

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

January 31, 2005

Informal Opinion 2005-INF-0131

Kenneth L. Morckel, Director
Ohio Department of Public Safety

Dear Mr. Morckel:

In a letter received by the Ohio Ethics Commission on April 20, 2004, you ask whether the Ohio Ethics Law and related statutes prohibit employees of the Ohio Department of Public Safety (ODPS) who file financial disclosure statements from receiving compensation to teach at educational events.

Brief Answer

As explained below, based on the facts presented, the Ethics Law does not prohibit ODPS employees who file financial disclosure statements from receiving compensation to teach at educational events.

Facts

You state that several ODPS employees who file financial disclosure statements desire to receive compensation to teach educational seminars. The employees will use their own personal time and resources to prepare and conduct the seminars. The seminars range in duration from one to three days. The seminars will not be taught at colleges or universities; however, the students who enroll in these courses receive college credits, continuing education credits, or acquire knowledge that is required for completing requirements to practice a profession. You state that the entities that will sponsor the seminars are not doing or seeking to do business with, regulated by, or interested in matters before ODPS. You also state that the ODPS employees who desire to conduct these educational seminars are not assigned duties by ODPS that involve the entities that will sponsor the seminars. In a telephone conversation with Commission staff, you explained that ODPS does not offer educational sessions on the same topics offered by the ODPS employees. You have provided a description of the characteristics of the educational seminars.

General Outside Employment Restrictions—R.C. 102.03(D) and (E)

R.C. 102.03(D) and (E) 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.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is appointed or employed by a state department. R.C. 102.01(B) and (C). Ohio Ethics Commission Advisory Opinion No. 77-006. Therefore, all employees of ODPS, including those required to file disclosure statements, are subject to the prohibitions in 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); Adv. Ops. No. 82-002 and 89-003. Compensation received by a public official or employee from private employment or business activity is a "thing of value" for purposes of R.C. 102.03(D) and (E).

General Restrictions on Outside Employment or Business Activity

The Ethics Law does not prohibit a public official or employee from engaging in private employment or business activity provided that there is neither a conflict of interest between his public duties and private financial interests nor a misuse of the authority or influence of his public office or employment. Adv. Op. No. 96-004. Whenever private employment or business activity is not prohibited, the Ethics Law imposes general restrictions on all public officials and employees who engage in private employment or business activity. These restrictions are described in Ohio Ethics Commission Advisory Opinion No. 96-004, which is attached to this advisory opinion.

Prohibitions Imposed by R.C. 102.03(D)

R.C. 102.03(D) 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 is dependent upon the facts and circumstances of each situation. Adv. Op. No. 87-008.

The Ethics Commission has determined that, under certain circumstances, the public interest could be adversely affected when a public official or employee receives compensation from private employment or business activity as a result of his use of, or failure to exercise, his official authority, or if the receipt of compensation could impair the performance of his public duties. Adv. Op. No. 96-004. Therefore, R.C. 102.03(D) prohibits a public official or employee who is engaged in private employment or business from:

- (a) using public time, facilities, personnel, or resources in conducting his private employment or business, including using public equipment to conduct demonstrations for clients;
- (b) using his official title or identification on private business cards or other written materials;
- (c) using his relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding his private interests;
- (d) discussing, deliberating, or voting on any matter involving his private interest;
- (e) receiving compensation for providing services rendered on projects that he has recommended in his official capacity;
- (f) participating in decisions or recommendations regarding his competitors;
and
- (g) using his public position or authority in any other way to secure a benefit for his outside employer or private business.

Prohibitions Imposed by R.C. 102.03(E)

R.C. 102.03(E) prohibits a public official or employee 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 or employee from using the authority or influence of his office to secure a thing of value, R.C. 102.03(E) prohibits a public official or employee from merely soliciting or accepting an improper thing of value even if he does not use his official authority or influence to secure it. Adv. Op. No. 90-004.

The Ethics Commission has determined that the relationship between a public official or employee and the source of the thing of value determines whether the receipt of a thing of substantial value may improperly influence the public official or employee with respect to his official duties. Adv. Ops. No. 86-011 and 92-015. The Commission has explained that the receipt of a thing of substantial value will improperly influence a public official's or employee's objectivity and independence of judgment with regard to his official duties if he were to solicit or accept the 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. Op. No. 83-007.

Therefore, R.C. 102.03(E) prohibits a public official or employee from engaging in private employment or business activity with a party that is interested in matters before, regulated by, or doing or seeking to do business with his own public agency. If a public official or employee operates a private business, then he is prohibited from accepting, soliciting, or using his authority or influence to secure fees or other payments from a customer who is interested in matters before, regulated by, or doing or seeking to do business with, the official's or employee's public agency. The payments received from these parties are of such a character as to improperly influence the official or employee with respect to the performance of his official duties regarding the source of the payments. See, e.g., Adv. Ops. No. 83-007 (an employee of the Board of Cosmetology is prohibited from selling products to regulated salons) and 93-014 (a member of a board of education is prohibited from selling annuities to school district employees).

