

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

January 11, 2008

Informal Opinion 2008-INF-0111

Stephen M. Millett

[REDACTED]

Dear Mr. Millett:

On November 16, 2007, the Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you have been a member-at-large of the State Board of Education (Board) since January 2003. You operate through your private company, Futuring Associates LLC, and speak and consult on strategic thinking as a professional futurist. You asked if the Ethics Law and related statutes prohibit you from accepting a professional fee and reimbursement of travel expenses from the Railway Research Advisory Board (RRAB) for speaking and commentating at the Canadian Rail Research Symposium. You also asked if you are prohibited from accepting fees and expenses related to other potential futuring speaking engagements and how Advisory Opinion No. 99-003 applies to these activities.

Brief Answer

As more fully explained below, because the speaking engagements you describe are provided through a bona fide business that initially began before you became a state official, the Ethics Law does not prohibit you from receiving payment for speaking or reimbursement of the related travel expenses, unless: (1) the payment is from a party that is regulated by, interested in matters before, or doing or seeking to do business with the Board; (2) the payment is made for speeches you provide as a member of the Board, regardless of the subject of the speech or source of the payment; or (3) the payment is from a person who meets the definition of "legislative agent."

Based on the information you have provided, you are not prohibited from accepting professional fees and travel expenses from RRAB for the speaking engagements at the Canadian Rail Research Symposium.

Facts

In your letter, you explained that you have been asked by RRAB, a Canadian governmental advisory board, to give a keynote address and to participate as a commentator in the Canadian Rail Research Symposium in Toronto Canada on November 28 and 29, 2007. RRAB has offered to pay \$5,000 and travel expenses for your services. You indicated that you plan to go ahead with this speaking engagement, but will not keep any payments if the Commission determines that doing so is prohibited by the Ethics Law.¹ You will speak on the concepts and methods of futuring and visioning as applied to the Canadian railroad system. Your invitation from RRAB is related to a similar address you gave in March 2003 at a truck safety conference in Washington, D.C. You stated that this type of work is usual and customary for you and you have been giving these types of speeches since at least 1999 while you were a futurist at Battelle. You stated that, since retiring from Battelle, you have continued these activities under your company, Futuring Associates LLC, which you incorporated in February 2007.

You indicated that you understand you are prohibited from accepting speaking fees when the topic concerns public education and when you are speaking in your capacity as a Board member. However, it is your opinion that your speaking engagement at the Canadian Rail Research Symposium is not a conflict because it is not related to education and RRAB is not interested in Ohio public education and does not do business with Ohio or the Board. Also, based on your interpretation of Advisory Opinion No. 99-003, because your futuring speaking engagements are connected with a bona fide business that existed before you were appointed to the Board, payments you receive for the speeches are not "honoraria."

Honorarium Prohibition—R.C. 102.03(H)

The honorarium prohibition is contained in R.C. 102.03(H), which provides the following:

No public official or employee, except for the president or other chief administrative officer of or a member of a board of trustees of a state institution of higher education as defined in section 3345.011 of the Revised Code, who is required to file a financial disclosure statement under section 102.02 of the Revised Code shall solicit or accept, and no person shall give to that public official or employee, an honorarium.

The term "honorarium" is defined, in R.C. 102.01(H), in pertinent part:

"Honorarium" means any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or similar gathering.

¹This opinion does not reach any conclusions as to whether holding a check, without endorsing or depositing it, constitutes acceptance of payment.

As a member of the Board, you are a “public official or employee” subject to the prohibitions in R.C. 102.03(H). R.C. 102.01(B) and (C); Ohio Ethics Commission Advisory Opinion No. 79-006. Because you are required to file a financial disclosure statement, R.C. 102.03(H) prohibits you from accepting an honorarium for giving a speech, publishing an article, or attending a conference from any source on any topic.

Honorarium Exception—R.C. 102.01(H)

As stated above, the term honorarium is defined in R.C. 102.01(H). However, R.C. 102.01(H) also provides as follows:

“Honorarium” does not include...earned income from any person, other than a legislative agent, for personal services that are customarily provided in connection with the practice of a bona fide business, if that business initially began before the public official or employee conducting that business was elected or appointed to his office or position of employment.

As you know, the Ethics Commission applied the exception to this definition of honorarium to a question involving the receipt of payment for speaking services by a state official in Advisory Opinion No. 99-003. You have asked if the general guidelines set forth in Advisory Opinion No. 99-003 are applicable to the situation you have described.

Application of Advisory Opinion No. 99-003

In Advisory Opinion No. 99-003, the Ethics Commission stated that the Ethics Law does not prohibit a state employee from receiving payment for speaking or writing services through the business established before becoming a state employee, unless: (1) the payment is from a party that is regulated by, interested in matters before, or doing or seeking to do business with the state office he serves;² or (2) the payment is made for speeches he provides as an employee of his state agency, regardless of the subject of the speech or source of the payment.³ In addition, the Commission stated that R.C. 102.01(H) prohibits a state employee from accepting payment for speaking if the payment is made by any person who meets the definition of “legislative agent.” Adv. Op. No. 99-003.

