

OPINION NO. 92-069

Syllabus:

1. R.C. 5126.03(E) prohibits a county mental retardation and developmental disabilities board from entering into a contract with a nonprofit corporation created pursuant to R.C. Chapter

1702 that offers a particular kind of assistance and whose board of trustees includes one or more county commissioners of the county served by the county mental retardation and developmental disabilities board.

2. R.C. 5126.03(E) prohibits a county mental retardation and developmental disabilities board from entering into a contract with a nonprofit corporation created pursuant to R.C. Chapter 1702 that is formed by, and whose sole member is, a second nonprofit corporation whose board of trustees includes one or more county commissioners of the county served by the county mental retardation and developmental disabilities board.

To: R. Alan Corbin, Brown County Prosecuting Attorney, Georgetown, Ohio
By: Lee Fisher, Attorney General, December 29, 1992

You have asked whether a county board of mental retardation and developmental disabilities ("county MR/DD board") may enter into a contract with (1) a nonprofit corporation whose board of trustees includes one or more county commissioners of the county served by the county MR/DD board, or (2) a nonprofit corporation that is formed by a nonprofit corporation whose board of trustees includes one or more county commissioners of the county served by the county MR/DD board.

I. A County MR/DD Board May Not Contract With a Nonprofit Corporation Whose Board of Trustees Includes One or More County Commissioners of the County Served by the County MR/DD Board

Pursuant to R.C. 5126.05(E), a county MR/DD board is empowered to enter into contracts "with public or private, nonprofit, or profit-making agencies or organizations of the same or another county." However, the county MR/DD board is expressly prohibited from entering into a "contract with an agency whose board includes a county commissioner of the county served by the county board." R.C. 5126.03(E); *accord* 11 Ohio Admin. Code 5123:2-1-02(E)(6)(g). Resolution of your first question, therefore, turns on whether a nonprofit corporation is an "agency" as that term is used in R.C. 5126.03(E).

A. For Purposes of R.C. 5126.03(E), "Agency" Means an Organization that Offers a Particular Kind of Assistance

There is no definition of "agency" in the Ohio Revised Code for purposes of R.C. 5126.03(E). *Cf.* R.C. 163.01(A) (as used in R.C. 163.01-.22, which governs the appropriation of property, the term "agency" includes "any governmental corporation, unit, organization, or officer authorized by law to appropriate property in the courts of this state" or "any other corporation, firm, partnership, voluntary association, joint-stock association, or company authorized by law to appropriate property in the courts of this state"); R.C. 3107.01(D) (as used in R.C. 3107.01-.19, unless the context otherwise requires, the term "[a]gency" means any public or private organization certified, licensed, or otherwise specially empowered by law or rule to place minors for adoption"). "Where the General Assembly has not provided or attached a specific meaning to a term, the common or plain meaning of the term is used." 1989 Op Att'y Gen. No. 89-091 at 2-434; *accord* R.C. 1.42. The term "agency," as defined in *Webster's New World Dictionary* 25 (3rd college ed. 1988), means, *inter alia*, "an organization that offers a particular kind of assistance [a social agency]." The term "agency," as used in R.C. 5126.03(E), thus, includes any organization that offers a particular kind of assistance.

B. The Term "Agency," as Used in R.C. 5126.03(E), Includes a Nonprofit Corporation Created Pursuant to R.C. Chapter 1702 that Offers a Particular Kind of Assistance

