

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

August 25, 2004 Informal Opinion 2004-INF-0825

David C. Sweet, President
Youngstown State University

[REDACTED]

Dear Mr. Sweet:

In a letter that the Ethics Commission received on March 8, 2004, you ask whether the Ohio Ethics Law and related statutes prohibit First Energy employees who contract with Youngstown State University (YSU) to serve as part-time instructors from receiving compensation from First Energy for the teaching services that they provide to YSU.

Brief Answer

As explained below, First Energy employees who contract with YSU to serve as part-time instructors, and who exercise the full authority and responsibility of part-time instructors, are "public servants," and therefore subject to the prohibitions of R.C. 2921.43. However, under the facts presented, First Energy employees are not prohibited from providing teaching services to YSU and being paid for their services by First Energy as part of their regular salary.

Facts—First Energy and YSU Collaborative Education and Training Program

You state that YSU has worked with First Energy to develop and implement a two-year associate degree in Electric Utility Technology. First Energy has established this type of cooperative educational program with public two-year institutions of higher education in Ohio. The program consists of both classroom instruction and outdoor laboratory sessions. YSU provides the land for the outdoor laboratory. The program's classroom portion consists of 75 percent of the curriculum and is taught by YSU faculty. The program's laboratory portion consists of 25 percent of the curriculum and is taught by First Energy employees.

You state that during the first two years of the program at YSU, First Energy employees taught the laboratory portion of the program as part of their regularly assigned duties for First Energy. Because these First Energy employees were not under contract to YSU, an YSU administrator was listed as the instructor of record for the course. The administrator was responsible for assigning grades and managing actions that involved students.

YSU proposes to issue a zero dollar contract for part-time instruction to the First Energy employees who will teach the laboratory portion of the program as an agreed resolution to collective bargaining concerns raised by traditional faculty. The contract between YSU and the First Energy employees will give them "full authority and responsibility" as part-time instructors. They will perform all actions of a part-time instructor involving students, including assigning grades and managing grade appeals. First Energy will pay its employees who contract with YSU as part of their regular First Energy salary.

Jurisdiction of the Ethics Commission

The Ohio Ethics Commission administers, interprets, and assists in the enforcement of the Ohio Ethics Law and related statutes, Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. R.C. 102.02, 102.06, and 102.08. The Ohio Ethics Law and related statutes include prohibitions against public officials and employees misusing their official positions for their own personal benefit, the benefit of their family members or business associates, or where there is otherwise a conflict of interest. The Ethics Commission has no authority to interpret or enforce other statutes, rules, or policies that may be applicable to the question you have raised. This opinion is limited to consideration of statutes in R.C. Chapter 102. and Sections 2921.42 and 2921.43.

Ethics statutes contain definitions that determine whether an individual is subject to the prohibitions. Because definitions within these two Chapters of the Revised Code differ, an individual may be subject to some, but not all, of the prohibitions found in R.C. Chapter 102. and R.C. Sections 2921.42 and 2921.43. The Ethics Commission must use the statutory definitions within R.C. Chapter 102. and R.C. Chapter 2921. to determine whether the First Energy employees under contract to YSU to serve as part-time instructors are subject to the Ethics Laws and related statutes.

"Public Official or Employee"—R.C. 102.01(B)

R.C. 102.01(B) defines the term "public official or employee" for purposes of R.C. Chapter 102., and reads, in pertinent part:

"Public official or employee" means any person who is elected or appointed to an office or is an employee of any public agency. . . . "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 authority to perform, administrative or supervisory functions.

Pursuant to R.C. 102.01(A), a teacher, instructor, professor, or other kind of educator who does not perform administrative duties is not subject to the provisions in R.C. Chapter 102. that refer to "public officials and employees." See Ohio Ethics Commission Advisory Opinion No. 93-017. This does not, however, answer the question of whether a teacher, instructor, professor, or other kind of educator is subject to R.C. 2921.42 and 2921.43. Id.

