

**OPINION NO. 84-019****Syllabus:**

An employee of a county board of mental retardation and developmental disabilities may not receive a fee for performing his official duties from a private nonprofit corporation which has contracted with the board.

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**To: Lynn C. Slaby, Summit County Prosecuting Attorney, Akron, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, April 30, 1984**

I have before me your request for my opinion concerning the propriety of an arrangement between the County of Summit Board of Mental Retardation and Developmental Disabilities (the Board) and the board of the Sheltered Workshop Fund, Inc. (the Sheltered Workshop). You state the facts which give rise to your questions as follows:

The County of Summit Board of Mental Retardation and Developmental Disabilities wishes to employ a Sheltered Workshop Fund Director. The Board would like to pay this individual a base salary and, in addition, have this individual receive additional compensation on an incentive/percentage basis from the Board of the Sheltered Workshop based on the production of the sheltered workshop clients. The Sheltered Workshop Board is a non-profit, non-county agency with whom the County of Summit Board of Mental Retardation and Developmental Disabilities contracts.

Your specific questions with regard to this situation are:

1. Is such a compensation arrangement permissible pursuant to the Board of Mental Retardation and Developmental Disabilities' powers under Ohio Rev. Code Section 5126.06?

2. Does Ohio Rev. Code Section 102.04 prevent such an arrangement?

3. Would the receipt of the incentive payment by the Workshop Fund Director constitute a violation of Ohio Rev. Code Section 2921.43(A)(1) as receipt of "any compensation or fee, other than as allowed by law"?

Turning to your first question, I note that R.C. 5126.05 sets forth the powers and duties of a county board of mental retardation and developmental disabilities, and reads in part:

Subject to the rules established by the director of the department of mental retardation and developmental disabilities pursuant to Chapter 119. of the Revised Code, the county board of mental retardation and developmental disabilities shall:

(A) Administer and operate facilities, programs, and services as provided by Chapters 3323. and 5126. of the Revised Code;

(B) Assess the facility and service needs of the mentally retarded and the developmentally disabled residents of the county and of former residents of the county presently residing in state institutions or placed under purchase of service agreements under section 5123.18 of the Revised Code;

(C) Subject to the approval of the director of mental retardation and developmental disabilities, plan and set priorities based on available funds for the provision of both facilities and services to meet the needs of county residents with mental retardation or developmental disabilities and of former residents of the county presently residing in state institutions or placed under purchase of service agreements according to section 5123.18 of the Revised Code;

(D) Coordinate, monitor, and evaluate existing services and facilities;

(E) Provide early childhood services, supportive home services, and adult services, according to the plan and priorities developed under division (C) of this section;

. . . .

(G) Require individual habilitation plans for clients and eligible unserved clients;

. . . .

(J) Adopt a salary schedule and budget, authorize expenditures for the purposes listed in this section, and exercise such powers and duties as are prescribed by the director;

. . . .

(L) Contract for employee benefits.

. . . .

Any county board may enter into contracts with other such boards and with public or private, nonprofit or profit making agencies or organizations of the same or another county, to provide the facilities, programs, and services authorized or required, upon such terms as may be agreeable, and in accordance with Chapters 3323. and 5126. of the Revised Code and rules adopted thereunder.

. . . .

The board of county commissioners shall levy taxes and make appropriations sufficient to enable the county board of mental retardation and developmental disabilities to perform its functions and duties as provided by this section, and may utilize any available local, state, and federal funds for such purpose.

R.C. 5126.06 further provides:

The superintendent of the county board of mental retardation and developmental disabilities shall:

(A) Administer the work of the board subject to the board's rules;

(B) Recommend to the board the changes necessary to increase the effectiveness of the programs and services offered pursuant to Chapters 3323. and 5126. of the Revised Code;

(C) Approve all employment contracts and personnel actions that involve employees in the classified civil service and, subject to the approval of the board, approve all other employment contracts and personnel actions as may be necessary for the work of the board;

(D) Approve compensation for employees within the limits set by the salary schedule and budget set by the board and ensure that all employees and consultants are properly reimbursed for actual and necessary expenses incurred in the performance of official duties;

(E) Provide consultation to public agencies as defined in division (C) of section 102.01 of the Revised Code, including other county boards of mental retardation and developmental disabilities, and to individuals, agencies, or organizations providing services supported by the board.

The superintendent may authorize the payment of board obligations by the county auditor.

Thus, the Board has the power, pursuant to R.C. 5126.05, to contract with a private nonprofit corporation for the provision of sheltered workshop programs, services, and facilities. In addition, the Board and its superintendent have the power, pursuant to R.C. 5126.05 and R.C. 5126.06, to employ and set the compensation of a person whose duties would include conducting business with the nonprofit corporation on behalf of the Board or otherwise carrying out the Board's responsibilities with regard to sheltered workshop services. In concluding that a county board of mental retardation and developmental disabilities has the above-named powers, I am assuming that the exercise of these powers is otherwise lawful. It is this assumption which leads me to a discussion of R.C. 2921.43.