Information provided in conjunction with your request indicates that the nonprofit corporation in question is created under R.C. Chapter 1702 (nonprofit corporation law). Under R.C. Chapter 1702, a nonprofit corporation may be formed by any person,¹ singly or jointly with others, for any purpose or purposes for which natural persons lawfully may associate themselves. R.C. 1702.03; R.C. 1702.04. See generally R.C. 1702.04(A) (the articles of incorporation of a nonprofit corporation must set forth the purpose or purposes for which the corporation is formed). A nonprofit corporation created pursuant to R.C. Chapter 1702, thus, is an "organization," as that term is commonly understood. See *Webster's New World Dictionary* at 954 (defining "organization" as "a body of persons organized for some specific purpose"); see also R.C. 1.42. Furthermore, a nonprofit corporation created under R.C. Chapter 1702 may offer a particular kind of assistance as one of its purposes. See, e.g., R.C. 176.011 (authorizing the creation of a nonprofit corporation for the purpose of acquiring, constructing, or rehabilitating housing to enhance the availability of adequate housing in the state and to improve the economic and general well-being of the people of the state); R.C. 1724.01 (a nonprofit corporation may be organized for the "purpose of advancing, encouraging, and promoting the industrial, economic, commercial, and civic development of a community or area"). Thus, a nonprofit corporation created pursuant to R.C. Chapter 1702 for the purpose of offering a particular kind of assistance would constitute an "agency" for purposes of R.C. 5126.03(E). Accordingly, a county MR/DD board may not contract with such a nonprofit corporation whose board of trustees includes one or more county commissioners of the county served by the county MR/DD board.

The articles of incorporation of the nonprofit corporation about which you ask provide, *inter alia*, that one of the corporation's purposes is

[t]o provide elderly persons and handicapped persons with housing facilities and services specifically designed to meet their physical, social, and psychological needs, and to promote their health, [security], happiness, and usefulness in longer living, the charges for such facilities and services to be predicated upon the provision, maintenance, and operation thereof on a non-profit basis.

Obviously, the provision of housing facilities and services specifically designed to meet the physical, social, and psychological needs of elderly persons and handicapped persons is a kind of assistance. See *Webster's New World Dictionary* at 83 (defining "assistance" as "the act of assisting or the help given; aid"). A nonprofit corporation created pursuant to R.C. Chapter 1702 that provides elderly persons and handicapped persons with housing facilities and services specifically designed to meet the physical, social, and psychological needs of elderly persons and handicapped persons, thus, offers a particular kind of assistance, and is therefore an "agency," as that term is used in R.C. 5126.03(E). Therefore, a county MR/DD board may not contract with such a nonprofit corporation whose board of trustees includes one or more county commissioners of the county served by the county MR/DD board.

¹ As used in R.C. Chapter 1702, "unless the context otherwise requires: ... 'Person' includes, but is not limited to, a nonprofit corporation, a corporation for profit, a partnership, an unincorporated society or association, and two or more persons having a joint or common interest." R.C. 1702.01(J).

II. A County MR/DD Board May Not Contract With a Nonprofit Corporation that Is Formed by, and Whose Sole Member Is, a Second Nonprofit Corporation Whose Board of Trustees Includes One or More County Commissioners of the County Served by the County MR/DD Board

You have also asked whether a county MR/DD board may contract with a nonprofit corporation (corporation "A") that is formed by a nonprofit corporation (corporation "B") whose board of trustees includes county commissioners of the county served by the county MR/DD board. Additional background material provided by you indicates that corporation "B" is the sole member of corporation "A." Based on the foregoing, it is appropriate to rephrase your question as follows: When corporation "B" is responsible for the formation of, and is the sole member of, corporation "A," may a county MR/DD board enter into a contract with corporation "A"?