R.C. 2921.42 prohibits any "public official" from having an interest in public contracts entered into by a public agency with which he is connected. 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, whether in a temporary or permanent capacity." A person employed by a college or university as a teacher, instructor, professor, or other kind of educator, whether he is employed in a full-time or part-time, temporary or permanent, position, is a "public official," within this definition. See State v. Sakr (1995), 101 Ohio App.3d 334, 337. Therefore, such an individual is subject to the provisions in R.C. 2921.42.

However, your question does not apply to individuals who are employees of a university. Rather, it applies to individuals who are providing teaching services for the university as employees of a private corporation. Therefore, these individuals are not "public officials," within the definition of that term in R.C. 2921.01.

R.C. 2921.43 prohibits any "public servant" from accepting supplemental compensation for the performance of his public duties. The term "public servant" is defined in R.C. 2921.01(B) to include:

- (1) Any public official (as defined in R.C. 2921.01(A));
- (2) Any person performing ad hoc a governmental function, including, but not limited to, a juror, member of a temporary commission, master, arbitrator, advisor, or consultant;
- (3) A person who is a candidate for public office, whether or not the person is elected or appointed to the office for which the person is a candidate. (Emphasis added.)

Performing Ad Hoc a Governmental Function

In the situation you have described, the First Energy employees are under contract with YSU for the purpose of providing teaching services for the laboratory courses in the two-year associate degree program in Electric Utility Technology. First Energy employees are performing services that are necessary for YSU students to successfully complete the two-year program in Electric Utility Technology. The question is whether, by providing teaching services in connection with a degree program offered by a state university, the First Energy employees are performing *ad hoc* a governmental function.

The term “governmental function” is not defined in the Ohio Revised Code for purposes of R.C. Chapter 2921. However, the term “governmental function” is defined in R.C. 2744.01. For purposes of political subdivision tort liability, the activities of public agencies are divided into two categories: governmental functions and proprietary functions. For purposes of R.C. Chapter 2744., R.C. 2744.01(C) provides:

- (1) “Governmental function” means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:
 - (2)(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;
 - (b) A function that is for the common good of all citizens of the state;
 - (c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.
- (2) A “governmental function” includes, but is not limited to, the following:
 - ...
 - (c) The provision of a system of public education;
...
 - (x) A function that the general assembly mandates a political subdivision to perform.

The state, including a state university, is not a political subdivision for purposes of the tort liability provisions in R.C. Chapter 2744. See R.C. 2744.01(F) and (I); See also 2743.02. Further, the definition of “governmental function” set forth in R.C. 2744.01(C) is not explicitly applicable to the term “governmental function” used in R.C. 2921.43(A). However, while the definition of governmental function in R.C. 2744.01(C) is not specifically applicable to the use of the term in R.C. 2921.01(B), it is instructive.

YSU is created and empowered by the Ohio General Assembly. See R.C. 3356.01. The general assembly defines a “state university” as a public institution of higher education that is a body politic and corporate. R.C. 3345.011. The General Assembly includes YSU within the definition of state universities. *Id.* Therefore, by creating YSU, along with other state universities and colleges, the General Assembly expressed its purpose to provide a system of

post-secondary public education. The General Assembly has mandated that the Board of Trustees of YSU (Board) "shall do all things necessary for the creation, proper maintenance, and successful continuous operation of such university." Therefore, the participation in a system of public post-secondary education by a public university is a "governmental function," as that term is defined for purposes of R.C. 2744.01(C).

R.C. 3356.03 provides that the Board shall employ and fix the compensation of such employees as it may deem necessary. However, as noted above, the individuals at issue in this question are not YSU employees. The question, then, is whether First Energy employees who provided educational services for YSU pursuant to contract are performing, *ad hoc*, a governmental function.

