January 22, 1996

OPINION NO. 96-007

The Honorable Dean Holman
Medina County Prosecuting Attorney
60 Public Square
Bank One Building
Medina, Ohio 44256

Dear Prosecutor Holman:

You have requested an opinion concerning the propriety of an employee of a county board of mental retardation and developmental disabilities (county MR/DD board) serving as an executive officer of a nonprofit corporation. You state that the nonprofit corporation in question was created under R.C. Chapter 1702 (nonprofit corporation law) to provide employment services to the clients of the county MR/DD board, and that the county MR/DD board has entered into a contract whereby the nonprofit corporation provides these services to the county MR/DD board. The employee of the county MR/DD board seeks to serve as an executive officer of the nonprofit corporation pursuant to an agreement between the county MR/DD board and nonprofit corporation, and would receive no compensation from the nonprofit corporation. You wish to know whether an employee of a county MR/DD board, in his official capacity, may serve as an executive officer of a nonprofit corporation that has entered into a contract with the county MR/DD board.

Pursuant to R.C. 5126.03(C), "[n]o employee of an agency contracting with a county board of mental retardation and developmental disabilities...shall serve as...an employee of the county board." Because a nonprofit corporation created pursuant to R.C. Chapter 1702 for the purpose of offering a particular kind of assistance constitutes an agency for purposes of R.C. 5126.03(C), *see* 1992 Op. Att'y Gen. No. 92-069 at 2-286, no employee of such a nonprofit corporation that has entered into a contract with the county MR/DD board may be employed by the county MR/DD board. *See, e.g.,* 1984 Op. Att'y Gen. No. 84-019 at 2-65 (an employee of the Sheltered Workshop Fund, Inc., a private nonprofit corporation, may not be employed by a county MR/DD board). Accordingly, since the nonprofit corporation referenced in your letter has contracted with the county MR/DD board to provide employment services to the clients of the county MR/DD board, it must be determined whether an individual employed by a county MR/DD board who serves in his official capacity as an executive officer of a nonprofit corporation is an "employee" of that nonprofit corporation.

The term "employee" is not defined in R.C. 5126.03 or elsewhere in R.C. Chapter 5126. Terms left undefined by statute are to be accorded their common, everyday meanings. *State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals*, 63 Ohio St. 3d 354, 358, 588 N.E.2d 116, 120 (1992); *see also* R.C. 1.42 ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"). *Black's Law Dictionary* 525 (6th ed. 1990) provides the following definition of the term "employee":

> A person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed. One who works for an employer; a person working for salary or wages. (Citation omitted.)

Accord Webster's New World Dictionary 459 (2nd college ed. 1986). An employment relationship arises by contract either express or implied, and is evidenced by payment of salary or wages by the employer to the employee. 1982 Op. Att'y Gen. No. 82-020 at 2-64; *see also Home Indem. Co. v. Village of Plymouth*, 146 Ohio St. 96, 64 N.E.2d 248 (1945) (for purposes of an insurance contract, an employee is a person who works for another for salary or wages); *Pantall v. Shriver-Allison Co.*, 61 Ohio App. 119, 122, 22 N.E.2d 497, 499 (Mahoning County 1938) ("[g]enerally the relation of master and servant exists where one person for pay or other valuable consideration enters into the service of another and devotes to him his personal labor for an agreed price"), *appeal dismissed*, 135 Ohio St. 164, 19 N.E.2d 901 (1939); 1984 Op. Att'y Gen. No. 84-019 at 2-65 (a person could be considered an employee of a nonprofit corporation if he receives compensation from the nonprofit corporation).

With respect to your specific inquiry, you have described a situation in which no employment contract exists between the nonprofit corporation and the individual as an executive officer. Instead, the county MR/DD board designates the individual to serve in his official capacity as an executive officer of the nonprofit corporation. The individual thus remains an employee of the county MR/DD board. Moreover, the individual receives no compensation from the nonprofit corporation for serving as an executive officer. The individual receives compensation only from the county MR/DD board for services rendered as an employee of the county MR/DD board. In light of the fact that no employment contract exists between the nonprofit corporation and the individual as an executive officer, and the fact that the individual, as an executive officer, does not receive any compensation from the nonprofit corporation, it must be concluded that an individual employed by a county MR/DD board who serves in his official capacity as an executive officer of a nonprofit corporation is not an "employee" of that nonprofit corporation for purposes of R.C. 5126.03(C). *See* 1982 Op. Att'y Gen. No. 82-020 at 2-64 ("[a]bsent an employment contract between the county and its jail inmates, and in view of the fact the county does not pay the inmates for work performed in a work-release program, I must conclude that county jail inmates working outside the jail as part of a work-release program are not employees of the county"). Accordingly, R.C. 5126.03(C) does not prohibit an employee of a county MR/DD board, in his official capacity, from serving as an executive officer of a nonprofit corporation created pursuant to R.C. Chapter 1702 that has entered into a contract with the county MR/DD board.

