

# OHIO ETHICS COMMISSION

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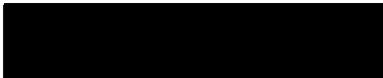


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January 26, 2001

Informal Opinion 2001-INF-0126-2

Hon. Betty D. Montgomery  
Attorney General of the State of Ohio  
State Office Tower



Dear Ms. Montgomery:

In a letter to the Ohio Ethics Commission, you asked whether the Ethics Law and related statutes prohibit instructors at the Ohio Peace Officer Training Academy (OPOTA) from engaging in outside employment in which the instructors would provide private peace officer training.

As explained more fully below, R.C. 2921.43(A)(1) prohibits all instructors at OPOTA from receiving compensation, from any source other than their public employer, for teaching the same courses that they are required to teach in the course of their public employment. Further, if their positions involve the performance of, or authority to perform, administrative or supervisory functions, then the instructors are also subject to the provisions of R.C. Chapter 102., including R.C. 102.03(D) and (E).

R.C. 102.03(D) and (E) do not absolutely prohibit the instructors who perform, or who have the authority to perform, administrative or supervisory functions, from accepting compensation for providing private peace officer training so long as they do not use their public positions to secure the compensation. R.C. 102.03(D) also prohibits any public official or employee who engages in private outside employment or business activity from: (a) using public time, facilities, personnel, or resources in conducting a private business or while engaging in private outside employment; (b) using his official title or identification on written business materials or appearing in uniform while conducting private business; (c) using his relationship with other public officials and employees in matters regarding his private interests; (d) discussing, deliberating, or voting on any matter involving his private business; (e) receiving fees for providing services rendered on projects that he has recommended in his official capacity; (f) participating in decisions or recommendations regarding his competitors; and (g) using his public position or authority in any other way to secure a benefit for his outside employer or private business.

**Facts**

In your letter to the Commission, you state that instructors at OPOTA have requested authorization to engage in outside employment. You explain that OPOTA and the Ohio Peace Officer Training Commission (Training Commission) perform their statutory responsibilities under the auspices of the Ohio Attorney General.

OPOTA has been established pursuant to R.C. 109.79 for the purpose of providing instruction to persons who wish to serve as peace officers within Ohio. The Training Commission is responsible for recommending to the Attorney General the promulgation of administrative rules that establish the courses of instruction that are offered at OPOTA and at other peace officer training schools throughout the state. R.C. 109.79(A). R.C. 109.77(B)(1) provides that no person shall receive an original appointment on a permanent basis as an Ohio peace officer unless the person previously has been awarded a certificate by the executive director of the Training Commission attesting to the person's satisfactory completion of an approved peace officer basic training program.

You explain that OPOTA provides two types of peace officer training: basic training for persons who wish to embark upon a career in law enforcement, and advanced in-service training for acting peace officers. You further explain that instructors at OPOTA ordinarily provide instruction in both the basic training program and the advanced in-service training program. Several of these instructors propose to pursue employment outside OPOTA for the purpose of teaching persons who wish to receive appointments as Ohio peace officers. This employment, for which the instructors would receive compensation, would be in addition to their public employment at OPOTA, and would take place at various private educational institutions in Ohio. You state that the courses taught at the private educational institutions would be the same as the courses that these instructors teach at OPOTA in the basic training program and the advanced in-service training program. You state that there may be a few instances, however, in which the courses taught at the private educational institutions would not be duplicated at OPOTA.

Finally, you state that a person who receives instruction in basic training at one of these private educational institutions must be awarded a certificate by the executive director of the Training Commission attesting to the person's satisfactory completion of an approved peace officer training program before the person may receive an original appointment as an Ohio peace officer. R.C. 109.77(B)(1). The advanced courses taught at the private educational institutions are not under the purview of the executive director of the Training Commission and a person does not qualify to receive the executive director's certification under R.C. 109.77(B)(1) for taking these courses.

Based on the information that you have presented, and in light of the conclusions set forth in Ohio Ethics Commission Advisory Opinion No. 98-005, you request the Ethics Commission to address the question of whether an instructor at OPOTA may also be employed at and compensated by a private educational institution for the purpose of teaching basic or advanced peace officer training courses to persons who wish to receive appointments as Ohio peace officers and who may thereafter apply to the executive director of the Training Commission for certification under R.C. 109.77(B)(1).

