

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

February 11, 2005

Informal Opinion 2005-INF-0211

Joseph W. Diemert, Jr.
Joseph W. Diemert, Jr. & Associates Co., L.P.A.

Dear Mr. Diemert:

In a letter received by the Ohio Ethics Commission on August 16, 2004, you have explained that your law firm represents the Northern Ohio Fire Fighters Association (NOFF). You have explained William Deighton, a member of NOFF, is a trustee of the Ohio Police and Fire Pension Fund (OP&F). You have not identified whether he is an appointed or elected member of OP&F. You have also explained that Mr. Deighton serves as a service staff representative/agent to NOFF members in the area of workers' compensation and assists injured NOFF members in the preparation of workers' compensation forms, provides advice and counsel to workers regarding options available to them under the workers' compensation system, and represents members of NOFF in workers' compensation hearings. However, you have indicated that Mr. Deighton does not, in any way, handle any disability claims with OP&F and will have no responsibility to serve as an agent or process any claim with OP&F.

As the lawyer for NOFF, you have opined that there is "absolutely no conflict of interest whatsoever" between Mr. Deighton's duties as a workers' compensation agent for NOFF and his duties for OP&F. While you explained that your letter to the Ethics Commission was "being forwarded . . . in the interest of complete disclosure," because the facts described in the letter present potential issues under R.C. Chapter 102., the Commission will treat your letter as the basis for advice to Mr. Deighton on the question of whether the Ethics Law prohibits him from serving simultaneously as an agent for NOFF members and a trustee for OP&F.

Brief Answer

As explained below, unless he is able to meet the exception in R.C. 102.04(D), R.C. 102.04(A) prohibits Mr. Deighton from receiving compensation for any services he renders personally, on matters before the Bureau of Workers' Compensation (BWC) or other state agencies, for NOFF members.

In addition, the criminal provisions of R.C. 102.03(D) and (E) prohibit Mr. Deighton from receiving compensation for outside employment activities performed for members of NOFF, unless he is able to fully withdraw from any participation, as a member of the OP&F board, in matters that definitely and directly affect those members for whom he has performed services. Mr. Deighton must also abstain from any matter before the OP&F board that definitely and directly affects the interests of NOFF or its individual members where he has performed any services or provided any advice or consultation to NOFF or its members on that specific matter, and must comply with the other outside employment restrictions described in this opinion.

Facts

As noted above, you have explained that Mr. Deighton is a retired City of Cleveland Firefighter. Mr. Deighton serves as a service staff representative/agent to NOFF members in the area of workers' compensation. In that role, Mr. Deighton assists injured NOFF members in the preparation of workers' compensation forms, and provides advice and counsel to workers regarding options available to them under the workers' compensation system. He also represents members of NOFF in workers' compensation hearings. For these services, Mr. Deighton receives a biweekly salary of \$450.00. You have stated that Mr. Deighton does not, in any way, handle any disability claims with OP&F and will have no responsibility to serve as an agent or process any claim with OP&F.

According to R.C. 742.03(B), the administration, control, and management of the Ohio Police and Fire Pension Fund is vested in a board of trustees composed of nine members. You have explained that Mr. Deighton is also a member of the OP&F board of trustees. The law requires that each member of the OP&F board, before entering upon his official duties, shall take an oath of office that he will honestly, faithfully, and impartially perform the duties of the member's office. R.C. 742.06. According to R.C. 742.10, the OP&F board may sue and be sued, enter into contracts, employ and fix compensation for its employees, and adopt rules for the proper administration and management of the fund.

Representation of NOFF Members—R.C. 102.04(A)

The facts described in your correspondence raise significant issues under R.C. 102.04(A), which provides:

Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

Members of state retirement system boards of trustees are appointed or elected to an office of a board of the state. See R.C. 742.03, 742.04, and 742.06. See also R.C. 102.01(C) (specifically including the five state retirement systems within the definition of public agency for purposes of R.C. Chapter 102.). As a member of the OP&F board of trustees, Mr. Deighton is subject to the prohibitions contained in R.C. 102.04(A).

“Compensation” is defined for purposes of R.C. 102.04 as money, a thing of value, or a financial benefit. R.C. 102.01(A). The money that Mr. Deighton would receive from NOFF as a service staff representative/agent providing services to NOFF members on workers’ compensation matters and representing members of NOFF before BWC is “compensation” for purposes of R.C. 102.04(C).

Therefore, R.C. 102.04(A) prohibits Mr. Deighton from accepting “compensation” for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before any agency, department, board, bureau, commission, or other instrumentality, of the state.¹

The phrase “rendering of services” used in R.C. 102.04(A) includes performing services “such as advising, consulting, representing or the like which involves matters ‘before’ the General Assembly or an agency, or a department, division, institution, instrumentality, board, commission, or bureau.” Adv. Op. No. 92-006. The Commission has held that “advising, consulting, or representing” include activities such as promoting, advocating, or opposing matters before a public agency. *Id.* The Commission has also explained that a matter is “before” a governmental agency “when it is being considered by, decided by, or in the presence of or under the official purview of” the governmental agency. *Id.* (citing Adv. Op. No. 76-009).

Accordingly, unless he meets the exception contained Division (D), R.C. 102.04(A) would prohibit a member of the OP&F board from receiving compensation for personally rendering services as an advocate or representative of clients or other parties, including members of NOFF, on matters being considered by or under purview of any state agency. Mr. Deighton is prohibited from personally representing NOFF members before BWC, or personally performing any other services for NOFF members related to matters being considered by or under the purview of any state agency, including BWC, unless he can meet the exception in R.C. 102.04(D).