The Ethics Commission has explained that in certain situations, a public official or employee who engages in private employment or business activity may withdraw from consideration of matters as a public official or employee that could pose a conflict of interest. Adv. Ops. No. 89-006 and 89-010. However, the Commission also explained that some high-level public officials and employees possess unique authority from which they cannot withdraw and therefore they are prohibited from pursuing certain kinds of private employment or business activity. Adv. Op. No. 92-009.

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 if 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. Op. No. 90-002. In Advisory Opinion No. 89-010, the Ethics Commission explained that an employee of a public agency owes his responsibility to the exercise of the public trust by performing the tasks assigned to him by the agency. The Commission continued: "This duty must not be impaired by a public employee's concern for his own personal interests." A public agency may, in some instances, be willing to accommodate the personal financial interests of its employees, but it is within the discretion of the agency to determine whether it is possible or desirable to make that accommodation. An advisory opinion from the Commission does not compel any public agency to accommodate the private financial interests of its officials or employees. Adv. Op. No. 90-002.

Application to Facts Presented

You have stated that the ODPS employees would not use state time or resources to prepare or present the seminars. The ODPS employees would have to comply with the other general outside employment restrictions imposed by R.C. 102.03(D). The employees would be prohibited, for example, from using their official titles or identification on materials advertising the program and from using their public positions or authority in any other way to secure a benefit for their outside employer or private business.

You have also explained that the sponsors of the seminars are not doing or seeking to do business with, regulated by, or interested in matters before ODPS. In a telephone conversation with Commission staff, chief counsel at ODPS has explained that one example of a seminar sponsor is the United States Department of Justice. If the sponsors of the seminars have any of these kinds of relationships with ODPS, employees of the Department would be prohibited from accepting compensation for teaching seminars from them. See Adv. Op. No. 98-005 (regarding electrical safety inspectors charging electrical contractors to teach code certification classes).

Finally, you have explained that ODPS does not provide education to the same parties for whom the employee will offer education, on the same topic. If the education were offered by ODPS, and the official had participated in developing or delivering the education, or administering the educational program, as part of his job duties at ODPS, he would be prohibited from being compensated to offer the educational services privately. See Adv. Op. No. 93-002.

Prohibition Against Receiving an Honorarium—R.C. 102.03(H)(1)

Your question also raises issues under R.C. 102.03(H)(1), which prohibits some public officials and employees from accepting an honorarium. R.C. 102.03(H)(1) reads:

No public official or employee, except for the president or other chief administrative officer of or a member of a board of trustees of a state institution of higher education as defined in section 3345.011 of the Revised Code, who is required to file a financial disclosure statement under section 102.02 of the Revised Code shall solicit or accept, and no person shall give to that public official or employee, an honorarium.

As noted above, an ODPS employee falls within the definition of “public official or employee” and an ODPS employee who files a financial disclosure statement is subject to the prohibition against receiving an honorarium imposed by R.C. 102.03(H)(1). “Honorarium” is defined in R.C. 102.01(H), for purposes of R.C. Chapter 102., as:

[A]ny payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or similar gathering. (Emphasis added).

In Advisory Opinion No. 94-006, the Ethics Commission explained that R.C. 102.03(H) did not prohibit public officials or employees who are required by R.C. 102.02(A) to file a financial disclosure statement with the Ohio Ethics Commission from receiving compensation as consideration for part-time teaching at colleges and universities. In Advisory Opinion No. 94-003, the Ethics Commission recognized that the impetus behind Am. Sub. H.B. 492, 120th General Assembly (1994) (eff. May 12, 1994), which enacted R.C. 102.03(H), was concern that arose regarding the propriety of members of the General Assembly accepting honoraria which were not required to be disclosed on their financial disclosure statements. The Commission stated that it did not appear that the legislative intent of R.C. 102.03(H)(1) was to bar all outside

private employment that involves speaking. Ohio Ethics Commission Advisory Opinion No. 94-006.

The Ethics Commission reached its answer in Advisory Opinion No. 94-006 after an analysis of the definitions of the words used in R.C. 102.03(H) to delineate the difference between speaking and teaching. See R.C. 1.42; Adv. Ops. No. 75-006 and 87-002 (words in a statute that are not statutorily defined must be construed according to rules of grammar and common usage). The Ethics Commission used the definition of "speech" found in *Webster's New World Dictionary*, Second College Edition (1976) at 1368, which defines a "speech" as "a talk or address given to an audience." The Ethics Commission also examined the definition of "education" found in the same dictionary, which defines education as "the process of training and developing the knowledge, mind, character, etc., especially by formal schooling." *Webster's New World Dictionary* at 444.

