

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

June 2, 2008

Informal Opinion 2008-INF-0602-2

Thomas W. Weeks
Executive Director
Ohio State Legal Services Association
[REDACTED]

Dear Mr. Weeks:

On November 19, 2007, the Ethics Commission received your request for an advisory opinion in which you explained that you have been appointed to the Unemployment Compensation Advisory Council (Advisory Council). You are also the Executive Director of the Ohio State Legal Services Association (OSLSA).

After attending an ethics education seminar as required by Governor Strickland's Executive Order 2007-01S, you contacted the Ethics Commission for an opinion. Specifically, you have asked whether the Ethics Law and related statutes prohibit you from: (1) serving on the Advisory Council if any OSLSA employee represents claimants before the Unemployment Compensation Review Commission (Review Commission); (2) serving as a member of the Review Commission when a Commissioner is disqualified from deciding a particular case when OSLSA represent claimants before the Review Commission; and (3) accepting a grant, on behalf of OSLSA, from the Ohio Department of Job & Family Services (ODJFS) to operate a referral telephone number.

Brief Answer

As explained below, and in specific response to your three questions, the Ethics Law and related statutes:

(1) Do not prohibit you from serving on the Advisory Council even if OSLSA employees represent claimants before the Review Commission. If you represent claimants before the Review Commission while serving on the Advisory Council, you are required to file the disclosure statement described in R.C. 102.04(D) and must be able to withdraw from matters before the Advisory Council that affect officials and employees of the Review Commission;

(2) Do not prohibit you from serving as a member of the Review Commission when a Commissioner is disqualified from deciding a particular case, provided that you do not hear any cases where the claimants are represented by OSLSA staff; and

(3) Prohibit you from having a fiduciary interest, as Executive Director of OSLSA, in a grant from ODJFS to OSLSA. If you are unable to meet the exception in R.C. 2921.42(C), you would have a prohibited interest in the ODJFS grant unless you resign from your position on the Advisory Council.

Facts

In your letter, you stated that you serve on the Unemployment Compensation Advisory Council. The General Assembly established the Advisory Council, a twelve-member body, by enacting R.C. 4141.08. The Advisory Council serves as a policy-making body, making recommendations and proposed changes regarding the laws, rules, and procedures governing the Ohio's unemployment compensation program. R.C. 4141.08(G). Recommendations are made to the Director of ODJFS, the Review Commission, and the Governor. Id. R.C. 4141.08(C) provides that members of the Advisory Council shall serve without salary but shall receive \$50.00 per day and actual and necessary expenses when engaged in the performance of their duties. One of the responsibilities of the members of the Advisory Council is to serve on the Review Commission in the event that a Review Commission member is disqualified from participating in a particular case. R.C. 4141.06.

The Review Commission is a three-member body created to review unemployment compensation decisions made by ODJFS. R.C. 4141.06. The Review Commission holds hearings with claimants who have been denied claims for unemployment compensation benefits by ODJFS. R.C. 4141.281(C). It has the authority to adopt and revise procedural rules and conduct investigations in order to dispose of appeals for benefits. R.C. 4141.06. Appeals heard before the Review Commission are conducted at a review level, generally after an appeal is initially heard before a hearing officer appointed by the Review Commission. R.C. 4141.281(C)(4). However, a claimant can file a request that the Review Commission directly hear his or her appeal. Id.

You also are employed as the Executive Director of OSLSA, a legal aid society. While your duties at OSLSA are primarily administrative, you occasionally represent clients on unemployment compensation matters before the Review Commission. Additionally, you supervise attorneys and paralegals who regularly represent claimants on matters before the Review Commission.

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 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. Ohio Ethics Commission Advisory Opinion No. 94-002. Thus, 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 requesting the opinion. Because you are currently serving on the Advisory Council, the Commission can provide

guidance to you with respect to your future activities, and reaches no conclusions on your past actions.

Board Members Representing Clients before State Agencies—R.C. 102.04(A)

As a member of the Advisory Council, you are subject to R.C. 102.04(A), which provides that no person appointed to an office of any instrumentality¹ of the state shall:

[R]eceive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission or bureau of the state, excluding the courts.

“Compensation” is defined as “money, thing of value, or financial benefit,” and would include salary, payments, and other benefits from any person to render services for clients or others. R.C. 102.01(A); Adv. Op. No. 92-006.

