

OHIO ETHICS COMMISSION

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December 15, 2000 Informal Opinion 2000-INF-1215-2

Tom Neyer, Jr.
Hamilton County Board of Commissioners

Dear Mr. Neyer:

The Ohio Ethics Commission received your request for an advisory opinion on December 1, 2000, and your revised request on December 7, 2000. In your request, you ask whether the Ohio Ethics Laws and related statutes prohibit you from participating, as a county commissioner, in the funding of an arts initiative known as the Regional Cultural Alliance (RCA).

Brief Answer

As explained below, because of the specific circumstances presented, including your service as a member of the RCA Transition Team, and the particular and significant responsibility you assumed with respect to the creation of the RCA as the chair of the RCA Transition Team, R.C. 102.03(D) prohibits you, at this time, from voting, discussing, deliberating, or participating, in any other way, as a county commissioner, in the funding of an arts initiative known as the RCA.

Facts

You have explained that you are a county commissioner for Hamilton County. You have stated that you participated in a two-year planning process, known as the Regional Cultural Planning Committee, which produced a "Regional Cultural Plan" in March, 1999. You further state that "shortly thereafter," the RCA Transition Team "was formed to implement some of the . . . objectives" established by the Regional Cultural Plan. You state that you chair the RCA Transition Team.

You have also stated that you serve on the board of four arts organizations, and that your mother serves on the board of a number of other arts organizations, in the Cincinnati area. While these organizations may have interests in the actions of the RCA, you have stated that you do not intend to ask the county to provide direct financial support for any of the organizations on which you or your mother serves as a board member.

The board of county commissioners is considering whether the county should provide significant funding for the operation of the RCA. You state that the RCA will focus on advocacy for regional arts and culture, arts education, and the promotion of cultural tourism, and will serve as a unified voice for the arts and culture in the region by establishing vital links between arts groups throughout eight counties in the tri-state area.

In your letter, you have explained the aims and goals of the proposed RCA, as provided in the Regional Cultural Plan, and developed by the RCA Transition Team. While the issue of providing public funding for the RCA may have significant merit, it is not an issue under the purview of the Ethics Commission. The question before the Commission is whether you are prohibited from participating in the decision of the county commissioners because of the totality of the circumstances presented, including your service as a member of the Regional Cultural Planning Committee, and as the Chair of the RCA Transition Team.

Advisory Function of the Ethics Commission

Because of the significance of this issue to the citizens of Hamilton County, it is important that the Ethics Commission clarify the authority it holds to respond to the issues presented by in request. The General Assembly's grant of advisory authority to the Commission exists to guide a public official or employee before he takes an action in a matter that implicates the prohibitions imposed by Ohio's Ethics Law and related statutes. See State v. Nipps, 66 Ohio App. 2d 17, 22 (1979) ("[A] public official or employee is not required to guess whether his conduct may be prohibited, but, may request an advisory opinion from the Ohio Ethics Commission.") The Commission generally renders advisory opinions in response to questions that are hypothetical or prospective. Ohio Ethics Commission Advisory Opinions No. 75-037 and 94-002.

In keeping with the Ethics Commission's duties, the rendering of an advisory opinion is not a fact-finding process. The Commission cannot, in an advisory opinion, examine the past actions of a public official or employee to determine whether the official or employee has taken any actions or used his authority in any way to contravene a criminal statute. Adv. Ops. No. 75-037, 92-003, and 94-002. If a question is raised with regard the propriety of the activity in which a public official or employee has already engaged, then the Ethics Commission can only act through its investigative authority to determine whether those facts that have already occurred indicate that the Ethics Law and related statutes have been violated, and then consider the possible referral of the matter for prosecution based upon the evidence. R.C. 102.06; Adv. Ops. No. 92-003 and 94-002. The Ethics Commission's investigative process is confidential by law. Id.

