

OHIO ETHICS COMMISSION

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Informal Opinion 2006-INF-0124-1

Charles R. Knight, M.S.
Manager, Standardized Expression Measurement Center
Medical University of Ohio at Toledo

Dear Mr. Knight:

In a letter to the Ethics Commission that was received on August 23, 2005, you ask whether you can be compensated for providing consulting services to a company called Gene Express that has a contract with the Medical University of Ohio at Toledo (MUOT) by which you are employed.

Brief Answer

As explained below, R.C. 102.03(E) prohibits you from rendering private consulting services for compensation as a scientific advisor for Gene Express while you are employed as the manager of the SEM Center at MUOT.

Facts

You state that you are employed full-time at the MUOT as the manager of the Standardized Expression Measurement (SEM) Center. Your income as a MUOT employee is supplied by a grant from the National Cancer Institute.

You have been asked to provide consulting services as a scientific advisor for a company called Gene Express, Inc. You state that, as a scientific advisor for Gene Express, you will work strictly as a consultant and will have no decision-making authority for the company. Gene Express licenses the Standardized RT-PCR (StaRT-PCR) transcript abundance measurement platform technology from MUOT. Gene Express also produces and markets StaRT-PCR reagents. Gene Express contracts with the SEM Center at MUOT for the analysis of samples from clients. You state that, as manager of the SEM Center at MUOT, you process all samples that Gene Express sends to the SEM Center. Your supervisor, Dr. James C. Willey, is the inventor of StaRT-PCR and has a significant financial interest in Gene Express.

R.C. 3345.14—Application of Exception for Entrepreneurship

Before addressing your question, it is necessary to determine whether R.C. 3345.14 applies to your question. In 2000, in consultation with the Ethics Commission, the General Assembly amended R.C. 3345.14 to include a provision that, notwithstanding provisions of the Revised Code to the contrary, including but not limited to R.C. 102.03, 102.04, 2921.42, and 2921.43, boards of trustees of state universities can adopt rules that set forth circumstances under which a university employee may have a financial interest in discoveries or inventions made or created by that employee or in patents issued to that employee. R.C. 3345.14(D).

As set forth above, your supervisor, Dr. James C. Willey, is the inventor of the StaRT-PCR and has a significant financial interest in Gene Express. However, in R.C. 3345.14(D), the General Assembly clearly indicated that such rules apply only to the employee who made the discovery or invention or has been issued a patent. Because of the scope of R.C. 3345.14(D), the exception does not apply and you are governed by the prohibitions imposed by Chapter 102. and sections 2921.42 and 2921.43 of the Revised Code. Therefore, the answer to your question is determined by the Ohio Ethics Law and related statutes.

Conflict of Interest Prohibitions—R.C. 102.03(D) and (E)

Divisions (D) and (E) of Section 102.03 of the Revised Code read:

- (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 an employee of a state university, you are a "public official or employee," as that term is defined in R.C. 102.01(B) and (C), and is subject to the prohibitions of R.C. 102.03(D) and (E). Ohio Ethics Advisory Opinion No. 77-003.

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. 102.30(D) and (E). Adv. Op. No. 96-004. In addition, the beneficial or detrimental economic impact of a decision made by a public official or employee is a thing of value for purposes of R.C. 102.03. Adv. Ops. No. 85-012, 90-002, and 90-012.

In the instant situation, both the compensation that you would receive from Gene Express for performing private consulting and the beneficial or detrimental economic impact realized by Gene Express from decisions you render as the manager of the SEM Center at MUOT are things of value for purposes of R.C. 102.03(D) and (E).

General Restrictions on Outside Employment or Business Activity

R.C. 102.03(D) and (E) do not prohibit a public official or employee from engaging in private employment 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. Even where private employment or business activity is not prohibited, the Ethics Law limits some of the actions of any public official or employee who engages in private employment or business activity.

The restrictions in R.C. 102.03(D) and (E) are more fully described in Ohio Ethics Commission Advisory Opinion No. 96-004, which is attached to this advisory opinion. The application of the prohibition is dependent upon the facts and circumstances of each situation. Adv. Op. No. 87-008. This opinion will highlight the restrictions as they apply to the situation you have described.

