

OHIO ETHICS COMMISSION

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INFORMATION SHEET: ADVISORY OPINION NO. 2001-08 **DISCOUNT TO PUBLIC OFFICIALS AND EMPLOYEES**

What is the question addressed in the opinion?

Do the Ohio Ethics Law and related statutes prohibit a private company that does business with, or is regulated by, public agencies from offering a discount on its goods or services, which is a uniform percentage off the price that it offers to the general public at fixed and identical terms for all customers, to public officials and employees if some of the officials or employees possess the authority to affect their agency's future purchases of goods or services from, or regulatory matters affecting, the company?

What is the answer in the opinion?

A company is not prohibited from offering a uniform discount to a large class of individuals comprised of public officials and employees, even if some members of the class serve agencies that purchase goods and services from, or regulate, the company.

A company that does business with, or is regulated by, public agencies is prohibited from offering a discount that is limited to individual public officials or employees with the authority to affect the company's financial interests, or that are selective, differential, or in disproportion to the discounts provided to all other officials and employees who comprise the class that is eligible for the discount.

To whom does this opinion apply?

The opinion applies to any private company within the state of Ohio that provides goods and services to the general public at terms that are fixed and identical for all customers.

How and when did the opinion become effective?

The opinion became effective upon acceptance by the Ethics Commission.

For More Information, Please Contact:

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IT IS NOT AN ETHICS COMMISSION ADVISORY OPINION.
ADVISORY OPINION NO. 2001-08 IS ATTACHED.**

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Advisory Opinion
Number 2001-08
November 16, 2001

Syllabus by the Commission:

- (1) Division (F) of Section 102.03 and Division (A) of Section 2921.43 of the Revised Code do not prohibit a company from promising or giving a uniform discount on its goods or services to a large class of individuals comprised of public officials and employees, as described in this opinion, even if some members of the class serve public agencies that either purchase goods and services from, or regulate, the company;
- (2) Division (F) of Section 102.03 of the Revised Code prohibits a company that does business with, or is regulated by, public agencies from promising or offering a discount on its services that is limited to individual public officials or employees who have official duties and responsibilities that affect the financial interests of the company, or which are selective, differential, or in disproportion to the benefits provided to all other public officials and employees who comprise the class, as described in this opinion, that is eligible for the discount.

* * * *

You state that your company sells goods and services to individuals, as well as to private businesses and public agencies. You ask whether the Ohio Ethics Law and related statutes prohibit your company from offering a discount to a large class of public officials and employees who purchase your company's goods or services for their private individual use.

The proposed discount is a uniform percentage off the price of goods or services that your company otherwise makes available to the general public at terms that are fixed and identical for all customers. You explain that the practice of your company giving a discount on its services will not be limited to public employers; your company has offered similar discounts to private employers whenever the particular employer has a large presence in a particular community. The potential recipients of the discount you contemplate include public employees and elected and appointed public officials.

Your company proposes to offer the discount uniformly to a large class of potential customers, such as all public officials and employees, all officials and employees of the state university near your business, all state officials and employees, or all of the officials and employees of the city or county where your business is located. Some of these officials and employees possess the authority to approve the expenditure of public funds for the purchase of your company's goods and services for the use of their public agency. In addition, some of the officials and employees would have discretionary decision-making authority to determine whether to purchase services from your company for the use of their public agency—such as purchasing agents and office managers. However, your company's employees would not, at the time of a purchase, know whether the public official or employee using the discount has discretionary decision-making authority to affect either his or her public agency's future purchases of goods or services from, or regulatory matters affecting, your company.

You emphasize that your company's motive for offering and giving the discounts to a large class of individuals comprised of public officials and employees is to develop good will among consumers in a geographical area that has a high concentration of public offices. Finally, you state that neither you, nor any of the company's owners and officers or their family members, hold elective office, appointed positions, or are employed by any public agency with which the company does business.

Promising or Giving Anything of Value

Your attention is directed to R.C. 102.03(F), which reads:

No person shall promise or give to a public official or employee anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

The term "person" is defined to include any individual, corporation, partnership, association, or other similar entity. R.C. 1.59. A private company is a "person," subject to the prohibitions in R.C. 102.03(F). Ohio Ethics Commission Advisory Opinion No. 90-001. The term "public official or employee" is defined, for purposes of R.C. 102.03, to include any person who is elected or appointed to an office or is an employee of any public agency. R.C. 102.01(B) and (C).

