

OHIO ETHICS COMMISSION

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January 24, 2002

Informal Opinion 2002-INF-0124-2

Marlo B. Tannous
Chief Legal Counsel
Ohio Department of Development



Dear Ms. Tannous:

In a letter received by the Ohio Ethics Commission on October 16, 2001, you have asked whether the Ethics Law and related statutes prohibit a member of the Industrial Technology Enterprise Advisory Council (ITEAC) from accepting a payment of \$20,000 from the Edison Biotechnology Center (EBTC) for her prior service as a loaned executive to EBTC. You explain that the EBTC receives funding from the Ohio Department of Development (ODOD), and that the ITEAC as a council within ODOD recommends the amount of funding that an Edison Center will receive from ODOD.

Opinion Summary

As explained more fully below, R.C. 2921.42(A)(3) prohibits the ITEAC member from profiting from any grant that was authorized by ITEAC while she was a member of ITEAC. If the ITEAC member were to accept compensation from the EBTC for the services that she performed as a loaned executive, she would profit from ITEAC's grant to the EBTC. Therefore, the ITEAC member is prohibited from accepting compensation from the EBTC for the services that she performed as a loaned executive.

The ITEAC member is also prohibited from using her public position to secure a contract, including a grant, or any other thing of value for the EBTC, while she is providing services for the EBTC as a loaned executive and thereby engaging in common business endeavors with the EBTC.

Facts

In your letter to the Ethics Commission, you state that a member of the ITEAC, a council that ODOD assists, served as a loaned executive for the EBTC beginning in August 2000. You state that at the time the ITEAC member became a loaned executive for the EBTC, there was no arrangement by the EBTC for payment for the work that she would perform for EBTC as a loaned executive.

You explain that on July 3, 2001, the ITEAC member received a phone call from the EBTC's industrial chairman who informed her that it was decided by the EBTC Board Officers that the EBTC desired to pay the ITEAC member a one-time payment of \$20,000 for the work that she had performed for the EBTC for the past year. The industrial chairman read to her a letter dated June 30, 2001 telling her of this decision by the EBTC. However, the ITEAC member did not receive the letter and check until July 31, 2001, when she returned from a vacation and an injury that required surgery.

You explain that the EBTC receives funding from ODOD, and that ITEAC recommends the amount of funding that an Edison Center will receive from ODOD. You state that the ITEAC member who served as a loaned executive to the EBTC participated, as an ITEAC member, in the funding decision for the EBTC during the fiscal years of 2000 and 2001 (covering the period from July 1, 1999 to June 30, 2001). However, you state that her participation in determining funding for the EBTC for fiscal years 2000 and 2001 occurred before she became a loaned executive for the EBTC. You explain that when funding was to be determined for the EBTC for fiscal year 2001, the ITEAC member left the ITEAC meeting and did not participate in any discussions or decisions regarding the EBTC or any of the Edison Centers for that fiscal year. You also explain that the EBTC received a funding cut of 21% relative to the fiscal year 2001 budget, which was consistent the overall reduction in Edison funds made available in fiscal year 2002 to all Edison Centers.

Finally, you explain that the ITEAC member has not cashed the check she received from the EBTC and that she has returned the check to the EBTC pending the Ohio Ethics Commission's review and determination of this issue.

Profiting From a Grant Issued by the ITEAC—R.C. 2921.42(A)(3)

The situation you have described implicates R.C. 2921.42(A)(3), which provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

The term "public official" is defined for purposes of R.C. 2921.42 to include any elected or appointed officer, or employee, or agent of the state or any political subdivision. See R.C. 2921.01(A). In an informal advisory opinion issued to the Honorable Charles Horn, the Ethics Commission stated that a member of ITEAC is an appointed officer of the state and is therefore subject to the prohibitions of R.C. 2921.42.

The term "public contract" is defined, in R.C. 2921.42(G)(1)(a), to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either. The Commission has stated that a public agency's acquisition of property or services through its

issuance of a grant or a loan is a public contract. Adv. Ops. No. 85-002, 87-003, 89-006, and 92-014. Therefore, ITEAC's issuance of a grant to the EBTC is a public contract for purposes of the application of R.C. 2921.42.

A public contract is considered to be authorized by an official or board if the contract could not have been awarded without the approval of the official, the public position in which she serves, or the board of which she is a member. See Adv. Op. No. 87-004. In your letter to the Ethics Commission, you indicate that the ITEAC member participated in the funding decision for EBTC during the fiscal years of 2000 and 2001, but that she did not participate in the funding decision for the fiscal year 2002. Note that for purposes of the application of R.C. 2921.42(A)(3), the question is whether she or the board of which she is a member (ITEAC) authorized the issuance of grants from which she would profit. Therefore, regardless of whether she abstained from ITEAC's funding decision with respect to the EBTC, R.C. 2921.42(A)(3) would prohibit her from profiting from ITEAC's issuance of funds to the EBTC if she was a member of ITEAC at the time ITEAC made the decision to issue funds to the EBTC from which she would profit.

The question becomes whether the ITEAC member would profit from ITEAC's issuance of funds to the EBTC if she were to accept compensation from the EBTC for performing her past duties as a loaned executive to the EBTC. The ITEAC member would be deemed to profit from ITEAC's grant to the EBTC where: (1) the establishment or operation of the EBTC is dependent upon receipt of the grant; (2) the creation or continuation of the official's position with the EBTC is dependent upon the award of the grant; (3) the grant funds would be used by the EBTC to compensate the ITEAC member for her services as a loaned executive or as a basis for her compensation; or (4) she would otherwise profit from the award of the grant. See Adv. Ops. No. 87-004, 88-008, and 89-006.

