



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

Advisory Opinion Number 92-015
October 9, 1992

Syllabus by the Commission:

(1) Division (A)(1) of Section 2921.43 of the Revised Code and Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit members of a city police department from accepting a discount which a retailer located within the city offers to them as a community service acknowledgement and recognition for performing the duties of their public employment;

(2) Division (A)(1) of Section 2921.43 of the Revised Code and Division (F) of Section 102.03 of the Revised Code prohibit a retailer which is located within the city from promising or giving a discount to members of the city police department as a community service acknowledgement and recognition for performing the duties of their public employment.

* * * * *

You have asked whether the Ohio Ethics Law and related statutes prohibit members of a city police department from accepting a 10% discount from a retailer located within the city who offers the discount to members of the police department as a community service acknowledgement and recognition for the performance of their duties.

You state that the retailer operates a small chain of stores which sell general household merchandise including appliances, televisions, and furniture. You also state that the members of the city police department provide no special services to the retailer in exchange for the 10% discount.

Your attention is first directed to R.C. 2921.43 (A)(1), which provides:

(A) No public servant shall knowingly solicit or accept and no person shall knowingly promise or give to a public servant . . . 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.

The term "public servant" is defined for purposes of R.C. 2921.43 to include any employee of a political subdivision of the state. See R.C. 2921.01 (A) and (B)(1). Thus, a member of the city police department is a "public servant" who is subject to the prohibitions of R.C. 2921.43.

R.C. 2921.43 (A)(1) prohibits a public servant from soliciting or accepting any "compensation," other than as allowed by R.C. 102.03 (G)-(I) or other provision of law, for: (1) performing any duty, act, or service required in his official capacity as a public servant; (2) the general performance of his duties; or (3) as a supplement to his public compensation. See Ohio Ethics Commission Advisory Opinion No. 92-014. R.C. 2921.43 (A)(1) also prohibits any person from promising or giving to public servants "compensation," other than as allowed by R.C. 102.03 (G)-(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. See Advisory Opinion No. 90-001. The term "person" is defined to include any individual, corporation, partnership, association, or other similar entity. See R.C. 1.59. The prohibition imposed by R.C. 2921.43 (A)(1) applies to the retailer who offers the discount to members of the police department.

The exceptions set forth in R.C. 102.03 (G) to (I) concern campaign contributions, honoraria or fees for making a personal appearance or speech, and travel, meal and lodging expenses incurred in connection with the personal appearance or speech or conferences, seminars, and similar events. A discount offered by a retailer does not fall within these exceptions. Also, no other provision of law provides for members of a city police department to accept a discount from a retailer.

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).

R.C. 2921.43 addresses situations where a public servant would receive compensation other than as provided by law which is given to him for any one of three reasons. In order to fall within the prohibitions of R.C. 2921.43, the compensation must be provided to the public servant for: (1) performing a duty, act, or service required in his official capacity as a public servant; (2) the general performance of his public duties; or (3) as a supplement to his public compensation. See Advisory Opinions No. 89-012 (payment for legal services required to be performed by a law director), 89-013 (travel, meal, and lodging expenses for travel on state business) and 91-010 ("frequent flyer" benefits earned through travel on state business). Cf. Advisory Opinion No. 92-014 (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).

You have stated that the retailer is located within the city and provides the 10% discount to members of the city police department as a community service acknowledgement and recognition of the members of the police department, but that the members of the city police department provide no special services to the retailer as consideration for receiving the discount. Therefore, the discount is not intended to be provided to the members of the city police department in exchange for the performance of a particular duty, act, or service which is required to be performed by members of the city police department. However, it is apparent that the discount is 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, a member of the city police department who receives a discount which is provided as a community service acknowledgment would realize a personal pecuniary benefit or gain from the discount and thus, would receive "compensation" other than as allowed by law for the general performance of his public duties and as a general supplement to his public compensation.

Prior to the enactment of Am. Sub. H.B. 300, 116th Gen. A. (1986) (eff. September 17, 1986) authorizing the Ohio Ethics Commission to issue advisory opinions interpreting R.C. 2921.43, the Attorney General, in Ohio Op. Att'y Gen. No. 84-019, addressed the prohibition of R.C. 2921.43 (A)(1) holding, 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 for 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 Baker v. West Carrollton, 64 Ohio St. 3d 446 (1992) (common-law principles regarding a finder's claim to lost property do not govern the disposition of lost property recovered by a municipal police officer).