In addition to the prohibition in R.C. 5126.03(C), ethical principles, which are set forth in R.C. Chapter 102 and R.C. 2921.42, and general common law principles prohibit an employee of a county MR/DD board from having a personal interest in a contract of the county MR/DD board. Because the General Assembly has authorized the Ohio Ethics Commission pursuant to R.C. 102.08 to render advisory opinions on the applicability of the ethical provisions of R.C. Chapter 102 and R.C. 2921.42, it is appropriate that the Attorney General decline the issuance of opinions on matters arising under these provisions. *See, e.g.,* 1994 Op. Att'y Gen. No. 94-079 at 2-397; 1994 Op. Att'y Gen. No. 94-039 at 2-200. It is, therefore, recommended that you contact the Ohio Ethics Commission for an analysis of the situation you have described to ensure that all problems have been recognized and honored. I am, however, able to examine the general common law principles to determine whether an employee of the county MR/DD board who serves in his official capacity as an executive officer of a nonprofit corporation that contracts with the board has a prohibited personal interest in a contract of the board.

1991 Op. Att'y Gen. No. 91-007, which concluded that a county employee may serve as a trustee, officer, or director of a nonprofit corporation established pursuant to R.C. 307.696, determined that, under general common law principles, a county employee does not have a prohibited personal interest in a public contract when the individual participates in the nonprofit corporation on behalf of the county, rather than to represent personal interests. As stated in 1991 Op. Att'y Gen. No. 91-007 at 2-36 through 2-38:

> The letter requesting this opinion notes that the Ohio Ethics Commission has concluded, in various instances, that public officials may serve as members or trustees of nonprofit corporations with which their public entities contract.... Those opinions have set forth four criteria that must be met before it may be determined that a public official who also serves a private organization does not have a prohibited personal interest in a contract between the public entity and the private organization. The relevant criteria are these:

> (1) [T]he governmental entity must create or be a participant in the non-profit corporation; (2) any public official or employee connected with the jurisdiction, including a council member, may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity; (3) the public official or employee must be formally instructed to represent the governmental entity and its interests; and (4) there must be no other conflict of interest on the part of the designated representative.

Ohio Ethics Commission Advisory Op. No. 88-005, slip op. at 4 (quoting Ohio Ethics Commission, Advisory Op. No. 84-001).

The Ohio Ethics Commission has, thus, found that, when these four criteria are satisfied, a particular public servant does not have a prohibited personal interest in a

> public contract. While opinions of the Attorney General have not formally adopted these same criteria, the result reached under these criteria is consistent with the analyses undertaken in various Attorney General opinions considering questions of ethics. *See, e.g.*, Op. No. 89-063; 1988 Op. Att'y Gen. No. 88-041. The Ohio Ethics Commission has, in essence, concluded that *an individual does not have a prohibited personal interest in a contract by virtue of serving a nonprofit corporation when his service to the nonprofit corporation is performed in his official capacity, as a formal representative of a governmental entity — for then his interest in the nonprofit corporation is public and official, rather than private; he represents and serves the governmental entity and not his own interests.* This conclusion is eminently reasonable and a valid statement of general ethical principles governing participation by public servants in the affairs of nonprofit corporations, and I embrace it wholeheartedly.
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> .... Applying [these four] criteria to [your] second question, I conclude that, in the case of a nonprofit corporation established pursuant to R.C. 307.696, the county administrator *and/or any other county official or employee* other than a county commissioner may legally serve as a *trustee, officer, or director of the corporation* if: (1) the county has created or participated in the nonprofit corporation; (2) the board of county commissioners formally designates the office or position in question to represent the county; (3) the county administrator or other county official or employee is formally instructed to represent the county and its interests; and (4) there is no other conflict of interest on the part of the particular county administrator or other county official or employee. (Emphasis added.)

