

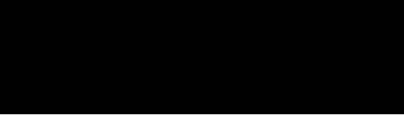


OHIO ETHICS COMMISSION
8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
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May 20, 1997

Informal Opinion 1997-INF-0520-2

Marlo B. Tannous, Deputy Chief Legal Counsel
Ohio Department of Development



Dear Ms. Tannous:

You have submitted a request for an advisory opinion in which you ask whether the Ohio Ethics Laws and related statutes prohibit the Deputy Director of the Community Development Division (Division) of the Ohio Department of Development (ODOD), Oren J. Henry, from receiving a per diem and the reimbursement of travel expenses for attending meetings of the Affordable Housing Program Advisory Council Board (Board) of the Federal Home Loan Bank of Cincinnati (FHLBC).

As explained below, under the facts that you have presented, Mr. Henry is not prohibited from receiving a per diem and the reimbursement of travel expenses from FHLBC. However, Mr. Henry must use vacation time, or another form of leave, while he attends FHLBC meetings for which he is paid a per diem.

Facts

You state that Mr. Henry serves on the Board and held this position prior to his becoming employed by the Division. You state that FHLBC pays all of the members of the Board \$250.00 per day for attending each meeting plus reimbursement for travel expenses. You state that the Board advises and assists FHLBC's Board of Directors and management in FHLBC's operation of its Affordable Housing Program and community investment resources to meet the housing needs of low to moderate-income individuals and families in the Fifth Federal Home Loan Bank District. The material that you have provided to our office with your request for an advisory opinion includes a memorandum to you from Mr. Henry in which he states that he takes vacation time when he attends FHLBC meetings for which he is paid a per diem.

You assert that neither the Division nor Mr. Henry make decisions that directly affect FHLBC. You state that it is conceivable that an organization or community could apply to the Division for funding through the Community Development Block Grant Program, HOME, or Trust Fund Program for a housing project to meet the housing needs of low- to moderate-income individuals and families and also apply, through a member lender, to FHLBC's Affordable Housing Program or its community investment fund for a grant or subsidized advance. In such a situation, the assistance from FHLBC would be used in addition to the funding received from the Division to make the project more affordable to the low-income family.

Prohibitions 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 appointed to a public agency. R.C. 102.01 (B). The term "public agency" is defined to include any department of the state. R.C. 102.01 (C). Therefore, an employee of ODOT is a "public official or employee" for purposes of R.C. Chapter 102. and is subject to the prohibitions therein. Advisory Op. No. 87-004.

R.C. 102.03 defines "anything of value" for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 102.01 (G). A per diem and travel expenses paid by the FHLBC to Mr. Henry for his services on the Board are things of value for purposes of R.C. 102.03 (D) and (E). Advisory Ops. No. 86-011 and 90-012.

R.C. 102.03 (D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his official position to secure anything of value, for himself or any other party, that is of an improper character. Advisory Ops. No. 88-004, 89-006, and 90-012. In Advisory Opinion No. 86-011, the Commission held that in order to determine the question of the propriety of the thing of value under R.C. 102.03, the focus is on the source of the thing of value. The Commission has held that R.C. 102.03 (D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his public office or employment to secure a substantial thing 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 he 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 his public agency. Advisory Ops. No. 86-011, 89-013, and 89-014.

For example, in Advisory Opinion No. 90-012, the Ethics Commission addressed the issue of a member of a state regulatory board serving as an officer or board member of a professional organization that is comprised of individuals who are regulated by the member's regulatory board. The Ethics Commission held, in Advisory Opinion No. 90-012, that the Ethics Law and related statutes do not per se prohibit the regulatory board member from serving as an

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officer or board member of the professional organization. The Ethics Laws and related statutes do, however, impose conditions upon the board member's conduct. See also Advisory Op. No. 85-012. The Commission noted, in Advisory Opinion No. 90-012, that the Respiratory Care Board regulated, and stood in a position of authority over, practitioners of respiratory care within the state, and found that state and national professional respiratory care organizations that represent such practitioners are interested, on an ongoing basis, in matters that the respiratory care board has the statutory responsibility to regulate. Accordingly, the Commission held that R.C. 102.02 (E) would prohibit a member of the Respiratory Care Board from receiving compensation, a fee, or anything else of value for service as an officer or board member of an organization of individuals that are regulated by the Board and that is interested, on an ongoing basis, in matters pending before the Board. The Commission also held that R.C. 102.03 (D) would prohibit a member of the Respiratory Care Board from using his official authority or influence to secure compensation or anything else of value for service as an officer or board member of such an organization.

The facts in the instant situation differ considerably from those that the Commission addressed in Advisory Opinion No. 90-012. In addition, as you point out in your memorandum, the circumstances are different from the situation you set forth in 1994. You have asserted that neither the Division nor Mr. Henry make decisions that directly affect the FHLBC. Therefore, the Board of the FHLBC is neither interested in matters pending before, nor regulated by the Division. Rather, it is the organizations or communities that apply to the Division for funding through the Community Development Block Grant Program, HOME, or Trust Fund Program that are interested in matters pending before, or regulated by the Division. The fact that the same organizations or communities may also apply, through a member lender, to FHLBC's Affordable Housing Program or their community investment fund for a grant or subsidized advance does not make the Board either interested in matters pending before, or regulated by, the Division.

The question remains whether Mr. Henry is required to take vacation time when he attends FHLBC meetings for which he is paid a per diem.

The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official or employee from using public time, facilities, personnel, or resources in operating a private business or while engaging in private outside employment. Advisory Op. No. 96-004. See also Advisory Ops. No. 84-012, 90-003, and 90-009. The Ethics Commission has held that a public official's or employee's duty is to the exercise of the public trust by performing the tasks assigned to him by the public agency with which he serves, or by which is employed, and that a public agency provides public time, facilities, or resources to its officials and employees for the performance of these tasks and not for the official's or employee's personal financial gain or benefit. Advisory Ops. No. 89-004 and 96-004. In the instant situation, Mr. Henry would receive a definite and direct personal financial gain or benefit from the payment of a per diem from FHLBC. Therefore, R.C. 102.03 (D) would prohibit Mr. Henry from receiving the payment of a per diem from FHLBC unless he takes vacation time, or another form of leave, while he attends FHLBC meetings.

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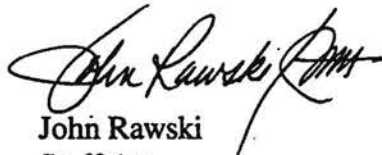
In the instant situation, under the facts that you have presented, the per diem and travel expenses received by Mr. Henry from FHLBC for attending meetings of the Board are not of such character as to manifest an "improper" influence upon him with respect to his duties as Deputy Director of the Division. Accordingly, R.C. 102.03 (D) and (E) do not prohibit him from accepting the per diem and travel expenses from FHLBC for attending meetings of the Board. However, Mr. Henry must use vacation time, or another form of leave, while he attends FHLBC meetings for which he is paid a per diem.

Conclusion

As explained above, under the facts that you have presented, Mr. Henry is not prohibited from receiving a per diem and the reimbursement of travel expenses from FHLBC. However, Mr. Henry must use vacation time, or another form of leave, while he attends FHLBC meetings for which he is paid a per diem.

This informal advisory opinion was approved by the Ethics Commission at its meeting on May 20, 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.

Sincerely,



John Rawski
Staff Attorney