

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

August 1, 2007

Informal Opinion 2007-INF-0801

Amy Minardo
Deputy General Counsel
Office of Treasurer Richard Cordray

Dear Ms. Minardo:

On April 5, 2007, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you asked several questions regarding the application of the Ethics Law and related statutes to employees of the Treasurer's Office who work with Community Financial Education (CFE), a non-profit entity created to assist the Office in its educational efforts.

Specifically, you asked whether the Ethics Law and related statutes prohibit any Treasury employee from:

1. Working in conjunction with CFE where the employee's job involves administering community education programs that are funded in part by CFE; or
2. Participating in fundraising activities for CFE where charitable contributions are made by entities, or foundations funded by entities, doing business with the Treasurer's Office.

You have also asked whether the Ethics Law and related statutes require measures to be taken to separate the functions of CFE and the Treasurer's Office and whether there are any other issues that arise under the ethics statutes regarding the interaction between CFE and the Treasurer's Office. Finally, you have asked whether the Ethics Law and related statutes prohibit the Treasurer's Office from providing resources to an independent contractor of CFE.

You have stated that the current Executive Director and Secretary of CFE are employees of the Treasurer's Office. You have stated that you are familiar with the Commission's opinions on the ability of a public official or employee to hold a fiduciary position with a nonprofit corporation that is receiving funds from the public agency he or she also serves, and that you believe that the employees of the Treasurer's Office are serving with CFE in a permissible manner. In order to answer your other questions, the Commission will also examine the ability of Treasurer's Office employees to serve with CFE.

Brief Answer

As more fully explained below, the Ethics Law and related statutes prohibit a Treasury employee from serving as an officer of CFE *unless* the employee is appointed, by the Treasurer, to serve with CFE in his or her "official capacity" as a representative of the Office.

The Ethics Law and related statutes do *not* prohibit any employee of the Treasurer's Office, regardless of whether the employee serves as an officer of CFE, from working in conjunction with CFE or participating in matters that affect the interests of CFE. The Law does not prohibit any employee of the Treasurer's Office from participating in fundraising activities for CFE where the sources of the contributions are *not* entities that do business with, or are seeking to do business with, or are regulated by or interested in matters before, the Treasurer's Office, unless the funds would accrue to the personal benefit of the employee.

This opinion does not rule on the question of whether employees of the Treasurer's Office can participate in fundraising activities for CFE where the sources of the contributions are entities, or foundations funded by entities, that do business with the Treasurer's Office. The Commission is not prepared to issue an opinion on this issue and the potential for conflicts of interest that it raises without further research.

Purpose of an Advisory Opinion

The purpose of an Ethics Commission advisory opinion is to provide guidance to a public official or employee upon which he or she can rely before engaging in an action that may be prohibited by the Ethics law. Based on the information provided in your letter, the relationship between CFE and the Treasurer's Office and staff has been in place since 2000. The Commission can render an advisory opinion only in response to a question that is hypothetical or involves the prospective conduct of the person who requests the opinion. Ohio Ethics Commission Advisory Opinions No. 75-037 and 94-002. For that reason, this opinion will address prospective matters and will not reach conclusions on any past actions.

Summary of Presented Facts

You explained that CFE is a charitable corporation organized in 2000, under Revised Code Chapter 1702., by a predecessor of the current Treasurer. According to your letter and the CFE Code of Regulations and Articles of Incorporation enclosed with it, the purpose of CFE is to assist the office in community education initiatives and assist in the conduct of community financial education programs approved by the Treasurer. Members of CFE's board of trustees are educators who serve on the board as volunteers.¹ CFE has no employees.

¹ CFE's Articles of Incorporation provide: "The Trustees shall not receive compensation for and [sic] services rendered in such capacity. However, nothing contained herein shall be construed to preclude any Trustee or committee member from receiving compensation from the Corporation for other services actually rendered or for expenses incurred for serving the corporation in any other capacity." Sec. 3.14. You have stated that employees of the Treasurer's Office receive no compensation from CFE, and this opinion relies on that fact. If the employees were to receive compensation, or payment of expenses, in any fashion, from CFE, the conclusions in this opinion would not apply, and you should seek further guidance from the Commission.