In contrast, an advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes, and sets forth the standards that a public official or employee must observe to avoid actions that may run afoul of these statutes in a given set of circumstances. Adv. Ops. No. 75-037, 90-013, 92-003, and 92-015. An advisory opinion offers the person to whom it is directed immunity from criminal prosecution, civil actions, and actions for removal from office for a violation of the Ohio Ethics Laws and related statutes, if the person complies with the

guidance provided in the opinion before he acts, and provided that the facts that have been supplied to the Commission, and upon which the opinion is based, are accurate and complete. R.C. 102.08. The Commission's advisory opinions are public record.

General Conflicts of Interest Provision—R.C. 102.03(D)

Your question raises the application of one of the general conflicts of interest provision of the Ethics Law, set forth in Revised Code Section 102.03(D), which reads:

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.

R.C. 102.01(B) defines a "public official or employee" for purposes of R.C. Chapter 102. as any person who is elected, 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 of a county. Thus, a member of the Board of Hamilton County Commissioners is a "public official or employee" for purposes of R.C. 102.03(D). Adv. Op. No. 88-003.

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. 102.01(G). The Ethics Commission has held that the beneficial or detrimental economic impact of a decision by a public entity is a thing of value for purposes of R.C. 102.03(D). Adv. Ops. No. 85-012, 90-002, and 90-012.

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his position to secure a thing of value that is of such a character as to manifest a substantial and improper influence upon the official with respect to his duties. As it was initially enacted, R.C. 102.03(D) prohibited a public official or employee from using his authority or influence to secure anything of value for himself if the thing of value were of such character as to manifest a substantial and improper influence upon him with respect to his duties. See Adv. Ops. No. 79-008, 80-003, 84-010, and 85-011. However, R.C. 102.03(D) was amended in 1986 to delete the requirement that the thing of value resulting from an official decision be for the public official or employee himself. The protection to the public against the impairment of the independence of a public servant's judgment in the exercise of his duties is therefore not solely dependent upon a showing that the public official or employee would himself derive a personal, pecuniary benefit from his participation in an official matter. R.C. 102.03(D) requires that the thing of value, whether it is secured for the official or for another person or entity, be of "such a character as to manifest a substantial and improper influence upon him with respect to his duties."

A determination as to whether a public official is prohibited from participating in a matter that results in a benefit for someone other than himself will depend on the relationship between the official and the party whose interests would be affected in that matter. Adv. Op. No. 89-005.

The Ethics Commission has held that the standard in judging such participation is whether the relationship between the public official and the party is such that the public official's objectivity or independence of judgment could be impaired with regard to the matter affecting the party's interests. Id.

For example, the Commission has stated that R.C. 102.03(D) prohibits a public official from participating in matters that would result in a definite and direct benefit for the official's family member (Adv. Op. No. 98-002), business associate (Adv. Op. No. 89-016), or outside employer (Adv. Op. No. 89-008). In each case, the Commission has held that the relationship between the official and the party who would receive the thing of value was such that the thing of value would have a substantial and improper influence upon the public official with respect to his official duties.

In the situation you have described, it does not appear that you, or any of your family members or business associates will definitely and directly benefit from the decision pending before the county commission. However, as stated above, these are merely examples of the application of the conflict of interest restriction in R.C. 102.03(D). There are other kinds of relationships that a public official may have with private parties whose interests are before his public agency which could implicate the restriction in R.C. 102.03(D).

Membership in an Organization—Advisory Opinion No. 89-005 and R.C. 102.03(J)

In Advisory Opinion No. 89-005, the Commission examined a situation that provides more direct guidance for the question that you have presented. In that opinion, the Commission was asked whether a school board member, who is a member of an employee labor organization as a teacher in another school district, is prohibited from participating in discussions or voting on a proposed collective bargaining agreement between the employee organization and the school district of which he is a board member. The Commission examined R.C. 102.03(D), and concluded that a public official, who is a member of an organization, is not generally prohibited from participating in matters before his public agency that affect the organization. However, the Commission went on to state that there are some situations in which a public official, who is a member of an organization, would be prohibited from participating in matters before his public agency that affect the organization. The Commission stated:

Division (D) of Section 102.03 would prohibit a public official or employee who is a member of an organization from participating in deliberations, voting, or otherwise using his official position with regard to the interests of the organization, where: (1) he is an officer, board member, or employee of the organization; (2) he has assumed a particular responsibility in the organization with regard to that subject matter; (3) the matter would affect his personal, pecuniary interests; or (4) the facts otherwise indicate that membership in the organization could impair the official's objectivity or independence of judgment.

