

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

April 13, 2004

Informal Opinion 2004-INF-0413

Jeffrey S. Tyler, RA, CBO
Assistant Superintendent Industrial Compliance

Dear Mr. Tyler:

In your letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes prohibit you, as the State's Chief Building Official, from providing plan examination services for the City of Dayton (City). You have also asked whether you can provide architectural and construction related services to other clients.

Brief Answer

As explained below, because of the scope and significance of your authority as the State's Chief Building Official, R.C 102.03(D) and (E) prohibit you from providing code-related consultation services for any party. You are also prohibited from providing other consulting services, including architectural design, historic preservation, and building planning services, to any party, including any engineer, architect, builder, or owner, that that is doing or seeking to do business with, regulated by, or interested in matters before the Division of Industrial Compliance or any local building department.

Facts—Public Employment

You have explained that you are employed as a Deputy Director for the Department of Commerce, in the position of Assistant Superintendent of Industrial Compliance. The Superintendent is the state's responsible party with respect to building code enforcement within his specified jurisdiction. According to your position description, the Assistant Superintendent "plans, directs, and supervises operations of the Bureaus of Construction Compliance and Plans and Specifications within the Division of Industrial Compliance."

You state that, in your capacity as Assistant Superintendent, you are the state's Chief Building Official. In that role, you are responsible for overseeing plan review and inspection for buildings and projects on state property and in political subdivisions that are not regulated by a building department that is certified by the Ohio Board of Building Standards.

Facts—Proposed Outside Employment

You propose to contract with the City to perform commercial plan reviews for new construction within the city limits. The contract would specify that the City compensate you through an hourly rate schedule. Your contact with parties submitting commercial plans would be through the City and limited to written correspondence. You would contract with a private messenger service to transfer plans and correspondence with parties submitting commercial plans. Your duties would not include attending administrative relief hearings or representing the City before public agencies. You would not perform your duties for the City during state time.

You also propose to engage in consulting for private clients. Specifically, you have stated that you hope to provide services in a building code consulting capacity outside of the jurisdiction of the Superintendent of the Division of Industrial Compliance to architects, engineers, and construction project owners. Finally, you have also asked whether you can provide non-building code services (*i.e.* architectural design, historic preservation, and building planning) to these same parties.

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.

As an employee of the Ohio Department of Commerce, you are a "public official or employee" and subject to the prohibitions of R.C. 102.03(D) and (E). R.C. 102.01(B) and (C).

The term "anything of value" is defined for purposes of R.C. 102.03 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. Any earnings that you would receive from providing consulting services for the City and private clients would be a thing of value for purposes of R.C. 102.03(D) and (E).

General Restrictions Upon Outside Business Activity

The Ethics Commission has explained that the Ohio Ethics Law and related statutes do not prohibit public officials and employees from engaging in outside business activity provided that no conflict of interest exists between the official's or employee's assigned duties as a public official or employee and his private financial interests. Adv. Op. No. 96-004.

In some instances, the Commission has held that the public official or employee is not prohibited from engaging in a private business or holding outside employment provided that he is able to withdraw from consideration of matters that would pose a conflict of interest. See Adv. Op. No. 89-006. 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 his employing agency. Adv. Ops. No. 89-006, 89-010, and 90-002. In order for a public official or employee to withdraw effectively from a matter and avoid a conflict under R.C. 102.03(D) and (E), then a person with superior or equal authority to the official or employee must oversee the resolution of the matter. Adv. Op. No. 90-010. A public official or employee cannot delegate matters from which he must withdraw to any person over whom he has supervisory authority and cannot supervise any person in the performance of matters from which he has withdrawn. Adv. Op. No. 92-009.

In other instances, the Commission has recognized that a public official's or employee's proposed outside employment activities are 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 and will give rise to an insurmountable conflict of interest and divided loyalties between his public duties and private interests. In such situations, R.C. 102.03 (D) and (E) prohibit the official or employee from engaging in outside business activities while he holds his public employment. See Adv. Op. No. 81-007 (an employee of a county recorder's office may not conduct private title searches), Adv. Op. No. 83-007 (employees of the Board of Cosmetology may not sell products to regulated parties), and Adv. Op. No. 92-008 (a township clerk may not be an employee of a bank which receives township funds).

For example, the Commission has concluded that the Executive Director of the Ohio State Barber Board is prohibited from owning and operating a barber shop. Adv. Op. No. 92-009. The Commission examined the regulatory authority of the Barber Board, as well as the powers and duties of the Executive Director in pursuit of that authority. The Commission stated:

As Executive Director, you must exercise independence and objectivity of judgment in performing your duties. [Citation omitted.] That objectivity and independence of judgment could be impaired if you owned and operated a barber shop subject to the Board's licensure and regulation. You would be rendered unable to perform your statutorily mandated duties if you owned a barber shop.

Furthermore, the Executive Director of the Barber Board is the appointing authority for the Board's inspectors, clerks, and other assistants and has the discretion to determine the need for their employment. See R.C. 4709.05 (G). If you were to apply for a barber shop license, then the Board, as assisted by its employees, would have to determine whether your barber shop meets requirements established by statute and rules adopted by the Board. The Board employees over which you are the appointing authority would be required to inspect your shop and otherwise help the Board determine whether you are in compliance with the law in obtaining and maintaining a barber shop license. As Executive Director you are required to supervise the employees' work, and would be in a position to control the work product and determine what will be reported to the Board. Also, you would be required to evaluate the performance of the Board employees in accomplishing their tasks. This would result in an untenable situation for the Board's employees. See Advisory Opinion No. 89-015.