Exception—R.C. 102.04(D)

Division (D) of Section 102.04 of the Revised Code provides an exception to the prohibition of R.C. 102.04(A) for public employees and persons who are appointed to non-elective offices. You have not stated whether Mr. Deighton is serving in an elective position on OP&F.

¹ The restriction in R.C. 102.04(A) does not apply to personal services rendered in matters before a state court. However, your question does not involve matters pending before a court.

If Mr. Deighton was elected or appointed to an elective position on the OP&F board, he cannot qualify for the exception in R.C. 102.04(D). If Mr. Deighton is serving in a non-elective office on the OP&F board, he may qualify for the exception in R.C. 102.04(D).

Assuming that a public official is not serving in an elective office, he must meet two conditions in order to qualify for the exception in R.C. 102.04 (D). First, the representation he provides must be before a public agency other than the one he serves. Second, prior to rendering the personal services, the public official must file the disqualification statement described in R.C. 102.04(D) with: (1) the Ohio Ethics Commission; (2) his own agency; and (3) the agency before which he will be rendering personal services. The statement must include the public official's name and home address, the name and mailing address of the public agencies with which he serves and before which the matter is pending, and a brief description of the pending matter and of the personal services to be rendered by the official. The statement must include the declaration, by the official, that he disqualifies himself, for a period of two years, from any participation as a public official in any matter involving any public official or employee of the agency before which the present matter is pending.

Therefore, assuming that Mr. Deighton is not serving on the OP&F board in an elected office, he may be able to comply with the exception in R.C. 102.04(D), and therefore receive compensation for representing NOFF members before, or performing other personal services for NOFF members on matters pending before, BWC or state agencies other than OP&F. In order to comply with the exception, he must file the R.C. 102.04(D) Statement, disclosing the required information, with the Ethics Commission, OP&F, and BWC, or any other state agency before which he is representing NOFF members. Further, he must disqualify himself, as a member of the OP&F board, from any matters before OP&F that involves any official or employee of BWC, or any other state agency before which he is representing NOFF members. A blank R.C. 102.04(D) statement is attached for Mr. Deighton's use.

Conflict of Interest Prohibitions—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.

As a member of the OP&F board of trustees, Mr. Deighton is a "public official or employee," as that term is defined, and is 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 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. 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

At the outset, it must be noted that 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 does impose 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 also 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 can 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.

Adv. Op. No. 96-004.

Prohibitions Imposed by R.C. 102.03(E)

In addition to the restrictions in R.C. 102.03(D), 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 the 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. See also Ohio Sup. Ct. Bd. Of Comm'rs on Grievances and Discipline Op. 2002-10 and Joint Legislative Ethics Committee Advisory Opinion No. 95-002. 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 of R.C. 102.03(D) and (E)

R.C. 102.03(D) and (E) prohibit Mr. Deighton from receiving compensation for outside employment activities performed for members of NOFF, or any other parties that are doing or seeking to do business with, regulated by, or interested in matters before OP&F, unless he is able to fully withdraw, as a member of the OP&F board, from matters that affect those members. Because he is receiving compensation from NOFF, Mr. Deighton must be able to fully withdraw from any discussion, deliberation, vote, or other action of the OP&F board on matters that definitely and directly affect NOFF or its individual members if NOFF is representing those members on the matter. Mr. Deighton must also abstain from any matter before the OP&F board that definitely and directly affects the interests of NOFF or its individual members where he has performed any services or provided any advice or consultation to NOFF or its members on that matter.

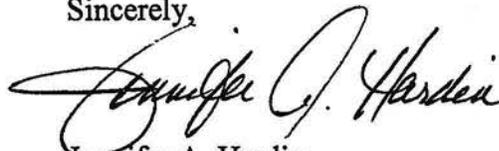
Mr. Deighton must also comply with the other outside employment restriction discussed above. You have stated that Mr. Deighton does not, in any way, handle any disability claims with OP&F and will have no responsibility to serve as an agent or process any claim for a NOFF member with OP&F. These steps will significantly assist Mr. Deighton to comply with the outside employment restrictions in the Ethics Law. However, Mr. Deighton will need to take additional steps. For example, he will be prohibited from using his position as a member of the OP&F board to secure a benefit for a member of NOFF, on any matter on which NOFF has provided any services. As noted above, the OP&F board of trustees is responsible for the administration, management, and control of the Fund. Mr. Deighton would be prohibited, in the exercise of this authority, from discussing the matters with any OP&F officials or employees, formally or informally, or taking any other action to secure a benefit for a member of NOFF.

Conclusion

As explained above, unless he is able to meet the exception in R.C. 102.04(D), R.C. 102.04(A) prohibits Mr. Deighton from receiving compensation for any services he renders personally, on matters before the Bureau of Workers' Compensation or other state agencies, for NOFF members. In addition, the criminal provisions of R.C. 102.03(D) and (E) prohibit Mr. Deighton from receiving compensation for outside employment activities performed for members of NOFF, unless he is able to fully withdraw from any participation, as a member of the OP&F board, in matters that definitely and directly affect those members for whom he has performed services. Mr. Deighton must also abstain from any matter before the OP&F board that definitely and directly affects the interests of NOFF or its individual members where he has performed any services or provided any advice or consultation to NOFF or its members on that specific matter, and must comply with the other outside employment restrictions described in this opinion.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 28, 2005. 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

Enclosures: Advisory Opinion No. 96-004; R.C. 102.04(D) Statement

cc: William Deighton