The primary question is whether the public speaking services that you describe will be provided in connection with the practice of a “bona fide business” that initially began before you assumed your seat on the Board, such that payment for the speaking services would not be considered “honorarium” based on the exception set forth in R.C. 102.01(H).

² This restriction is based on the application of R.C. 102.03(D) and (E) as discussed on page six of Advisory Opinion No. 99-003.

³ This restriction is based on the application of R.C. 2921.43(A) as discussed on the bottom of page five of Advisory Opinion No. 99-003.

The term “bona fide business” is not defined in the statute. The Ethics Commission, in interpreting statutes containing words that are not statutorily defined, has consistently followed the rule of statutory construction that words used in a statute must be construed according to rules of grammar and common usage. R.C. 1.42; Adv. Ops. No. 75-004, 87-002, and 89-001. See also City of Mentor v. Giordano, 9 Ohio St.2d 140, 144 (1967) and Adv. Op. No. 92-014.

In Advisory Opinion No. 99-003, the Commission concluded that a “bona fide business” would include any person, partnership, or corporation engaged in an authentic commercial, manufacturing, or service profit-seeking enterprise or concern. The word “business” is defined as “a person, partnership, or corporation engaged in commerce, manufacturing, or a service; profit-seeking enterprise or concern.” Random House Webster’s Unabridged Dictionary 283 (1987). See Adv. Op. No. 85-004 (business associates are persons engaged in a business enterprise for profit). See also Village of Mantua v. Marsillo, 110 Ohio App. 3d 227 (1996) (the definition of “business,” adopted through the application of R.C. 1.42, includes “a commercial or industrial enterprise”). Additionally, the Commission cited Ohio Attorney General Opinion No. 90-100, which considered the word “business,” in the common, general sense, as “employment, occupation, profession, or commercial activity engaged in for gain or livelihood.”

In your letter to the Commission, you explained that you have been speaking on futuring topics since at least 1999, several years before you were appointed to the Board. You began speaking as a futurist, as part of your compensated employment at Battelle, and have since continued under your own company. Because you began speaking for profit, as part of your profession as a futurist, prior to your service on the Board, you are not be prohibited, except as set forth in the three restrictions discussed above and in Advisory Opinion No. 99-003, from continuing to accept compensation for providing speeches on futuring topics.

Financial Disclosure

Because you are a member of the State Board of Education, you are required to file a financial disclosure statement. The disclosure law includes a requirement in R.C. 102.02(A)(2)(a), that a public official or employee who files a financial disclosure statement must identify every source of income received during the preceding calendar year, in his own name or by any other person for his use or benefit, and provide a brief description of the nature of the services for which the income was received. See also R.C. 102.01(E) (“Income” includes gross income as defined and used in the “Internal Revenue Code of 1986,” 100 Stat. 2085, 26 U.S.C. 1, as amended). R.C. 102.02(A)(2)(a) requires that you disclose any source of compensation that you receive for providing speeches on futuring topics on your financial disclosure statement. Furthermore, a public official or employee who engages in any private activity that results in financial gain is governed by the restrictions imposed by the Ethics Laws and related statutes to prevent misuse of the public resources provided to the official or employee. See Adv. Op. No. 96-004.

Conclusion

As explained above, because the speaking engagements you describe are provided through a bona fide business that initially began before you became a state official, the Ethics Law does not prohibit you from receiving payment for speaking or reimbursement of the related travel expenses, unless: (1) the payment is from a party that is regulated by, interested in matters before, or doing or seeking to do business with the Board; (2) the payment is made for speeches you provide as an member of the Board, regardless of the subject of the speech or source of the payment; or (3) the payment is from a person who meets the definition of "legislative agent."

Based on the information you have provided, you are not prohibited from accepting professional fees and travel expenses from RRAB for the speaking engagements at the Canadian Rail Research Symposium.⁴

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 11, 2008. 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,



Karen R. King
Staff Advisory Attorney

⁴ Based on your letter, you accepted fees for speaking engagements while serving on the Board before you wrote to our office for advice. The purpose of an Ethics Commission advisory opinion is to provide guidance to a public official or employee upon which he can rely before engaging in an action that may be prohibited by the Ethics law. The Commission has explained that its function in rendering an advisory opinion is not a fact-finding process. Adv. Op. No. 94-002. The Commission can render an advisory opinion only in response to a hypothetical question or a question that involves the prospective conduct of the person who requests the opinion. Adv. Ops. No. 75-037 and 94-002. Therefore, this advisory opinion addresses only the prospective matters you have described and does not reach any conclusions with respect to matters that have already occurred.