

# OHIO ETHICS COMMISSION

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October 4, 2004

Informal Opinion 2004-INF-1004

Susan Russell, Staff Counsel  
School Employees Retirement System



Dear Ms. Russell:

On August 12, 2004, the Ohio Ethics Commission received your request for an advisory opinion. In your request, submitted on behalf of Ohio's five state retirement systems, you ask several questions about the revisions to the Ethics Law and related statutes, as they apply to the board members and employees of retirement systems, contained in Sub. S.B. 133.

Specifically, you ask:

- (1) What actual authority or job responsibilities of a retirement system employee who is not a state retirement system investment officer would the Ethics Commission find qualifies that person as an employee "who exercises substantial and material discretion regarding investing the system's funds," such that the person is subject to newly enacted R.C. 102.03(H)(2)?
- (2) When a retirement system is a limited partner in a partnership to invest fund assets, does R.C. 102.03(H)(2) prohibit the system's officials and employees from accepting travel expenses to attend partnership meetings from the partnership?
- (3) Are employees of a retirement system, who are not required to file financial disclosure statements, prohibited from accepting honoraria or travel, meal, and lodging expenses as set forth in R.C. 102.03(H)(1)?

You have asked one other question, regarding the application of R.C. 102.03(G), which the Commission will answer in a separate opinion.

### **Brief Answers**

As explained more fully below, for purposes of R.C. 102.03(H)(2), the employees of a retirement system who exercise substantial and material discretion regarding investing the system's funds are those employees with considerable or fundamental, and important or consequential, authority to make decisions regarding investing the system's funds, even if they do not exercise final decision-making authority.

The officials and employees of retirement systems who are identified in R.C. 102.03(H)(2) are prohibited from accepting travel expenses from any person, including a partnership of which is it a partner.

Finally, employees of a retirement system who are identified in R.C. 102.03(H)(2) do not qualify for the exception in R.C. 102.03(H)(1) as it pertains to travel expenses. However, the employees who are not required to file financial disclosure statements can accept honoraria under the limited exceptions described in R.C. 102.03(H)(1).

### **Sub. S.B. 133**

Senate Bill 133 was passed by the General Assembly to reform the management and operations of the five state public retirement systems—Ohio Public Employees Retirement System (PERS), Ohio Police and Fire Pension Fund (OP&F), State Teachers Retirement System (STRS), School Employees Retirement System (SERS), and State Highway Patrol Retirement System (HPRS). Significant aspects of the bill concerned the Ethics Law and related statutes as they apply to board members and employees of the retirement systems.

Of specific note is R.C. 102.03(H)(2), which provides:

No person who is a member of the board of a state retirement system, a state retirement system investment officer, or an employee of a state retirement system whose position involves substantial and material exercise of discretion in the investment of retirement system funds shall solicit or accept, and no person shall give to that board member, officer, or employee, payment of actual travel expenses, including expenses incurred with the travel for lodging, meals, food, and beverages.

R.C. 102.03(H) was originally enacted by the 116th General Assembly in Am. Sub. H.B. 300 (eff. September 17, 1986) as an exception to the conflict of interest provisions of the Ohio Ethics Law. The conflict of interest provisions prohibit public officials and employees from soliciting or accepting anything of value, which can include travel expenses, if the thing of value could have a substantial and improper influence upon the officials or employees with respect to the performance of their duties. As it was originally enacted, R.C. 102.03(H) contained two

exceptions that permitted public officials and employees to accept travel, meal, and lodging expenses in limited circumstances. See Ohio Ethics Commission Advisory Opinion No. 86-011.

The exceptions in R.C. 102.03(H) were amended by the 120<sup>th</sup> General Assembly in Am. Sub. H.B. 492 (eff. May 12, 1994). The General Assembly also included, in R.C. 102.03(H)(1), a prohibition against receipt of honoraria by public officials and employees who are required to file financial disclosure statements.

