

OHIO ETHICS COMMISSION

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October 31, 2007 Informal Opinion 2007-INF-1031-1

Gregory Trout
Chief Counsel, ODRC

Dear Mr. Trout:

On May 24, 2007, the Ohio Ethics Commission received your letter requesting an advisory opinion. You explained that you are the Chief Legal Counsel of the Ohio Department of Rehabilitation and Correction (ODRC). You have asked several questions regarding the relationships of ODRC officials and employees with professional associations.

In summary, you have asked whether the Ethics Law and related statutes prohibit an ODRC employee from accepting compensation and travel expenses from the American Correctional Association (ACA) to conduct audits of correctional facilities in other states. You have also asked whether the law prohibits ODRC employees from accepting travel expenses from ACA or its local affiliates to attend ACA conferences or meetings. You have asked whether the law prohibits ODRC employees from participating in fundraising efforts for a conference of the National Association of Institutional Agribusiness (NAIA). Finally, you have asked whether the Ethics Law prohibits an ODRC official or employee from keeping a door prize won at a conference as long as the source of the prize does not do business with ODRC.

This opinion will answer your question involving ODRC officials and employees accepting compensation and travel expenses from ACA for auditing correctional facilities in other states. Your other questions will be answered separately.

Brief Answer

As explained below, R.C. 102.03(E) does not prohibit ODRC officials and employees from accepting compensation and travel expenses from ACA for auditing correctional facilities in other states provided that it is possible for them to withdraw from all matters pending before ODRC that affect ACA. ODRC officials and employees who exercise significant authority regarding ACA (pages four and five) are prohibited from receiving compensation and travel expenses from ACA. Further, R.C. 102.03(D) prohibits ODRC officials and employees who are able to perform audits for ACA from using ODRC time, facilities, and resources to perform any services for ACA.

Facts

You stated that ODRC is a dues-paying organizational member of ACA. You also state that many ODNR employees purchase individual ACA memberships.

ACA serves as the nationwide quality control authority for correctional facilities by establishing standards for facility operations and auditing facilities for compliance with these standards. ACA audits and accredits all ODRC facilities. Each ODRC facility contracts with ACA for these services. You stated the cost of these services depends on the ODRC facility and averages between \$6,000 and \$8,700 every three years. You have provided a list of ODRC officials and employees who sign contracts with ACA.

ACA asks individual members of the organization to serve as auditors. Members apply to ACA for an auditing position and become certified as auditors after being recommended by their agency directors and completing ACA training. ODRC officials and employees serve as ACA auditors in other states. ACA gives auditors "an honorarium" of \$300 per audit and pays travel expenses.¹ One auditor, who serves as audit chairperson and compiles the audit report, receives an additional \$150 writing stipend.

You have asked whether the Ohio Ethics Laws and related statutes prohibit ODRC officials and employees from receiving compensation and travel expenses from the ACA for auditing correctional facilities in other states.

Prohibition Against Accepting Anything of Value—R.C. 102.03(E)

R.C. 102.03(D) and (E) limit the outside employment activities of a public official or employee if there are significant conflicts between his or her public duties and private employment. Of specific relevance to your question is R.C. 102.03(E), which states:

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*.

(Emphasis added.)

The term "anything of value" is defined 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. The compensation and travel expenses that an ODRC employee would receive from the ACA to audit correctional facilities are things of value.

¹ The Ethics Law prohibits any public employee who is required to file a financial disclosure statement from accepting an honorarium (R.C. 102.03(H)(1)), which is a payment for giving a speech, writing an article, or appearing at an event. R.C. 102.01(H). Because the activities an ACA auditor would perform are not these kinds of activities, the prohibition in R.C. 102.03(H)(1) does not apply even though the ACA calls the payments honoraria.