A. R.C. 5126.03(E)

As stated above, R.C. 5126.03(E) prohibits a county MR/DD board from entering into a contract with a nonprofit corporation whose board of trustees includes one or more county commissioners of the county served by the county MR/DD board. *Accord* rule 5123:2-1-02(E)(6)(g). R.C. 5126.03(E) is indicative of the General Assembly's intention to forbid a county commissioner from having an interest in a contract between a nonprofit corporation, whose board of trustees includes him, and the county MR/DD board that serves his county. *See* R.C. 305.27 ("[n]o county commissioner shall be concerned, directly or indirectly, in any contract for work to be done or material to be furnished for the county"); R.C. 2921.42 (prohibiting a public official from having an unlawful interest in the benefits or profits of a public contract). *See generally State ex rel. Taylor v Pinney*, 13 Ohio Dec. 210, 212 (C.P. Franklin County 1902) ("[p]ublic officials, who are the agents of the public, will not be permitted to put themselves in a position antagonistic to the public interests which are represented and which it is their duty to protect"). A determination that a nonprofit corporation whose board of trustees includes a county commissioner may form and be the sole member of a second nonprofit corporation that enters into a contract with the county MR/DD board that serves the commissioner's county, would implicitly sanction a county commissioner's interest in a contract between a nonprofit corporation and the county MR/DD board and provide a relatively simple means to circumvent the statutory prohibition of R.C. 5126.03(E). Thus, if a county MR/DD board were permitted to enter into a contract with a nonprofit corporation that is formed by, and whose sole member is, a nonprofit corporation whose board of trustees includes a county commissioner of the county served by the county MR/DD board, the board would be doing indirectly what it cannot lawfully do directly.

It is axiomatic that a governmental entity cannot lawfully do indirectly what it cannot lawfully do directly. *See Parma Heights v Schroeder*, 26 Ohio Op. 2d 119, 196 N.E.2d 813 (C.P. Cuyahoga County 1963). Because a county MR/DD board cannot lawfully do indirectly what it cannot lawfully do directly, it must be concluded that R.C. 5126.03(E) prohibits a county MR/DD board from entering into a contract with a nonprofit corporation that is formed by, and whose sole member is, a second nonprofit corporation whose board of trustees includes one or more county commissioners of the county served by the county MR/DD board, thereby avoiding circumvention of the General Assembly's intention, as expressed in R.C. 5126.03(E), that a county MR/DD board not enter into a contract with an agency whose board includes a county commissioner of the county served by the county board. *See generally Henry v. Central Nat'l Bank*, 16 Ohio St. 2d 16, 242 N.E.2d 342 (1968) (the primary purpose in the interpretation of statutes is to determine and give effect to the intention of the General Assembly).

B. Unlawful Contract

In Ohio, a contract entered into in violation of the provisions of a statute is unlawful. *State v. Buttles*, 3 Ohio St. 309 (1854); 1959 Op. Att'y Gen. No. 51, p. 29; *see also Findlay v. Pertz*, 66 F. 427 (6th Cir. 1895). Insofar as a contract entered into between a county MR/DD board and corporation "A" violates R.C. 5126.03(E), the contract is unlawful. Accordingly, when corporation "B," whose board includes a county commissioner, is responsible for the formation of, and is the sole member of, corporation "A," the county MR/DD board may not enter into a contract with corporation "A." *See* 1973 Op. Att'y Gen. No. 73-132; 1948 Op. Att'y Gen. No. 3075, p. 197; *see also* 1961 Op. Att'y Gen. No. 2466, p. 494. *See generally Doll v. State*, 45 Ohio St. 445, 449, 15 N.E. 293, 295 (1887) ("[t]o permit those holding offices of trust or profit to become interested in contracts for the purchase of property for the use of the state, county, or municipality of which they are officers, might encourage favoritism, and fraudulent combinations and practices, not easily detected, and thus make such officers, charged with the duty of protecting those whose interests are confided to them, instruments of harm. The surest means of preventing this, was to prohibit all such contracts").

III. Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. R.C. 5126.03(E) prohibits a county mental retardation and developmental disabilities board from entering into a contract with a nonprofit corporation created pursuant to R.C. Chapter 1702 that offers a particular kind of assistance and whose board of trustees includes one or more county commissioners of the county served by the county mental retardation and developmental disabilities board.
2. R.C. 5126.03(E) prohibits a county mental retardation and developmental disabilities board from entering into a contract with a nonprofit corporation created pursuant to R.C. Chapter 1702 that is formed by, and whose sole member is, a second nonprofit corporation whose board of trustees includes one or more county commissioners of the county served by the county mental retardation and developmental disabilities board.