



OHIO ETHICS COMMISSION

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Advisory Opinion Number 97-001

March 14, 1997

Syllabus by the Commission:

(1) Divisions (D) and (E) of Section 102.03 of the Revised Code and Divisions (A)(1) and (B)(1) and (2) of Section 2921.43 of the Revised Code prohibit a public employee from soliciting, accepting, or using the authority or influence of his office to secure, a substantial amount of money or any other thing of value from a subordinate, as an incentive to retire, where the retirement will enable the subordinate to be promoted to the position that is vacated;

(2) Division (F) of Section 102.03 of the Revised Code and Division (A)(1) of Section 2921.43 of the Revised Code prohibit a subordinate employee from promising or giving money or any other thing of value to a superior employee as an incentive to retire, where the retirement will enable the subordinate to be promoted to the position that is vacated.

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The issue before the Ethics Commission is whether the Ohio Ethics Law and related statutes prohibit a city employee from soliciting or accepting a substantial amount of money or other thing of value from a subordinate as an incentive to retire. The retirement will enable the subordinate to be promoted to the position that is vacated by the retiring superior employee.

As explained below, a public employee is prohibited from soliciting, accepting, or using the authority or influence of his office to secure a substantial amount of money or other thing of value from a subordinate as an incentive to retire, where the retirement will enable the subordinate to be promoted to the position that is vacated by the retiring superior employee. Also, a subordinate employee is prohibited from promising or giving money or any other thing of value to a superior employee as an incentive to retire, where the retirement will enable the subordinate to be promoted to the position that is vacated by the retiring employee.

City employees who are interested in being promoted must take a civil service examination. The employees who pass the examination are placed on a list of candidates for the position. The list is in effect for two years. If, during this two-year period, no one creates a vacancy by retiring, then the list expires.

As the expiration date approaches, in some instances, a superior who is eligible to retire will let the fact become known through his division. This individual, or someone on his behalf, will contact the subordinate employee who is the prime candidate to move into the vacancy that would be created. If the subordinate employee is interested, he will offer a substantial amount of money or a substantial gift or item, to his superior as an incentive for his superior to retire. The

subordinate employee will solicit lower-echelon employees, or other positions thereby opened for promotion, who are candidates for his position, to contribute to the amount that he will pay his superior.

For example, in the city fire department, a captain who is eligible to retire will contact a lieutenant who is on the list of candidates for promotion. The lieutenant will offer the captain a substantial amount of money as an incentive to retire before the civil service list expires. The offer may also be in the form of a substantial gift or a significant discount on acquiring an item, such as a boat or car. A firefighter who is on the list for promotion to lieutenant will pay money to the lieutenant, and the lieutenant will use this money to pay the captain. In such a situation, the captain retires, the lieutenant becomes a captain, and the firefighter becomes a lieutenant. This practice is colloquially known as "buying the coat."

Prohibitions Imposed by Conflict of Interest Provisions, R.C. 102.03 (D) and (E)

Your attention is directed to Divisions (D) and (E) of Section 102.03 of the Revised Code, which read as follows:

(D) No public official or employee shall use or authorize the use of the authority or influence of 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 the public official or employee with respect to that person's 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 the public official or employee with respect to that person's duties.

R.C. 102.01 (B) defines a "public official or employee" for purposes of Chapter 102. of the Revised Code as any person who is appointed to an office or is an employee of any public agency. R.C. 102.01 (C) defines the term "public agency" to include any board, commission, or authority of a city. A city employee is a public official or employee for purposes of Chapter 102. of the Revised Code and is subject to the provisions therein. Advisory Op. No. 77-003.

R.C. 102.03 defines the term "anything of value" for purposes of R.C. 102.03 to include money, goods and chattels, promissory notes, a promise of future employment, and every other thing of value. R.C. 102.01(G). A definite pecuniary benefit to a person is considered to be a thing of value under R.C. 102.03 (D) and (E). Advisory Ops. No. 85-006, 85-011 and 86-007. In the instant situation, the money, or gift or item, that a superior receives from a subordinate as consideration for retiring is within the definition of "anything of value." Also, the promise of future employment that the subordinate will secure, due to the system of promotion from an eligibility list, falls within the definition of "anything of value."

