



OHIO ETHICS COMMISSION

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Advisory Opinion Number 95-005

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Syllabus by the Commission:

Division (E) of Section 102.03 of the Revised Code and Division (A) of Section 2921.43 of the Revised Code do not prohibit officials and employees of the Department of Education from accepting the payment or reimbursement of expenses from a nonprofit organization to which the Department pays membership dues, and collaboratives created by the nonprofit organization, where the Department personnel serve as representatives of the Department to guarantee the development of educational products, for the acquisition and use by the Department and for the benefit of the public, by contractors who are engaged by the non-profit organization.

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You have asked whether the Ohio Ethics Law and related statutes prohibit Department of Education (Department) personnel from accepting the payment or reimbursement of expenses related to travel, meals, and lodging from the Council of Chief State School Officers (Council). Specifically, you ask this question regarding Department personnel in two situations. You state that Department personnel serve as representatives: (1) to the Council; and (2) to collaboratives that are organized by the Council.

As explained below, the Ohio Ethics Law and related statutes do not prohibit Department personnel, who serve as representatives of the Department to the Council, and to collaboratives that are organized by the Council, from accepting the payment or reimbursement of expenses related to travel, meals, and lodging from the Council under the circumstances described.

The Council of Chief State School Officers

You have provided the Ethics Commission with a description of the Council and its operation. In summary, the Council is a nationwide, nonprofit organization comprised of the directors of the departments of elementary and secondary education in the United States. The Council seeks ideas from its members on educational issues and communicates their collected views to interested parties and the public. The Council researches issues pertinent to education and disseminates information to its members. The Council provides opportunity for the professional growth of its members by arranging seminars, programs, and educational travel. The Department pays annual dues to the Council and assigns its personnel to serve as Department representatives to Council functions.

Collaboratives formed by the Council

The Council has formed collaboratives for states to share their expertise and resources on specific educational issues. Through these collaboratives, educational exercises and products are developed for the use and benefit of the member states more economically than an individual state could develop them on its own. A state pays additional dues to the Council to belong to a collaborative. In addition, outside sources, such as a nonprofit foundation, may support a collaborative by providing funding to augment the dues that are paid by the member states. The member states' dues cover the travel expenses of representatives from each state to serve on a design team and attend meetings and seminars concerning the collaborative.

The educational exercises and materials are developed for the use and benefit of the member states by contractors who are engaged by the collaborative. The Council writes requests for proposals for the collaborative and submits the proposals from contractors to the member states for their review. Upon approval by the member states, the Council authorizes the contractor to produce the educational exercises and materials as specified. The Council, on behalf of the states, holds the copyright on the developed product. The contractor who develops the products for the member states does not sell the products to outside parties.

The Department belongs to two of the Council's collaboratives. One collaborative involves the development of a science program. The Department paid dues of \$50,000 to participate in Phase I of the science collaborative and will pay \$70,000 in dues to participate in Phase II of the collaborative. The other collaborative involves the development of assessment resources for reading, writing, and mathematics for students in kindergarten through the third grade. The Department paid dues of \$40,000 to participate in Phase I, and will pay \$40,000 in dues to participate in Phase II, of this collaborative. The Department is expected to pay \$200,000 in dues to participate in these collaboratives over four years. As a member of the collaboratives, the Department has access to all educational products developed through the collaboratives without additional charge and can use the products any way it chooses. You state that the Department will obtain at least two million dollars in education exercises and materials as a result of participating in the collaboratives.

Issue No. 1: Expenses for Department Personnel Serving on Collaboratives

You ask whether Department personnel who serve on a design team and attend meetings and seminars of a collaborative formed by the Council may accept the payment or reimbursement of expenses related to travel, meals, and lodging from the Council. These personnel serve as representatives of the Department on the design team and collaborative in order to guarantee the development of educational exercises and materials for use by the Department.

Analysis: Substantial and Improper Things of Value

The payment or reimbursement of expenses related to travel, meals, and lodging by the Council to the Department's personnel implicates R.C. 102.03 (E), which reads as follows:

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.

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). The term "public agency" is defined to include the general assembly, all courts, any department, division, institution, board, commission, authority, bureau, or instrumentality of the state or its political subdivisions, and any other governmental entity. R.C. 102.01 (C). Personnel of the Department of Education are public officials and employees for purposes of R.C. 102.03 (E).

