



OHIO ETHICS COMMISSION

8 East Long Street, Suite 1200

Columbus, Ohio 43215-2940

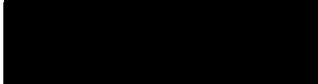
Telephone: (614) 466-7090

Fax: (614) 466-8368

February 2, 1996

Informal Opinion 1996-INF-0202-2

Terri A. Davis, President
Davis Council and Associates



Dear Ms. Davis:

You requested an advisory opinion with regard to two employees of the Ohio Department of Development (DOD) owning and operating a small private business, Davis Council and Associates (DCA), and the effect of the Ohio Ethics Law and related statutes upon that enterprise. You stated that DCA's purpose is to provide comprehensive business development assistance to small, medium, and minority-owned businesses throughout Ohio. DCA offers its clients: business development services such as organizational assessment/development, government procurement, marketing, networking, technical training, management assistance, legal counsel, and human resource management; financial and investment services such as accounting, investments, management and cost accounting, tax preparation, and loan packaging; computer information services and clerical services; and international opportunities.

You serve as the president of DCA. As such, you state that you serve as both the Chief Executive Officer (CEO) and Chief Financial Officer (CFO) for the organization, to identify and implement growth strategies. The vice president, legal counsel, and certified public accountant report directly to the president. The DCA vice president, who is also an employee of DOD, directs and manages DCA's day-to-day operations.

With regard to your public employment, you are a Training Coordinator for DOD's Economic Development Division in Region 2. Through your public authority for DOD, you administer the Ohio Industrial Training Program (OITP) in Region 2 by developing and implementing policies and procedures; seeking out businesses and following up on referrals to promote OITP and training services; developing and maintaining contacts with local business leaders, local government officials, human service organizations, and training providers; conducting quarterly meetings to enhance local economic development; advertising and promoting OITP; writing OITP proposals, marketing plans, and budgets for approval; evaluating performance of program staff; developing training plans for businesses to create or retain jobs; and monitoring in-training programs. Additionally, when not engaged in OITP activities, you assist the DOD Regional Representative to attract, retain, and create business in Ohio.

The vice-president of DCA is also a DOD employee, who serves as DOD's High Unemployment Program (HUP) Coordinator for OITP. Her DOD job description states that in

her position she is responsible for: assisting district directors with HUP proposals; administering \$3 million of state grant money; developing and updating policy guidelines and program direction; reviewing proposals from OITP districts; preparing and amending grant contracts; serving as DOD/OITP's representative on District Boards; preparing quarterly reports; assisting in financial packaging; performing site reviews of grant recipients; giving speeches about HUP; and participating in and coordinating training seminars.

According to your follow-up letter, as employees of DOD's Economic Development Division, both you and your associate administer various training grants awarded to companies, but do not make decisions as to which companies will be awarded grants. To avoid conflict, you state that DCA will not accept as clients any companies that are doing business with DOD's Economic Development Division.

The Ethics Commission has held, in general, that the Ethics Law does not prohibit public officials and employees from engaging in private employment so long as no conflict of interest exists between the official's or employee's public and private positions. R.C. 102.03 is applicable to most outside employment situations, including the present situation. R.C. 102.03 states, in pertinent part:

(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.

An employee of DOD is a "public official or employee," as that term is defined in R.C. 102.01(B) and (C). As such, you and your associate are subject to the prohibitions of R.C. 102.03(D) and (E). The term "anything of value" is defined for purposes of R.C. 102.03, in R.C. 1.03, to include money, the promise of future employment, and every other thing of value. R.C. 1.03, 102.01(G). A public official's or employee's earnings from private employment are within the definition of "anything of value." Advisory Op. No. 93-002. The earnings that you would receive from your consultation with and training of small, medium, and minority-owned businesses would be a thing of value for purposes of R.C. 102.03(D) and (E). Therefore, R.C. 102.03(D) and (E) prohibit you from using or authorizing the use or authority of your public employment to secure, soliciting, or accepting earnings, from a private consultation and training service, if those earnings would manifest a "substantial and improper influence" upon you with respect to your public duties.

The Ethics Commission has stated that R.C. 102.03(E) prohibits a public official or employee from accepting or soliciting outside employment from any party that is interested in matters before, regulated by, or doing or seeking to do business with, the public agency with

which he serves, because it could otherwise impair his objectivity and independence of judgment with regard to his official decisions and responsibilities. See Advisory Ops. No. 79-002, 84-009, 90-006, and 90-009.