The Ethics Commission has held that, in order for its receipt to be prohibited by R.C. 102.03 (D) and (E), the thing of value must be substantial. Advisory Ops. No. 90-001, 92-014, and 92-015. See also Advisory Ops. No. 75-014 and 76-005 (the word "substantial" means "of or having substance, real, actual, true, not imaginary; of considerable worth or value; important.") In the instant situation, the money, or gift or item, that would be received from the subordinate is not incidental or minimal in amount, and thus, would be of a substantial nature.

R.C. 102.03 (D) prohibits a public official or employee from using the authority or influence of his official position to secure anything of value, if the thing of value is of an improper character. Advisory Op. No. 84-010. See also Advisory Ops. No. 86-011 and 90-001. R.C. 102.03 (E) prohibits a public official or employee from accepting an improper thing of value and does not require that he use the authority or influence of his position to secure it. Advisory Op. No. 90-012. The prohibitions that R.C. 102.03 (D) and (E) impose upon public officials or employees are dependent on the facts and circumstances of each individual situation. Advisory Ops. No. 89-003 and 92-009.

The Ethics Commission has explained that a public official or employee must exercise his duties without hindrance by any improper influence. Advisory Op. No. 89-010. The Ethics Commission has held that a thing of value is considered to be of an improper character for purposes of R.C. 102.03 (D) and (E) where it is secured from a party that is interested in matters before, regulated by, or doing or seeking to do business with the public agency with which the official or employee serves, or where the thing of value could impair the official's or employee's objectivity and independence of judgment with respect to his official actions and decisions for the public agency with which he serves or is employed. Advisory Ops. No. 89-006, 90-009, and 90-012.

In Advisory Opinion No. 84-010, the Ethics Commission held:

[T]he 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 character as to manifest a substantial or improper influence upon the public official or employee with respect to his duties, because it could impair his independence of judgment in the performance of his official duties and affect subsequent decisions in matters involving the donor of the thing of value.

Accordingly, the Ethics Commission has held that R.C. 102.03 (D) and (E) prohibit a public official or employee from soliciting, accepting, or using his authority or influence to secure consulting fees, gifts, gratuities, or discounts from a party that is doing or seeking to do business with, interested in matters before, or regulated by, the official's or employee's public agency. Advisory Ops. No. 79-002, 86-011, and 92-015. See also Advisory Op. 90-001 (addressing R.C. 102.03 (F), which prohibits interested and regulated parties or vendors from promising or giving a substantial thing of value to a public official or employee).

The Ethics Commission has not specifically addressed the issue of a public employee soliciting or accepting a substantial thing of value from a subordinate public employee. In Advisory Opinion No. 89-008, however, the Ethics Commission addressed the issue of the employer-employee relationship between a public official and his private employer and held that, "[a]n employer holds a position of power and authority over the hiring, compensation, discipline, and termination of its employees." Advisory Op. No. 89-008. In light of this relationship, the Commission held that a public official or employee may not secure a substantial thing of value for his private employer. Advisory Op. No. 89-008. See also Advisory Ops. No. 80-003 and 88-005.

The same type of relationship exists between superior and subordinate public employees. Whenever a superior public employee solicits a substantial amount of money or a gift from a

subordinate public employee, the superior exercises the inherent power and authority or influence of his office in a manner that is directive, and potentially coercive. Where the solicitation is conditioned upon securing a position for which increased compensation and rank are attendant, the subordinate employee is placed in the untenable position of deciding, with urgency, whether to let the civil service list expire and seek recertification in the future, or to respond to his superior's solicitation. The superior employee creates the dilemma in which the subordinate employee is placed. The superior employee thereby uses the authority inherent in his public position to create urgency by making his offer to retire before the list expires.

The superior's solicitation and receipt of a thing of value from the subordinate employee could also impair the superior's objectivity and independence of judgment in matters that could affect the subordinate in the future. This could occur with regard to any decisions he would be required to make on subsequent matters concerning the subordinate. For example, a superior may be disinclined to take proper disciplinary action against a subordinate if he knows that the subordinate will pay him money as an incentive to retire. Similarly, the superior public employee may be improperly inclined to discipline a subordinate, in other matters, who did not follow similar actions of his predecessors, and pay compensation to his superior.