R.C. 102.03(H)(2), enacted in Sub. S.B. 133, engrafts another prohibition onto R.C. 102.03(H). The specific prohibition will be discussed more fully below, in response to your second and third questions. R.C. 102.03(H)(2) applies to all members of the board of a state retirement system, all state retirement system investment officers, and all employees of state retirement systems whose positions involve substantial and material exercise of discretion in the investment of retirement system funds.

#### **Substantial and Material Discretion Regarding Investing Retirement Funds**

The Ohio Revised Code sets forth which retirement system officials and employees are either board members or state retirement system investment officers. See R.C. 145.04 (PERS), R.C. 742.03(B) (OP&F), R.C. 1707.01(JJ) (state retirement system investment officers), R.C. 3307.05 (STRS), R.C. 3309.05 (SERS), and R.C. 5505.04 (HPRS). However, the Code does not set forth which employees of a state retirement system are those “whose position[s] involves substantial and material exercise of discretion in the investment of retirement system funds.”

Your first question is what “actual authority or job responsibilities” of a retirement system employee who is not a state retirement system investment officer would the Ethics Commission find qualifies that person as an employee “who exercises substantial and material discretion regarding investing the system’s funds,” such that the person is subject to newly enacted R.C. 102.03(H)(2).<sup>1</sup> From information provided, the Commission is unable to assess what actual authority or specific job responsibilities may apply to a specific position. Further, the activities and authority may vary from system to system. However, the Commission can define the phrase, and suggest employees who are likely to fall within the description.

The phrase “substantial and material discretion” is not defined in the Ohio Revised Code for purposes of R.C. 102.03(H)(2). In the absence of a statutory definition, the Ethics Commission gives words of a statute their plain, commonly understood meaning. See *Kocsorak v. Cleveland Trust Co.*, 151 Ohio St. 212, 216 (1949) (Words of a statute must be given their common, ordinary, and accepted meaning in the connection in which they are used).

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<sup>1</sup> It should be noted that the phrase “employee of a state retirement system whose position involves substantial and material exercise of discretion in the investment of retirement system funds” is used throughout Sub. S.B. 133, in numerous provisions related to lobbying activity. The Ethics Commission is empowered to interpret the Ethics Law and related statutes. Therefore, the Commission’s definition applies only to the phrase as it is used in R.C. 102.03(H)(2).

The *Random House Webster's Unabridged Dictionary* defines "substantial" as "of ample or considerable size," and "basic or essential, fundamental." *Random House Webster's Unabridged Dictionary* 1897 (2d ed., 1997). It further defines "material" as "of substantial import; of much consequence; important." *Id.* at 1185. Finally, "discretion" is defined as "the power or right to decide or act according to one's own judgment." *Id.* at 563. See, generally, Adv. Ops. No. 92-011 and 93-005.

Therefore, an employee of the retirement system has engaged in "substantial and material exercise of discretion" regarding investing the system's funds if he has considerable or fundamental, and important or consequential, authority to make decisions regarding investing the system's funds. It is not necessary that the employee exercises sole or final decision-making authority. In fact, an employee whose initial analysis of investment options is necessary for the board, or a retirement system investment officer, to make later decisions could well fall within the category of an employee who has engaged in substantial and material exercise of discretion regarding investing the system's funds.

Examples of some retirement system employees who fall within these parameters would be the Executive Director or Chief Executive, Assistant or Associate Director and other retirement system employees who are called upon to act in the absence of the System's Executive Director, Chief Investment Officer and other investment officers, even if they are not "state retirement system investment officers," Chief Operating Officer, and Chief Legal Counsel and other attorneys whose job duties include reviewing investment contracts or other legal matters related to investments. This is not an exhaustive list, and there may be other employees whose authority or job responsibilities meet these descriptions. If any of the retirement systems has a question about a specific individual or specific job responsibilities, the retirement system is encouraged to contact the Commission for further guidance. Once again, it is not necessary that the employee is the ultimate decision-maker regarding investments.