Accordingly, R.C. 2921.43 (A)(1) prohibits members of a city police department from accepting a discount which a retailer located within the city offers to them as a community service acknowledgement and recognition for performing the duties of their public employment. Also, R.C. 2921.43 (A)(1) prohibits the retailer from promising or giving a discount to members of the city police department as a community service acknowledgement and recognition for performing the duties of their public employment. See Advisory Opinion No. 90-001. R.C. 2921.43 (A)(1) requires that members of the city police department receive only the compensation as allowed by law for the performance of the duties of their public employment. See Advisory Opinions No. 89-012, 89-014, 91-010, and 92-014.

Your attention is also directed to Divisions (D), (E), and (F) of R.C. Section 102.03, which provide:

(D) No public official or employee shall use or authorize the use of the authority or influence of his office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

(E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

(F) 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 him with respect to his duties.

The term "public official or employee" is defined for purposes of R.C. 102.03 to include any employee of a city. See R.C. 102.01 (B) and (C). Therefore, members of the city police department are "public officials or employees" for purposes of R.C. 102.03 (D), (E), and (F).

As described above, the term "person" is defined to include any individual, corporation, partnership, association, or other similar entity. See R.C. 1.59. Accordingly, the prohibition imposed by R.C. 102.03 (F) applies to the retailer who would promise or give the discount to members of the city police department.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money, goods and chattels, and every other thing of value. See R.C. 1.03, 102.01 (G). The Ethics Commission has held that gifts, gratuities, and loans constitute things of value for purposes of R.C. 102.03. See Advisory Opinion No. 86-003. See also Advisory Opinions No. 79-006, 80-004, 84-010, 86-011, 87-005, 87-007, 89-013, 89-014, and 90-001.

The Ethics Commission has consistently held that R.C. 102.03 (D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his office or employment to secure anything of value, or the promise or offer of anything of value, as consideration for services which are his duty to provide as part of his official duties. See Advisory Opinions No. 84-012 and 85-014. Conversely, R.C. 102.03 (F) would prohibit persons from promising or giving anything of value to a public official or employee as consideration for services which the official or employee is required to provide as part of his official duties. See generally Advisory Opinion No. 90-001. 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.

The Ethics Commission has consistently held that a definite and particular pecuniary benefit to a person which is not nominal or de minimus is considered to be "substantial" for purposes of Section R.C. 102.03. See Advisory Opinions No. 86-003, 89-014, 90-001, and 92-014. The Commission has determined that, for purposes of R.C. 102.03, the word 'substantial' means "of or having substance, real, actual, true, not imaginary; of considerable worth or value; important." Advisory Opinion No. 89-014 (quoting Advisory Opinions No. 75-014 and 76-005). See also Advisory Opinions No. 86-011 (a meal provided to a public official or employee in conjunction with a speech is not generally of substantial value) and 92-014 (one tee-shirt given to a public official or employee by a regional transit authority as an incentive to encourage commuter ridesharing is not a substantial thing of value.) However, even if an individual item is nominal or de minimus, the Commission has explained that a quantity of de minimus or nominal items could have a substantial cumulative value for the official or employee if their receipt by the official or employee extends over time. See Advisory Opinions No. 86-003, 89-014, and 92-014.

It must be emphasized that the requirement that a thing of value be "substantial" applies to Division (F) as well as Divisions (D) and (E). As explained above, items which are de minimus or nominal could have a substantial cumulative value for the official or employee if their receipt by the official or employee extends over time. In the same manner, for purposes of Division (F), there would be a substantial cumulative value if a person promises or gives a quantity of de minimus or nominal things of value to a group of public officials or employees either at once or over a period of time. In other words, the aggregate value of the items which a person provides to public officials or employees may be considered for purposes of Division (F).

In the instant situation, since the retailer sells general household merchandise including appliances, televisions, and furniture, it is apparent that the 10% discount which the retailer offers to individuals while they serve as members of the city police department, would be substantial rather than nominal or de minimus in nature.