The Ethics Commission, in reaching its answer in Advisory Opinion No. 94-006, gave considerable weight to the consideration that teaching generally embraces a free exchange of ideas between teacher and student and that teaching may involve activity that goes beyond merely giving a talk or address, such as preparing and conducting examinations, reviewing assigned exercises, and evaluating a student's performance. The Commission stated in Advisory Opinion No. 94-006:

There may be instances where teaching will consist of a singular or isolated event. In such a circumstance, the teaching will be akin to giving "a talk or address . . . to an audience" despite the fact that the teaching is part of a planned educational process where academic credit is offered and earned. For example, state law requires individuals engaged in certain occupations to complete continuing education in order to maintain a license to practice. It is apparent that programs that provide continuing education are part of a planned educational process for which those attending receive credit.

In the situation you have described, the educational seminars range in duration from one to three days. It is obvious that a one-day training course would be of relatively short duration. However, the difference between speaking and teaching cannot be delineated merely by the length of the event. You state that one characteristic of the training courses is that they "would be comprehensive and would involve a mutual exchange of ideas, student-teacher interaction, and discussions regarding hypothetical scenarios." This description of the student-teacher interaction is of prime importance in determining the answer to your question, because it makes clear that the activity is not "a singular or isolated event" and more akin to the type of teaching activity that was described by the Ethics Commission in Advisory Opinion No. 94-006. Other factors that may indicate teaching activity, as distinguished from giving a speech, are the preparation of learning objectives and materials, and the structure of the event. However, the Commission cautioned that public officials or employees should not attempt to circumvent R.C. 102.03(H), in order to accept a fee for giving a speech or attending a public or private conference, by simply describing their activity as teaching.

When rendering an advisory opinion, the Commission must rely on the facts presented by the requester. Relying on your description of the educational seminars that the ODPS employees wish to conduct, the Commission concludes that these events are educational events, and that the ODPS employees are engaged in teaching, rather than making a speech or a personal appearance. Therefore, ODPS employees who file financial disclosure statements are not prohibited by R.C. 102.03(H)(1) from receiving compensation for conducting these educational sessions, as long as they are using their own personal time and resources and as long as they are not accepting payments from any parties that are doing or seeking to do business with, regulated by, or interested in matters before ODPS. If, however, the characteristics of an individual event differ from the description you have made, the application of R.C. 102.03(H)(1) would be affected and the ODPS employees would be prohibited from receiving compensation to conduct the training courses.

Receiving Supplemental Compensation—R.C. 2921.43(A)(1)

In a telephone conversation with Commission staff, you have indicated that ODPS does not offer the kind of educational program that the ODPS employees wish to provide for compensation. If, however, ODPS did offer to the same kinds of classes the employees wish to teach, and any of the employees are required to teach the same kind of classes, your question would implicate R.C. 2921.43(A)(1), which provides:

- (A) No public servant shall knowingly solicit or accept and no person shall knowingly promise or give to a public servant either of the following:
 - (1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform his official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation.

The term "public servant" is defined, in R.C. 2921.01(B), to include any "public official," which includes any employee of the state. See R.C. 2921.01(A). An employee of ODPS is an employee of the state, and therefore a public servant for purposes of R.C. 2921.01(B).

R.C. 2921.43(A)(1) prohibits a public servant from accepting compensation from any party, except as provided by law, for the performance of his official duties, for the general performance of the duties of his office or employment, or as a supplement to his public compensation. Generally, the Commission has stated that this section prohibits a public official from receiving compensation, from any party other than his public employer, for performing the duties of his public position. Adv. Op. No. 89-012 (a city law director is required, as a part of his job duties, to represent the city school district, and cannot accept additional compensation, from the school district, to represent it) and Adv. Op. No. 90-007 (a county prosecutor is

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required, as a part of his job duties, to represent townships within the county, and cannot accept additional compensation, from any township, to represent it).

If the ODPS employees in your question are required, as a part of their public employment, to teach the same kind of classes for ODPS, the employees would be prohibited from receiving compensation from any other party to teach the same classes. See Adv. Op. No. 98-005.

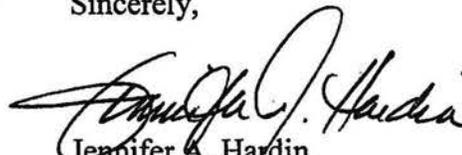
Conclusion

As explained above, based on the facts presented, the Ethics Law does not prohibit ODPS employees who file financial disclosure statements from receiving compensation to teach at educational events.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 28, 2005. The Commission commends you for requesting guidance on behalf of the employees of ODPS.

This 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. Any ODPS employees who are interested in engaging in teaching of the kind described may wish to review this opinion with ODPS legal counsel to assure that the employees understand the differences between speaking and teaching and that they act in compliance with the prohibitions described. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,


Jennifer A. Hardin
Chief Advisory Attorney

Enclosure: Advisory Opinion No. 96-004