Personally rendering services includes, but is not limited to, representing, advising, preparing non-ministerial documents for, or consulting with, any person. Adv. Op. No. 75-006. Examples are: (1) negotiating or discussing matters with agency personnel or contractors; (2) appearing at an agency hearing; and (3) preparing pleadings or documents to be filed with or submitted to an agency. Adv. Op. No. 87-009.

A matter is before a state agency when it is “being considered by, decided by, or in the presence of or under the official purview of” the state agency. Adv. Op. No. 76-009. This prohibition applies even if the affected public official is not appearing before the agency on the matter. Adv. Op. No. 75-025.

The prohibition in R.C. 102.04(A) is intended to serve the public interest in effective, objective, and impartial government by prohibiting a state official or employee from using the influence of his position on behalf of clients. Adv. Ops. No. 89-014, 90-012, and 2007-03. All public officials and employees must accept necessary restrictions to avoid any likely interference with the responsibilities of the public positions they hold. See Adv. Ops. No. 89-010 and 90-012.

¹ In many cases, *uncompensated* members of state boards and commissions that function exclusively for advisory purposes are not subject to the Ethics Law. R.C. 102.01(B) and (C). However, where those members are *compensated*, they are public officials subject to the Ethics Law.

Exception

For board members who are not elected, R.C. 102.04(D) provides an exception to the R.C. 102.04(A) prohibition. This exception provides that, if the public official meets the two elements, he is not prohibited from receiving compensation to perform services on a matter before another state agency, board, commission, or instrumentality. The public official must demonstrate that:

- (1) The matter on which the board member is rendering services is pending before an agency *other than* the one with which he serves; and
- (2) Prior to rendering services, the board member files a statement with: (a) the board on which he serves (Agency A); (b) the state agency, board, commission, or instrumentality before which the matter is pending (Agency B); and (c) the Ohio Ethics Commission.²

The board member must file a statement for each year he is rendering services on matters before the other agency.

On the statement, the board member must declare that he will not participate as a board member in any matter before Agency A if the matter involves an official or employee of Agency B. Adv. Op. No. 92-006. The board member is not required to withdraw from matters that affect Agency B as a whole or classes of employees from Agency B. Adv. Op. No. 89-006. This disqualification is effective for two years from the date of the most recently filed disclosure statement. Adv. Op. No. 93-010. R.C. 102.04(E) prohibits any person who files or is required to file the statement from failing to disqualify himself from matters before the board that affect officials or employees of the agency handling the matter on which he is performing services.

Application of the Restriction

R.C. 102.04(A) prohibits you from receiving compensation, other than as provided by R.C. 4141.08(C), for any service which you personally render on behalf of a client in any matter which is before any state agency, board, commission, or instrumentality. One of your responsibilities as Executive Director of OSLSA is to represent clients before the Review Commission. If you were to represent a client before the Review Commission, you would be receiving compensation to personally render services on a matter pending before a state agency, board, commission, or instrumentality. Adv. Op. No. 87-009.

² The board member must disclose: (a) his name and address; (b) the names and addresses of the two public agencies involved; and (c) a brief description of the pending matter and the services that he will render personally. R.C. 102.04(D)(2).

Therefore, in order to continue service on the Advisory Council, you must show that you meet the exception set forth in R.C. 102.04(D). This exception requires you to disclose the fact that you represent claimants on matters before the Review Commission to the: (1) Advisory Council; (2) Review Commission; and (3) Ethics Commission. You are also required to disqualify yourself from participating in any matter before the Advisory Council that involves any official or employee of the Review Commission.

The purpose of the Advisory Council is to advise and make recommendations to ODJFS, the Governor, and the Review Commission. The Advisory Council proposes changes to the administration of the unemployment compensation program by ODJFS and the Review Commission. Furthermore, one of the responsibilities of an Advisory Council member is to serve on the Review Commission in the event that a Commission member has to disqualify himself or herself.

Because of the significant overlap between these two agencies, it may be very difficult for you to withdraw from matters before the Advisory Council involving the officials and employees of the Review Commission. While you are not required to disqualify yourself from matters involving the Review Commission as an agency, you are required to disqualify yourself from any assessment of the performance of the individual Commission members or the staff of the Commission.

Unless it is possible for you to remove yourself from consideration of any matters before the Advisory Council that affect individual officials and employees of the Review Commission, R.C. 102.04(A) would prohibit you from serving as a member of the Advisory Council while you serve as the Executive Director of the OSLSA and represent claimants before the Review Commission.