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 1.03, 102.01 (G). The Ethics Commission has held that conference registration fees, honoraria, travel, meal, and lodging expenses, and other similar payments and reimbursements are things of value for purposes of R.C. 102.03 (E). Ohio Ethics Commission Advisory Ops. No. 86-011 and 87-005. The Ethics Commission has held 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 Op. No. 89-014 (quoting Advisory Ops. No. 75-014 and 76-005). See also Advisory Op. No. 86-011 (a meal provided to a public official or employee in conjunction with giving a speech that provides information about his public agency is not generally of substantial value). In the instant situation, it is apparent that the payment or reimbursement to Department personnel of expenses related to travel, meals, and lodging from the Council is substantial. The Ethics Commission has consistently held that R.C. 102.03 (E) prohibits a public official or employee from accepting or soliciting anything of value, or the promise or offer of anything of value, from a party that is doing or seeking to do business with, regulated by, or interested in matters before, the agency with which he serves. See Advisory Ops. No. 86-011, 87-005, 87-007, 89-013, 89-014, 91-010, 92-015, 92-018, and 95-001. The Commission has held, in these situations, that the party's interests depend upon the discharge of the official's or employee's responsibilities and the direct or indirect payment of expenses to an official or employee by the party could impair the official's or employee's objectivity and independence of judgment in future matters affecting the party. See Advisory Ops. No. 86-011 and 92-018.

The Ethics Commission has held that R.C. 102.03 (E) prohibits a public official or employee from receiving expenses where the official or employee is performing a function that is directly related to his public duties, such as conducting an inspection, providing information about his agency, or attending a conference or seminar for his professional development. See Advisory Ops. No. 86-011 and 92-018, respectively. The Commission has held that public officials and employees are prohibited from accepting expenses from a prohibited source even if the expenses are paid as reimbursements to the official's or employee's public agency. Advisory Ops. No. 89-013 and 92-018. The Commission has held that R.C. 102.03 (E) prohibits public officials and employees from receiving expenses from a vendor, even if the agency enters into a written agreement with the company stating that the agency is under no obligation to purchase the company's products or services if the agency's officials and employees accept the company's payment of expenses, because it does not negate the potential impairment of the objectivity and

independence of judgment of an official or employee in matters affecting the company. Advisory Op. No. 89-014.

Also, the Ethics Commission has held that R.C. 102.03 (E) prohibits a public official or employee from receiving expenses from a vendor even where the public agency purchases the goods and services pursuant to competitive bidding and the company which is offering to furnish the expenses has submitted the lowest bid. Advisory Op. No. 90-001. The Commission has held that a public official or employee who is entrusted with formulating bid specifications, determining what is to be provided, advertising the bids, evaluating the goods and services offered by the vendors, and deciding what is the lowest and best bid must act with complete objectivity and independence of judgment. Id. A competitive bidding process does not negate the potential impairment of an official's or employee's objectivity and independence of judgment in matters affecting the vendor that is offering to provide the expenses. Id.

In addition to the prohibition against accepting an improper thing of value, it must be noted that R.C. 102.03 (D) prohibits a public official or employee from authorizing 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, from a party that is doing or seeking to do business with, regulated by, or interested in matters before, the agency with which he serves. See Advisory Ops. No. 79-002, 79-006, 80-004, 84-010, 87-007, 89-013, 89-014, 91-010, 92-015, and 92-018.

The Ethics Commission has, however, recognized an exception to the prohibition imposed by R.C. 102.03 (E) against a public agency receiving expenses from a vendor for the travel expenses of the agency's officials and employees. The Commission has held that R.C. 102.03 (E) does not prohibit a public agency from accepting expenses from a vendor provided that the public agency's bid specifications and the contract between the agency and the vendor mandate that the vendor will provide necessary expenses to the agency's officials and employees for official business purposes. Advisory Op. No. 87-007.