Currently, employees of the Treasurer's Office serve as officers of CFE, in the positions of executive director and secretary. They are not on the CFE Board. Employees of the Treasurer's Office also provide administrative support for CFE. The employees are paid by the Treasurer's Office and receive no compensation from CFE. The Treasurer's Office also provides CFE with office space and computers and pays other related expenses for CFE.

You stated that CFE raises over \$200,000 yearly from grants and charitable donations to administer community education programs and that the funds are held in an account at a private bank. When the Treasurer's Office is not directly contracting to support educational programs, CFE enters into contracts with vendors and independent contractors to teach classes, provide facility space, and prepare written materials. The Treasurer's Office is currently considering using CFE as a funding mechanism to support all of the community education programs affiliated with the Treasurer's Office and the CFE Board is considering delegating additional activities, such as applying for grant funding, to the Treasurer's Office. A number of Treasury employees spend most of their time working on projects funded in part by CFE donations.

Employees Serving with CFE

In a series of advisory opinions, the Commission has considered whether public officials or employees are prohibited from serving as board members or officers of non-profit corporations that provide goods or services to, or receive public funds from, the public agencies they serve. See, e.g., Adv. Ops. No. 83-010, 88-005, and 96-005. R.C. 2921.42(A)(4), governing public contracts, applies to the question, and states that no public official shall knowingly:

Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

A "public official" is defined as any employee of the state. R.C. 2921.01. An employee of the Treasurer's Office is a "public official" subject to the prohibitions of R.C. 2921.42. A "public contract" is defined as "the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state." R.C. 2921.42(G)(1)(a). The Office's acquisition of CFE's services to facilitate in its educational efforts, through the provision of any kind of funds or resources, is a public contract. R.C. 2921.42(G)(1).

A public official has a prohibited "interest" in a public contract if the official would have a definite and direct interest, of either a financial or fiduciary nature, in the contract. Adv. Ops. No. 81-008 and 88-001. See State v. Urbin (2003), 100 Ohio St. 3d 1207, 1208, 2003 Ohio 5549 at ¶ 10 (When this appeal of a conviction under R.C. 2921.42(A)(1) was dismissed by the Supreme Court as improvidently allowed, Chief Justice Moyer, writing separately, stated that the Ethics Commission's opinions are well-reasoned when concluding that intangible benefits, and not just quantifiable financial benefits, are sufficient to demonstrate an improper interest in a public contract within the purview of the statute.). An officer of a non-profit corporation has a fiduciary interest in the contracts of that corporation, even if he or she does not receive a quantifiable financial benefit from the contracts. Adv. Op. No. 96-005. Therefore, a public

official or employee is prohibited from serving as a member of a board of a non-profit corporation that provides property or services to the public agency he or she serves. Id.

You indicated that two Treasury employees serve as officers of CFE. An employee of the Treasurer's Office who serves as an officer of CFE has a prohibited fiduciary interest in the public contracts between CFE and the Treasurer's Office unless he or she serves in an "official capacity." If the official capacity exception to R.C. 2921.42(A)(4) cannot be met, the Treasury employees would be prohibited from serving as trustees or officers of CFE.

"Official Capacity" Exception to the Prohibition of R.C. 2921.42(C)

The Ethics Commission has explained that whenever a public official serves as an officer or on the board of a non-profit corporation in his or her official capacity, he or she continues to pursue the interests of his or her public entity. For that reason, "there would not be a dual interest in which private considerations would distract from [him or her] serving the public interest." Adv. Op. No. 84-001.

There are four criteria that must be met in order for a public official to be deemed to serve with a non-profit corporation in his or her official capacity. The criteria are as follows:

- (1) The governmental entity must create or be a participant in the non-profit corporation;
- (2) Any public official or employee connected with the jurisdiction, including a council member, may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity;
- (3) The public official or employee must be formally instructed to represent the governmental entity and its interests; and
- (4) There must be no other conflict of interest on the part of the designated representative.

