

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 2320, COLUMBUS, OH 43215-6104
(614) 644-5800 (888) 664-8345 FAX: (614) 644-5804
www.sconet.state.oh.us

OFFICE OF SECRETARY

OPINION 2003-4

Issued August 8, 2003

SYLLABUS: Ohio Ethics Law is contained in Chapter 102 and related statutes R.C. 2921.01, 2921.42, 2921.421 and 2921.43 of the Ohio Revised Code. For matters relating to judicial officers, judicial employees, and judicial candidates, the Board of Commissioners on Grievances and Discipline has advisory authority regarding the application of Ohio Ethics Law.

The President/CEO and employees of Oriana House, which operates the Summit County Community Based Correctional Facility and Program, are not *judicial officers, judicial employees, or instrumentalities of the court* for purposes of Chapter 102 of the Ohio Revised Code. Whether the President/CEO and employees of Oriana House are *public officers, public employees, or instrumentalities of the state* for purposes of Chapter 102 of the Ohio Revised Code is a determination outside this Board's advisory authority.

The President/CEO and employees of Oriana House, which operates the Summit County Community Based Correctional Facility and Program, are not *judicial officers, judicial employees, or agents of the court* and they are not performing *ad hoc judicial functions* for purposes of Section 2921.42 and 2921.43 of the Ohio Revised Code. Whether they are *public officials, public employees, agents of state, or performing ad hoc governmental functions* for purposes of Section 2921.42 and 2921.43 is a determination outside this Board's advisory authority.

OPINION: This opinion addresses whether the President/CEO and the employees of Oriana House, Inc., which operates the Summit County Community Based Correctional Facility and Program, are judicial officers and judicial employees for purposes of Ohio Ethics Law and related statutes. This opinion does not address whether Ohio Ethics Law has been violated.

Are the President/CEO and the employees of Oriana House, Inc., which operates the Summit County Community Based Correctional Facility and Program, judicial officers and judicial employees for purposes of Ohio Ethics Law and related statutes?

Why is the Board advising as to the application of Ohio Ethics Law?

The privatization of public services creates uncertainty as to how the laws governing public officials and employees apply, if at all, to officers and employees of private entities. The Office of the Auditor of State of Ohio has asked the Board whether the President/CEO and the employees of Oriana House, Inc., which operates the Summit County Community Based Correctional Facility, are judicial officers or judicial employees for purposes of Ohio Ethics Law. Community-based correctional facilities and programs are public offices under Section 117.01 of the Ohio Revised Code and are subject to audit under Section 117.10 of the Revised Code. Ohio Rev. Code Ann. § 2301.56 (E)(1) (West Supp. 2003). Private or non-profit entities that perform the day-to-day operations of any community-based correctional facility and program are also subject to audit. Ohio Rev. Code Ann. § 2301.56 (E)(1) (West Supp. 2003).

For matters relating to judicial officers, judicial employees, and judicial candidates, the Board of Commissioners on Grievances and Discipline has advisory authority regarding the application of Chapter 102 and related statutes R.C. 2921.01, 2921.42, 2921.421 and 2921.43 of the Ohio Revised Code. See Ohio Rev. Code Ann. §§ 102.01(F)(2) and 102.08 (West 2002). [The Joint Legislative Ethics Committee advises as to matters relating to members of the general assembly, employees of the general assembly, employees of the legislative service commission, and candidates for the office of member of the general assembly. See Ohio Rev. Code Ann. § 102.01 (F)(1) (West 2002). The Ohio Ethics Commission advises as to matters relating to all other persons. See Ohio Rev. Code Ann. § 102.01 (F)(3) (West 2002)].

What is Oriana House, Inc.?