**Accepting Compensation for Performing Duties of Public Position—R.C. 2921.43(A)(1)**

Your question implicates R.C. 2921.43(A)(1), which provides that no public servant shall solicit or accept, and no person shall promise or give a public servant:

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.

The term "public servant" is defined, in R.C. 2921.01(B), to include any "public official," and "any person performing ad hoc a governmental function." The term "public official" is defined, in R.C. 2921.01(A), to include, "any elected or appointed officer, or employee, or agent of the state or any political subdivision." An OPOTA instructor is a state employee, and is, therefore, a "public servant" for purposes of R.C. 2921.43(A)(1).

R.C. 2921.43(A)(1) prohibits a public servant from accepting compensation from any party, except as provided by law, for the performance of his official duties, for the general performance of the duties of his office or employment, or as a supplement to his public compensation. Generally, the Commission has stated that this section prohibits a public official from receiving compensation, from any party other than his public employer, for performing the duties of his public position. Adv. Op. No. 89-012 (a city law director is required, as a part of his job duties, to represent the city school district, and cannot accept additional compensation, from the school district, to represent it) and Adv. Op. No. 90-007 (a county prosecutor, who is required to represent townships within the county, cannot accept additional compensation, from any township, to represent it).

In Advisory Opinion No. 98-005, the Commission stated that if electrical safety inspectors are required, as a part of their public employment, to teach recertification classes for the political subdivisions they serve, the electrical safety inspectors would be prohibited from receiving compensation from any other party to teach the same classes. The Commission stated that the electrical safety inspectors would be prohibited from receiving compensation from any party, other than their public employers, for teaching recertification classes, including parties regulated by the electrical safety inspectors and parties who are not regulated by the electrical safety inspectors.

In the situation that you have presented to the Commission, the OPOTA instructors would be teaching the same training courses in the private sector that they are required to teach as part of their public employment. R.C. 102.03(G), (H), and (I) do not allow an OPOTA instructor to solicit or accept compensation for teaching the private training courses. Therefore, regardless of whether the training courses are part of the basic or advanced training programs, R.C. 2921.43(A)(1) prohibits OPOTA instructors from accepting compensation for teaching training courses that the instructors are required to teach as part of their public employment. So long as the restrictions of R.C. 102.03(D) and (E) are observed, as discussed below, the OPOTA instructors would not be prohibited from accepting compensation for teaching courses that they are not required to teach as part of their public employment.

**The Application of the Provisions of R.C. Chapter 102. to Academy Instructors**

When answering questions pertaining to outside employment, the Commission generally considers the conflict of interest law, set forth in R.C. 102.03. The provisions of R.C. 102.03 apply to any person who is a "public official or employee." Before proceeding to the application of the conflict of interest law to the question that you have presented to the Commission, it is first necessary to determine whether OPOTA instructors are "public officials or employees" for purposes of R.C. Chapter 102. R.C. 102.01(B) defines "public official or employee," as that term is used in R.C. Chapter 102., to include "any person who is elected or appointed to an office or is an employee of any public agency." "Public agency" is defined as "the general assembly, all courts, any department, division, institution, board, commission, authority, bureau, or other instrumentality of the state, a county, city, village, township, and the five state retirement systems, or any other governmental entity." R.C. 102.01(C).

R.C. 109.79 provides that "[t]he Ohio peace officer training commission shall establish and conduct a training school [the Ohio peace officer training academy] for law enforcement officers of any political subdivision of the state or of the state public defender's office." As you have stated, the Training Commission performs its statutory duties under the auspices of your office. Therefore, as state employees, it appears that OPOTA instructors are "public officials and employees" for purposes of R.C. Chapter 102.

R.C. 102.01(B) further provides, however, that "'public official or employee' does not include a person who is a teacher, instructor, professor, or any other kind of educator whose position does not involve the performance of, or the authority to perform, administrative or supervisory functions" (emphasis added). Therefore, if the duties of OPOTA instructors do not involve the performance of, or the authority to perform, administrative or supervisory functions, then the instructors are not subject to the provisions of R.C. Chapter 102.

In addressing the question of whether a teacher or other kind of educator is subject to R.C. Chapter 102., the Commission stated the following in Advisory Opinion No. 93-017:

Any teacher or other kind of educator whose position involves the performance of, or authority to perform, any duties that involve managing or directing the activities of the school district or other school employees, or supervising other school employees, is a "public official or employee" for purposes of R.C. 102.01(B). See The New Lexicon Webster's Dictionary of the English Language, 11 and 994. For example, an educator who is the head of an academic department and establishes the curriculum, teaching activities, or other matters for the department is a teacher whose position involves the performance of administrative duties. In another example, an instructor who also acts as an athletic coach, and supervises the activities of assistant coaches, is an educator whose position involves the performance of supervisory duties. See generally Advisory Op. No. 91-006.