Furthermore, the possibility of impaired objectivity and independence of judgment of the superior, who is receiving a substantial amount of money as an incentive to retire, exists even if he does not personally supervise the subordinate employee who is furnishing the money. A public official or employee will develop working relationships by cooperating with other public officials and employees while performing his official duties. See Advisory Op. No. 90-002 (a Department of Agriculture meat inspector who owns and operates a meat processing plant in an inspection district other than his own may not use his relationship with other Department personnel to intervene in regulatory decisions regarding his plant). The possible receipt of a substantial amount of money could entice a superior to improperly use his relationship with other city officers and employees, such as securing a favorable decision or action by another official or employee regarding the subordinate employee who will furnish the money as an incentive to retire. As stated above, the Ethics Commission has explained that a public official or employee must exercise his duties without hindrance by any improper influence.

Accordingly, R.C. 102.03 (D) and (E) prohibit a city employee from soliciting, accepting, or using the authority or influence of his office, to secure a substantial amount of money from a subordinate as an incentive to retire where the retirement will enable the subordinate to be promoted to the position that is vacated.

Prohibition Imposed by R.C. 2921.43

Your attention is also directed to R.C. 2921.43, which reads in pertinent part:

(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.

(B) No public servant for his own personal or business use and no person for his own personal or business use or for the personal or business use of a public servant or party official, shall solicit or accept anything of value in consideration of either of the following:

(1) Appointing or securing, maintaining, or renewing the appointment of any person to any public office, employment, or agency;

(2) Preferring, or maintaining the status of, any public employee with respect to his compensation, duties, placement, location, promotion, or other material aspects of his employment. (Emphasis added).

The term "public servant" is defined for purposes of R.C. 2921.43 to include any employee of a political subdivision of the state. R.C. 2911.01 (A) and (B)(1). City employees are "public servants" and are subject to the prohibitions of R.C. 2921.43. Advisory Op. No. 92-015.

As explained above, in the instant situation, the superior city employee is soliciting or accepting a substantial amount of money from a subordinate as an incentive to retire. The retirement will enable the subordinate, who is furnishing the money, to be promoted to the position that is vacated.

The superior employee's decision to discontinue his public employment and create a vacancy in his position by not performing his public duties is an act that he would make in his public capacity. The money or other thing of value that he would receive as an incentive to retire would be consideration for his decision and would supplement his public compensation. R.C. 2921.43 (A)(1) prohibits a public servant from soliciting and accepting compensation to either perform an act in his public capacity or supplement his public compensation. Therefore, the solicitation and acceptance of compensation from a subordinate employee as an incentive not to perform his public duties by discontinuing his public employment and relinquishing his official duties clearly violates R.C. 2921.43 (A)(1).

The system of promotion from the eligibility list insures promotion of the subordinate employee without a payment to his superior. R.C. 2921.43 (B)(1) prohibits a public servant from soliciting or accepting a thing of value for securing the appointment of any person to any public employment. Therefore, the practice of soliciting or accepting a thing of value in consideration in order to secure the appointment of a subordinate employee to the higher public position being vacated by the superior employee clearly violates R.C. 2921.43 (B)(1).

The practice of soliciting or accepting a thing of value in consideration in order to secure the appointment of a subordinate employee also results in the superior public employee preferring the status of a public employee with respect to that employee's promotion. Therefore, the superior employee's solicitation and acceptance of a thing of value in consideration for preferring the status of the subordinate employee is in violation of R.C. 2921.43 (B)(2).

Accordingly, R.C. 2921.43 (A) and (B), as well as R.C. 102.03 (D) and (E), prohibit a city employee from soliciting or accepting a substantial amount of money from a subordinate as an incentive to retire, where the retirement will enable the subordinate be promoted to the position that is vacated.

Prohibition Imposed Upon the Subordinate Employee by R.C. 102.30 (F) and R.C. 2921.43 (A) and (B)

Division (F) of Section 102.03 of the Revised Code reads as follows:

(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 the public official or employee with respect to that person's duties.