Oriana House, Inc. [Oriana House] describes itself as “a private, nonprofit agency that assists people in overcoming chemical dependencies and provides suitable, reintegrating community corrections programs for those offenders who live in or are returning to our communities.” <http://www.orianahouse.com/> (last visited Jul 9, 2003). Oriana House operates two types of programs: chemical dependency programs and community corrections programs. Both programs have residential and non-residential components. The Oriana House Web site categorizes the programs as follows:

Chemical Dependency Treatment Programs

Residential Programs

- Detoxification, Central Assessment and Drop-in Center
- Residential Treatment Center

Nonresidential Programs

- Intensive Outpatient Program
- Relapse Prevention Program
- Aftercare

- Summit Link

Community Corrections Programs

Residential Programs

- Glenwood Jail-Driver Intervention Program
- Glenwood Jail-DUI Multiple Offender Program
- Halfway House Program
- Work Release Program
- Community Based Correctional Facility Program
- Juvenile Halfway House
- Special Housing Adjustment Residential Program

Nonresidential Programs

- Day Reporting Center
- Home Incarceration Program
- Bail Supervision
- Drug Court*
- Discretionary Rehabilitation Program
- Family Violence Court*

<http://www.orianahouse.com> (last visited Jul 9, 2003).

*Listing a court as a “nonresidential program” of a private non-profit program is a misnomer.

Some people enter Oriana House programs voluntarily. For example, the chemical dependency programs are available to chemically dependent Summit County residents through self-referral or through referrals by social service agencies, law enforcement, family members or employers.

Other people enter Oriana House programs as offenders. For example, offenders enter the community corrections programs of Oriana House through sentencing orders of a court, through post-release control imposed by the parole board or, according to Oriana House Web site, through the Federal Bureau of Prisons. http://www.orianahouse.com/halfway_house_program.htm (last visited Jul 9, 2003).

What is the Summit County Community Based Correctional Facility?

A community-based correctional facility and program is a statutorily created entity that provides both community residential and non-residential sanctions for offenders. See Ohio Rev. Code Ann. § 2301.51 (West Supp. 2003). A community-based correctional facility and program serves a county. A district community-based correctional facility

and program serves multiple counties. See Ohio Rev. Code Ann. § 2301.51(A)(2) (West Supp. 2003).

The Summit County Community Based Correctional Facility serves Summit County. There are actually two community-based correctional facilities in Akron—the Summit County Community Based Correctional Facility (a 120 bed facility for males that opened in 1992) and the Cliff Skeen Community Based Correctional Facility for Women (a 60 bed facility for females that opened in 2001). http://www.orianahouse.com/community_based_correctional_facility_program.htm (last visited Jul 9, 2003). For purposes of this opinion, “Summit County Community Based Correctional Facility” refers to both facilities.

Offenders enter into community-based correctional facilities and programs in the following ways: by a court pursuant to Section 2929.16 or 2929.17 of the Ohio Revised Code; by the parole board pursuant to Section 2967.28 of the Ohio Revised Code; or are otherwise committed or admitted to a facility and program when authorized by law. Ohio Rev. Code Ann. § 2301.51(B)(2) (West Supp 2003).

Pursuant to Section 2929.16(A), a court, may impose *community residential sanctions* or a combination of community residential sanctions upon a felony offender who is not required to serve a mandatory prison term. A court may impose community residential sanctions upon a fourth degree felony OMVI in addition to the mandatory term of local incarceration imposed under section 2929.13 of the Ohio Revised Code. Ohio Rev. Code Ann. § 2929.16(A) (West Supp 2003).

A community-based correctional facility and program is one option a judge may choose when sentencing an offender to *community residential sanctions*. Examples of community residential sanctions also include a term in a jail, a halfway house, or an alternative residential facility. See Ohio Rev. Code Ann. §2929.16(A)(1) through (5) (West Supp. 2003).

Pursuant to Section 2929.17, a court may impose *community non-residential sanctions* for felony offenders who are not required to serve a mandatory prison term. A court may impose nonresidential sanctions upon a fourth degree felony OMVI in addition to the mandatory term of local incarceration imposed under Section 2929.13 of the Ohio Revised Code. Ohio Rev. Code Ann. § 2929.17 (West Supp 2003).

