

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

October 17, 2003

Informal Opinion 2003-INF-1017

Bruce F. Molnar
[REDACTED]

Dear Mr. Molnar:

In a letter that was received by the Ohio Ethics Commission on July 7, 2003, you ask whether the Ohio Ethics Law and related statutes prohibit two employees of the Ohio Lottery Commission (OLC), from operating a private business that would create computer software for on-line lottery games and sell the software to companies that may be doing or seeking to do business with the OLC.

Brief Answer

As explained below, the OLC employees are prohibited from operating a private business that would create computer software for on-line lottery games and sell the software to companies that may be doing or seeking to do business with the OLC.

Facts

You state that both OLC employees are lottery ticket sales representatives. One employee sells and distributes scratch-off lottery tickets to lottery retailers within his assigned territory. The other employee trains personnel in the sale of lottery tickets and resolves problems arising with the games, policies, procedures, and regulations involving lottery agents. You state that both employees have no direct contact with OLC's vendors. You state that the employees desire to operate a private business that would create computer software for on-line lottery games and sell the software to companies that will market the games to state and foreign lotteries.

You state that the OLC employees will not conduct private business activities during regular working hours. You also state that they will not use their influence or official positions as OLC employees to promote their business activities. You further state that the OLC employees plan to hire personnel to sell the computer software developed by their company and negotiate contracts with its customers. You stress that the private business that the OLC employees propose to operate will neither create nor sell instant lottery ticket games.

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

Your attention is directed to R.C. 102.03(D) and (E), which provide:

- (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.

An OLC 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); Ohio Ethics Commission Advisory Opinions No. 82-002 and 89-003. The earnings that the OLC employees would receive from their proposed private business would constitute a thing of value for purposes of R.C. 102.03(D) and (E).

General Restrictions Upon Private Business Activity

The Ohio Ethics Law does not prohibit a public official or employee from engaging in private business activity so long as no actual conflict of interest exists between the official's or employee's public and private positions. Adv. Op. No. 96-004. There are, however, situations where a public official's or employee's private business interests could be of such a character as to manifest a substantial and improper influence upon the public official or employee with regard to his official decisions and responsibilities. In such situations, R.C. 102.03(D) and (E) prohibit the public official or employee from engaging in the private outside business activity. Id. See also Adv. Ops. No. 77-006, 84-009, and 86-008.

Prohibitions Imposed By R.C. 102.03(D)

Division (D) of Section 102.03 of the Revised Code 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. The application of the prohibition of R.C. 102.03(D) is dependent upon the facts and circumstances of each individual situation. Adv. Op. No. 87-008. As explained below, Division (D) prohibits any action or inaction by a public official or employee that would result in securing a substantial and improper thing of value.

Generally, the Ethics Commission has explained that the compensation secured by a public official or employee while engaging in private outside employment or business activity 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 private 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 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.

Prohibitions Imposed By R.C. 102.03(E)

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 soliciting or merely accepting certain things of value even where the official takes no action to secure them. Adv. Op. No. 90-004.

A public official or employee is prohibited, by R.C. 102.03(E), from either soliciting or accepting "anything of value" if the thing of value could have a substantial and improper influence upon the official or employee. The Ethics Commission has determined that private business activity, and the payment received therefore, are "substantial" for purposes of this restriction. Adv. Op. No. 92-015.

In order to determine whether something of substantial value will also have an improper influence on a public official, the Ethics Commission has stated that it is necessary to examine the relationship between the public official or employee and the source of the thing of value. Adv. Op. No. 86-011. A public official's or employee's objectivity and independence of judgment with regard to his official actions could be impaired 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. 87-006 and 87-009. See also Adv. Ops. No. 87-008 and 90-004. Therefore, R.C. 102.03(E) prohibits a public official or employee from engaging in private business activity with parties that are interested in matters before, regulated by, or doing or seeking to do business with his own agency. Adv. Op. No. 96-004.

Exception to the Prohibition Imposed by R.C. 102.03(E)

In certain situations, a public official or employee who engages in private outside business activity may be able withdraw from consideration of matters that would create an impairment of his objectivity and independence of judgment. Adv. Ops. No. 89-006 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. Adv. Ops. No. 89-010 and 90-002. See also Adv. Op. No. 90-010.

Therefore, R.C. 102.03(E) prohibits a public official or employee from engaging in private outside employment or business activity with parties that are interested in matters before, regulated by, or seeking to do business with his own agency, unless he is able to withdraw from consideration of matters that would present a conflict of interest. However, the Ethics Commission has explained a public official's or employee's withdrawal from consideration of matters that could pose a conflict of interest must not interfere with the official's or employee's performance of his duties. Adv. Ops. No. 89-010 and 90-002. The Commission has identified situations where a public official's or employee's private interests would be of such a character as to manifest a substantial and improper influence upon the public official or employee with regard to his official decisions and responsibilities. In these situations, the public official or employee is unable, because of the duties of the public position he holds, to withdraw from matters in which he has a conflict of interest. In such situations, R.C. 102.03(D) and (E) prohibit the public official or employee from engaging in the private outside business activity. Adv. Ops. No. 92-008 (a township clerk is prohibited from holding employment with a bank that is a depository of township funds) and 92-009 (the Executive Director of the Ohio State Barber Board is prohibited from owning and operating a barber shop). See also Adv. Ops. No. 84-009, 88-002, and 89-015.

The application of the prohibitions in R.C. 102.03(D) and (E) depends upon the facts and circumstances of each individual situation. Adv. Op. No. 87-008. Therefore, it is necessary to examine the duties that the OLC employees perform in order to determine whether their withdrawal from consideration of matters that involves companies that may be doing or seeking to do business with the OLC would interfere with the performance of their duties as OLC employees.

Application of Ethics Law to Facts Presented

As explained above, the OLC employees desire to operate a private business that would create and sell computer software to companies that may be doing or seeking to do business with the OLC. You state that the OLC employees have no "direct contact" with vendors doing business with the OLC; however, you also state that one employee sells and distributes scratch-off lottery tickets to lottery retailers within his assigned territory and that the other employee trains personnel in the sale of lottery tickets and resolves problems arising with the games, policies, procedures, and regulations involving lottery agents. It is apparent that because the duties of both OLC employees concern the sale and distribution of lottery tickets, the performance of their duties as OLC employees would have a definite and direct impact upon the vendors who sell or desire to sell lottery tickets to OLC.

If the OLC employees were to withdraw from all matters pertaining to those vendors due to their desire to engage in private outside business with them, then such a withdrawal would clearly interfere with the performance of their duties as OLC employees. Therefore, R.C. 102.03(D) and (E) prohibit the OLC employees from operating a private business that would create and sell computer software for on-line lottery games to companies that may be doing or seeking to do business with the OLC.

Bruce F. Molnar
October 17, 2003
Page 5

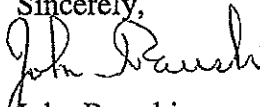
Conclusion

As explained above, the OLC employees are prohibited from operating a private business that would create and sell computer software for on-line lottery games to companies that may be doing or seeking to do business with the OLC.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 17, 2003. The Commission commends the OLC employees for requesting guidance before taking any actions that could be prohibited by the Ethics Law.

The opinion is based on the facts presented. It is limited to questions arising under Chapter 102, and Sections 2921.42 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,



John Rawski
Staff Attorney