

OHIO ETHICS COMMISSION

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Informal Opinion 2001-INF-0223-2

Tim Phillians, Director
Staff/Student Services
OCSS-ODRC

Dear Mr. Phillians:

In your letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes prohibit Ohio Department of Rehabilitation and Correction (DRC) employees who serve as assessors of entry-year teachers in the Ohio Central School System (OCSS) from receiving a stipend in connection with the assignment from the Ohio Department of Education (DOE).

Brief Answer

As explained above, under the specific circumstances described, a DRC employee who serves as an assessor of entry-year teachers at OCSS is not prohibited from receiving a stipend from DOE, provided that he has not improperly used the authority or influence of his public employment to secure his position as an assessor. Also, DOE is not prohibited from providing a stipend to a DRC employee who serves as an assessor. However, a DRC employee who serves as an assessor of entry-year teachers at OCSS must file the statements required by R.C. 102.04(D) with: (1) the Ohio Ethics Commission; (2) DRC; and (3) DOE. The statements must describe the services that he will perform for DOE as a PRAXIS III assessor and state that he will disqualify himself for a period of two years, from the date of the filing of his most recent statement, from any participation as a DRC employee in any matter involving any public official or employee of DOE.

Facts

You state that OCSS is a chartered school system that functions within DRC. The teachers in the OCSS are employees of DRC. State law requires teachers in all education systems in Ohio to meet uniform standards of professional licensure. An assessment program of entry-year teachers called PRAXIS III was developed as one means of meeting uniform standards of professional licensure.

You state that DOE has trained approximately twenty OCSS teachers to serve as PRAXIS III assessors of entry-year teachers employed by OCSS. You state that OCSS officials decided to use OCSS teachers as assessors because of possible safety and security concerns of assessors who are unfamiliar with the corrections setting. You state that DOE pays PRAXIS III assessors in the public schools a stipend of approximately \$350.00 for each completed assessment. You explain that, according to DOE, the stipend is not intended to compensate an assessor for the time involved in performing the actual assessment, but rather for the assessors' personal time used in completing assessment data and entering this information into a computer for electronic transmission to DOE. You state that this process can take up to ten hours. Finally, you believe that OCSS assessors "are no different than the public school assessors and should be eligible for this stipend."

Prohibition Against Receiving Supplemental Compensation—R.C. 2921.43(A)

R.C. 2921.43(A) provides:

- (A) No public servant shall knowingly solicit or accept and no person shall knowingly promise or give to a public servant either of the following:
 - (1) 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;
 - (2) Additional or greater fees or costs than are allowed by law to perform his official duties.

The term "public servant" is defined in R.C. 2921.01(A) and (B) for purposes of R.C. 2921.43 to include any person who is a public officer or employee of the state. A person who is employed by DRC is a "public servant" for purposes of R.C. 2921.43.

R.C. 2921.43(A)(1) prohibits a public servant from soliciting or accepting any "compensation," other than as allowed by R.C. 102.03 (G)-(I) or other provision of law, for: (1) performing any duty, act, or service required in his official capacity as a public servant; (2) the general performance of his duties; or (3) as a supplement to his public compensation.

R.C. 2921.43(A)(1) also prohibits any person from promising or giving to public servants "compensation," other than as allowed by R.C. 102.03 (G)-(I) or other provision of law, for: (1) performing any duty, act, or service required in their official capacity as public servants; (2) the general performance of their public duties; or (3) as a supplement to their public compensation. Ohio Ethics Commission Advisory Opinions No. 89-014, 90-001, and 92-015. In the instant situation, DOE is a "person" for purposes of R.C. 2921.43(A)(1). See Adv. Op.

No. 99-001 (holding that the word "person" as used in R.C. 102.03(A)(1) includes a public agency). Therefore, the prohibition imposed by R.C. 2921.43(A)(1) applies to the DOE.

The word "compensation" is not defined for purposes of R.C. Section 2921.43. In Advisory Opinion No. 92-014, the Ethics Commission held:

A primary rule of statutory construction is that words used in a statute must be construed according to rules of grammar and common usage. See R.C. 1.42. Furthermore, statutes "must be construed in the light of the mischief they are designed to combat." City of Mentor v. Giordano, 9 Ohio St. 2d 140, 144 (1967). "Compensation" is defined as "payment for services: esp., wages or remuneration." See Webster's New World Dictionary 289 (2nd College Ed. 1972).