Adv. Op. No. 84-001. See also Adv. Ops. No. 82-004, 83-010, and 88-005. See also 1991 Ohio Atty. Gen. Ops. No. 91-007 (The Attorney General recognized the Commission's analysis of "official capacity" and stated that the Office would "embrace it wholeheartedly.").

You indicated that CFE was organized by the Treasurer's Office and its purpose is to promote state community education initiatives in conjunction with the Treasurer's Office and assist in the conduct of community financial education programs approved by the Treasurer. Based on these facts, the first element of the exception is met.

Section 5.9 of the CFE Code of Regulations provides:

The representatives of the Treasurer of the State of Ohio (the "Treasurer's Office") elected as officers pursuant to this Section will have been designated by the Treasurer's Office to serve in such capacity in accordance with their official position with the Treasurer's Office. Such officers shall serve at the pleasure of the Treasurer's Office, and shall be expressly authorized, instructed, and directed to represent the interests of the Treasurer's Office at all times in serving as officers of the Corporation.

This provision demonstrates compliance with the second and third elements of the official capacity exception.

The final element to be met is that there are no other conflicts of interest on the part of the designated representatives. The fact that the Treasury employees working as officers of CFE do not receive any compensation from CFE, but instead receive all of their compensation from the Treasurer's Office, assists the employees in demonstrating that they have no conflicts of interest because they are acting in the Office's interests.² It must also be clear that the employees have no other conflicts, such as any personal interests in CFE or its contracts.

Working with and Participating in Matters Affecting CFE

In addition to the R.C. 2921.42(A)(4) restriction against having an interest in a public contract, R.C. 2921.42(A)(1) provides that no public official or employee shall "authorize or employ the authority or influence of his or her office to secure authorization of" any public contract in which the official or employee or a business associate has an interest. As noted, an officer of a non-profit organization has a fiduciary interest in the contracts of the organization. Adv. Op. No. 88-008. Further, an organization is the business associate of its officers. *Id.*

General conflict of interest statutes contained in 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.

² As noted in footnote 1, if the employees receive any compensation from CFE for serving as officers of the corporation, the conclusions in this opinion will not apply.

An employee of the Treasurer's Office is a "public official or employee" subject to this restriction. R.C. 102.01(B) and (C). R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting, or using his or her position to secure a thing of value for an organization with which he or she serves as a fiduciary, if the thing of value could have a substantial and improper influence upon him or her in the performance of his or her duties. Adv. Op. No. 96-005.

However, a public employee is not prohibited, by R.C. 2921.42(A)(1) or R.C. 102.03(D) and (E), from participating in matters before his or her public employer that affect a non-profit corporation in which the employee is an officer, if he or she is serving with the non-profit corporation in an "official capacity" as a representative of the public agency. The Commission has stated that where an employee serves with a non-profit corporation in his or her official capacity as a representative of the public agency that employs him or her:

Any benefit accruing to the Corporation from the Board . . . would not be of such a character as to manifest a substantial and improper influence upon the Board employee with respect to his official duties, since he is serving as the Corporation's executive officer as a part of his official duties. Benefits accruing to the Corporation as a result of the Board employee's service as executive officer would not accrue to the Board employee's personal benefit or to the benefit of any party with which the Board employee is connected in his personal capacity. Instead, the benefit would accrue to an agency that the Board employee had been charged to serve as part of his official responsibilities.

Adv. Op. No. 96-005.

R.C. 102.03(D) and (E) would not prohibit a Treasury employee who serves as an officer of CFE from participating in matters that affect CFE, as long as the employee serves in his or her official capacity. This is true even where the employee's public duties involve administering community education programs that are funded in part by CFE. Furthermore, as long as the employee meets the "official capacity" exception, he or she would not be prohibited from participating in fundraising activities for CFE as long as the sources of contributions are entities that do *not* do or seek to do business with, and are not regulated by, or interested in matters before, the Treasurer's Office.