A community-based correctional facility and program is one option a judge may choose when sentencing an offender to *community non-residential sanctions*. Examples of non-residential sanctions include a term of day reporting; electronically monitored house arrest; a term of community service; a term in a drug treatment program; a term of probation supervision; a term of monitored time; a term of drug and alcohol use monitoring, including random drug testing; a curfew; a requirement of employment, education or training; participation in victim-offender mediation; or counseling. See Ohio Rev. Code Ann. §2929.17 (West Supp. 2003).

A community-based correctional facility and program is also an option for the parole board in imposing post-release control sanctions. The parole board may impose sanctions it considers appropriate including any community residential sanction, community nonresidential sanction, or financial sanction that the sentencing court was authorized to impose pursuant to 2929.16, 2929.17, and 2929.18 of the Revised Code. See Ohio Rev. Code Ann. §2967.28 (D)(1) (West Supp. 2003).

How is a court involved with the Summit County Community Based Correctional Facility and Oriana House, Inc.?

The Ohio legislature designates the court of common pleas as the entity that may formulate a community-based correctional facility and program proposal. The proposal of the court must receive approval by the division of parole and community services of the department of rehabilitation and correction. See Ohio Rev. Code Ann. § 2301.51 (B)(1), (2) (West Supp. 2003); Ohio Rev. Code Ann. §. 5120.10(D)(4) (West Supp. 2003).

At the mandate of the Ohio legislature, the judges of the court of common pleas serve as the judicial corrections board that administers the county community-based correctional facility and program. See Ohio Rev. Code § 2301.51 (A)(1) (West Supp. 2003). The duties of the judicial corrections board are set forth in section 2301.55 of the Ohio Revised Code. For example, the judicial corrections board appoints and fixes the compensation of the director of the community-based correctional facility and program, and of the other professional, technical, and clerical employees. Ohio Rev. Code § 2301.55(A)(1) (West Supp. 2003). The judicial corrections board is permitted to enter contracts with the county commissioners whereby the county provides buildings, goods, and services to the facility and program. Ohio Rev. Code § 2301.55(A)(2) (West Supp. 2003).

The judicial corrections board adopts rules for sentencing or other commitment or admission pursuant to law of persons to, and the operation of, the facility and program, but the rules must conform to sections 2301.51 to 2301.56, 5120.10, 5120.111 and 5120.112 and must be entered on the journal of the court. Ohio Rev. Code § 2301.55(A)(3) (West Supp. 2003). The judicial corrections board may accept gifts, donations, devises, bequests, grants or appropriations in the interest of the facility and program. Ohio Rev. Code §2301.55(B) (West Supp. 2003). The judicial corrections board provides the citizens advisory programs with the staff assistance required to perform their duties. Ohio Rev. Code 2301.55 (C) (West Supp. 2003).

In addition, the judicial corrections board may request funding for some or all of the community-based correctional facilities and programs to the board of county commissioners of the county. The board of county commissioners may, but is not required to fund all aspects of each facility and program. Ohio Rev. Code Ann § 2301.51(C) (West Supp 2003). According to the letter requesting this opinion, funding for the Summit County Community Based Correctional Facility is through a grant of

approximately five million dollars from the Ohio Department of Rehabilitation and Corrections.

As mentioned already, judges sentence offenders to community-based correctional facilities and programs. After sentencing, intake officers of a community-based correctional facility and program screen each felony offender to make recommendations to the sentencing court regarding the admission or referral of the felony offender to the facility and program. Ohio Rev. Code Ann § 2301.52(D) (West Supp 2003).

In summary, the relationship of a court to a community-based correctional facility and program involves proposing a community-based correctional facility and program, serving on the judicial corrections board to administer the facility and program, and sentencing offenders to a community-based correctional facility and program.