### **Accepting Travel Expenses from Limited Partnership**

Your second question is whether retirement system officials and employees who are subject to R.C. 102.03(H)(2) are prohibited by R.C. 102.03(H)(2) from accepting travel expenses from a limited partnership in which the retirement system is a limited partner.

You have explained that the retirement systems have a fiduciary duty to discharge their duties with respect to the funds solely in the interests of participants and beneficiaries for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the system. In order to fulfill this duty, retirement systems use partnerships and discretionary managers that invest in partnerships to invest retirement system funds. In these investment structures, a retirement system is a limited partner.

The limited partnerships are “flow-through entities,” where partnership income and expenses are shared by the partners in proportion to each partner’s investment. In most of these partnerships, the expenses include travel costs to partnership meetings. The parties who ultimately pay the expenses of the partnership are the limited partners, including the retirement systems.

You have enclosed several samples of partnership agreements. In each of them, there is a reference to partnership expenses, including travel expenses. In some cases, expenses noted for meetings of the partners, advisory boards, or investment committees. For example, Section 5.2.1.3 of the Essex Woodlands Health Ventures Fund VI Partnership Agreement provides, in pertinent part:

Normal operating expenses include, without limitation . . . expenses of members of the Advisory Board (including travel-related costs and expenses); the costs and expenses (including travel-related expenses) of hosting annual or special meetings of the Partners, or otherwise holding meetings or conferences with the Partners, whether individually or in a group.

You have asked whether R.C. 102.03(H)(2) prohibits the retirement system officials and employees described in that Section from accepting reimbursement from a partnership for travel expenses to attend meetings of the partnership. You note that, if R.C. 102.03(H)(2) prohibits Ohio retirement system officials and employees from accepting reimbursement from the partnership, the retirement system would be required to pay the entire cost of its own officials’ and employees’ travel expenses, and its proportionate share of the travel expenses incurred on behalf of all of the other limited partners’ travel expenses.

The officials and employees subject to R.C. 102.03(H)(2) are all members of the board of a state retirement system, all state retirement system investment officers, and all employees of state retirement systems whose positions involve substantial and material exercise of discretion in the investment of retirement system funds. R.C. 102.03(H)(2) prohibits these officials and employees from accepting payment of “actual travel expenses,” from any person including lodging, meals, food, and beverage expenses. While R.C. 102.03(H)(2) prohibits any payment of travel expenses for these officials and employees from any person, it is illogical to suggest that the General Assembly intended to prohibit a retirement system from paying the travel expenses of its own officials and employees. Sub. S.B. 133 includes requirements for the five state public retirement systems to review policies regarding travel expenses of members of the boards. R.C. 145.092(A) (PERS), 742.102(A) (OP&F), 3307.041(A) (STRS), 3309.041(A) (SERS), and 5505.062(A) (HPRS). See also R.C. 145.042, 742.032, 3307.052, 3309.052, and 5505.049. When construing a statute, the Commission considers the consequences of a particular construction. R.C. 1.49. Such policies would be unnecessary had the General Assembly intended to prohibit the retirement systems from providing travel expense payments or reimbursements to their own board members.

Therefore, the identified officials and employees of retirement systems are prohibited from accepting travel expenses, including lodging, meals, food, and beverages, from any person other than the retirement system. **R.C. 102.03(H)(2) is a complete bar against receipt of travel expenses, provided by any person or entity other than the retirement system, by certain officials and employees of a retirement system.**

R.C. 102.03(H)(2) prohibits the identified retirement system officials and employees from accepting, and prohibits any person from giving the identified officials and employees, payment of travel expenses. A "partnership" is a person as that term is defined for purposes of the Ohio Revised Code. See R.C. 1.59(C). Both the retirement system officials and employees, and a partnership in which it is a member, are subject to the provision in R.C. 102.03(H)(2). Even though, in the situation you have described, the retirement system is a partner in a limited partnership for the purpose of investing public funds, and the partnership agreements require that the partners share the expenses of the partnership, the partnership is a legal entity separate and apart from the retirement system.