With respect to employees who provide support to CFE but are not officers of the corporation, governmental agencies have certain flexibility in assigning the performance of more than one duty to an employee and compensating the employee for all of the work assigned.³ You indicated that all the Treasury employees are paid by the Treasurer's Office and do not receive any compensation from CFE. Because they have no financial ties to CFE, any benefits accruing to CFE as a result of the work the employee does for the corporation would not accrue to the employees' personal benefit.

³ This opinion does not reach any conclusions as to whether it is generally appropriate for employees of the Treasurer's Office to perform duties related to CFE. For guidance on this question, you may want to contact the Auditor's Office and Attorney General's Office.

Therefore, the types of benefit accruing to CFE would not be of such a character as to manifest a substantial and improper influence upon the employee with respect to his or her public duties. As such, the employee is not prohibited from participating in matters involving CFE, even where the employee's public duties involve administering community education programs that are funded in part by CFE. He or she would also not be prohibited from participating in fundraising activities for CFE where the sources of contributions are entities that do *not* do or seek to do business with, and are not regulated by, or interested in matters before, the Treasurer's Office.

Other Considerations

You asked whether employees of the Treasurer's Office are prohibited from participating in fundraising activities where the sources of contributions are entities, or foundations funded by entities, that are doing business with the Treasurer's Office. In the absence of further research on the question, the Commission is not prepared to issue an opinion on this issue and the potential for conflicts of interest that it raises.

You have also asked whether the Treasurer's Office is prohibited from providing resources to an independent contractor of CFE that is not a Treasury employee. You also asked what, if any, measures are required to separate the functions of CFE and the Treasurer's Office. Finally, you asked if there any other issues regarding the role of CFE and the Treasurer's Office.

The Commission's jurisdiction is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. The Ethics Commission does not have the authority to interpret other laws or rules that may apply to the situation that you have raised. Beyond the prohibitions described above, the Ethics Law and related statutes under the Commission's authority that do not govern the functions of CFE or the cooperative relationship of CFE with the Treasurer's Office. For guidance on the appropriateness of any proposed expenditure of public resources, you should consult with the Office of the Auditor of State. For guidance regarding concerns on the role of CFE and its use by the Treasurer's Office to engage in educational activities or fulfill other statutory responsibilities of the Office, and on the other legal matters you have raised, you should consult with the Attorney General's Office.

Accountability and Appearances

Finally, it is clear, by your request for this opinion, that the Treasurer is attentive to his responsibilities to the citizens of the State. The Commission notes that the Treasurer and his staff should be cognizant of both the problem of accountability and the potential negative appearance that results from the use of a non-profit corporation to perform public duties and responsibilities that are within the Office's authority. It must be clear that the Treasurer's Office is not influenced in the exercise of its authority by contributions made to CFE and does not use CFE for any purposes beyond those recognized in the language that empowers the Treasurer. The Office must be careful to closely monitor the actions of CFE, its board, and any officers or employees, in order to ensure that its work is consistent with the mandate and missions of the Treasurer.

Conclusion

As explained more fully above, the Ethics Law and related statutes prohibit a Treasury employee from serving as an officer of CFE *unless* the employee is appointed, by the Treasurer, to serve with CFE in his or her "official capacity" as a representative of the Office.

The Ethics Law and related statutes do *not* prohibit any employee of the Treasurer's Office, regardless of whether the employee serves as an officer of CFE, from working in conjunction with CFE or participating in matters that affect the interests of CFE. The Law does not prohibit any employee of the Treasurer's Office from participating in fundraising activities for CFE where the sources of the contributions are *not* entities that do business with, or are seeking to do business with, or are regulated by or interested in matters before, the Treasurer's Office, unless the funds would accrue to the personal benefit of the employee.

This opinion does not rule on the question of whether employees of the Treasurer's Office can participate in fundraising activities for CFE where the sources of the contributions are entities, or foundations funded by entities, that do business with the Treasurer's Office. The Commission is not prepared to issue an opinion on this issue and the potential for conflicts of interest that it raises without further research.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on July 26, 2007. 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 black ink, appearing to read "Jennifer A. Hardin". The signature is fluid and cursive, with a large initial "J" and "H".

Jennifer A. Hardin
Chief Advisory Attorney