



OHIO ETHICS COMMISSION

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February 11, 1997 Informal Opinion 1997-INF-0211-1

Judith Mastrine Parker, MS,RD,LD
Executive Secretary
Ohio Board of Dietetics

Dear Ms. Parker:

In your letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes prohibit members of the Ohio Board of Dietetics (Board) from receiving reimbursement from the Commission on Dietetic Registration (CDR) for hotel, meal, and travel costs incurred by Board members who attend CDR's examination revision meetings.

In response to your question, Division (H) of Revised Code Section 102.03 authorizes the limited receipt of expenses where the state agency pays membership dues to a national organization. You have explained that your agency does not pay membership dues to CDR. As discussed below, Board members are prohibited from receiving reimbursement from CDR for the cost of attending CDR's examination revision meetings.

You begin your question by stating that CDR is the credentialing body for the American Dietetic Association. The CDR is responsible for establishing and enforcing standards and qualifications for the professional designation of a "Registered Dietitian."

In order to become licensed by the Board as a Registered Dietitian, an individual must either pass the Board-approved licensing examination or hold the CDR credential of Registered Dietitian. R.C. 4759.06. The CDR has developed a Registration Examination for Dietitians. The Board contracts with CDR to use CDR's examination as the state licensing examination for registered dietitians but the Board does not pay CDR any fee for the use of CDR's examination. You state that the State of Ohio is under no obligation to use CDR's examination as the state licensing examination. You also state that it is in CDR's interests to contract with as many states as possible to use their examination.

Annually, CDR revises the questions that comprise its examination. CDR invites members of the state boards that use its examination to participate in the revision process. The process requires the members of these state boards to attend a two-day meeting at CDR's Chicago office.

You state that the Board has inadequate funding to reimburse the Board members who participate in CDR's examination revision process but that CDR is willing to reimburse the individual Board members for associated hotel, meal, and travel expenses. You stress that Board participation and involvement in CDR's examination revision process is essential to the development of the examination and constitutes an integral part of the Board members' official duties.

The Board does not pay dues to CDR, however, four Board members are Registered Dietitians and pay individual dues annually to CDR to maintain their registration and meet continuing education requirements pursuant to Ohio Administrative Code 47599-4-04 (B).

Prohibition Imposed by R.C. 102.03 (D) and (E)

Your attention is directed to R.C. 102.03 (D) and (E), which read:

- (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.

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 employed by any public agency. The term "public agency" is defined to include any board of the state, therefore, members of the Ohio Board of Dietetics are "public officials or employees" and subject to R.C. 102.03. Advisory Op. No. 93-010.

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 (D) and (E). Advisory Opinions No. 79-006, 84-010, and 86-011.

Prohibition Against Receipt of Expenses

The Ethics Commission has consistently held that R.C. 102.03 (D) and (E) prohibit a public official or employee from accepting, soliciting, 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 interested in matters before, doing or seeking to do business with, or regulated by, the agency with which he serves. Advisory Ops. No. 79-002, 86-011, and 89-014.

The Ethics Commission held in Advisory Opinion No. 80-004 that R.C. 102.03 (D) and (E) prohibit a member of a state licensing board from accepting the payment of a registration fee and lodging in attending a conference sponsored by a professional association whose members were regulated by the board. Also, in Advisory Opinion No. 85-012, the Ethics Commission held that R.C. 102.03 (D) prohibits a member of a state licensing board from soliciting or receiving travel expenses from a state professional association whose members were regulated by the member's board.

The Ethics Commission has held that R.C. 102.03 (D) and (E) prohibit a public official or employee from receiving expenses even if the official or employee is performing a function that is directly related to his public duties, such as conducting an inspection, representing his public agency at a ceremony, providing information about his agency, or attending a conference or seminar for his professional development. Advisory Ops. No. 84-010, 86-011, and 92-018. The Ethics Commission has explained that the direct or indirect payment of expenses to an official or employee by a party whose interests may depend upon the performance of the official's or employee's responsibilities could impair the official's or employee's objectivity and independence of judgment in future matters affecting the party. *Id.* Furthermore, 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 reimbursement to the official's or employee's public agency. Advisory Ops. No. 89-013 and 92-018.

In the instant situation, the Ohio Board of Dietetics is responsible for licensing persons to practice dietetics, administering an examination for licensure, prescribing experimental requirements for licensure, establishing continuing education requirements for license renewal, establishing standards of professional responsibility, establishing licensure fees, and disciplining licensees. R.C. 4759.05 - .08. Thus, it is apparent that the Board exercises regulatory authority over persons who practice dietetics in the state or have applied for licensure to practice dietetics and will take the examination developed by CDR. As stated above, the Board contracts with CDR to use CDR's examination as the state licensing examination for registered dietitians, but that it is in CDR's interest to contract with as many states as possible to use their examination. Therefore, CDR is interested in matters before the Board even though the Board does not pay CDR any fee for the use of CDR's examination and the Board is under no obligation to use CDR's examination as the state licensing examination.