The Ohio Ethics Law does not prohibit a public official or employee from engaging in outside employment where no actual conflict of interest exists between his or her public and private positions. Adv. Op. No. 94-006. There are, however, situations where compensation received for outside employment is of such a character as to manifest a substantial and improper influence upon the public official or employee with regard to his or her official duties. If a public official or employee were to accept compensation for outside employment from a party that is also interested in matters before, regulated by, or doing or seeking to do business with his or her own public agency, the compensation would be of such a character as to impair the official's or employee's objectivity and independence of judgment with regard to official duties involving the source. Adv. Op. No. 2004-03 (A code enforcement official is prohibited from receiving payment for outside employment from a contractor subject to regulation by his or her public agency.). When public officials and employees deal with vendors, and regulated and interested parties, it is essential that they are not subject to divided loyalties. For that reason, R.C. 102.03(E) prohibits any public official or employee from soliciting or merely receiving payment for outside employment from these "improper" sources.² Id.

Because each ODRC facility contracts with ACA for auditing and accrediting services, ACA is a party that is doing business with ODRC. While the Commission recognizes the inherent value to both ACA and ODRC of utilizing officials and employees who are familiar with the auditing process to audit facilities in other states, the likelihood that those officials and employees are involved in the auditing process in Ohio is the crux of the conflict of interest. Unless it is possible for the ODRC official or employee to withdraw from the performance of his or her public authority related to ACA, as discussed below, R.C. 102.03(E) would prohibit any ODRC official or employee from receiving compensation and travel expenses from ACA for auditing correctional facilities, even though the facilities are not located in Ohio.

Withdrawal

Depending on the facts and circumstances, if a public official or employee can effectively withdraw from making decisions or recommendations, reviewing the work of, or otherwise affecting the interests of a private party, he or she would not be subject to divided loyalties and his or her judgment regarding the party cannot be impaired. Adv. Ops. No. 89-006 and 96-004. A public official or employee can effectively withdraw from specific matters only when his or her withdrawal: (1) does not interfere with the performance of assigned duties; and (2) is approved by the public agency. Adv. Ops. No. 89-010 and 90-002.

In order to accept compensation from ACA to audit correctional facilities, an ODRC official or employee must be able to withdraw from all matters before ODRC that affect the financial interests of ACA, including the award and administration of accreditation contracts between ODRC and ACA. The matters from which any ODRC official or employee withdraws must be assigned to individuals who are not subordinate to the withdrawing official or employee.

² R.C. 102.03(D) also prohibits any public official or employee from using his or her position to secure payments for outside employment from a prohibited source.

It is important to note that the Ethics Law does not require the public employer to allow its officials and employees to withdraw from matters in order to pursue outside employment. Adv. Op. 90-002. When determining whether withdrawal is possible, the public agency must weigh the needs of the state and its citizens more heavily than the desires of individual employees. The Commission has explained: "An employee of an administrative department of the state owes his responsibility to the exercise of the public trust by performing the tasks assigned to him by his employing agency" and "must accept necessary restrictions to avoid any possible interference with the responsibilities of . . . public service." Adv. Op. No. 89-010. If a public official or employee wishes to pursue conflicting employment where withdrawal is not possible or desirable for the agency, he or she can choose to leave state employment to do so.

To assure that conflicts are being properly managed while protecting the efficient functioning of ODRC, you, as Chief Counsel for ODRC, and the appropriate supervisor must determine whether an ODRC official or employee is capable of withdrawing from matters involving ACA. In that process, you and the supervisor should consider whether allowing the person to withdraw would negatively affect ODRC by restricting its ability to assign new duties to the official or employee that could bring him or her into contact with ACA. Adv. Ops. No. 90-002 and 96-004. Because the Director's recommendation is necessary before a person can be accredited to act as an ACA auditor, it may be that the best time for such an analysis to occur would be when a person requests the recommendation.