To determine whether the business that you propose to establish will give rise to a conflict of interest for the two of you, DOD's purpose and function must be examined as it relates to your proposed business. Pursuant to R.C. 122.01, DOD's purpose is to "develop and promote plans and programs designed to assure that state resources are efficiently used, economic growth is properly balanced, community growth is developed in an orderly manner, and local governments are coordinated with each other and the state." The Office of Small Business (OSB), within DOD, acts as a liaison between the small business community and state governmental agencies. OSB serves these businesses by furnishing information and technical assistance concerning the establishment and maintenance of a small business. R.C. 122.08(B). OSB also assists small businesses in receiving complaints and directing the businesses to the appropriate governmental agency for resolution of specific problems. Id. Also within DOD is the Small Business and Entrepreneurship Council (SBEC). SBEC's statutorily authorized duties and responsibilities include: the study and evaluation of the condition and needs of new and small businesses and entrepreneurship; the identification of opportunities for entrepreneurial activity in new and emerging industries and markets; the promotion of training opportunities, research and the dissemination of information helpful to new and small businesses and entrepreneurs; and the avocation of the interests of new and small businesses and entrepreneurs. R.C. 122.121(A)(2). Finally within DOD is the Minority Business Development Division, which: provides technical, managerial, and counseling services and assistance to minority business enterprises; provides bonding technical assistance to minority business enterprises; and provides procurement and bid packaging assistance to minority business enterprises. R.C. 122.92.

Based upon the information that you supplied with regard to DCA's proposed purpose and functions, many of the services that you seek to provide to your clients are provided by Divisions of DOD. In addition, the potential in-state customers for your proposed private enterprise are entities that may be interested in matters before, may seek the services of, or may obtain the services of DOD. As such, receipt of compensation, or any other thing of value, from these entities could impair your objectivity and independence of judgment with regard to your official decisions and responsibilities, or those of your Department, and is thereby generally prohibited by R.C. 102.03(D) and (E).

The Ethics Law prohibits a public official or employee from receiving remuneration for performing, in his private enterprise, the same duties or functions he is or may be required to perform in his public capacity. Advisory Op. No. 81-007. You have stated that both of you are employed by DOD's Economic Development Division. In your situation, you have proposed to provide training that is similar to the consultation that either you provide as a DOD employees, or which DOD provides. In applying the general outside-employment standard set forth above, that R.C. 102.03(D) and (E) prohibit a public official or employee from holding outside employment where it conflicts with his public employment, it is the conclusion of the Ethics

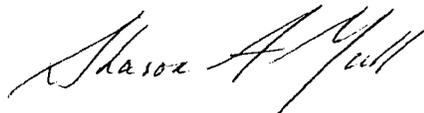
Commission that a public official or employee is prohibited by those same sections of the law from receiving private compensation to perform duties in his private capacity where the duties are substantially similar to duties performed by his public employer. Advisory Op. No. 93-002.

You are, therefore, prohibited from receiving payment for providing services in your private business that are available as part of a program established and administered by DOD. The training that you propose to provide is inextricably bound, through the potential clients involved and the type of training proposed, to the services that DOD provides. The overlap between the training and consultation you propose to provide privately, and the training and consultation provided by DOD is so great that it could manifest a substantial and improper influence upon you with respect to your state service if you were to provide those same types of training services, for private compensation, to employers located in the state. The similarity between the services provided by your public employer, DOD, and the services that you propose to provide in a private business may lead the individuals, who you solicit to become your private clients, to assume that the training or consultation that you provide bears the approval or implicit support of DOD, or may assist the client in future DOD requests or actions. This results in an impermissible conflict of interest.

Therefore, it is the opinion of the undersigned, and you are so advised, that Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit you from providing training or consultation services in your private capacity, where similar training and consultation services are offered by the governmental agency that you continue to serve. You are also prohibited from soliciting those who are seeking or obtaining services from, are interested in matters before, or regulated by DOD.

This advisory opinion was approved by the Ohio Ethics Commission at its February 2, 1996, meeting. It is based on the facts presented and 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. If you have any questions, please feel free to contact this Office.

Sincerely,



Sharon A. Mull, Staff Attorney
Ohio Ethics Commission