to the prohibitions of the Ethics Law.

Specifically, R.C. 2921.42(A)(4) will prohibit a physician employed by OVHA from also having a personal services contract with OVHA unless the physician is able to meet an exception to the law. Even if the physician can meet an exception, the Ethics Law will prohibit the physician from participating, as an OVHA employee, in any matter that affects the physician's contract and from using his or her influence, formally or informally, with other public officials or employees to secure contracts or payments.

This staff advisory opinion represents the views of the undersigned, based on the facts presented and the precedent of the Ethics Commission. 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. Please do not hesitate to contact this Office if you have any further questions or desire additional information.

Sincerely,



Karen R. King
Staff Advisory Attorney

Enclosures: Selling Goods or Services to Public Agency (State): Information Sheet # 3
Advisory Opinions No. 96-004 and 88-001.