R.C. 2921.43 addresses situations where a public servant would receive compensation other than as provided by law that is given to him for any one of three reasons. In order to fall within the prohibitions of R.C. 2921.43, the compensation must be provided to the public servant for: (1) performing a duty, act, or service required in his official capacity as a public servant; (2) the general performance of his public duties; or (3) as a supplement to his public compensation. See Adv. Ops. 89-012 (payment for legal services required to be performed by a law director), 89-013 (travel, meal, and lodging expenses for travel on state business) and 91-010 ("frequent flyer" benefits earned through travel on state business). Cf. Adv. Op. No. 92-014 (a public servant is not prohibited from accepting rideshare incentives purchased with grant money provided by a regional planning commission to his public employer since the incentives are provided for the public servant's commute to and from work and are not given for the performance of his official duties, for the performance of any act or service within his public capacity, or for the general performance of the duties of his public employment).

Prior to the enactment of Am. Sub. H.B. 300, 116th Gen. A. (1986) (eff. September 17, 1986) authorizing the Ohio Ethics Commission to issue advisory opinions interpreting R.C. 2921.43, and including amendments to R.C. 2921.43, the Attorney General, in Ohio Op. Att'y Gen. No. 84-019, addressed the prohibition of R.C. 2921.43(A)(1) holding, in pertinent part:

R.C. 2921.43(A) is a codification of the common law rule that a public officer may not receive remuneration other than that allowed by law for the performance of his official duties. See Somerset Bank v. Edmund, 76 Ohio St. 396, 81 N.E. 641 (1907); Debolt v. Trustees of Cincinnati Township, 7 Ohio St. 237 (1857); Gilmore v. Lewis, 12 Ohio 281 (1843); 1981 Op. Att'y Gen. No. 81-013. . . . Public officials and employees are not permitted to receive payment other than that provided by law for performing those duties for which they are responsible for in their official capacity. See generally State v. McKelvey, 12 Ohio St. 2d 92, 95, 232 N.E. 2d 391, 393 (1967) ("a public official cannot use his position for private profit").

In the instant situation, as explained above, the stipend provided by DOE is not intended to compensate an assessor for the time involved in performing the actual assessment, but rather the stipend is for the assessors' personal time used in completing assessment data and entering this information into a computer for electronic transmission to DOE. Therefore, it is apparent that DOE does not intend to provide the stipend to a DRC employee in exchange for either: (1) performing a duty, act, or service required in his official capacity as a DRC employee; (2) the general performance of his public duties as a DRC employee; or (3) as a supplement to his compensation due to him as a DRC employee.

Accordingly, R.C. 2921.43(A)(1) does not prohibit a DRC employee who serves as an assessor of entry-year teachers at OCSS from receiving a stipend from DOE. Also, R.C. 2921.43(A)(1) does not prohibit DOE from providing a stipend to a DRC employee who serves as an assessor.

Sale of Services to State Agencies—R.C. 102.04(B)

Your attention is also directed to Division (B) of Section 102.04, which reads:

Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall sell or agree to sell, except through competitive bidding, any goods or services to the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

Division (B) of Section 102.04 prohibits a state employee from selling, except through competitive bidding, any services to any instrumentality of the state, which would include a state department. Division (D) of Section 102.04 provides an exception to the prohibitions of Division (B) and is available to nonelected officials and public employees. Both of the following criteria must be met before the exception will apply:

- (1) The agency to which the official or employee wants to sell the goods or services, or before which the matter that involves the rendering of his services is pending, is an agency other than the one with which he serves;
- (2) Prior to rendering the personal services or selling or agreeing to sell the goods or services, he files a statement with the appropriate ethics commission, with the public agency with which he serves, and with the public agency before which the matter is pending or that is purchasing or has agreed to purchase goods or services.

Division (D) specifies the information that must be contained in the statement filed pursuant to that provision, including a declaration that the employee disqualifies himself for two years from participating in any matter involving any public official or employee of the agency before which the matter is pending or to which goods or services are to be sold. Division (E) emphasizes this disqualification, as follows:

No public official or employee who files a statement or is required to file a statement under division (D) of this section shall knowingly fail to disqualify himself from any participation as a public official or employee of the agency with which he serves in any matter involving any official or employee of an agency before which a matter for which he rendered personal services was pending or of a public agency that purchased or agreed to purchase goods or services.