What is the relationship of Oriana House, Inc. and the Summit County Community Based Correctional Facility and Programs?

Oriana House provides the day-to-day operations of the Summit County Community Based Correction Facility and Program. [Oriana House also operates a district community-based correctional facility located within Seneca County. http://www.orianahouse.com/community_based_correctional_facility_program.htm (last visited Jul 9, 2003).] According to the request letter, the Director of the Summit County Community Based Correctional Facility is the President/CEO of Oriana House. As stated in the request letter, Summit County and the Summit County Judicial Corrections Board contract with Oriana House for the provision of community-based correctional facility services. The details of the contract provisions are not before this Board.

Oriana House presumably has other relationships as well. Although not mentioned in the letter, the division of parole and community services of the Department of Rehabilitation and Corrections also is empowered to enter contracts. The powers and duties of the division of parole and community services include “contracting with a public or private agency or a department or political subdivision of the state that operates a licensed halfway house or community residential center for the provision of housing, supervision, and other services to parolees and probationers in accordance with section 2967.14 of the Revised Code.” Ohio Revised Code Ann. §5120.10(D)(8) (West Supp 2003).

What is Ohio Ethics Law and to whom does it apply?

Ohio Ethics Law is contained in Chapter 102 and related statutes R.C. 2921.01, 2921.42, 2921.421 and 2921.43 of the Ohio Revised Code. Section 102.02 provides for the filing of financial disclosure statements. Section 102.03 prohibits unlawful conflicts of interest during and after public employment. Section 2921.01 provides definitions. Section 2921.42 provides public contract restrictions. Section 2921.421 provides special rules for prosecuting attorneys. Section 2921.42 prohibits unlawful supplemental compensation.

As explained below, Ohio Ethics Law defines to whom each section of the law applies.

Chapter 102 of the Ohio Revised Code.

Chapter 102 applies to “public officials or employees.” As used in Chapter 102, “[p]ublic official or employee” means any person who is elected or appointed to an office or is an employee of any public agency.” Section 102.01(B). “Public agency” means the general assembly, all courts, any department, division, institution, board, commission, authority, or other instrumentality of the state, a county, city, village, township, and the five retirement systems, or any other governmental agency.” Ohio Rev. Code Ann. § 102.01(C) (West 2002).

Ohio Ethics Law does not provide a definition of “judicial officer” or “judicial employee.” Ohio Ethics Law does not define “appointed to an office.” The Ohio Ethics Commission has described the indicia of whether one is “appointed” to an office.

The Ethics Commission, in Advisory Opinion No. 74-007, reviewed existing case law and recognized factors which established a test to determine whether one is “appointed to an office”; which were, whether the person: (1) is appointed; (2) has a title; (3) exercises a function of government concerning the public; and (4) is not subject to a contract of employment. The Ethics Commission modified this test in Advisory Opinion No. 75-004 when it determined that whether the person exercises the “sovereign power” of government, as explained in case law, is an additional and essential criterion for determining whether one is “appointed to an office.”

Ohio Ethics Commission Op. 92-001.

It is the Board’s view that a “judicial officer” is a person elected or appointed as a judge of a court in the state of Ohio. The Ohio Constitution vests “judicial power” in the courts. Ohio Const. art. IV, § 1. The elected and appointed judges exercise this judicial power. The Board also considers magistrates and acting judges as “judicial officers” for purposes of Ohio Ethics Law. Magistrates and acting judges are appointed by judges and they exercise judicial power. Judges, acting judges, and magistrates hold offices of profit or trust. See e.g., O.A.G. Op. 96-024 and O.A.G. 90-089.