R.C. 102.04(A) does not apply to other attorneys or paralegals at OSLSA. Provided that you are not personally performing any services on matters before the Review Commission, other attorneys or paralegals at OSLSA would not be prohibited from representing clients before the Review Commission. This is true even if you serve in a supervisory position over those individuals.

Serving as a Member of the Review Commission

If you are able to meet the exception in R.C. 102.04(D), and can serve as a member of the Advisory Council, you have also asked whether you can serve, in the event a sitting member has a conflict of interest, as a member of the Review Commission. You have explained that, on occasion, you represent claimants before the Review Commission. Attorneys and paralegals at OSLSA routinely represent claimants before the Review Commission.

As a member of the Advisory Council, you are a public official subject to R.C. 102.03(D), which provides:

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.

The compensation you receive for your service as a member of the Advisory Council falls within the definition of "anything of value." R.C. 102.01(G); 1.03. Further, any financial benefit or detriment to a claimant or employer that results from a decision of the Review Commission is within the definition of "anything of value." See generally Adv. Op. No. 2007-01.

The application of R.C. 102.03(D) depends on the facts and circumstances presented. Adv. Op. No. 97-002. The Ethics Commission has examined R.C. 102.03(D), in a variety of different factual situations, as it applies to a public official or employee who represents or provides services to clients. Of specific relevance to your question, the Commission has explained that R.C. 102.03(D) prohibits an attorney who is also a public official from participating in a matter before his or her public agency that affects a person who is a client of his or her firm, but is not a client of the official, if the official's firm represents or provides services to the client on that matter that is before the agency. Adv. Op. No. 90-008. In this situation, the fact that the firm's interests will also be definitely and directly affected by the decision of the public agency is the determining factor in the application of R.C. 102.03(D). Even though the official does not have a close relationship to the client, his or her relationship to the *firm* is sufficiently close that any benefit or detriment to the firm resulting from the agency's decisions is of such a character as to manifest a substantial and improper influence upon the official. Id.

R.C. 102.03(D) would effectively prohibit you from serving as a member of the Review Commission in any matter where an attorney or paralegal of OSLSA was representing a claimant.³ Because of your relationship with the other employees at OSLSA, you would be unable to participate in the Review Commission's decision on a case involving a client of OSLSA. However, R.C. 102.03(D) would not prohibit you from serving as a member of the Review Commission when it is hearing cases that involve claimants who are not represented by OSLSA. It is your responsibility to carefully review any cases that the Review Commission will hear, in the event you are asked to serve as a member of the Review Commission, to determine whether OSLSA has provided any services to claimants in connection with the cases.

Having an Interest in a Public Contract

Your final question is whether there is any conflict of interest for you, regarding your serving on the Advisory Council, if OSLSA receives a grant from the Ohio Department of Job & Family Services to operate a referral telephone number. As a member of a state board, R.C.

³ R.C. 102.03(D) would also prohibit you from serving as a member of the Review Commission hearing any appeals involving claimants you represented. It does not appear, from your letter, that you are asking whether you could serve as a Review Commission member in this situation.

2921.42(A)(4) prohibits you from knowingly having an interest in a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which you are connected. R.C. 2921.42(A)(4). A "public contract" is any purchase or acquisition of property or services by or for the use of any public agency. R.C. 2921.42(I)(1)(a).

The Ethics Commission has stated that R.C. 2921.42(A)(4) prohibits a public official from having an interest in a public contract entered into by or for the use of any public agency with which the official is connected. Adv. Op. No. 99-004. A prohibited "interest" must be definite and direct, but can be either pecuniary or fiduciary in nature. Adv. Ops. No. 78-005 and 81-008. The Commission has explained that any individual who is a director, trustee, or officer of a company is considered to have a fiduciary interest in the company's contracts. Adv. Op. No. 88-008. A person compensated to serve as director of an organization has a financial interest in the organization's contracts. As the Executive Director, you have both a financial and a fiduciary relationship with OSLSA and have an interest in the contracts that it executes.