Exceptions to the Prohibition

The application of R.C. 102.03 (D) and (E) is dependent upon the facts and circumstances of each situation. Advisory Ops. No. 87-008 and 89-003. There are limited exceptions to the prohibition described above. These exceptions are described below but the facts you have presented do not fall within any of the exceptions.

Exception Authorized by Statute

In Advisory Opinion No. 87-005, the Ethics Commission held that a public agency is not prohibited from receiving expenses from a regulated party if the General Assembly has statutorily authorized the agency to charge for the cost of inspecting the party. In that advisory opinion, the Commission addressed the issue of whether R.C. 102.03 (D) and (E) would prohibit the Division of Consumer Finance from receiving travel, lodging, and meal expenses from a regulated party where the Division was statutorily authorized to charge for the cost of inspecting or examining the party. The Commission held in Advisory Opinion No. 87-005:

R.C. 131.53 authorizes the Division of Consumer Finance to require second mortgage lenders to pay the Division expenses incurred in conducting investigations outside the state when it appears expenses will exceed two hundred dollars. . . . R.C. 102.03 (E) does not prohibit a public agency from soliciting or accepting travel, meal, and lodging expenses which may be charged to a regulated party pursuant to statute. (Emphasis added.)

It must be noted that despite the fact that R.C. 131.53 provides an exception, the General Assembly enacted an exemption that is limited in scope. R.C. 131.53 does not authorize the Division of Consumer Finance to require the payment of expenses from all regulated parties in all circumstances. By enacting R.C. 131.53, the General Assembly authorized the Division of Consumer Finance to require one group of regulated parties to pay expenses of investigations only when the investigation is conducted out of state and the expenses exceed two hundred dollars.

In the instant situation, absent express statutory authority, the Board is prohibited from receiving reimbursement from CDR for hotel, meal, and travel costs incurred by Board members who attend CDR's examination revision meetings. The ability to receive reimbursement from an interested party must be founded upon the Legislature's review and ultimate decision to grant the Board authority to receive such reimbursement. See R.C. 117.13 (A)(1) (statutory authority for the auditor of state to recover costs of audits of state agencies). The General Assembly's consideration regarding such an exception assures an independent review of its merits and limitations.

Exception Provided by Bid Specification and Contract

In Advisory Opinion No. 87-007, the Ethics Commission held that R.C. 102.03 (D) and (E) do not prohibit an officer or employee of the Ohio Lottery Commission from soliciting, accepting, or using the authority or influence of his office or employment to secure travel expenses from a party that is doing business with the Lottery Commission where the requirement that trips be provided by the party to officers and employee of the Lottery Commission for the purpose of conducting official business is included in the bid specifications. In that situation, the requirement is ultimately included in the contract executed between the successful vendor and Commission, and the Lottery Commission pays consideration to the vendor for the receipt of the travel expenses. The Ethics Commission held in Advisory Opinion No. 87-007:

It is apparent that parties, in submitting a bid to the [Lottery] Commission, will include the cost of the trips in their proposals, and that such expenses are a cost included in the final contract price. Therefore, the travel expenses are a cost for which the Commission pays consideration. Ultimately, it is the Commission which bears the costs of the trips. Under these circumstances, the travel expenses are not of such a character as to manifest a substantial and improper influence upon a Lottery Commission officer or employee. (Emphasis added.)

The facts and circumstances of the instant situation differ considerably from those described in Advisory Opinion No. 87-007. Unlike the situation that the Commission addressed in Advisory Opinion No. 87-007, CDR is not a vendor selling goods or services to the Board pursuant to a contractual arrangement where the Board ultimately bears the cost of expenses incurred by Board members under the contract. Accordingly, the facts that you have presented do not fall within this exception to the general prohibition against a public official or employee accepting, soliciting, or using his position to secure anything of value from a party that is regulated by or interested in matters before the official's or employee's public agency.

Exception for Donations in Limited Circumstances

In Advisory Opinion No. 89-002, the Ethics Commission held that R.C. 102.03 (D) and (E) do not prohibit a public official or employee of the Industrial Commission from soliciting or receiving a donation of industrial and safety equipment from party that is regulated by the Industrial Commission where the solicitation or acceptance of the donated equipment is on behalf of the Industrial Commission and the Commission official or employee will not benefit personally. The Ethics Commission held in Advisory Opinion No. 89-002:

In [previous] opinions, payment was prohibited where made to the public official or employee himself, rather than to the public agency he served, even though in some instances, the payment benefits the agency, or was related to the performance of the official's or employee's official responsibilities. 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 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.