The answer to the question of whether an OPOTA instructor exercises, or has the authority to exercise, administrative or supervisory functions, is not clear based on the information that you have presented. Even if the instructors do not exercise administrative or supervisory functions, however, they are subject to R.C. 2921.43(A)(1) which prohibits them from accepting compensation from any source except their public employer, for teaching the same classes that they are required to teach in the course of their public employment, as discussed below.

**Soliciting or Accepting Compensation for Outside Employment—R.C. 102.03(D) and (E)**

If an OPOTA instructor exercises, or has the authority to exercise, administrative or supervisory functions, then he or she is subject to the provisions of R.C. Chapter 102. In particular, R.C. 102.03(D) and (E), which provide the following, are applicable to the situation that you have presented:

- (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.

R.C. 1.03 defines "anything of value" for purposes of R.C. 102.03 to include money, the promise of future employment, and every other thing of value. R.C. 102.01(G). A definite pecuniary benefit is considered to be a thing of value for purposes of R.C. 102.03(D) and (E). Adv. Ops. No. 79-008, 85-006, and 86-007. Therefore, the compensation that an OPOTA instructor would receive for providing private peace officer training is a thing of value for purposes of R.C. 102.03(D) and (E).

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 if the thing of value could manifest a substantial and improper influence upon him with respect to his duties. Adv. Op. No. 90-003. The Ethics Commission has stated that in order to be prohibited for purposes of R.C. 102.03, the thing of value must be of a substantial and improper character. Adv. Ops. No. 88-004, 89-006, and 89-014. Generally, the compensation that a public official or employee receives from a private outside employment or business activity would be of a substantial nature. Adv. Op. No. 96-004. R.C. 102.03(D) and (E), however, do not prohibit a public official or employee from engaging in private business activity so long as no conflict of interest exists between the public official's or employee's public position and private financial interests. Adv. Ops. No. 84-009, 84-012, and 92-009.

R.C. 102.03(E) does not require that the public official or employee use the authority or influence of his office or employment to secure an improper thing of value. Rather, by its language, R.C. 102.03(E) prohibits a public official or employee from merely soliciting or accepting an improper thing of value. Adv. Op. No. 90-004. The Ethics Commission has stated that the relationship between the public official or employee and the source of the thing of value determines whether the thing of value received from that party is improper for purposes of R.C. 102.03(E). Adv. Ops. No. 86-011 and 92-015. The Commission has also stated that the objectivity and independence of judgment, of a public official or employee, in performing his official public duties could be affected if he were to solicit or accept a thing of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with his own public agency. Adv. Ops. No. 84-010, 87-006, 87-009, and 89-006.

In Advisory Opinion No. 98-005, the Ethics Commission concluded that R.C. 102.03(E) prohibits publicly employed electrical safety inspectors (ESI's) from soliciting or accepting compensation for teaching a recertification class for electrical contractors who work within their jurisdiction because the independence and objectivity of judgment of the inspectors could be impaired with regard to carrying out the decisions and responsibilities of their public agencies. The determination of whether R.C. 102.03(E) prohibits a public official from accepting a thing of value, however, is dependent on the facts and circumstances surrounding the matter.

R.C. 102.03(E) prohibits a public official or employee from receiving anything of value, including payments for outside employment, from any party that is regulated by the public agency he serves. Adv. Op. No. 98-005. However, in Advisory Opinion No. 98-005, the Commission stated:

The Ethics Commission has held that in certain situations, a public official or employee who engages in private outside business activity may withdraw from consideration of matters that would create an impairment of his objectivity and independence of judgment. Adv. Op. No. 96-004. See also Adv. Ops. No. 89-006, 90-002, and 90-009. However, a public official's or employee's withdrawal from consideration of issues concerning parties who are interested in matters before, regulated by, or doing or seeking to do business with his own public agency may be accomplished only when such a withdrawal: (1) does not interfere with the official's or employee's performance of his assigned duties; and (2) is approved by the appropriate officials at his employing agency to assure that no conflict of interest is present. Id. See also Adv. Op. No. 89-010.