1991 Op. Att'y Gen. No. 91-007 thus concluded that, absent a violation of an ethical provision subject to interpretation by the Ohio Ethics Commission and other conflicts of interest, a county employee does not have a prohibited personal interest in a contract between the county and a nonprofit corporation by virtue of serving as a trustee, officer, or director of the nonprofit corporation when his service to the nonprofit corporation is performed in his official capacity. In accordance with this conclusion, 1991 Op. Att'y Gen. No. 91-007 approved and adopted four criteria that must be met before it may be determined that a county employee who also serves a nonprofit corporation does not have a prohibited personal interest in a contract between the county and the nonprofit corporation.

In regard to the situation posed in your opinion request, I find that the four criteria adopted in 1991 Op. Att'y Gen. No. 91-007 provide a useful format for determining whether a county employee may participate in the affairs of a nonprofit corporation created pursuant to R.C. Chapter 1702. Therefore, with some modification of the wording used in 1991 Op. Att'y Gen. No. 91-007 to fit your situation, I conclude that an employee of a county MR/DD board, in his official capacity, may serve as an executive officer of a nonprofit corporation established pursuant to R.C. Chapter 1702 if: (1) the county MR/DD board has participated in the nonprofit corporation; (2) the county MR/DD board formally designates the position in question to represent the county MR/DD board; (3) the county MR/DD board employee is formally instructed to represent the county MR/DD board and its

interests; and (4) there is no other conflict of interest on the part of the particular county MR/DD board employee.[1]

Whether the four criteria set forth above are satisfied, however, requires the resolution of factual questions that can only be answered on a case-by-case basis. 1991 Op. Att'y Gen. No. 91-007 at 2-38. Because the Attorney General is not authorized to decide questions of fact by means of a formal opinion, *see* 1987 Op. Att'y Gen. No. 87-082 (syllabus, paragraph three), it is appropriate for local officials, rather than the Attorney General, to determine whether these four criteria have been met. Moreover, as stated above, it is also appropriate to contact the Ohio Ethics Commission for an opinion under R.C. Chapter 102 and R.C. 2921.42 concerning the situation you have described. *See* R.C. 102.08.

In summary, it is my opinion and you are advised that:

1. R.C. 5126.03(C) does not prohibit an employee of a county board of mental retardation and developmental disabilities (county MR/DD board), in his official capacity, from serving as an executive officer of a nonprofit corporation created pursuant to R.C. Chapter 1702 that has entered into a contract with the county MR/DD board.

2. In the case of a nonprofit corporation established pursuant to R.C. Chapter 1702, and provided that there is no violation of a statutory provision subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08, an employee of a county MR/DD board, in his official capacity, may serve as an executive officer of the nonprofit corporation if: (1) the county MR/DD board has participated in the nonprofit corporation; (2) the county MR/DD board formally designates the position in question to represent the county MR/DD board; (3) the county MR/DD board employee is formally instructed

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[1] This opinion does not address the propriety of an employee of a county MR/DD board, in his official capacity, serving as an executive officer of a nonprofit corporation when the employee receives compensation from the nonprofit corporation. Whether such a situation is permitted requires an analysis of the situation in light of the four criteria set forth in the text above — with particular consideration given to the existence of a conflict of interest on the part of the county MR/DD employee.

to represent the county MR/DD board and its interests; and (4) there is no other conflict of interest on the part of the particular county MR/DD board employee. (1991 Op. Att'y Gen. No. 91-007, approved and followed.)

Respectfully,

BETTY D. MONTGOMERY
Attorney General

January 22, 1996

The Honorable Dean Holman
Medina County Prosecuting Attorney
60 Public Square
Bank One Building
Medina, Ohio 44256

SYLLABUS: 96-007

1.R.C. 5126.03(C) does not prohibit an employee of a county board of mental retardation and developmental disabilities (county MR/DD board), in his official capacity, from serving as an executive officer of a nonprofit corporation created pursuant to R.C. Chapter 1702 that has entered into a contract with the county MR/DD board.

2.In the case of a nonprofit corporation established pursuant to R.C. Chapter 1702, and provided that there is no violation of a statutory provision subject to interpretation by the Ohio Ethics Commission pursuant to R.C. 102.08, an employee of a county MR/DD board, in his official capacity, may serve as an executive officer of the nonprofit corporation if: (1) the county MR/DD board has participated in the nonprofit corporation; (2) the county MR/DD board formally designates the position in question to represent the county MR/DD board; (3) the county MR/DD board employee is formally instructed to represent the county MR/DD board and its interests; and (4) there is no other conflict of interest on the part of the particular county MR/DD board employee. (1991 Op. Att'y Gen. No. 91-007, approved and followed.)