It is the Board’s view that judicial employees are persons employed by the judicial branch of government. Judicial employees are persons subject to a contract of employment as an employee of a court. Some of the factors the Ohio Ethics Commission has used to distinguish an independent contractor from an employee include:

the extent of control the employer exercises over the details of the work, whether or not the individual is engaged in a distinct occupation or business, the skills required in the particular occupation, the length of time the individual is engaged, the method of payment (by job or by time), and

whether or not the parties believe they are creating a relationship of employer and employee. . . .

. . . An independent contractor is not elected or appointed to an office of or employed by the county, and, accordingly, is not subject to the limitations in R.C. 102.04(C).

Ohio Ethics Commission Op. 93-013 [citations omitted].

The President/CEO and employees of Oriana House are not judicial officers. They are not elected to a judicial office and they are not appointed to a judicial office. They do not exercise judicial power. The President/CEO and employees of Oriana House are not employed by the judicial branch of government. They are not judicial employees subject to contracts of employment as employees of the court. The court does not exercise control over the details of their work.

Oriana House is not an instrumentality of the court. A judge's sentencing of an offender to a community residential or nonresidential sanction of a community-based correctional facility and program in which the services are provided by Oriana House, does not make Oriana House an instrumentality of a court, any more than a jail or a prison is an instrumentality of a court. A judge's role in establishing a proposal for a community based correctional facility and program does not render Oriana House an instrumentality of the court. A judge's legislatively mandated service on a judicial corrections board does not render Oriana House which operates the community-based correctional facility and program an instrumentality of the court. [The judiciary may wish to question judges' involvement on judicial corrections boards overseeing the administration of a community-based correctional facility and programs; however, that is not the subject of this opinion.]

Community-based correctional facilities serve the county—they do not exist only for the court's use. A prime example is that the adult parole authority uses community-based correctional facilities and programs for post-control release sanctions. Judges serve on the judicial corrections board that administers a community-based correctional facility and program, but the Department of Rehabilitation and Corrections has significant responsibilities with regard to a community-based correctional facility and program. The Department of Rehabilitation and Correction is responsible for preparing and providing to the Auditor of State quarterly financial reports for each community-based correctional facility and program and for each private or nonprofit entity that performs the day-to-day operation of any community-based correctional facility and program. See Ohio Rev. Code Ann. § 2301.56(E)(2) (West Supp. 2003). The division of parole and community services of the Department of Rehabilitation and Corrections has the final approval over proposals for a facility and program. The division of parole and community services licenses halfway house and community residential centers for care and treatment of adult offenders; and enters contracts for provision of housing, supervision, and other services to parolees and probationers. See Ohio Rev. Code Ann. § 5120.10(D) (West Supp 2003). If a judicial corrections board wishes to dissolve a community-based correctional facility,

the division of parole and community services must be notified of the determination. Ohio Rev. Code Ann. § 2301.51(D)(1) (West Supp. 2003).

Thus, it is the Board's view that the President/CEO and employees of Oriana House are not *judicial officials, judicial employees, or instrumentalities of the court* for purposes of Chapter 102 of the Ohio Revised Code. Whether the President/CEO and employees of Oriana House, which operates the Summit County Community Based Correctional Facility and Program, are *public officers, public employees, or instrumentalities of the state* for purposes of Chapter 102 of the Ohio Revised Code is outside this Board's advisory authority. This Board advises only that they are *not judicial officers, judicial employees, or instrumentalities of the court*.

Section 2921.42 and 2921.43 of the Ohio Revised Code.

Section 2921.42 and 2921.43 apply to public officials and public servants. As used in Sections 2921.42 and 2921.43, "[p]ublic official means any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and includes, but is not limited to, legislators, judges, and law enforcement officers." Ohio Rev Code Ann § 2921.01(A) (West Supp 2003). As used in Section 2921.43 of the Ohio Revised Code, public servant means any "public official" or "any person performing ad hoc a governmental function, including, but not limited to, a juror, member of a temporary commission, master, arbitrator, advisor, or consultant." Ohio Rev Code Ann § 2921.01(B)(1), (2) (West Supp 2003).