In the instant situation, 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 minimus from the retailer. See Advisory Opinions No. 86-011, 87-006, 87-009, 89-002, 89-006, 89-013, 89-014, and 92-014. R.C. 102.03 (F) prohibits the retailer from promising or giving anything of value which is not nominal or de minimus to members of the city police department. See Advisory Opinion No. 90-001. However, it must be noted that R.C. 2921.43 (A)(1) prohibits a public servant from accepting, and a person from giving to a public servant, compensation for the performance by the public servant of a specific act or service, the general performance of the public servant's duties, or as a supplement to the public servant's public compensation even if the compensation is nominal or de minimus for purposes of R.C. 102.03 (D) and (E).

Your attention is directed to Advisory Opinion No. 89-002 which addresses a related issue. In Advisory Opinion No. 89-002, the Ethics Commission was asked whether the Ohio Ethics Law and related statutes prohibit private companies, which are regulated by the Industrial Commission, from donating industrial and safety equipment to the Industrial Commission. The Ethics Commission recognized that R.C. 9.20 authorizes the State to "receive by gift, devise, or bequest moneys, lands, or other properties," and held that R.C. 102.03 does not prohibit private

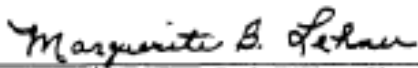
companies, which are regulated by the Industrial Commission, from donating industrial and safety equipment to the Industrial Commission provided that no officials or employees of the Industrial Commission would benefit personally from the donated equipment. See also Advisory Opinion No. 86-003.

The Commission explained in Advisory Opinion No. 89-002 that the General Assembly, by enacting R.C. 9.20, expressed an evident intent that the State be permitted to receive donations from outside sources and that in the absence of express statutory language to the contrary, the Ethics Commission will not interpret the statutes under its jurisdiction in a manner which disturbs the intent of other provisions of the Revised Code. However, the Commission warned in that advisory opinion that the prohibitions of the Ethics Law would be implicated if public officials or employees would personally benefit from the donation or if the donation were made to pay the expenses of public officials or employees. See also Advisory Opinion No. 89-013. The Ethics Commission also cautioned in Advisory Opinion No. 89-002 that an appearance of impropriety would be created if a party makes donations to a public agency and the agency accepts the donation where a specific case is pending before the agency involving that party, or where it could be reasonably foreseen that an action will come before the agency.

The provisions of R.C. 9.20 are also applicable to "a municipal corporation or the legislative authority, a board, or other officers thereof." Therefore, in light of the provisions of R.C. 9.20, R.C. 102.03 (F) and R.C. 2921.43 do not prohibit a retailer who wishes to make a community service acknowledgement in recognition of the services provided by the city police department from making a donation to the city police department; however, the donation must be for the general accommodations and operation of the city police department. R.C. 102.03 (D) and (E) and R.C. 2921.43 prohibit members of the city police department from benefiting personally from any donation presented to the city police department.

You have stated that the retailer has been providing discounts to members of the City Police Department since the late 1960's. Generally, an advisory opinion from the Ethics Commission or its staff is written in response to a hypothetical or prospective question. See Advisory Opinion No. 75-037. The Commission has explained that its function in rendering advisory opinions is not a fact-finding process. Id. Also, the Commission cannot, in rendering an advisory opinion, determine whether the law has been violated. Id. Rather, an advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes and sets forth the standards and criteria which must be observed in order to avoid a violation of the law in a given set of circumstances. See Advisory Opinions No. 75-037, 90-013, and 92-003. If a question is raised with regard to activity which has already occurred, the Commission can only act through its confidential investigative function to determine whether there are facts indicating that the Ethics Law may have been violated and to refer those matters required for prosecution. See Advisory Opinion No. 92-003. However, the Ethics Commission has issued advisory opinions in limited instances where a practice has existed for many years and public officials and employees have relied on past practices without the guidance of precise and uniform legal precedence addressing the specific issue. See, e.g., Advisory Opinion No. 91-010 (the acceptance or use by a public official or employee of discounted or free "frequent flyer" airline tickets earned through travel on state business).

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (A)(1) of Section 2921.43 of the Revised Code and Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit members of a city police department from accepting a discount which a retailer located within the city offers to them as a community service acknowledgement and recognition for performing the duties of their public employment; and (2) Division (A)(1) of Section 2921.43 of the Revised Code and Division (F) of Section 102.03 of the Revised Code prohibit a retailer located within the city from promising or giving a discount to members of the city police department as a community service acknowledgement and recognition for performing the duties of their public employment.



Marguerite B. Lehner, Chair
Ohio Ethics Commission