The term "anything of value" is defined, for purposes of R.C. 102.03, to include money, goods and chattels, and every other thing of value. R.C. 1.03; 102.01(G). The Ethics Commission has held that a discount on a retail sale constitutes a thing of value for purposes of R.C. 102.03. Adv. Op. No. 92-015. The discount that your company proposes to give to public officials and employees is a uniform percentage off the price of goods or services that your company makes available to the general public at terms that are fixed and identical for all customers. The proposed discount is a thing of value for purposes of R.C. 102.03(F). Id.

The issue becomes whether the proposed discounts are things of value that are of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties for purposes of R.C. 102.03(F).

For purposes of R.C. 102.03(F), the Ethics Commission has held that a party that is interested in matters before, regulated by, or doing or seeking to do business with, a public agency is an improper source to provide things of value to officials and employees of that public agency. Adv. Op. No. 95-001. In Advisory Opinion No. 84-010, the Ethics Commission explained the inherent conflict confronting a public official or employee who receives a thing of value from an improper source. In that opinion, the Commission held:

The receipt of something of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with the agency with which the public official or employee serves is of such [a] character as to manifest a substantial or improper influence upon the public official or employee with respect to his official duties, because it could impair his independence of judgment in the performance of his duties and affect subsequent decisions in matters involving the donor of the thing of value. (Emphasis added.)

However, the Ethics Commission has determined that, in some narrow circumstances, an official or employee may be able to withdraw from consideration of matters concerning parties who are interested in matters before, regulated by, or doing or seeking to do business with his own public agency, if the withdrawal is approved by the official's or employee's appropriate supervisor and does not result in a hardship for the public agency. See Adv. Ops. No. 89-006 and 93-015. If such a withdrawal is possible, it may allow the official or employee to accept something of value that would ordinarily be of such a character as to manifest a substantial and improper influence upon the official or employee with respect to his duties, and therefore prohibited by R.C. 102.03(E). Adv. Op. No. 90-002.

Because the proposed discount will be offered uniformly to a large class of public officials and employees, some officials and employees who could take advantage of the discount possess authority to approve the expenditure of public funds for purchases from your company and others would have discretionary decision-making authority to determine whether to purchase services from your company. Also, your company will be in a continuous regulatory relationship with some public agencies with regard to such matters as building, safety, and environmental codes; zoning; public infrastructure maintenance and improvements; and taxation. It is clear that decisions regarding such regulatory matters can affect the financial interests of your company as directly as a decision to purchase your company's services. Again, within the large class of officials and employees to whom you propose extending this discount are individuals who would participate in the regulation of your company.

Therefore, the facts of your situation clearly demonstrate that, for purposes of the application of the Ethics Law and the Commission precedent, your company is a "prohibited source" of discounts offered to public officials and employees who possess the authority to decide matters affecting the financial interests of your company.

In Advisory Opinion No. 92-015, the Commission considered the issue of discounts offered on a selective basis to specific public officials and employees. The Commission was asked whether the Ohio Ethics Law and related statutes prohibited a retailer located in a city from offering substantial discount cards to members of the police force in the city. In that opinion, the Commission concluded:

In the instant situation, since the retailer is located within the city and offers the discount to members of the city police department as a community service acknowledgement and recognition to the members of the police department, the discount is being provided to the members of the police department as consideration for services the members are required to provide as duties of their public employment. Therefore, the discount is of an improper character.

...

R.C. 102.03 (D) and (E) prohibit members of the city police department from soliciting, accepting, or using the authority or influence of their office or employment to secure anything of value which is not nominal or de minimis from the retailer. (Citations omitted.) R.C. 102.03 (F) prohibits the retailer from promising or giving anything of value which is not nominal or de minimis to members of the city police department.

Adv. Op. No. 92-015.

Therefore, R.C. 102.03(F) would prohibit you from promising or giving discounts of a substantial value to specific public officials and employees who perform duties in their public employment related to your business. However, in this situation, the discounts are not being offered on a selective basis to specific employees with whom your company has either business or regulatory dealings. As stated above, the proposed discounts will be offered to a large class comprised of public officials and employees regardless of the public duties performed by those officials and employees.