R.C. 102.03 (F) prohibits any person from promising or giving anything of value to a public official if the thing of value is of an improper character. Advisory Ops. No. 90-001 and 92-015. The Ethics Commission has held that a thing of value is considered to be of an improper character for purposes of R.C. 102.03 (F) where it is promised or provided from a party that is interested in matters before, regulated by, or doing or seeking to do business with the public agency with which the official or employee serves, or where the thing of value could impair the official's or employee's objectivity and independence of judgment with respect to his official actions and decisions for the public agency with which he serves or is employed. Advisory Op. No. 90-001. Because of the previously-described relationship that exists between superior and subordinate public employees, there is a potential for the exercise of improper influence. Whenever a subordinate public employee promises or gives a substantial amount money or a gift to a superior public employee as an incentive to retire and thus secure, for himself, a position for which increased compensation and rank are attendant, the subordinate is attempting to sway the superior to improperly exercise the power and authority or influence of his public employment. Therefore, R.C. 102.03 (F) prohibits a subordinate employee from promising or giving a thing of value to a superior employee as an incentive to retire. This practice is also prohibited by R.C. 2921.43 (A)(1), which prohibits any person from promising or giving compensation to a public servant to either perform an act in the public servant's public capacity or as a supplement his public compensation.

It must be noted that this advisory opinion addresses issues that have reportedly already occurred. R.C. 102.08 statutorily authorizes the Ohio Ethics Commission to render advisory opinions with regard to questions concerning ethics, conflict of interest, or financial disclosure under Revised Code Chapter 102., R.C. 2921.42, or R.C. 2921.43. Generally, the Ethics Commission or its staff issues advisory opinions in response to a question that is either hypothetical or prospective. Advisory Op. No. 75-037. The Commission has explained that the rendering of an advisory opinion is not a fact-finding process and it cannot, in rendering an advisory opinion, determine whether a public official or employee has violated a provision of the

law that has criminal sanctions. *Id.* Rather, an advisory opinion serves to explain the prohibitions imposed by the Ethics Law and related statutes and sets forth the standards and criteria that protect the public official and the public, and that a public official or employee must observe in order to avoid violating the law in a given set of circumstances. Advisory Ops. No. 75-037, 90-013, and 92-015. A question of a violation of the law must ultimately be decided by a court, upon a complaint or indictment resulting from a confidential investigation conducted by the Ethics Commission or other law enforcement agency, to determine whether there are facts indicating that individuals have violated the Ethics Law, and referral of the individuals to the appropriate prosecutor with a recommendation of criminal prosecution. Advisory Op. No. 92-003 and 94-002.

The Ethics Commission has issued advisory opinions in limited instances where the practice at issue appears widespread, or has existed for many years, and public officials and employees, and those who interact with them, have relied on past practice, without the guidance of precise and uniform legal precedent to address the specific issue. *See, e.g.*, Advisory Ops. No. 85-015 (the hiring a spouse by a county sheriff); No. 89-014 (the receipt of travel, meal, and lodging expenses by a county official or employee from a vendor); No. 91-007 (the authorization of an in-term increase in compensation by city council members; 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); 92-015 (the acceptance or use by a public official or employee of a discount offered by a retailer as a community service acknowledgment and recognition for their public service); and 94-002 (the provision of driver education training services by a school teacher to his employing school district).

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules.

Therefore, it is opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Divisions (D) and (E) of Section 102.03 of the Revised Code and Divisions (A)(1) and (B)(1) and (2) of Section 2921.43 of the Revised Code prohibit a public employee from soliciting, accepting, or using the authority or influence of his office to secure, a substantial amount of money or any other thing of value from a subordinate, as an incentive to retire, where the retirement will enable the subordinate to be promoted to the position that is vacated; and (2) Division (F) of Section 102.03 of the Revised Code and Division (A)(1) of Section 2921.43 of the Revised Code prohibit a subordinate employee from promising or giving money or any other thing of value to a superior employee as an incentive to retire, where the retirement will enable the subordinate to be promoted to the position that is vacated.


Sister Mary Andrew Matesich, Chair
Ohio Ethics Commission