As expressed already by the Board, the President/CEO and employees of Oriana House are not elected or appointed judicial officers, not judicial employees, and instrumentalities of the court. Now, the Board considers whether they are "agents of the court" or "performing ad hoc judicial functions" for purposes of Sections 2921.42 and 2921.43.

The Ohio Ethics Commission has advised that

a person is an agent of a public entity for purposes of R.C. 2921.42 if all three of the following apply: (1) the individual has the authority to enter into contracts with others and thus has the authority to act on the public entity's behalf and bind the public entity; (2) the public entity exercises the right of control over the individual; and (3) the individual's contractually prescribed actions are directed toward the attainment of an objective sought by the public entity.

Ohio Ethics Commission Op. 93-013 and Op. 92-001.

The President/CEO and employees of Oriana House are not agents of the court for purposes of R.C. 2921.42. Two of three conditions of being an "agent" are not met. The President/CEO and employees of Oriana House do not have authority to bind the court by entering into contracts with others on the court's behalf. Oriana House binds itself not

the court when it enters into contracts. The court does not exercise the right of control over the President/CEO or employees of Oriana House. However, in providing community corrections programs through a community-based correctional facility and program, the actions of the President/CEO and employees of Oriana House are directed toward the attainment of an objective sought by the court and the adult parole authority—the implementation of community residential and nonresidential sanctions imposed on offenders. But, to be considered an agent, all three conditions, not just one, must be met.

The President/CEO and employees of Oriana House are not performing ad hoc judicial functions. Ad hoc means “[f]ormed for a particular purpose.” Black’s Law Dictionary 41 (7th ed. 1999). The functions of the President/CEO and the employees of Oriana House in providing chemical dependency treatment programs and community control corrections program for a community-based correctional facility and program are not ad hoc *judicial* functions. The functions of Oriana House are not the exercise of judicial power. The functions of Oriana House serve multiple purposes—chemical dependency treatments for the community at large as well as community corrections programs for offenders sentenced by the court or under post-control release sanctions by the parole board.

Thus, it is this Board’s view that the President/CEO and employees of Oriana House, which operates the Summit County Community Based Correctional Facility and Program, are *not judicial officers, not judicial employees, not agents of the court*, and are *not performing ad hoc judicial functions* for purposes of Section 2921.42 and 2921.43 of the Ohio Revised Code. Whether they are *public officials, public employees, agents of state*, or *performing ad hoc governmental functions* for purposes of Section 2921.42 and 2921.43 is a determination outside this Board’s authority.

What is the Board’s conclusion?

Ohio Ethics Law is contained in Chapter 102 and related statutes R.C. 2921.01, 2921.42, 2921.421 and 2921.43 of the Ohio Revised Code. For matters relating to judicial officers, judicial employees, and judicial candidates, the Board of Commissioners on Grievances and Discipline has advisory authority regarding the application of Chapter 102 and Sections 2921.42 and 2921.43 of the Revised Code.

The President/CEO and employees of Oriana House, which operates the Summit County Community Based Correctional Facility and Program, are not *judicial officials, judicial employees, or instrumentalities of the court* for purposes of Chapter 102 of the Ohio Revised Code. Whether the President/CEO and employees of Oriana House, which operates the Summit County Community Based Correctional Facility and Program, are *public officers, public employees, or instrumentalities of the state* for purposes of Chapter 102 of the Ohio Revised Code is a determination outside this Board’s advisory authority.

The President/CEO and employees of Oriana House, which operates the Summit County Community Based Correctional Facility and Program, are not *judicial officers, judicial employees, agents of the court, or performing ad hoc judicial functions* for purposes of

Section 2921.42 and 2921.43 of the Ohio Revised Code. Whether they are *public officials, public employees, agents of state, or performing ad hoc governmental functions* for purposes of Section 2921.42 and 2921.43 is a determination outside this Board's advisory authority.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.