May 13, 2009

The Honorable Jessica A. Little
Brown County Prosecuting Attorney
200 East Cherry Street
Georgetown, Ohio 45121

SYLLABUS: 2009-016

Pursuant to R.C. 340.02, a member of a board of alcohol, drug addiction, and mental health services may not be an employee of an agency that is reimbursed by the board for providing services to clients of the board.

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

May 13, 2009

OPINION NO. 2009-016

The Honorable Jessica A. Little
Brown County Prosecuting Attorney
200 East Cherry Street
Georgetown, Ohio 45121

Dear Prosecutor Little:

You have requested an opinion whether a member of a board of alcohol, drug addiction, and mental health services (ADAMHS) is subject to an impermissible conflict of interest when the board member is employed by an agency that is reimbursed by the board for providing services to clients of the board. By way of background, you have informed us that

> [t]he Ohio Community Medicaid Program mandates that Community [ADAMHS] Boards reimburse service providers for Medicaid eligible services. Basically this means that if a provider is a contracted Medicaid provider in Ohio they then have a contract with all boards. The board that governs the county of residence of a client receiving Medicaid eligible services then becomes obligated to pay for those services....
>
> …. In the event that a potential or current board member is employed by a Medicaid Service Provider which receives reimbursement from our board, does this situation create a conflict and/or potential conflict of interest for the individual.

It is well established in Ohio that "an individual who is employed by an enterprise that has a contract with a public body has an interest in the contract, even if there is no direct connection between the employee and the proceeds of the contract." 2008 Op. Att'y Gen. No. 2008-002 at 2-12; *accord* 2000 Op. Att'y Gen. No. 2000-015 at 2-88. It also "has been held in many contexts that the fact of employment with a contracting entity is in itself sufficient to create a conflicting interest." 2008 Op. Att'y Gen. No. 2008-002 at 2-13. Moreover, "[e]ven when an employee has no direct connection with the contract, it has been found that there is a connection between the contract and the individual's employment that constitutes an interest in the public contract." 2008 Op. Att'y Gen. No. 2008-002 at 2-15 and 2-16. Accordingly, a member of a board of ADAMHS has a conflict of interest when he is employed by an agency that has entered into a contract with the board. *See* 1980 Op. Att'y Gen. No. 80-035 at 2-149 (a person "who

serves in dual public positions faces a situation which poses a conflict of interests when his responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective").

Having made this determination, we must now determine whether the conflict of interest is impermissible. *See* 2008 Op. Att'y Gen. No. 2008-024 at 2-257. R.C. 340.02 states, in part, that "[n]o member of a board of [ADAMHS] shall be an employee of any agency with which the board has entered into a contract for the provision of services or facilities." R.C. 340.02 thus unequivocally prohibits a member of a board of ADAMHS from being employed by an agency that has entered into a contract with the board for the provision of services or facilities, "regardless of whether the individual has any actual interest in the contract." 1989 Op. Att'y Gen. No. 89-063 at 2-284; *see* 1981 Op. Att'y Gen. No. 81-101 at 2-385 and 2-386.

R.C. 340.02 does not define the term "contract." It is therefore appropriate to consider the common meaning of the word and the context in which it appears. *See* R.C. 1.42. Generally, a "contract" is "[a]n agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." *Black's Law Dictionary* 341 (8th ed. 2004); *see also* Restatement (Second) of Contracts § 1 (1981) ("[a] contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty"). The agreement creating the contract may either be explicitly set out in writing (express contract) or inferred from the parties' conduct and other circumstances (implied-in-fact contract). *Black's Law Dictionary* 344-45 (8th ed. 2004).

In the context of R.C. 340.02's prohibition, no language indicates that the prohibition applies only when a written contract for the provision of services or facilities exists between a board of ADAMHS and an agency. Absent such a limitation, it reasonably follows that the term "contract," as used in R.C. 340.02, includes agreements that may be inferred from the parties' conduct and other circumstances. This means that R.C. 340.02's prohibition applies to instances in which the conduct of a board of ADAMHS and an agency evinces the creation of a contract whereby the agency provides services or facilities to the board.

Whenever an agency provides services or facilities to a board of ADAMHS and receives payment for such services or facilities, the conduct of the agency and the board evinces the creation of a contract whereby the agency provides services or facilities to the board. *See generally* 2004 Op. Att'y Gen. No. 2004-014 at 2-110 (the term "contract" ordinarily encompasses "a simple consumer purchase"). This includes situations in which a board of ADAMHS reimburses an agency for providing services to clients of the board. Accordingly, a board of ADAMHS that reimburses an agency for providing services to clients of the board has entered into a contract for the provision of services with the agency for purposes of R.C. 340.02, and, as such, no member of the board may be employed by the agency.

In conclusion, it is my opinion, and you are hereby advised that, pursuant to R.C. 340.02, a member of a board of alcohol, drug addiction, and mental health services may not be an

employee of an agency that is reimbursed by the board for providing services to clients of the board.

Respectfully,

RICHARD CORDRAY
Ohio Attorney General