The Commission explained that if a public agency stipulates in a bid specification that the successful vendor will provide expenses to the public agency's officials and employees, then vendors will include the cost of providing the expenses in their bid proposals. Id. In such a situation, the expenses will not be of such a character as to manifest a substantial and improper influence upon the agency's officials and employees since the public agency actually bears the cost of the vendor providing the expenses. Id. However, the Commission warned that the receipt of expenses in excess of what is necessary for conducting essential official business would be prohibited by R.C. 102.03 (E). Id. See also Advisory Op. No. 86-011.

Analysis: Travel Expenses for Department Personnel Serving on Collaboratives

You ask whether the Department's membership in the Council and its collaboratives for the development of educational exercises and materials for the Department's use and benefit constitutes the Department "doing business with" the Council for purposes of the prohibition imposed by R.C. 102.03 (E). As explained above, the prohibition imposed by R.C. 102.03 (E) is designed to prevent the creation of a situation where an official's or employee's objectivity and independence of judgment could be impaired regarding future matters affecting a party that is

doing or seeking to do business with the official's or employee's agency. For example, a dispute could arise between a public agency and a vendor after the delivery of the goods or services to the public agency regarding the quality of the final product. If officials and employees of the public agency had received expenses from the vendor, their objectivity and independence of judgment could be impaired with regard to their recommendations to their public agency concerning the actions to be taken against the vendor.

It must be noted that the expenses of Department employees who serve on the collaboratives are not paid, either directly or indirectly, by the contractor who develops the educational products. The dues that the Department pays to the Council to belong to a collaborative cover the expenses incurred by Department representatives who serve on design teams and attend meetings and seminars of the collaborative. As stated above, the Department belongs to two of the Council's collaboratives for educational exercises and materials to be developed for the benefit of the Department, and therefore the public it serves, in a more economical fashion than if the Department operated independently. Under these circumstances, the collaboratives are not traditional vendors with whom the Department is entering into a contract for a finished product. Rather, the Department's officials and employees serve on the design team and attend meetings and seminars in the capacity of public representatives of the Department to guarantee the development of educational exercises and materials for use by the Department and for the benefit of the public.

Essentially, by developing educational exercises and materials through its representatives in this fashion, the Department is conducting its official business in concert with other states and utilizing the assistance of a nonprofit organization to expedite the development of necessary services. In addition, because a portion of the Department's dues to the collaboratives may be applied to the travel expenses of Department representatives, the Department bears the cost of the expenses through the payment of dues in a manner similar to that described in Advisory Opinion No. 87-007. Because the Department, acting through its representatives, is actively participating in, and financially contributing to, the collaboratives of the nonprofit Council that is comprised of governmental members, the Council's reimbursement of expenses related to travel, meals, and lodging for representatives of the Department will not be of such a character as to manifest a substantial and improper influence upon the Department's officials and employees.

Issue No. 2: Expenses for Department Personnel Serving as Representatives to the Council

You also ask whether Department personnel who serve as representatives of the Department to the Council, but do not serve on collaboratives of the Council, may accept the payment or reimbursement of expenses related to travel, meals, and lodging from the Council.

As stated above, the Department pays annual membership dues to the Council. The Council seeks ideas from its members on educational issues and communicates their collected views to interested parties and the public. The Council also researches issues pertinent to education and disseminates information to its members. Furthermore, it arranges seminars, programs, and educational travel for its members. You state that Department personnel act as representatives to the Council to accomplish the above purposes.

Analysis: Expenses for Department Personnel Serving as Representatives to the Council

Department personnel who attend functions of the Council, that are not related to the Council's collaboratives, serve in the capacity of public representatives of the Department for the benefit of the Department and the public. The Council is not a typical party doing or seeking to do business with the Department. Rather, through its representatives to the Council, the Department is conducting its official business in concert with other states and utilizing the assistance of a nonprofit organization as a clearinghouse for ideas, an instrument for research, and a channel for communications. In addition, because the Department pays dues to the Council, the Department bears the cost of expenses through the payment of dues in a manner similar the circumstances described in Advisory Opinion No. 87-007. Therefore, the reimbursement, by the Council, of necessary travel, meal, and lodging expenses incurred by Department personnel who exercise official duties as public representatives to the Council will not be of such a character as to manifest a substantial and improper influence upon the Department's officials and employees.