R.C. 122.33(C)(3) provides that grants made under the Edison grant program "shall in all instances be in conjunction with a contribution to the project by a cooperating enterprise which maintains or proposes to maintain a relevant research, development, or manufacturing facility in the state, by a nonprofit organization, or by an educational institution or related entity." This section of the Revised Code further provides that "[n]o grant made under this program shall exceed the contribution made by the cooperating enterprise, nonprofit organization, or education institution or related entity." Therefore, it is clear that the ITEAC is not the sole provider of funding for the EBTC. However, it is also clear that the ITEAC is a source of a significant portion of the funding for the EBTC. Further, part of the mission of the ITEAC is to provide grants to foster research, development, or technology transfer efforts involving enterprises and educational institutions that will lead to the creation of jobs. R.C. 122.33. This mission is directly related to the initial creation and continued operation of Edison centers. Based on all of these factors, the establishment and operation of the EBTC is dependent on its receipt of funds from the ITEAC. Therefore, R.C. 2921.42(A)(3) prohibits the ITEAC member from accepting compensation from the EBTC for services provided during a fiscal year for which ITEAC provides funding to the EBTC and where she serves on the ITEAC when ITEAC authorizes such funding. In the situation you have described, R.C. 2921.42(A)(3) prohibits the ITEAC member

from accepting compensation for the services that she performed as a loaned executive to the EBTC.

Securing Authorization of a Grant for the EBTC—R.C. 2921.42(A)(1)

R.C. 2921.42(A)(1) is also applicable to the situation that you have described. R.C. 2921.42(A)(1) provides that no public official shall knowingly:

Authorize, or employ the authority or influence of his office to secure authorize of any public contract in which he, a member of his family, or any of his business associates has an interest.

As stated above, a member of ITEAC is subject to the prohibitions imposed by R.C. 2921.42. As is also stated above, ITEAC's issuance of a grant to the EBTC is a public contract for purposes of the application of R.C. 2921.42.

R.C. 2921.42(A)(1) prohibits a public official from using her authority or influence to secure authorization of a public contract in which a business associate has an interest. In the situation you have described, because they are engaged in a common business concern, the loaned executive and the EBTC are "business associates" for purposes of R.C. 2921.42(A)(1). See Adv. Op. No. 86-002. Therefore, the loaned executive is prohibited from using the authority or influence of her position on ITEAC to secure a grant for the EBTC. She is prohibited from voting, discussing, deliberating, formally or informally lobbying, or otherwise using her authority or influence as a member of ITEAC to secure any contract, including a grant, for the EBTC. Adv. Op. No. 89-008. See also R.C. 102.03(D) (discussed below).

Securing an Improper Thing of Value—R.C. 102.03(D)

Finally, the situation you have described implicates R.C. 102.03(D), which provides the following:

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.

A "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 an employee of any public agency. R.C. 102.01(B). In an informal advisory opinion issued to the Honorable Charles Horn, the Ethics Commission stated that a member of the ITEAC is appointed to an office of a public agency and therefore subject to the prohibitions of R.C. 102.03.

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. See R.C. 102.01(G). A definite and direct, pecuniary benefit to the financial interests of an individual, business, or entity, either private or

public, is considered to be a thing of value under R.C. 102.03(D). See Adv. Ops. No. 88-004, 88-005, and 89-008. See also Adv. Ops. No. 79-008, 85-006, 85-011, and 86-007. Therefore, a grant to a business or entity would be a thing of value to that business or entity for purposes of R.C. 102.03(D). See Adv. Op. No. 89-006.

R.C. 102.03(D) does not speak in terms of a public official's or employee's "interest" but rather prohibits a public official or employee from taking any action, formally or informally, to secure a thing of value if the thing of value could manifest a substantial and improper influence upon the public official or employee with respect to that person's duties. See Adv. Ops. No. 88-004 and 91-004. The Ethics Commission has held that a determination of whether a thing of value could manifest a substantial and improper influence upon a public official or employee with respect to that person's duties is dependent upon the facts and circumstances of each individual situation. See Adv. Ops. No. 87-008, 88-004, and 91-004.

As stated above, the ITEAC member and the EBTC are business associates. The Ethics Commission has stated that, as a general matter, the relationship between a public official and her business associate is such that the public official must refrain from participating in matters that would affect her business associate's interests. Adv. Op. No. 88-004. Therefore, the ITEAC member is prohibited from using her position on ITEAC to secure a pecuniary benefit for the EBTC even where she does not accept compensation for the services she provides as a loaned executive to the EBTC. In particular, the ITEAC member is prohibited from: (a) using her relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding the EBTC; (b) discussing, deliberating, or taking any action, as a member of ITEAC, on any matter involving the EBTC; and (c) using her public position or authority in any other way to secure a benefit, including a grant, for the EBTC. See Adv. Op. No. 96-004.

Conclusion

As explained more fully above, R.C. 2921.42(A)(3) prohibits the ITEAC member from profiting from any grant that was authorized by ITEAC while she was a member of ITEAC. If the ITEAC member were to accept compensation from the EBTC for the services that she performed as a loaned executive, she would profit from ITEAC's grant to the EBTC. Therefore, the ITEAC member is prohibited from accepting compensation from the EBTC for the services that she performed as a loaned executive.

The ITEAC member is also prohibited from using her public position to secure a contract, including a grant, or any other thing of value for the EBTC, while she is providing services for the EBTC as a loaned executive and thereby engaging in common business endeavors with the EBTC.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 24, 2002. The Commission commends you for requesting guidance on behalf of the ITEAC member before she took any action that implicates provisions of the Ethics Law and related statutes.

Marlo B. Tannous

January 24, 2002

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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 large initial "T" and "G".

Timothy L. Gates
Staff Attorney