In the instant situation, a DRC employee who is a trained PRAXIS III assessor who accepts the stipend you describe is selling services without competitive bidding to DOE, a state department other than his own. In order to receive compensation for providing services to DOE, an OCSS employee must file the statements required by R.C. 102.04(D) with the Ohio Ethics Commission, the agency with which he serves, (DRC), and the agency that is purchasing his services, (DOE). The DRC employee must, in his 102.04(D) Statement, describe the services that he will perform for DOE as a PRAXIS III assessor of entry-year teachers at OCSS and state that he will disqualify himself for a period of two years, from the date of the filing of his most recent statement, from any participation as a DRC employee in any matter involving any public official or employee of DOE. A blank R.C. 102.04(D) Statement, which you may copy for use by OCSS assessors, has been enclosed.

Conflict of Interest Prohibitions—R.C. 102.03(D) and (E)

As a final matter, 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.

A DRC employee is a "public official or employee" and is 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 and every other thing of value. R.C. 1.03, 102.01(G); Adv. Ops. No. 82-002 and 89-003. The stipend that the DRC employee would receive for providing services to DOE would constitute a thing of value for purposes of R.C. 102.03(D) and (E).

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his position to secure anything of value for himself, family members, business associates, or others where there is a conflict of interest. Adv. Ops. No. 79-002, 80-004, and 89-006. R.C. 102.03(E) prohibits a public official from soliciting or accepting anything of value that would have an improper influence upon him with respect to his duties. Unlike R.C. 102.03(D), which prohibits a public official from acting to secure a thing of value, R.C. 102.03(E) prohibits a public official from merely accepting certain things of value even where the official takes no action to secure it. Adv. Ops. No. 90-004 and 96-004. The application of the prohibitions of R.C. 102.03(D) and (E) are dependent upon the facts and circumstances of each individual situation. Adv. Op. No. 87-008.

Generally, the Ethics Commission has held that compensation secured by a public official or employee while engaging in outside employment is a thing of value that can be of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to his duties. The Commission has reasoned that the public interest could be adversely affected when a public servant receives compensation for outside employment activities if the compensation is paid as a result of the public servant's use of, or failure to exercise, his official authority, or if the mere receipt of compensation could impair the performance of public duties and therefore burden public resources entrusted to the public servant in favor of his own personal financial interests.

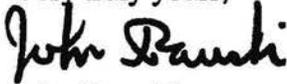
The Commission has therefore held that a public official or employee who is engaged in outside employment is prohibited from: (a) using public time, facilities, personnel, or resources in conducting the business, including using public equipment to conduct demonstrations for clients; (b) using his official title or identification on private business cards or other written materials; (c) 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; (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. Adv. Op. No. 84-013. See also Adv. Ops. No. 84-012, 85-013, 85-014, 90-003, and 90-009.

In 1996, the Ethics Commission issued a comprehensive opinion, detailing the application of the conflict of interest laws to outside employment situations. A copy of Advisory Opinion No. 96-004, which more fully explains the outside employment restrictions imposed by R.C. 102.03(D) and (E), is enclosed. Please contact this office for further guidance if issues arise that affect the prohibitions explained in Advisory Opinion No. 96-004.

Conclusion

As explained above, under the specific circumstances described, a DRC employee who serves as an assessor of entry-year teachers at OCSS is not prohibited from receiving a stipend from DOE, provided that he has not improperly used the authority or influence of his public employment to secure his position as an assessor. Also, DOE is not prohibited from providing a stipend to a DRC employee who serves as an assessor. However, a DRC employee who serves as an assessor of entry-year teachers at OCSS must file the statements required by R.C. 102.04(D) with: (1) the Ohio Ethics Commission; (2) DRC; and (3) DOE. The statements must describe the services that he will perform for DOE as a PRAXIS III assessor and state that he will disqualify himself for a period of two years, from the date of the filing of his most recent statement, from any participation as a DRC employee in any matter involving any public official or employee of DOE.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on February 23, 2001. 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.

Very truly yours,

John Rawski
Staff Attorney

Enclosure

Blank R.C. 102.04(D) Statement
Advisory Opinion No. 96-004