Therefore, R.C. 102.03(H)(2) prohibits a state public retirement system board member, investment officer, or employee who exercises the kind of discretion described in the statute, from soliciting or accepting travel expenses from any person, including a partnership in which it is a partner. R.C. 102.03(H)(2) prohibits a partnership in which a retirement system is a partner from giving or reimbursing or otherwise providing travel expenses to any state public retirement system board member, investment officer, or employee.

You have stated that, if the retirement system were required to decline travel expenses given by the partnership, the retirement system would effectively have to pay the expenses twice, to the detriment of system participants. You note that the retirement systems have a fiduciary duty to discharge their duties with respect to the funds solely in the interests of participants and beneficiaries for the exclusive purpose of providing benefits and defraying reasonable expenses of administration. See R.C. 145.11(A), 742.11(A), 3307.15(A), 3309.15(A), and 5505.06(A).

In order to comply with this fiduciary duty, the retirement systems have an obligation to negotiate future partnership agreements, or renegotiate current partnership agreements, in such a manner that the expenses of the partnership do not include travel expenses for other partners to attend meetings. When the partnership incurs such expenses, it affects the profits of the partnership, to the ultimate detriment of the partners and the parties they represent, including the beneficiaries of the retirement systems.

Further, because each state public retirement system is responsible for paying the cost of travel for its own officials and employees, the retirement systems should not incur any travel expense in excess of that which is definitely and directly related to minimum reasonable and necessary travel expenses to attend meetings. See also Adv. Op. No. 87-007 (Where the Ethics Law does not prohibit a public official to receive travel expenses, they must be limited to the amount essential for travel.).

**Overlap Between R.C. 102.03(H)(1) and 102.03(H)(2)**

Your third question is whether employees of a retirement system, who are not required to file financial disclosure statements, are prohibited from accepting honoraria or travel, meal, and lodging expenses as set forth in R.C. 102.03(H)(1). Specifically, you ask:

Does the amendment to R.C. 102.03(H)(1) regarding employees who are not required to file financial disclosure statements but who fall under R.C. 102.02(H)(2) . . . prohibit this class of employees from accepting honoraria or the payment of travel, meal, and lodging expenses paid in recognition of demonstrable business, professional, or esthetic interests of the public official or employee from entities who are not regulated by or seeking to do business with the retirement system?

Your question relates to R.C. 102.03(H)(1). As noted above, R.C. 102.03(H)(1) was amended in Sub. S.B. 133. What is now R.C. 102.03(H)(1) was formerly 102.03(H). It included the ban against receipt of honoraria for financial disclosure filers, and two exceptions to R.C. 102.03(D), (E), and (F) prohibitions against soliciting, accepting, or using one's public position to secure "anything of value," including travel, meals, and lodging payments, that could have a substantial and improper influence on a public official or employee with respect to the performance of his duties. The first exception applied to public officials and employees who are required to file financial disclosure statements. The second exception applied to public officials and employees who are not required to file financial disclosure statements.

The part of R.C. 102.03(H)(1) about which you inquired refers to non-filers, and provides:

Except as provided in division (H)(2) of this section, this division and divisions (D), (E), and (F) of this section do not prohibit a public official or employee who is not required to file a financial disclosure statement under section 102.02 of the Revised Code from accepting and do not prohibit a person from promising or giving to that public official or employee an honorarium or the payment of travel, meal, and lodging expenses if the honorarium, expenses, or both were paid in recognition of demonstrable business, professional, or esthetic interests of the public official or employee that exist apart from public office or employment, including, but not limited to, such a demonstrable interest in public speaking and were not paid by any person or other entity, or by any representative or association of those persons or entities, that is regulated by, doing business with, or seeking to do business with the department, division, institution, board, commission, authority, bureau, or other instrumentality of the governmental entity with which the public official or employee serves. (Emphasis added.)

