

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

March 21, 2005 Informal Opinion 2005-INF-0321-1

Mark C. Bissinger, Esq.
Dinsmore & Shohl

Dear Mr. Bissinger:

In a letter received via fax by the Ohio Ethics Commission on December 2, 2004, you ask whether the Ethics Law and related statutes prohibits a member of the Ohio State Dental Board (OSDB) from accepting and retaining the cash prize provided by a fund-raising raffle that was sponsored by the Ohio Dental Association Foundation (ODAF).

Brief Answer

As explained below, under the specific facts and circumstances presented, a member of the OSDB is not prohibited from accepting and retaining the cash prize provided by a fund-raising raffle that was sponsored by the ODAF.

Facts

You state that you represent Dr. Franklin D. Wright. Dr. Wright is a licensed dentist practicing in Ohio and a member of the OSDB. Dr. Wright is also a member of the Ohio Dental Association (ODA). The ODA created the ODAF in 1994 as a not-for-profit corporation for the purpose of raising funds for the ODA. The ODAF has, as its sole member, the ODA.

The ODAF has, for several years, organized and held a fund-raising raffle. In 2004, the ODAF sold approximately 500 tickets. The tickets sold for \$100.00 each or six tickets for \$500.00. You state that it is Dr. Wright's understanding that the tickets were sold to dentists who are members of the ODA. However, you further explained in a telephone conversation that the tickets were available for sale to the general public and sales were not limited to ODA members. This year, the drawing was held at a public forum during the 2004 Annual Session of the ODA. Dr. Wright was not present at the drawing and was notified by telephone that he had won the grand prize of \$20,000.

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

Your attention is first directed to 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;
 - (2) Additional or greater fees or costs than are allowed by law to perform his official duties.

The term "public servant" is defined for purposes of R.C. 2921.43 to include any person who is an appointed officer of the state. See R.C. 2921.01(A) and (B)(1). Thus, a member of the OSDB is a "public servant" who is subject to the prohibitions of R.C. 2921.43.

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)-(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. Ohio Ethics Commission Advisory Opinions No. 92-014 and 92-015. 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. The exceptions in R.C. 102.03(G) through (I) do not apply to the facts that you have set forth and need not be discussed further.¹

The term "person" is defined to include any individual, corporation, partnership, association, or other similar entity. R.C. 1.59. The prohibition imposed by R.C. 2921.43(A)(1) applies to the ODAF.

The word "compensation" is not defined for purposes of R.C. Section 2921.43. In Advisory Opinion No. 92-014, the Ethics Commission explained:

¹The exceptions set forth in R.C. 102.03(G) to (I) concern campaign contributions, honoraria or fees for making a personal appearance or speech, and travel, meal and lodging expenses incurred in connection with the personal appearance or speech or conferences, seminars, and similar events.

A primary rule of statutory construction is that words used in a statute must be construed according to rules of grammar and common usage. See R.C. 1.42. Furthermore, statutes “must be construed in the light of the mischief they are designed to combat.” City of Mentor v. Giordano, 9 Ohio St. 2d 140, 144 (1967). “Compensation” is defined as “payment for services: esp., wages or remuneration.” See Webster's New World Dictionary 289 (2nd College Ed. 1972).

R.C. 2921.43 addresses situations where a public servant would receive compensation other than as provided by law that is given to him for any one of three reasons: (1) performing a duty, act, or service required in his official capacity as a public servant; (2) the general performance of his public duties; or (3) as a supplement to his public compensation. See Adv. Ops. No. 89-012 (payment for legal services required to be performed by a law director), 89-013 (travel, meal, and lodging expenses for travel on state business) and 91-010 (“frequent flyer” benefits earned through travel on state business). Cf. Adv. Op. No. 92-014 (a public servant is not prohibited from accepting rideshare incentives purchased with grant money provided by a regional planning commission to his public employer because the incentives are provided for the public servant’s commute to and from work and are not given for the performance of his official duties, for the performance of any act or service within his public capacity, or for the general performance of the duties of his public employment).