The Commission also believes that it may be helpful, as part of the process of managing this outside employment activity, for ODRC to request that its employees report, to ODRC, compensation and travel expense payments made to them by ACA. Officials and employees of ODRC who are required to file financial disclosure statements with the Ohio Ethics Commission would be required to disclose ACA as a source of income, but would not be required to disclose ACA as a source of travel expenses. R.C. 102.02(A)(2) and (8) (a filer is required to disclose all sources of income, but is required to disclose sources of travel expenses only for travel incurred in connection with public duties). The ODRC can better assess the possibility of impairment of an official's or employee's authority by monitoring the frequency and amount of these payments to any ODRC official or employee regardless of whether the official or employee is required to file a financial disclosure statement with the Ethics Commission.

There are some high-level public officials and employees who possess significant authority from which they cannot withdraw, thereby limiting their ability to pursue compensated private employment. See Adv. Ops. No. 88-002 (the President of the Controlling Board cannot be employed by a state agency) and 92-008 (a township fiscal officer cannot be employed by a bank that receives township funds). It would be impossible for any ODRC official charged with significant authority relative to ACA's accreditation of Ohio's correctional facilities to effectively withdraw from that authority and accept compensation from ACA for auditing services. Examples of significant authority include, but are not limited to, the authority to negotiate, sign, and administer accreditation contracts with ACA, oversee the work of ACA auditors within the facility, and pay or approve the payment of ACA invoices. For example, an ODRC employee whose job duties include acting as a liaison between the warden and the auditors in order to facilitate the audit

process would have significant authority relative to the accreditation. It would be impossible for the employee to withdraw from this authority in order to serve as an ACA auditor in other states.

Any ODRC official or employee who exercises significant authority relative to contracts with ACA would confront insurmountable divided loyalties between the duty to ODRC and his or her private interests if he or she were to accept compensation from ACA. R.C. 102.03(E) prohibits these employees from accepting compensation and travel expenses from ACA for auditing services.³

General Outside Employment Restrictions

Officials and employees who are not prohibited from accepting compensation from ACA for auditing correctional facilities must also comply with other provisions of the Ethics Law regarding outside employment. For example, R.C. 102.03(D) prohibits an ODRC employee from using ODRC time, facilities, and resources to perform any services for ACA. Adv. Op. No. 96-004 (attached). If an ODRC employee serves as the chairperson of an audit, and is responsible for preparing the audit report, he or she is prohibited from working on the report on ODRC time, or using ODRC computers, copying machines, personnel, or other resources to produce or compile the report. An official or employee who is compensated by ACA is prohibited from using his or her position with ODRC to secure any benefits for ACA, or persuade other ODRC officials or employees to make decisions in ACA's interests. Id.

Use of Leave

You have asked for guidance on the kind of leave an ODRC employee should use when engaged in auditing. While the Ethics Law prohibits a public official or employee from receiving compensation from a private source for performing public duties and from performing private work on public time, it does not mandate which kind of leave he or she should use when engaged in private employment. See R.C. 2921.43(A)(1). There may be provisions outside the Ethics Law that limit or require the use of a particular kind of leave for this purpose.

Conclusion

As explained above, R.C. 102.03(E) does not prohibit ODRC officials and employees from accepting compensation and travel expenses from ACA for auditing correctional facilities in other states provided that it is possible for them to withdraw from all matters pending before ODRC that affect ACA. ODRC officials and employees who exercise significant authority regarding ACA (pages four and five) are prohibited from receiving compensation and travel expenses from ACA. Further, R.C. 102.03(D) prohibits ODRC officials and employees who are able to perform audits for ACA from using ODRC time, facilities, and resources to perform any services for ACA.

³ R.C. 102.03(E) would not prohibit any ODRC official or employee from performing auditing services for ACA, outside of Ohio, as long as he or she did not accept any compensation or travel expenses for performing the services.

Gregory Trout
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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 31, 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 cursive script, appearing to read "Jennifer A. Hardin".

Jennifer A. Hardin
Chief Advisory Attorney

Enclosure: Advisory Opinion No. 96-004