



OHIO ETHICS COMMISSION

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

Advisory Opinion
Number 89-013
October 18, 1989

Syllabus by the Commission:

The Ohio Ethics Law and related statutes prohibit a public official or employee from accepting from a vendor interested in doing business with the official's or employee's agency travel, meal, and lodging expenses incurred in viewing the vendor's product, and prohibit the vendor from paying such expenses, regardless of whether the expenses would be paid directly to the public official or employee, or as reimbursement to the official's or employee's agency.

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You have asked whether the Ohio Ethics Law and related statutes prohibit a vendor from paying the travel, meal, lodging, and other expenses incurred by employees of the Department of Mental Retardation and Developmental Disabilities (Department) in order to visit a facility in another state where the vendor's product, in which the Department is interested, is being used. Department employees wish to see the product being used in a facility setting, and believe direct observation and discussion with current users of the product would be advantageous. You have also asked whether it would make any difference if the employee's expenses were paid by the Department in accordance with procedures governing out-of-state travel for state employees, and the vendor then reimbursed the Department for such payments.

Divisions (D), (E), and (F) of Section 102.03 of the Ohio Revised Code read as follows:

- (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 person who is appointed to an office or is an employee of any department of the state. See R.C. 102.01(B) and (C). The Department of Mental Retardation and

Developmental Disabilities is an administrative department statutorily created within state government. See R.C. 121.02(M); R.C. Chapter 5123. Therefore, officials and employees of the Department of Mental Retardation and Developmental Disabilities are "public official or employees" who are subject to the prohibitions of Section 102.03. See Ohio Ethics Commission Advisory Opinions No. 84-009 and 88-001.

Divisions (D) and (E) of Section 102.03 prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his position to secure anything of value, including travel, meal, and lodging expenses, from a party that is interested in matters before, regulated by, or doing or seeking to do business with the agency with which the official or employee serves. See Advisory Opinions No. 79-002, 79-006, 80-004, 84-010, and 86-011. Additionally, Division (F) of Section 102.03 prohibits parties who are interested in matters before, regulated by, or doing or seeking to do business with a public agency from promising or giving anything of value, including travel, meal, and lodging expenses, to an official or employee of that agency. See Advisory Opinions No. 87-005 and 87-007. As summarized in Advisory Opinion No. 89-002, it is immaterial that the thing of value would be given to the public official or employee in connection with his official position or would benefit his public agency:

This standard . . . has . . . been applied in instances where the thing of value would be given directly to the public official or employee, but in connection with his official position, and under circumstances that would directly or indirectly benefit his public agency. For example, the Commission has held that a public official or employee is prohibited from accepting conference registration fees, honoraria, or travel, meal, and lodging expenses from an improper source even where he is representing his agency in a ceremonial function, is providing information about his agency, its duties, or the area it administers, or is attending a conference or seminar for his professional development or education. See Advisory Opinions No. 79-006, 80-004, 84-010, and 86-011. The Ethics Commission has further held that a public official or employee is prohibited from receiving travel, meal, and lodging expenses from a party that is interested in matters before, regulated by, or doing or seeking to do business with, his public agency, even where the payment of such items would be directly related to the required performance of his official duties, and would directly benefit his public agency by relieving the agency of the necessity of paying for such expenses. See Advisory Opinion No. 86-011 (citing the example of a regulated party paying the expenses of an official or employee to inspect the site of a facility required as part of a permit application, enforcement action, or compliance review).

. . . . The direct payment or contribution of money or other items of value to a public official or employee from a party whose interests may depend upon the performance of that official's or employee's official responsibilities is of such character as to unduly influence or impair the objectivity of the official or employee, and thus is prohibited by R.C. 102.03.

Divisions (D) and (E) of Section 102.03 would, therefore, prohibit an official or employee of the Department of Mental Retardation and Developmental Disabilities from accepting, soliciting, or using the authority or influence of his position to secure travel, meal, lodging, or other expenses from a vendor who is interested in doing business

with the Department, even though such expenses would be incurred in order for the employees to view and evaluate the vendor's product in a facility setting. Division (F) of Section 102.03 prohibits a vendor who is interested in doing business with the Department from paying to officials or employees of the Department travel, meal, lodging and other expenses incurred in connection with a trip to view the vendor's product.

You have also asked whether the Department may pay the employees' expenses in accordance with state travel regulations and the vendor then reimburse the Department for such payments. In Advisory Opinion No. 89-002, the Ethics Commission considered whether private companies which are regulated by the Industrial Commission are prohibited from donating industrial and safety equipment to the Industrial Commission. Advisory Opinion No. 89-002 held that "the Ohio Ethics Law and related statutes do not prohibit private companies from donating industrial and safety equipment to the Industrial Commission, so long as no official or employee of the Commission benefits personally from the equipment, and so long as the donation is voluntary." See also Advisory Opinion No. 86-003 ("the Ohio Ethics Law and related statutes do not prohibit a resident from making a gift, devise, bequest, or donation to the Veterans Home, provided that he enters the transaction voluntarily").

The situation which you have presented is substantially different from the donations considered in Advisory Opinion No. 89-002. In that opinion, the private companies' donations were unrelated to any particular matter pending before the Commission involving the interests of the donors. Equipment was donated by private companies to the Industrial Commission for the general enhancement of safety training programs conducted by the Commission's Division of Safety and Hygiene. The companies had nothing specific to gain from their donations and there were no facts indicating that the Commission was, at the time of the donations, acting upon the interests of the companies. Indeed, the opinion advised against the donation of items in instances where a specific case was pending before the Commission involving the donor or where the Commission could reasonably foresee that an action would come before the Commission.