Prior to the enactment of Am. Sub. H.B. 300, 116th Gen. A. (1986) (eff. September 17, 1986) authorizing the Ohio Ethics Commission to issue advisory opinions interpreting R.C. 2921.43, the Attorney General, in Ohio Op. Att’y Gen. No. 84-019, addressed the prohibition of R.C. 2921.43(A)(1) holding, in pertinent part:

R.C. 2921.43 (A) is a codification of the common law rule that a public officer may not receive remuneration other than that allowed by law for the performance of his official duties. See Somerset Bank v. Edmund, 76 Ohio St. 396, 81 N.E. 641 (1907); Debolt v. Trustees of Cincinnati Township, 7 Ohio St. 237 (1857); Gilmore v. Lewis, 12 Ohio 281 (1843); 1981 Op. Att’y Gen. No. 81-013. . . . Public officials and employees are not permitted to receive payment other than that provided by law for performing those duties for which they are responsible for in their official capacity. See generally State v. McKelvey, 12 Ohio St. 2d 92, 95, 232 N.E. 2d 391, 393 (1967) (“a public official cannot use his position for private profit”).

See also Baker v. West Carrollton, 64 Ohio St. 3d 446 (1992) (common-law principles regarding a finder's claim to lost property do not govern the disposition of lost property recovered by a municipal police officer).²

² In State v. Urbin (2003), 100 Ohio St.3d 1207, 1209 (dismissed, *sua sponte*, as having been improvidently allowed), Chief Justice Moyer took the opportunity, while concurring in the dismissal, to affirm the Ethics Commission’s role in interpreting the Ethics Law in its advisory opinions.

In the instant situation, the OSDB member is providing no services to the ODAF as consideration for receiving the cash prize provided by a fund-raising raffle. Therefore, the raffle prize is not intended to be provided to the OSDB member in exchange for the performance of a particular duty, act, or service that he is required to perform. Also, the prize is neither being provided for the general performance of the public duties rendered by the OSDB member nor as a supplement to his public compensation.

Therefore, R.C. 2921.43(A)(1) does not prohibit a member of the OSDB from accepting and retaining the cash prize provided by a fund-raising raffle that was sponsored by the ODAF.

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.

The term "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is appointed to a public agency. R.C. 102.01(B). The term "public agency" is defined to include any board of the state. R.C. 102.01(C). Therefore, a member of the OSDB is a "public official or employee" for purposes of R.C. 102.03 (D) and (E). The term "anything of value" would include money, gifts, and gratuities. R.C. 1.03, 102.01(G). Adv. Ops. No. 86-003, 92-015, and 2001-03.

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his public position to secure anything of value, for himself or any other party, that is of an improper character. Adv. Ops. No. 80-007, 85-006, and 89-006. The Ethics Commission has explained that R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his office or employment to secure anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the public agency with which he serves because the thing of value could impair his objectivity and independence of judgment with respect to his official actions and decisions for the public agency which he serves. Adv. Ops. No. 79-002, 87-006, and 87-009.

R.C. 102.03(E) does not require that a public official or employee use the authority or influence of his office to secure a thing of value, but prohibits a public official or employee from merely soliciting or accepting anything of value where the thing of value could manifest a substantial and improper influence upon him with respect to his official duties. Adv. Op. No. 90-012. The Ethics Commission has explained that R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with the public agency with which he serves if the receipt of such a thing of value could impair his objectivity and independence of judgment with regard to his official decisions and responsibilities. Adv. Ops. No. 86-011, 89-006, and 90-009. See also State v. Lordi, 140 Ohio App.3d 561, 569 (2000), discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001) (a county commission violated R.C. 102.03(E) by soliciting private business from an official of a township that was seeking road improvement funds from the board of county commissioners).