The limitations and restrictions on the conduct of a public official or employee who wishes to engage in a private business or hold outside employment are dependent on the facts and circumstances of each individual situation. See Adv. Ops. No. 77-003, 89-003, and 90-002. Therefore, it is necessary to examine your authority to determine whether you can engage in the consulting activity you describe.

Chief Building Official

As noted above, you have explained that you are employed as a Deputy Director for the Department of Commerce, in the position of Assistant Superintendent of Industrial Compliance. In your capacity as Assistant Superintendent, you are the state's Chief Building Official. You explain that, in that role, you are responsible for overseeing plan review and inspection for buildings and projects on state property and in political subdivisions that are not regulated by a building department that is certified by the Ohio Board of Building Standards.

According to your position description, the office you hold "plans, directs, and supervises operations of the Bureaus of Construction Compliance and Plans and Specifications within the Division of Industrial Compliance." In this role, you are responsible for assigning responsibilities to and evaluating the performance of immediate managers and supervisors. You are also responsible for providing management oversight and direction on the activities of the Division including inspection policies and procedures and compliance activities and responsibilities. You participate in the development and implementation of Division policies. In the absence of the Superintendent for Code Compliance, you are authorized to act in the Superintendent's behalf.

Providing Service for the City of Dayton

In the instant situation, you propose to contract with the City to perform commercial plan reviews for new construction within the city limits. The City has a building department that is certified by the Ohio Board of Building Standards. Therefore, any plan review and building construction within the City limits is not subject to direct regulation by the Division of Industrial Compliance.

However, it must be noted that the Ohio Board of Building Standards is authorized to certify municipal, township, and county building departments to enforce the Ohio Basic building Code. R.C. 3781.10(E). A political subdivision's certification can be revoked for cause. See City of Middleburg Heights v. Ohio Board of Building Standards, 65 Ohio St. 3d. 510 (1992). Because the City's certification is subject to review by the state agency that you serve as Chief Building Official, the City is a party that is interested in matters before the Division of Industrial Compliance. Further, the parties whose plans you would review as a contractor for the City may also be either regulated by, or interested in matters before, the Division of Industrial Compliance. Therefore, the receipt of consulting fees from the City could manifest an improper influence upon you with respect to your duties.

As stated above, you serve as the State's Chief Building Official. Even though it is unlikely that you would personally review every issue regarding building codes and the certification of municipal building departments that comes before the Division of Industrial Compliance, it is apparent that you perform a key role with respect to the operation of the Division. Because of the scope of your position of authority within the Division of Industrial Compliance and the significance of that authority, R.C. 102.03(D) and (E) would prohibit you from providing plan examination services for the City. This same conclusion would apply if you were offered an opportunity to provide services to another public agency with a certified building department.

Providing Services for Private Clients

You have stated that you would also like to pursue supplemental employment providing architectural/construction related services. Specifically, you have stated that you hope to provide services in a building code consulting capacity outside of the jurisdiction of the Superintendent of the Division of Industrial Compliance. You have stated that you will abstain from directly reviewing or inspecting projects that may be submitted by any architect or engineer for whom you are providing code-consulting services. You have asked whether you can provide building code consultation services to a property owner whose construction project falls outside the jurisdiction of the Division. Finally, you have also asked whether you can provide non-building code services (*i.e.* architectural design, historic preservation, and building planning) to these same parties.

As noted above, you are responsible for planning, directing, and supervising operations of the Bureaus of Construction Compliance and Plans and Specifications within the Division of Industrial Compliance. You supervise employees of the Bureaus by assigning responsibilities to them and evaluating their performance. You provide management oversight and direction regarding inspections and compliance activities.

The parties to whom you propose to provide both code consulting and other services are directly regulated by and interested in matters before the Bureaus of Construction Compliance and Plans and Specifications. Architects and engineers will submit plans for approval. Building owners and construction companies have job sites that are subject to inspection. Even if the Division of Industrial Compliance is not, itself, involved in these activities, local building departments subject to certification by the Board of Building Standards within the Department of Commerce are involved. If you were to engage in the consulting activity you describe, you would be required to withdraw from any matters involving parties for whom you are providing services, not merely those matters on which you are providing services.

Further, you hold a supervisory position in the Division. You are responsible for assigning responsibilities to and evaluating the performance of other supervisory employees in the Division. If you were to be permitted to withdraw from performance of your job duties in order to pursue outside employment, those duties would have to be reassigned, by the Superintendent of Code Compliance, to other employees in the Division. In order to effectively withdraw, you would also be prohibited from supervising the work of other Division employees with respect to matters from which you had withdrawn. It would create an untenable situation for any employee of the Division whose work you evaluate to make decisions in your place regarding your private clients.

When explaining the application of the Ethics Law to situations such as the one you have proposed, the Commission has stated: "An employee of an administrative department of the state owes his responsibility to the exercise of the public trust by performing the tasks assigned to him by his employing agency. This duty must not be impaired by a public employee's concern for his own personal interests." Adv. Op. No. 89-010.

In this situation, because of the scope and significance of your authority at the Division, you are prohibited from providing code-related consultation services for any party. You are also prohibited from providing other building services, including architectural design, historic preservation, and building planning services, to any party, including any engineer, architect, builder, or owner, that is doing or seeking to do business with, regulated by, or interested in matters before the Division of Industrial Compliance or any local building department. You would not be prohibited from engaging in activities of the kind you have described outside the State of Ohio, as long as you are not providing services to any party that is doing or seeking to do business with, regulated by, or interested in matters before the Division of Industrial Compliance or any local building department.

Jeffrey S. Tyler
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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 7, 2004. The Commission commends you for requesting guidance before taking any actions that could be prohibited by 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 feel free to contact this Office again.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jennifer A. Hardin".

Jennifer A. Hardin
Chief Advisory Attorney