The application of R.C. 102.03(E) is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 90-004 and 91-002. In some situations a public official or employee may not have any official duties that bring him into contact as a public official or employee with the party with which he desires to conduct private business, who is also regulated by, or does business with, the public agency of the public official. In such a situation, it is obvious that a withdrawal from matters affecting the interested party is unnecessary. But it is necessary, in that situation, that the appropriate officials at the affected official's or employee's agency approve the proposed activity of the official or employee because

the existence of a private business relationship would affect his employing public agency's ability to assign new duties that could bring him into contact with the interested party in the future.

In Advisory Opinion No. 98-005, the ESI's would be receiving compensation from individuals in the private sector over whom they had regulatory power in the public sector. After examining the authority of ESI's, the Commission concluded that ESI's would be unable to withdraw from regulatory matters that affect electrical contractors who work in his jurisdiction, in order to pursue outside employment activities, without an insurmountable interference with the inspector's performance of his assigned public duties. Therefore, the Commission concluded that the ESI's were prohibited from teaching recertification classes for electrical contractors over whom they had regulatory authority.

In the situation you have presented, OPOTA itself regulates the parties who would be providing compensation to OPOTA instructors. However, the OPOTA instructors themselves do not possess any type of regulatory powers over those from whom they would accept compensation. If this is the case, then OPOTA instructors would not be required to formally withdraw from matters involving those parties in order to teach classes for compensation. See Adv. Op. No. 98-005. However, the OPOTA instructors would be required to seek and obtain approval of the proposed training activities from the appropriate officials at OPOTA because the existence of a private business relationship would affect OPOTA's ability to assign new duties that could bring the instructors into contact with the regulated parties. Further, the OPOTA instructors are prohibited from accepting compensation for providing private peace officer training if they use the authority or influence of their public employment to secure the private compensation.

**General Outside Employment Restrictions—R.C. 102.03(D)**

The Ethics Commission had also identified a number of general restrictions that apply to all public officials and employees who engage in private outside employment, including the OPOTA instructors in the situation that you have presented. The Commission stated, in Advisory Opinion No. 96-004, that R.C. 102.03(D) prohibits a public official or employee who engages in private outside employment or business activity from:

- (1) using public time, facilities, personnel, or resources in conducting a private business or while engaging in private outside employment including conducting demonstrations for clients using public equipment.
- (2) using his official title or identification on private business cards or other written materials or appearing in uniform while soliciting business or conducting demonstrations for clients;
- (3) using his relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding his private interests;

- (4) discussing, deliberating, or voting on any matter involving his private business, including recommending his outside employer's or business's services to his own public agency;
- (5) receiving fees for providing services rendered on projects that he has recommended in his official capacity;
- (6) participating in decisions or recommendations regarding his competitors; and,
- (7) using his public position or authority in any other way to secure a benefit for his outside employer or private business.

The Commission has established these general limitations on the conduct of a public official or employee who wishes to engage in a private business. The application of these limitations is dependent on the facts and circumstances of each individual situation. See generally Adv. Ops. No. 77-003, 86-007, and 92-009.

### Conclusion

As explained above, R.C. 2921.43(A)(1) prohibits all instructors at OPOTA from receiving compensation, from any source other than their public employer, for teaching the same courses that they are required to teach in the course of their public employment. Further, if their positions involve the performance of, or authority to perform, administrative or supervisory functions, then the instructors are also subject to the provisions of R.C. Chapter 102., including R.C. 102.03(D) and (E).

R.C. 102.03(D) and (E) do not absolutely prohibit the instructors who perform, or who have the authority to perform, administrative or supervisory functions, from accepting compensation for providing private peace officer training so long as they do not use their public positions to secure the compensation. R.C. 102.03(D) also prohibits any public official or employee who engages in private outside employment or business activity from: (a) using public time, facilities, personnel, or resources in conducting a private business or while engaging in private outside employment; (b) using his official title or identification on written business materials or appearing in uniform while conducting private business; (c) using his relationship with other public officials and employees in matters regarding his private interests; (d) discussing, deliberating, or voting on any matter involving his private business; (e) receiving fees for providing services rendered on projects that he has recommended in his official capacity; (f) participating in decisions or recommendations regarding his competitors; and (g) using his public position or authority in any other way to secure a benefit for his outside employer or private business.

Hon. Betty D. Montgomery

January 26, 2001

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The Ohio 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 questions or desire additional information, please contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy L. Gates". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Timothy L. Gates  
Staff Attorney