

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

January 24, 2006

Informal Opinion 2006-INF-0124-3

Craig Cornell
Director, Student Financial Aid Office
Bowling Green State University
Bowling Green, Ohio 43403

Dear Mr. Cornell:

In a letter received by the Ohio Ethics Commission on September 19, 2005, you have asked whether the Ethics Law prohibits you, as the Director of the Student Financial Aid Office at Bowling Green State University, from accepting the payment of travel expenses from a student loan vendor where the payment of the travel expenses is part of a contract between the vendor and the University.

Brief Answer

As explained more fully below, unless the contract was competitively bid and awarded to the lowest and best bidder, R.C. 102.03(E) prohibits you from accepting the payment of travel expenses in connection with a contract between the student loan vendor and the University.

Facts

In your letter to the Ethics Commission, you stated that you are the Director of the Student Financial Aid Office at Bowling Green State University. You also stated that the University is in the process of developing a private loan program to benefit its students. You explained that the University has requested, through a request for proposal (RFP) process, competitive bids for the development of the program.

You ask whether the Ethics Law and related statutes prohibit you from sitting on a loan development board and having your travel expenses paid for by the contract winner, if the RFP and subsequent contract provide for the payment of travel expenses by the private loan company.

Soliciting or Accepting Things of Value from a Vendor—R.C. 102.03(D) and (E)

R.C. 102.03(D) and (E) are applicable to your question. R.C. 102.03(D) and (E) provide the following:

- (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 subject to the prohibitions imposed by R.C. 102.03(D) and (E). See Ohio Ethics Commission Advisory Opinion No. 2003-03.

R.C. 102.03(D) prohibits a public official from using his public position to secure a thing of value that would manifest a substantial and improper influence on the official with respect to the public official's duties. R.C. 102.03(E) prohibits a public official from soliciting or accepting anything of value that would manifest a substantial and improper influence on the official with respect to his official duties. The Ethics Commission has stated that a thing of value could have an improper influence upon a public official if the source of the thing of value is doing or seeking to do business with, regulated by, or interested in matters before, the public official's public agency. Adv. Op. No. 86-011. In this case, the source of the thing of value is doing business with the University.

Given the facts you have described, the provision that is more closely applicable to your question is R.C. 102.03(E), which prohibits solicitation of acceptance of a thing of value that is of such a character as to manifest and substantial and improper influence on the official or employee who solicits or accepts it. The payment of travel expenses, including expenses for accommodations, by a party that is doing or seeking to do business with a public agency, is a thing of value that is of such a character as to have a substantial influence on any official or employee of the agency. Therefore, the solicitation or acceptance of travel expenses from the loan company could have a substantial and improper influence upon you with respect to your duties. See Adv. Op. No. 2003-03.

However, as in all situations, the application of the Ethics Law is dependent on the facts and circumstances presented to the Commission. For example, in Advisory Opinion No. 87-007, the Ethics Commission stated that a public employee is not prohibited from accepting the

payment of travel expenses from a company doing business with his public agency where specific requirements are met. First, the contract must be awarded by the public agency to the lowest and best bidder in a competitive bidding process. Second, the requirement for payment of travel expenses must be included in the bid specifications. Third, the travel expenses must be a term of the contract between public agency and the successful bidder. In all cases, the purpose of the trips should be limited to conducting official business and no recreational or other personal purpose is served by the trips. Further, the receipt of such expenses must be limited to that amount which is essential to the official's or employee's travel.

Given these parameters, the travel expenses are items for which the public agency pays consideration and, ultimately, it is the public agency that bears the cost of the trips. Adv. Op. No. 87-007. The Commission concluded that, under these circumstances, the travel expenses provided by the vendor are not of such a character as to manifest a substantial and improper influence upon an officer or employee of the public agency who travels in connection with the contract.

Application to Presented Facts

You have explained that the University is selecting a vendor to develop a private student loan program for the University's students. The University is using an RFP process. You have described the process as a competitive one. You ask whether the Ethics Law and related statutes prohibit you from sitting on loan development board and having your travel expenses paid for by the contract winner, if the RFP and subsequent contract provide for the payment of travel expenses by the private loan company.