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. 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. 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, and thus manifest an improper influence upon him with respect to his 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 because the payments received from these improper sources are of such a character as to improperly influence the official or employee with respect to the performance of his official duties in consideration of matters that affect the interests of these parties. See, e.g., Adv. Ops. No. 83-007 (an employee of the Board of

Cosmetology is prohibited from selling products to regulated salons), 92-008 (a township clerk may not be employed by a bank that receives township funds, and 92-009 (the Executive Director of the State Barber Board may not own and operate a barbershop).

Withdrawal From Matters Affecting the Improper Source

In certain situations, a public official or employee who engages in private employment 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 has 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 duties 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."

Application of R.C. 102.03(E)

As set forth above, R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting anything of value, including fees or other payment or compensation for consulting services, from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the official's or employee's public agency.

Under the facts that you have provided, Gene Express licenses the StaRT-PCR transcript abundance measurement platform technology from MUOT. In addition, Gene Express contracts with SEM at MUOT for the analysis of samples from clients. Furthermore, Gene Express send samples to the SEM Center which are processed by you as manager of the SEM Center at MUOT. Therefore, in light of these relationships between MUOT and Gene Express, the company is a party that is interested in matters before, regulated by, or doing or seeking to do business with both MUOT and the SEM Center, which is the specific entity that you manage as an MUOT employee.

Possibility of Withdrawal

As explained above, 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. R.C. 102.03(E) prohibits you from participating in matters, as the manager of the SEC Center, that affect the pecuniary interests of Gene Express and its clients. This prohibition would extend to your supervision of SEC employees who are subordinate to you and interact with Gene Express regarding matters before the SEM Center that affect the pecuniary interests of Gene Express and its clients.

In your letter, you discuss the concept of a public official or employee being able to withdraw 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. You state that if you receive compensation for rendering private consulting services as a scientific advisor for Gene Express, you believe you have the ability to withdraw from matters that affect the interests of Gene Express because you will work for them "strictly as a consultant" and you will have no authority to make decisions on behalf of Gene Express.

However, as explained above, the requirement that a public official or employee withdraw from matters to avoid a conflict of interest under R.C. 102.03(E) pertains to the person's withdrawal from official matters in his capacity as a public official or employee, not in his capacity as a consultant for a private company. The specific duties that the person would perform for the private company for compensation and the degree of authority the company would provide to the person are not relevant for purposes of R.C. 102.03(E).

If you were to withdraw from all matters that affect Gene Express, including supervision of your subordinate employees, then such a withdrawal would interfere with the performance of your assigned duties as manager of the SEM Center. Therefore, it would be impossible for you to withdraw from your authority at the SEM Center in order to render private consulting services as a scientific advisor for Gene Express due to the nature of its contractual and regulatory connections with the SEM Center at MUOT.

Prohibitions Imposed By R.C. 102.03(D)

If you were to perform services as a consultant for Gene Express without compensation, you would still be subject to the prohibitions in R.C. 102.03(D). Where it is possible for a person to engage in outside business activity, 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 or his business associates. Adv. Ops. No. 79-002, 80-004, and 89-006. 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.

These restrictions would apply to you if you were to serve as an unpaid consultant for Gene Express. Once again, given the scope of your authority as the Manager of the SEM Center, it may be impossible for you to comply with these restrictions as they apply to Gene Express. For example, R.C. 102.03(D) would prohibit you from participating in matters that affect Gene Express's interests. As noted above, your authority as Manager of the SEM Center will make it impossible for you to withdraw from matters affecting Gene Express.

Conclusion

As explained more fully above, R.C. 102.03(E) prohibits you from rendering private consulting services for compensation as a scientific advisor for Gene Express while you are employed as the manager of the SEM Center at MUOT.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 13, 2006. The Commission commends you for requesting guidance before taking any actions that could be prohibited by law. 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

Enclosure: Adv. Op. No. 96-004