Adv. Op. No. 89-005 (emphasis added). See also Adv. Op. No. 90-012 (a member of the Ohio Respiratory Care Board is prohibited from voting on matters before the Board that affect a state

or national professional organization of which he is a member if he has assumed a particular responsibility in the organization with regard to those matters).

R.C. 102.03(J), enacted by the General Assembly in 1990 as a specific exception to the prohibition of 102.03(D), supports and is consistent with the Commission's analysis in Adv. Op. No. 89-005. R.C. 102.03(J) provides:

For purposes of divisions (D), (E), and (F) of this section, the membership of a public official or employee in an organization shall not be considered, in and of itself, to be of such a character as to manifest a substantial and improper influence on the public official or employee with respect to that person's duties. As used in this division, "organization" means a church or a religious, benevolent, fraternal, or professional organization that is tax exempt under subsection 501(a) and described in subsection 501(c) (3), (4), (8), (10), or (19) of the "Internal Revenue Code of 1986." This division does not apply to a public official or employee who is an employee of an organization, serves as a trustee, director, or officer of an organization, or otherwise holds a fiduciary relationship with an organization. This division does not allow a public official or employee who is a member of an organization to participate, formally or informally, in deliberations, discussions, or voting on a matter or to use his official position with regard to the interests of the organization on the matter if the public official or employee has assumed a particular responsibility in the organization with respect to the matter or if the matter would affect that person's personal, pecuniary interests. (Emphasis added.)

R.C. 102.03(J) clarifies and supports the proposition that R.C. 102.03(D) will not prohibit a public official who is a mere member of an organization from participating in matters pending before his public agency that affect the interests of the organization. However, the exception in R.C. 102.03(J) does not apply and, depending on the specific facts, R.C. 102.03(D) may prohibit a public official from participating in a matter that affects an organization of which he is a member, if the public official "has assumed a particular responsibility in the organization with respect to the matter." The General Assembly incorporated, in the exception, the specific language that Commission used in Advisory Opinion No. 89-005 to describe a public official who has a unique connection with an organization because of the work he does for the organization.

Relationship with RCA

The application of R.C. 102.03(D) is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 87-007 and 89-003. In order to determine whether R.C. 102.03(D) prohibits you from participating, at this time, as a county commissioner, in the consideration of funding of the RCA, it is necessary for the Commission to examine all of the facts and circumstances that you have presented.

You have stated that you participated in a two-year planning process, conducted by the Regional Cultural Planning Committee, to produce a "Regional Cultural Plan" in March, 1999. You have further stated that you served as member and chairperson of the RCA Transition Team that was formed to implement the objectives established by the Regional Cultural Planning Committee in the Regional Cultural Plan.

You have stated that one of the key recommendations of the Regional Cultural Planning Committee was the creation of the RCA. As a member and chair of the RCA Transition Team, you assumed a particular responsibility with that organization to achieve the Regional Cultural Planning Committee's goal of creating the RCA. In fact, you have stated that you agreed to help form the RCA.

Conclusion

Therefore, because of the specific circumstances presented, including your service as a member of the RCA Transition Team, and the particular and significant responsibility you assumed with respect to the creation of the RCA as the chair of the RCA Transition Team, R.C. 102.03(D) prohibits you, at this time, from voting, discussing, deliberating, or participating, in any other way, as a county commissioner, in the funding of an arts initiative known as the RCA.

The Commission appreciates your desire for specific guidance with respect to the pending matter, and commends you for seeking an opinion. This advisory opinion is a response to your request for specific guidance with respect to the pending matter, and in no way prejudices the outcome of any other related issues before the Commission.

The Ethics Commission approved this informal advisory opinion at its meeting on December 15, 2000. 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,



David E. Freel
Executive Director