In this instance, the company is actively seeking to do business with the Department, and is offering to pay for employees' expenses incurred in viewing the company's product for the purpose of securing the Department's business. The payment of such expenses is not a donation or gift for the general benefit of the Department but is designed to promote the company's interest in conducting business with the Department. Furthermore, the officials and employees of the Department would, at the time of payment or promise of payment, be in the process of deciding whether to conduct business with the company, and the payments are intended to be used in that decision-making process. The employees whose job performances may be affected by the reimbursement are those persons who have an essential and immediate role in deciding the company's interests. Indeed, the potential for divided loyalties may expand to administrators within the Department who may not travel to view the vendor's product but who may have decision-making authority with respect to the product, as well as responsibility for the Department's budget.

Unlike the donations considered in Advisory Opinion No. 89-002, the payment of expenses to the Department in this situation is an attempt to do indirectly what is directly prohibited by R.C. 102.03. See City of Parma Heights v. Schroeder, 26 Ohio Op. 2d 119, 122 (C.P. Cuyahoga County 1963) (a public official cannot do indirectly what he cannot do directly). Although R.C. 102.03 does not prohibit companies from making voluntary donations to a state agency that are of a general nature or for a general

purpose, R.C. 102.03 does prohibit direct payments to a state agency that are made in connection with the agency's consideration of the company's interests.

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

- (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.

R.C. 2921.43(A)(1) prohibits a public servant, including a state official or employee, see R.C. 2921.01(A) and (B), from accepting any compensation, other than as allowed by R.C. 102.03(G)-(I) or other provision of law, to perform any act in his public capacity or generally perform the duties of his public position. R.C. 2921.43(A)(1) also prohibits any person from promising or giving to a public servant any such outside compensation.

Division (G) of Section 102.03 relates to campaign contributions; Division (H) relates to honoraria, and travel, meal, and lodging expenses incurred by a public official or employee in making a speech or other personal appearance; and Division (I) relates to conference fees and travel, meal, and lodging expenses incurred by a public official or employee in attending a conference, seminar, or similar event. It is apparent that the term "compensation," as used in R.C. 2921.43, includes travel, meal, and lodging expenses; otherwise the exception for certain travel, meal, and lodging expenses referenced in Divisions (H) and (I) of Section 102.03 would be unnecessary. See Dougherty v. Torrence, 2 Ohio St. 3d 69 (1982) (in interpreting a statute, effect must be given to words used, and words used may not be deleted). Furthermore, there is nothing in Divisions (G), (H) or (I) which would allow a public official or employee to accept expenses from a vendor desiring to do business with his agency in order to view and evaluate the vendor's product, an act which is clearly within the performance of the official's or employee's public duties. There is nothing in Divisions (G), (H) or (I) which would allow a vendor to pay for such expenses.

The fact that, in this instance, the vendor desires to reimburse the Department for its payment of the employees' expenses does not alter the prohibition of Section 2921.43. See Advisory Opinion No. 89-002 (stating that although companies may make donations of equipment to the Industrial Commission, "this opinion should not be interpreted as permitting payment of officials' or employees' honoraria or expenses directly to their public agency by parties who are regulated by, interested in matters before, or doing or seeking to do business with, the public agency" due to the restrictions of R.C. 2921.43). The prohibition against a public official receiving compensation for the performance of his public duties prevents the public official from being in a position of serving two masters and helps to ensure his objectivity. See generally Somerset Bank v.

Edmund, 76 Ohio St. 396 (1907); 1918 Ohio Op. Att'y Gen., Vol. II, No. 1569, p. 1428. The payment by an outside source of the employees' expenses to the Department rather than to the employees does not alleviate this concern, especially if the trip would not be made except for the reimbursement or promise thereof. To permit outside sources to pay for the Department's employees' compensation through the Department, or to allow the Department employees to accept compensation from an outside source paid through the Department, would again, be to effectively circumvent the prohibitions of Section 2921.43, and the public policy served thereby.

As a final matter, your attention is drawn to Advisory Opinion No. 87-007, which holds:

Divisions (D) and (E) of Section 102.03 of the Revised Code do not prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his office or employment to secure travel expenses from a party which is doing business with his agency, where the requirement that trips be provided by the party to officers or employees of the public agency for the purpose of conducting official business is included in the public agency's bid specifications, and ultimately in the contract executed between the party and the public agency;

Division (F) of Section 102.03 of the Revised Code does not prohibit a party from promising or giving travel expenses to a public official or employee of a public agency with which it is doing business, where the requirement that trips be provided by the party to officers or employees of the public agency for the purpose of conducting official business is included in the public agency's bid specifications, and ultimately in the contract executed between the party and the public agency.

The agency, by including the costs of trips in bid specifications and in the final contract, pays consideration for such trips, and ultimately bears the cost of such trips. Id. Such arrangements not only avoids the prohibitions of R.C. 102.03, but of R.C. 2921.43, as well.

This advisory opinion is based on the facts presented, and is rendered only with regard to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.

Therefore, it is the opinion of the Ethics Commission, and you are so advised, that the Ohio Ethics Law and related statutes prohibit a public official or employee from accepting from a vendor interested in doing business with the official's or employee's agency travel, meal, and lodging expenses incurred in viewing the vendor's product, and prohibit the vendor from paying such expenses, regardless of whether the expenses would be paid directly to the public official or employee, or as reimbursement to the official's or employee's agency.



Richard D. Jackson, Chairman
Ohio Ethics Commission