The emphasized section of R.C. 102.02(H)(1) is the amendment. The exception allows any public official or employee who is not required to file a financial disclosure statement to accept an honorarium and travel, meal, and lodging payments, in very limited circumstances, from any person or entity that was not regulated by, doing business with, or seeking to do business with, the governmental entity with which to official or employee serves. An "honorarium," as defined in R.C. 102.01(H), is any payment made for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or similar gathering.

Prior to the enactment of Sub. S.B. 133, and the amendment to R.C. 102.03(H)(1), the exception applied to any official or employee of a retirement system who was not required to file a financial disclosure statement. However, Sub. S.B. 133 amended R.C. 102.03(H)(1) to state that the exception applied except as provided in R.C. 102.03(H)(2). As noted above, R.C. 102.03(H)(2) is a complete bar against receipt of travel expenses by certain officials and employees of a retirement system.

Of the parties specifically identified in R.C. 102.03(H)(2), the board members and state retirement system investment officers are required, by R.C. 102.02(A), to file financial disclosure statements. The chief executive officer of each retirement system is also required to file a financial disclosure statement. For those officials and employees, the exception in R.C. 102.03(H)(1) would not have been available in its prior or current form. R.C. 102.03(H)(2) also provides:

No person who is . . . an employee of a state retirement system whose position involves substantial and material exercise of discretion in the investment of retirement system funds shall solicit or accept . . . payment of actual travel expenses, including expenses incurred with the travel for lodging, meals, food, and beverages.

Therefore, the exception in R.C. 102.03(H)(1) regarding payment of travel, meal, and lodging expenses does not apply to employees of a state retirement system whose positions involve substantial and material exercise of discretion in the investment of retirement system funds, regardless of the fact that the employees are not required to file disclosure statements and regardless of the reason for the travel, as explained more fully below.

However, R.C. 102.03(H)(2) does not impose a restriction regarding receipt of honoraria. Therefore, the exception in R.C. 102.03(H)(1) would allow any employee of a retirement system who is not required to file a financial disclosure statement, to receive a honorarium only if the honorarium: (1) is paid in recognition of demonstrable business, professional, or esthetic interests of the employee that exist apart from public office or employment, including, but not limited to, such a demonstrable interest in public speaking; and (2) is not paid by any person or other entity, or by any representative or association of those persons or entities, that is regulated by, doing business with, or seeking to do business with the retirement system the employee serves. The exception that allows payment of honoraria would apply to any non-filing employee

of the retirement system, including an employee of a state retirement system whose position involves substantial and material exercise of discretion in the investment of retirement system funds.

### Conclusion

As explained more fully above, for purposes of R.C. 102.03(H)(2), the employees of a retirement system who exercise substantial and material discretion regarding investing the system's funds are those employees with considerable or fundamental, and important or consequential, authority to make decisions regarding investing the system's funds, even if they do not exercise final decision-making authority.

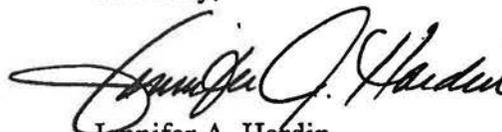
The officials and employees of retirement systems who are identified in R.C. 102.03(H)(2) are prohibited from accepting travel expenses from any person, including a partnership of which is it a partner.

Finally, employees of a retirement system who are identified in R.C. 102.03(H)(2) do not qualify for the exception in R.C. 102.03(H)(1) as it pertains to travel expenses. However, the employees who are not required to file financial disclosure statements can accept honoraria under the limited exceptions described in R.C. 102.03(H)(1).

The Ohio Ethics Commission approved this advisory opinion at its meeting on September 24, 2004. The Commission appreciates the retirement systems' inquiry and cooperation in the implementation of the provisions of Sub. S.B. 133.

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,



Jennifer A. Hardin  
Chief Advisory Attorney

cc: David E. Freel, Executive Director  
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