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

The OSDB regulates and stands in a position of authority over practitioners of dentistry within the state. Also, state and national professional dental organizations that represent such practitioners are interested in matters that the OSDB has the statutory responsibility to regulate. Therefore, R.C. 102.03(D) and (E) prohibit an OSDB member from accepting, soliciting, or using the authority or influence of his office to secure anything of value from individual practitioners of dentistry or professional dental care organizations. Adv. Op. No. 90-009. See also Adv. Ops. No. 80-004, 85-012 and 87-006 (payments of honoraria, conference registration fees, and travel, meal and lodging expenses are "things of value" for purposes of R.C. 102.03).

In the instant situation, R.C. 102.03(D) is not an issue because no facts have been provided to suggest that the OSDB member used the authority or influence of his public position to secure the raffle prize for himself. The issue becomes whether, for purposes of R.C. 102.03(E), the mere acceptance of the raffle prize could manifest a substantial and improper influence upon him with respect to his official duties as an OSDB member.

As explained above, soliciting or accepting a thing of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the public agency that a public official or employee serves could manifest a substantial and improper influence upon the official or employee with respect to his official duties in certain circumstances. A thing of value could have a substantial and improper influence on a public official or employee if the receipt of such a thing of value could impair his objectivity and independence of judgment with regard to his official decisions and responsibilities in future matters that would affect the provider of the thing of value.

Despite the fact that the cash prize from the raffle is derived from the payments made by individual practitioners to the ODAF for raffle tickets, there is no definite and direct link between the individual practitioners who are regulated by the OSDB and the OSDB member. The OSDB member would not know the identity of the practitioners who purchased tickets for the fundraising raffle or the number of tickets purchased by any particular raffle participant. In addition, the OSDB member would not know if any particular raffle participant was currently involved in any regulatory matter pending before the OSDB. Further, based on the fact that the OSDB member was not present at the drawing, there appears to be a lack of influence by the OSDB member related to the selection. The selection was random, and was made live, in a public forum. The board member has no connection to the person making the drawing.

The situation would be different if the prizes were provided and the raffle sponsored by vendors at a conference that was attended by public officials and employees who had been sent to the conference by, and at the cost of, the public agency with which they served or were employed to seek information on the products and services being exhibited by the vendors. In such a situation, the public official or employee would know the identity of the vendors who either provided the items to awarded as prizes or participated in the drawing. In addition, the public official or employee would know whether these vendors were currently interested in seeking to do business with the public agencies which had sent their officials and employees to the conference.

Therefore, based on the specific facts and circumstances, R.C. 102.03(E) does not prohibit a member of the OSDB from accepting and retaining the proceeds of a fund-raising raffle that was sponsored by the Ohio Dental Association Foundation (ODAF).

Disclosure

The members of the OSDB are required to file annual financial disclosure statements. If he accepts the raffle prize, the OSDB member is required to disclose the ODAF as a source of income on his financial disclosure statement for 2004.

Conclusion

As explained above, under the facts and circumstances presented, a member of the OSDB is not prohibited from accepting and retaining the cash prize provided by a fund-raising raffle that was sponsored by the ODAF.

Finally, while the Ethics Law does not prohibit the OSDB member from retaining the prize provided at the raffle in this situation, the Commission suggests that members of regulatory boards should not place themselves in positions of this kind. While the law certainly does not prohibit a regulatory board member from providing financial support to an organization of which he is a member, composed of parties regulated by his state agency, he should do so in a way that could not result in a benefit flowing back to him as a result of his support. In other words, instead of

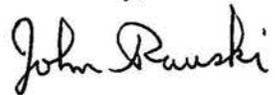
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participating in a raffle which may result in a substantial cash prize, a regulatory board member who wished to support his professional organization could make a contribution directly to the organization or foundation.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on March 18, 2005. The Commission commends the OSDB member for requesting guidance on this matter.

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 that reads "John Rawski".

John Rawski
Staff Attorney