You state that your company's offer of the proposed discounts is unrelated to the performance of the official duties entrusted to the public officials and employees who may desire to purchase, through a private transaction, your company's services. Rather, your company's motive for offering and giving the discounts to a class of individuals comprised of public officials and employees is to develop a larger pool of consumers in a geographical area. See R.C. 2921.43(A) (set forth below). Further, as stated above, the discounts are fixed and identical for all of the public officials and employees in the large class, and the public officials and employees that decide matters affecting the financial interests of your company would not receive selective, differential, or disproportionate financial benefits to the benefits provided to all other public officials and employees in the class.

Thus, unlike the situation considered in Advisory Opinion No. 92-015, the promise or offer of the proposed discounts could not manifest a substantial and improper influence upon the public officials and employees with respect to their duties. Therefore, R.C. 102.03(F) does not prohibit your company from promising or giving a uniform discount on its services to a large class of public officials and employees, even though some members of the class serve public agencies that do business with, or regulate your company. In addition, R.C. 102.03(E) does not prohibit any public official or employee—including a public official or employee who performs official duties that affect decisions involving the financial interests of your company—from accepting such a discount as long as the official or employee does not use his or her authority over your company in any way to secure the discount.

It must be stressed, however, that a promise or offer of a discount that is limited or specifically directed to individual public officials or employees who have public duties and responsibilities that affect the financial interests of your company, or that is selective, differential, or in disproportion to the benefits provided to all other public officials and employees who comprise the eligible class, is a promise or offer of a thing of value that could manifest a substantial and improper influence upon the public officials and employees with respect to their duties. See Adv. Ops. No. 82-005 and 92-015. In such a situation, R.C. 102.03(F) would prohibit your company from promising or offering such discounts and R.C. 102.03(E) would prohibit those public officials and employees from accepting them.

Supplemental Compensation—R.C. 2921.43(A)

Also relevant to your question is R.C. 2921.43(A), which provides:

- (A) No public servant shall knowingly solicit or accept and no person shall knowingly promise or give to a public servant either of the following:
 - (1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform his official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation;
 - (2) Additional or greater fees or costs than are allowed by law to perform his official duties.

The term "public servant" is defined for purposes of R.C. 2921.43 to include any elected or appointed officer, employee, or agent of the state or any political subdivision, or anyone performing ad hoc a governmental function. Thus, elected and appointed officers and employees of state and local public agencies are subject to the prohibitions of R.C. 2921.43. The term "person" is defined to include any individual, corporation, partnership, association, or other similar entity. R.C. 1.59. Therefore, your company is subject to the prohibition imposed by R.C. 2921.43(A)(1).

R.C. 2921.43(A)(1) prohibits any person from promising or giving to public servants "compensation," other than as allowed by R.C. 102.03(G) through (I) or other provision of law, for: (1) performing any duty, act, or service required in their official capacity as public servants; (2) the general performance of their public duties; or (3) as a supplement to their public compensation. Adv. Op. No. 90-001. The exceptions set forth in R.C. 102.03(G) through (I) concern campaign contributions, and under certain circumstances, honoraria and travel, meal, and lodging expenses incurred in connection with a personal appearance or speech, or attendance at conferences, seminars, and similar events, and are not applicable to your question.

Since 1986, the Ethics Commission has interpreted R.C. 2921.43(A) in several advisory opinions. In Advisory Opinion No. 89-012, the Commission held that R.C. 2921.43(A) prohibits a city law director from receiving supplemental compensation to represent the city school district, because the law director is statutorily required to represent the city school district as a part of his duties. In Advisory Opinion No. 89-013, the Commission stated that state employees are prohibited from receiving travel, meal, and lodging expenses from a vendor, because the expense payments would constitute supplemental compensation for the employees traveling to conduct state business. Also, in Advisory Opinion No. 91-010, the Commission stated that a public official or employee is prohibited from using frequent flyer benefits earned through travel on state business, because the benefits would constitute additional compensation for the official or employee.