...

The donations are not accruing to the officials' or employees' personal benefit or to the benefit of anyone with whom they are connected in their personal capacities. The benefit is accruing to the agency with which they serve in their official capacity and they are soliciting or receiving the donations as part of their official responsibilities. Therefore, the donations to the Industrial Commission would not be of such a character as to manifest a substantial and improper influence upon the officials or employees with respect to their duties. (Emphasis in original.)

Furthermore, in Advisory Opinion No. 89-002, the Ethics Commission warned that an appearance of impropriety would be created if a regulated or interested party makes a donation to a public agency and the agency accepts the donation while a specific case is pending before the agency involving that party, or if it could be reasonably foreseen that an action will come before the agency. See also Advisory Op. No. 92-015.

The facts and circumstances in the instant situation differ considerably from those described in Advisory Opinion No. 89-002. In the instant situation, the receipt of reimbursement from CDR for hotel, meal, and travel costs incurred by Board members who attend CDR's examination revision meetings is not a "donation." Also, CDR is offering reimbursement to the Board during the time when a specific matter involving CDR -- revision and continued use of CDR's examination as the Ohio licensing exam -- is pending before the Board. Accordingly, the facts that you have presented do not fall within this exception to the general prohibition against a public official or employee accepting, soliciting, or using his position to secure anything of value from a party that is regulated by or interested in matters before the official's or employee's public agency.

Application of Precedent

After examining the three exceptions, it is apparent that the facts you have presented do not fall within any of the three exceptions to the general prohibition against a public official or employee accepting, soliciting, or using his position to secure anything of value from a party that is regulated by or interested in matters before the official's or employee's public agency.

Exception Provided by R.C. 102.03 (H)

R.C. 102.03 (H) modifies the prohibitions imposed by R.C. 102.03 (D) and (E) against a public official or employee from receiving expenses from a party that is regulated by or interested in matters before, or doing or seeking to do business with the official's or employee's public agency. R.C. 102.03 (H) reads in pertinent part:

No public official or employee, except for the president or other chief administrative officer of or a member of a board of trustees of a state institution of higher education as defined in section 3345.031 of the Revised Code, who is required to file a financial disclosure statement under section 102.02 of the Revised Code shall solicit or accept, and no person shall give to that public official or employee, an honorarium. This division and divisions (D), (E), and (F) of this section do not prohibit a public official or employee who is required to file a financial disclosure statement under section 102.02 of the Revised Code from accepting and do not prohibit a person from giving to that public official or employee the payment of actual travel expenses, including any expenses incurred in connection with the travel for lodging, and meals, food, and beverages provided to the public official or employee at a meeting at which the public official or employee participates in a panel, seminar, or speaking engagement or provided to

the public official or employee at a meeting or convention of a national organization to which either house of the general assembly, any legislative agency, or any other state agency pays membership dues. . . . (Emphasis added).

But, as explained below, the facts that you have presented do not fall within the exception provided by R.C. 102.03 (H).

As set forth above, you have stated that the Board does not pay dues to CDR. But four Board members are Registered Dietitians and pay individual dues annually to CDR to maintain their registration and meet continuing education requirements pursuant to Ohio Administrative Code 47599-4-04 (B). The language of R.C. 102.03 (H) states that the exception will apply where a state agency pays membership dues. It does not apply where a public official or employee pays individual membership dues. Accordingly, the facts that you have presented do not fall within the exception provided by R.C. 102.03 (H).

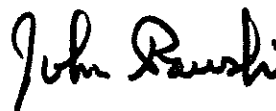
Conclusion

Therefore, as explained above, Board members are prohibited from receiving reimbursement from CDR for the cost of attending CDR's examination revision meetings. In addition to the restriction imposed upon Board members and employees, private parties must be aware that R.C. 102.03 (F) prohibits them from promising or giving anything of value which could manifest a substantial and improper influence upon public officers and employees with respect to their duties. Advisory Ops. No. 90-001 and 92-015.

The Ethics Commission has recognized that public agencies face budgetary constraints but has, nonetheless, concluded that "although budgetary considerations are of great concern to any [government agency], the prohibitions of R.C. 102.03 override the [agency's] desire to maximize its budget by having parties that are interested in matters before, regulated by, or doing or seeking to do business with the [agency] pay the travel, meal, and lodging expenses of its officials and employees." Advisory Op. No. 90-001. See also Advisory Op. No. 89-014.

This informal advisory opinion was approved by the Ethics Commission at its meeting on February 11, 1997. The opinion is based on the facts presented and 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. If you have any further questions, please feel free to contact this Office again.

Very truly yours,



John Rauski
Staff Attorney