If the vendor were to be selected by virtue of a competitive bidding process, the conclusions in Advisory Opinion No. 87-007 would apply to the facts you have described. However, you have not described a competitive bidding situation but rather an RFP process. A competitive bid process utilizes an invitation to bid, with bid specifications wherein the product or service to be delivered is well-defined and can be specified in detail. Bidders on the contract submit sealed bids. Bids from bidders who are responsive (those who promise to deliver the goods or services exactly as specified) and responsible (those who have the skills, resources, and experience to provide the goods or perform the services) are unsealed in an open public process. The contract is awarded to the responsive and responsible bidder who has submitted the lowest bid, with no negotiation.

By contrast, an RFP process is a negotiated procurement method, where both parties have greater flexibility. Each party has the freedom to propose or chose alternatives in service delivery, price, and payment methods. The purchasing party can use subjective scoring criteria to assess responding proposals, with greater weight given to consideration such as past experience with the vendor or quality, rather than cost. The RFP process can be used to develop ongoing relationships between the public agency and the vendor. While an RFP process has some competitive aspects, it is not a competitive bid. See *Danis Clarkco Landfill Co. v. Clark*

Cty. Solid Waste Management District (1994), 73 Ohio St. 3d 590, 600 (“The RFP method of procurement is not competitive bidding.”) See also Adv. Op. No. 88-006 (distinguishing between ‘competitive bidding’ and a political subdivision’s ‘selection process’ for purposes of the public contract provisions of the Ethics Law).

Therefore, the conclusions in Advisory Opinion No. 87-007 would not apply to the situation you have described, where the University will use an RFP process rather than a competitive bidding process to select the vendor. R.C. 102.03 (E) would prohibit you, as a University employee, from soliciting or accepting travel expenses from the vendor that is operating the private student loan program for the University, even if the travel is included in a contract between the University and the vendor. R.C. 102.03(D) would also prohibit you from using your position to secure the payments of these travel expenses.

Interest in a Public Contract—R.C. 2921.42(A)(4)

R.C. 2921.42(A)(4), which prohibits a public official from having an interest in a public contract entered into by or for the use of the public agency he or she serves, is also applicable to your question. As an employee of the University, you are a public official for purposes of R.C. 2921.42(A)(4). R.C. 2921.01(A). A contract under which the University engages a vendor to develop a private loan program for its students is a public contract for purposes of this restriction, because the University is purchasing services under the contract. R.C. 2921.42(G)(1).

If a University employee were to receive travel expenses provided by a vendor under a contract with the University, the employee would have an interest in the contract. Therefore, R.C. 2921.42(A)(4) would also prohibit the activity you have described.

There is an exception to the prohibition in R.C. 2921.42(A)(4), set forth in R.C. 2921.42(C). The exception requires that the public official meet four requirements, one of which is that the public agency could not acquire the goods or services from any other party for the same or lower cost. If the contract were to be competitively bid, and the vendor was providing services to the University for a lower cost than any other vendor, you may be able to meet the exception in R.C. 2921.42(A)(4). Enclosed is an information sheet that will provide additional information about the four requirements in R.C. 2921.42(C). If the University decides to competitively bid the contract, do not hesitate to contact the Commission if you have questions about the other requirements in the exception.

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

Finally, R.C. 2921.43(A)(1) may be applicable to your question. R.C. 2921.43(A)(1) provides that, unless one of three narrow exceptions applies, no public servant shall knowingly solicit or accept, and no person shall knowingly promise or give to a public servant, any compensation “to perform his official duties, to perform any other act or service in the public

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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." As an employee of a state university, you are a "public servant" subject to the prohibition imposed by R.C. 2921.43. Adv. Op. No. 2003-03. However, because R.C. 102.03(E) prohibits you from soliciting or accepting the travel expenses, and the Commission does not have sufficient information to apply R.C. 2921.43, the restriction is not considered further in this opinion.

Conclusion

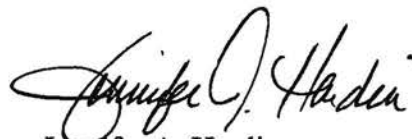
As explained above, unless the contract was competitively bid and awarded to the lowest and best bidder, R.C. 102.03(E) prohibits you from accepting the payment of travel expenses in connection with a contract between the student loan vendor and the University.

You should also note that Revised Code provisions outside the Ethics Law, such as R.C. 2921.02(B) and R.C. 3599.01, also prohibit public servants from soliciting or accepting items of value. These provisions are not within the Commission's jurisdiction, and will not be considered further. However, you may wish to consult with legal counsel for the University to determine whether any other provisions also apply to your question.

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: Information Sheet #3—State Officials or Employees Selling Goods or Services