Analysis: Additional Compensation

The payment of a public official's or employee's expenses by a source other than the official's or employee's public agency also implicates the prohibitions of R.C. 2921.43 (A), which reads:

(A)No public servant shall knowingly solicit and no person shall knowingly promise or give to a public servant either of the following:

(1)Any compensation, other than 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 servants; 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 Ethics Commission has determined that the term "compensation" as used in R.C. 2921.43 (A) includes the payment of a public official's or employee's expenses incurred in the performance of his official duties. See Advisory Ops. No. 89-013, 89-014, and 90-001. See also Advisory Op. No. 89-002. Accordingly, R.C. 2921.43 (A) prohibits a person, including an individual, corporation, partnership, association, or other similar entity, from promising or giving to a public servant or his public agency, conference fees and travel, meal, and lodging expenses, other than allowed by R.C. 102.03 (G)-(I) or other provision of law. R.C. 1.59; Advisory Ops. No. 89-013, 89-014, and 90-001. The issue becomes whether the expenses in the instant situation fall within an exception provided by R.C. 102.03 (G)-(I).

Division (I) of R.C. 102.03 applies to conference fees and travel, meal, and lodging expenses incurred by a public official or employee in attending a conference, seminar, or similar event related to his official duties and reads, in pertinent part:

A public official or employee may accept travel, meals, and lodging or expenses or reimbursement of expenses for travel, meals, and lodging in connection with conferences, seminars, and similar events related to his official duties if the travel, meals, and lodging, expenses, or reimbursement is not of such character as to manifest a substantial and improper influence upon him with respect to his duties.

The exception of R.C. 102.03 (I) must be applied in conjunction with the prohibition imposed by R.C. 102.03 (E).

As discussed above, R.C. 102.03 (E) prohibits a public official or employee from accepting anything of value, or the promise or offer of anything of value, from a party that is doing or seeking to do business with, regulated by, or interested in matters before, the agency with which he serves. Because of the prohibition imposed by R.C. 102.03 (E), the Ethics Commission held, in Advisory Opinion 86-011, that R.C. 102.03 (I) does not permit a public official or employee to accept travel, meals, or lodging from a party that is regulated by, interested in matters before, or doing or seeking to do business with, his public agency. See also Advisory Ops. No. 89-013 and 89-014.

However, the reimbursement, by the Council, of necessary travel, meal, and lodging expenses incurred by Department officials and employees will not be of such a character as to manifest a substantial and improper influence upon the Department personnel for purposes of R.C. 102.03 (E) because the Department pays membership dues to the Council and the Department personnel serve as representatives of the Department to the Council and its collaboratives. Therefore, the exemption to R.C. 2921.43 (A) provided by R.C. 102.03 (I) applies in the instant situation.

Accordingly, R.C. 2921.43 (A) does not prohibit officials and employees of the Department of Education from accepting the payment or reimbursement of expenses from the Council, or from collaboratives created by the Council. However, R.C. 2921.43 (A), in addition to R.C. 102.03 (E), prohibits the receipt of expenses by Department officials and employees in excess of what is necessary for conducting essential official business.

As stated above, Divisions (G) and (H) of R.C. 102.03 provide additional exceptions to R.C. 2921.43 (A). However, Divisions (G) and (H) are inapplicable in this situation and need not be addressed.

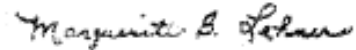
Conclusion

The Ohio Ethics Law and related statutes do not prohibit Department personnel, who serve as representatives of the Department to the Council, and to collaboratives organized by the Council, from accepting the payment or reimbursement of expenses related to travel, meals, and lodging from the Council. However, the receipt of expenses in excess of what is necessary for

conducting essential official business would be prohibited by R.C. 102.03 (E) and R.C. 2921.42 (A).

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: Division (E) of Section 102.03 of the Revised Code and Division (A) of Section 2921.43 of the Revised Code do not prohibit officials and employees of the Department of Education from accepting the payment or reimbursement of expenses from a nonprofit organization to which the Department pays membership dues, and collaboratives created by the nonprofit organization, where the Department personnel serve as representatives of the Department to guarantee the development of educational products, for the acquisition and use by the Department and for the benefit of the public, by contractors who are engaged by the non-profit organization.



Marguerite B. Lehner, Chair
Ohio Ethics Commission