The term "*ad hoc*" is defined in Black's Law Dictionary as "for this special purpose." Black's Law Dictionary 39 (1979). You have explained that YSU will engage the First Energy employees, pursuant to a contract with First Energy, to provide teaching services necessary for YSU to implement a two-year associate degree program in Electric Utility Technology. As part-time instructors, the First Energy employees will exercise the full authority and responsibility of part-time instructors. They will perform all actions of a part-time instructor involving students, including assigning grades and managing grade appeals.

The services provided by First Energy employees, as part-time instructors with full authority and responsibility regarding students including assigning grades and managing grade appeals, are necessary for YSU to provide this educational program, as a part of its overall delivery of a post-secondary education program. Therefore, by providing teaching services necessary to deliver this degree program, the First Energy employees are performing, for that purpose, a governmental function, and they fall within the definition of "public servant" for purposes of R.C. 2921.43.

Receiving Compensation Other Allowed by Law—R.C. 2921.43(A)(1) and (2)

As noted above, 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) through (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. Adv. Op. No. 92-014 and 92-015. R.C. 2921.43(A)(2) prohibits a public servant from soliciting or accepting additional or greater fees or costs than are allowed by law to perform his official duties.

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) through (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. Adv. Op. No. 90-001. R.C. 2921.43(A) also prohibits a "person," which is defined in R.C. 1.59 to include an individual, corporation, partnership, association, or other

similar entity, from promising or giving to a public servant any compensation, other than allowed by law, to perform any act in his public capacity or generally perform the duties of his public position. Adv. Ops. No. 89-013, 89-014, and 90-001.

An individual who is a public servant, and therefore subject to the prohibitions of R.C. 2921.43, is prohibited from receiving money from any party, other than compensation that is allowed by some provision of law, for performing any tasks or duties he is responsible for performing pursuant to his public services. Adv. Ops. No. 92-014, 92-015, and 93-013. The YSU Board has statutory authority to make and enter into all contracts and agreements necessary for the operation of YSU. R.C. 3356.04. The Board also has the statutory authority to employ and fix the compensation of professors, teachers, and other employees. R.C. 3356.03. The support for the operation of YSU is not limited to appropriations from the General Assembly and may come from other sources. R.C. 3356.05.

As described above, the YSU Board will enter into a contract with First Energy and its employees for the purpose of implementing a two-year associate degree program in Electric Utility Technology. The Board and First Energy have agreed to issue a zero dollar contract to First Energy employees for them to serve as part-time instructors who will teach the laboratory portion of the program. First Energy will pay its employees who are under contract with YSU to serve as part-time instructors for the program, as part of their regular salary. Therefore, First Energy will become the source of some of the support for the operation of YSU's two-year degree program in Electric Utility Technology.

It is clear that the entire contractual arrangement between YSU and First Energy and its employees falls within the statutory authorization to the Board for fixing the compensation of its professors and teachers as part of the operation of YSU. Thus, the payment that a First Energy employee receives from First Energy, as part of his regular salary, pursuant to the contract between First Energy and YSU, is compensation as allowed by law. However, any payment a First Energy employee would receive from a source other than First Energy for providing teaching services for the laboratory courses in the two-year associate degree program in Electric Utility Technology would also be compensation, but would not be compensation allowed by provisions of law because it would not be contractually sanctioned by the Board.

Conclusion

As explained above, First Energy employees who contract with YSU to serve as part-time instructors, and who exercise the full authority and responsibility of part-time instructors, are "public servants," and therefore subject to the prohibitions of R.C. 2921.43. However, under the facts presented, First Energy employees are not prohibited from providing teaching services to YSU and being paid for their services by First Energy as part of their regular salary.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on August 11, 2004. The Commission commends you for requesting guidance before taking any actions that could be prohibited by law.

David C. Sweet
August 25, 2004
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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 black ink, appearing to read "Jennifer A. Hardin". The signature is written in a cursive style with a large initial "J".

Jennifer A. Hardin
Chief Advisory Attorney