By comparison, the Commission concluded, in Advisory Opinion No. 92-014, that a public servant is not prohibited from accepting rideshare incentives purchased with grant money provided by a regional planning commission to his public employer since the incentives are provided for the public servant's commute to and from work and are not given for the performance of his official duties, for the performance of any act or service within his public capacity, or for the general performance of the duties of his public employment. See also State v. Capko, Cuyahoga App. No. 56814, unreported, 1990 LEXIS 1287 (March 28, 1990) (R.C. 2921.43(A) prohibits a public servant from receiving things of value for properly performing his public duties).

The issue becomes whether the discount that your company proposes to offer would be considered additional compensation for the performance of official duties of the public officials or employees to which it is offered. The word "compensation" is not defined for purposes of R.C. Section 2921.43. In Advisory Opinion No. 92-014, the Ethics Commission held:

A primary rule of statutory construction is that words used in a statute must be construed according to rules of grammar and common usage. See R.C. 1.42. Furthermore, statutes "must be construed in the light of the mischief they are designed to combat." City of Mentor v. Giordano, 9 Ohio St. 2d 140, 144 (1967). "Compensation" is defined as "payment for services: esp., wages or remuneration." See Webster's New World Dictionary 289 (2nd College Ed. 1972).

Prior to the time that the Ohio Ethics Commission was empowered to interpret R.C. 2921.43, the Attorney General, in Att'y Gen. Op. No. 84-019, addressed the prohibition of R.C. 2921.43(A)(1). The opinion holds, in pertinent part:

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. . . . 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").

See also State v. Livesay, 91 Ohio Misc. 208 (Jackson County February 19, 1988).

As set forth above, your company proposes to offer the discount on the private purchases of your company's services uniformly to a large class comprised of public officials and employees with the motive of developing good will among consumers in a geographical area that has a high concentration of public offices. It is apparent that the discount is not being promised or offered as an exchange in return for some obligation by the public officials and employees in the performance of their official duties. Therefore, R.C. 2921.43(A) does not prohibit your company from offering a discount on the sale of your company's services to a large class of public officials and employees, despite the fact that the class includes officials and employees who perform official duties that affect decisions involving the financial interests of your company.

However, it must be stressed that R.C. 2921.43(A) prohibits a company from giving any public servant any item, regardless of its value, that is intended to be an exchange in return for the performance of a public servant's public duties. For example, a television set, trip, or discount provided to a public servant with the intent of developing good will, so that the public servant will favor a particular vendor when purchasing items on behalf of his public employer, is consideration (television set or trip) given to a public servant for performing his public duties (purchasing). In Advisory Opinion No. 92-015, the Commission concluded that discounts provided by a city retailer to members of the city police department, as a community service acknowledgement and in recognition of the members of the police department was "supplemental compensation," because it was provided for the general performance of the public duties rendered by members of the city police department and as a supplement to their public compensation. Therefore, the Commission concluded that R.C. 2921.43(A) prohibited a member of a city police department from receiving a discount provided to the employee in specific acknowledgment and recognition of the work performed by the public employees. Adv. Op. No. 92-015.

Your question may also raise issues concerning local ordinances, charters, administrative rules, or in-house policies that are independent of the Ohio Ethics Law and related statutes and that may impose a broader prohibition upon the receipt of a thing of value or supplemental compensation by a public official or employee than those explained above with respect to the Ohio Ethics Law. You may wish to seek information from the specific public agency regarding the existence of additional restrictions.

Finally, this opinion does not consider the issue of discounts offered to public officials and employees of a specific public agency as a result of, or in connection with, a negotiated contract between a vendor and the agency. The application of the Ethics Law to those situations, particularly with respect to the officials and employees directly involved in the negotiation or authorization of the contract, will differ from the application of the Ethics Law to the situation presented in this opinion.

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (F) of Section 102.03 and Division (A) of Section 2921.43 of the Revised Code do not prohibit a company from promising or giving a uniform discount on its goods or services to a large class of individuals comprised of public officials and employees, as described in this opinion, even if some members of the class serve public agencies that either purchase goods and services from, or regulate, the company; and (2) Division (F) of Section 102.03 of the Revised Code prohibits a company that does business with, or is regulated by, public agencies from promising or offering a discount on its services that is limited to individual public officials or employees who have official duties and responsibilities that affect the financial interests of the company, or which are selective, differential, or in disproportion to the benefits provided to all other public officials and employees who comprise the class, as described in this opinion, that is eligible for the discount.



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