R.C. 2921.43(A) is a codification of the common law rule that a public officer may not receive remuneration other than that allowed by law for the performance of his official duties. See Somerset Bank v. Edmund, 76 Ohio St. 396, 81 N.E. 641 (1907); Debolt v. Trustees of Cincinnati Township, 7 Ohio St. 237 (1857); Gilmore v. Lewis, 12 Ohio 281 (1843); 1981 Op. Att'y Gen. No. 81-013. R.C. 2921.43 reads in part: "(A) No public servant shall knowingly do either of the following: (1) Solicit or receive any compensation or fee, other than as allowed by law, to perform his official duties; (2) Solicit or receive greater fees or costs than are allowed by law to perform his official duties." Cf. R.C. 141.13 (prohibiting state elective executive officers and those judges named in R.C. Chapter 141 from receiving "fees in addition to the salaries and compensation named in [R.C. 141.01-.12]," from receiving "additional remuneration . . . under any other title than that by which he was elected or duly appointed," and providing that "[t]he salaries provided in such sections shall be in full compensation for any services rendered by such officers and employees, payment of which is made from the state treasury"); R.C. 325.02 ("[t]he salaries and compensation of county officers provided for by [R.C. 325.03-.09], shall be in lieu of all fees, costs, penalties, percentages, allowances, and all other perquisites, of whatever kind, which any of such officials collects and receives. . ."). Public officials and employees are not permitted to receive payment other than that provided by law for performing those duties for which they are responsible in their official capacity. See generally State v. McKelvey, 12 Ohio St. 2d 92, 95, 232 N.E.2d 391, 393 (1967) ("a public official cannot use his position for private profit").

An employee of a county board of mental retardation is a public servant for purposes of R.C. 2921.43, see R.C. 2921.01(A) and (B), and thus is subject to its provisions. The compensation of a county board employee which is set by the board and paid from the county treasury upon the warrant of the county auditor, as authorized by the board or its superintendent, see R.C. 319.16, R.C. 5126.05(J), R.C. 5126.06, is the employee's compensation allowed by law. See R.C. 5126.05(J) and (L); R.C. 5126.06(D). The receipt by a board employee of remuneration from a

private entity for the performance of his official duties is not provided by law, and thus is prohibited by R.C. 2921.43(A).<sup>1</sup>

You have also inquired about the applicability of R.C. 102.04. Division (C) prohibits a person employed by a county from receiving or agreeing 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 . . . matter which is before any agency, department, board, bureau, commission, or other instrumentality. . . of the entity of which he is an officer or employee," and seems to reflect the same principle reflected in R.C. 2921.43 that a public servant may not receive compensation other than that allowed by law for performing his official duties. R.C. 102.04 appears to prohibit the arrangement you have described. See generally Ohio Ethics Commission, Advisory Opinions No. 82-007, No. 82-006, No. 81-006. Pursuant to R.C. 102.08, however, the Ohio Ethics Commission is the authority with the responsibility for rendering advisory opinions concerning the interpretation of R.C. 102.04, and thus should be contacted if you should have any further questions as to this provision. I note that the situation you present may, depending on the precise facts involved, constitute a violation of other statutory provisions, such as R.C. 102.03(A), R.C. 102.03(D), and R.C. 2921.42(A)(1) and (4). Again, the Ethics Commission, pursuant to R.C. 102.08, has the authority to render advisory opinions concerning R.C. 102.03 and R.C. 2921.42, and thus should be contacted. Recently, it was held that a police officer who solicited and received "valuable consideration for performing a duty which was his responsibility to perform as a police officer" was guilty of violating R.C. 2921.02(B), which prohibits a public servant from "knowingly solicit[ing] or accept[ing] any valuable thing or valuable benefit to corrupt or influence him with respect to the discharge of his duty" which is considered bribery, even though the solicitation and receipt of the consideration and the performance of the act were performed during the officer's off-duty hours. State v. Seneff, 70 Ohio App. 2d 171, 174, 435 N.E.2d 680, 683 (Cuyahoga County 1980).

As a final point, I note that R.C. 5126.03(C) prohibits an employee of an agency which contracts with a county board of mental retardation and developmental disabilities from serving as an employee of the board, unless the board passes a resolution providing for the eligibility of such person to serve. Depending on the particular facts involved, the person in question could be considered an employee of the Sheltered Workshop if he receives compensation from the Sheltered Workshop, and thus could not serve as an employee of the Board without a resolution. See generally Council v. Douglas, 163 Ohio St. 292, 126 N.E.2d 597 (1955) (setting forth the indicia of an employer-employee relationship).

In conclusion, it is my opinion, and you are advised, that an employee of a county board of mental retardation and developmental disabilities may not receive a fee for performing his official duties from a private nonprofit corporation which has contracted with the board.

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<sup>1</sup> Violation of R.C. 2921.43(A) is a first degree misdemeanor, R.C. 2921.43(D), and "[a] public servant who is convicted of a violation of [R.C. 2921.43] is disqualified from holding any public office, employment, or position of trust in this state for a period of seven years from the date of conviction." R.C. 2921.43(E). As my predecessor stated in 1983 Op. Att'y Gen. No. 83-001 at 2-2, "I cannot render a verdict as to the criminal guilt or innocence of a particular person. . . . Only a court of law may make such a decision. I can only express my opinion as to whether a given set of facts, if proven in court, could constitute the violation of a criminal statute." In this case, my opinion is rendered for the purpose of the county's consideration in determining whether the proposed arrangement should be executed.