You stated that OSLSA receives a grant from ODJFS to operate a referral telephone number. This grant constitutes a public contract under R.C. 2921.42, because the agency is acquiring services. Because of your financial and fiduciary relationship, you have a prohibited interest in any public contract that OSLSA enters into with any public agency with which you are "connected." Although R.C. 2921.42(A)(4) does not define "connected," common usage indicates that to be "connected with" something is to be related to, or associated with, that entity. See Webster's New World Dictionary 301 (2d college ed. 1972).⁴

As mentioned earlier, the Advisory Council advises ODJFS on the administration of the state's unemployment compensation program. R.C. 4141.08. Additionally, ODJFS employees play a significant role on the Advisory Council as well. ODJFS employees provide the Advisory Council with professional and clerical support staff, and the Director is responsible for paying its operating expenses, furnishing members with office space, and providing any other assistance that may be requested by the Advisory Council. *Id.* These factors demonstrate that the Advisory Council is *related to* or *associated with* ODJFS and that a member of the Advisory Council is connected to ODJFS. Therefore, you would have a prohibited interest in any public contract that OSLSA enters into with ODJFS.

There is an exception to R.C. 2921.42(A)(4) that may apply in the situation you have described. R.C. 2921.42(C) provides that a public official does not have a prohibited interest in a public contract provided that he or she can meet four requirements:

- (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;

⁴ See also R.C. 1.42 (words and phrases used in statutes shall be construed according to the rules of grammar and common usage).

- (2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision or governmental agency or instrumentality involved;
- (3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;
- (4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of the public official's family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

The criteria are strictly construed against the public official who must show compliance with the requirements in the exception. Adv. Ops. No. 83-004 and 84-011.

R.C. 2921.42(C)(1) can be met by a showing that ODJFS is receiving a necessary service as a result of the telephone referral number operated by OSLSA. The grant documents may assist you to meet this requirement.

R.C. 2921.42(C)(2) can be met in two ways: (1) if the grant is part of a continuing course of dealing established before your appointment to the Advisory Council; or (2) if the services provided by OSLSA are unobtainable elsewhere for the same or lower cost. You have explained that the grant has been in place for many years. Therefore, you can meet the first requirement in R.C. 2921.42(C)(2) provided that the current OSLSA grant had been awarded before you were appointed to the Advisory Council. The first requirement will also apply to new grants if all of the grant terms remain as they were before you were appointed to the Advisory Council.

If the grant terms were to be altered after you started serving on the Advisory Council, you must show that you can meet the other requirement in Division (C)(2)—that the goods or services that OSLSA provides to ODJFS under the grant are unobtainable elsewhere for the same or lower cost. The Commission has explained that the public agency and public official must be able to objectively demonstrate that the contractual arrangement is the best or only alternative available to the agency for reaching the goals described in the contract. You may be able to demonstrate that OSLSA is uniquely situated to supply the services it provides to ODJFS under the grant agreement.

The third requirement in the exception, contained in Division (C)(3), is that the treatment provided by OSLSA to ODJFS is as good as or better than the services that it would provide to any other source of grant funds. Finally, Division (C)(4) requires that the transaction be conducted at arm's length, that ODJFS has full knowledge of your interest in the contract, and that you take no part, as a member of the Advisory Council, in the deliberations and decisions to secure the grant from ODJFS to OSLSA.

If you cannot show that you meet all four requirements in R.C. 2921.42(C), you would have a prohibited interest, while you serve on the Advisory Council, in the grant funds OSLSA receives from ODJFS.

Conclusion

As explained more fully above, and in specific response to your three questions, the Ethics Law and related statutes:

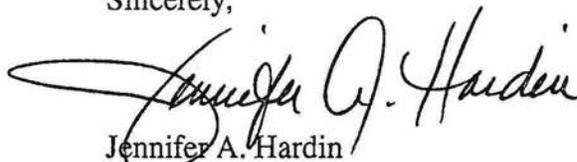
(1) Do not prohibit you from serving on the Advisory Council even if OSLSA employees represent claimants before the Review Commission. If you represent claimants before the Review Commission while serving on the Advisory Council, you are required to file the disclosure statement described in R.C. 102.04(D) and must be able to withdraw from matters before the Advisory Council that affect officials and employees of the Review Commission;

(2) Do not prohibit you from serving as a member of the Review Commission when a Commissioner is disqualified from deciding a particular case, provided that you do not hear any cases where the claimants are represented by OSLSA; and

(3) Prohibit you from having a fiduciary interest, as Executive Director of OSLSA, in a grant from ODJFS to OSLSA. If you are unable to meet the exception in R.C. 2921.42(C), you would have a prohibited interest in the ODJFS grant unless you resign from your position on the Advisory Council.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on May 29, 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,



Jennifer A. Hardin
Chief Advisory Attorney