

OHIO ETHICS COMMISSION

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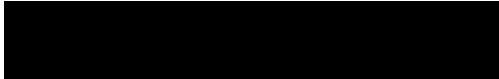


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January 17, 2003

Informal Opinion 2003-INF-0117-1

E.P. Nevada
Senior Consultant
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Dear Mr. Nevada:

In a letter that the Ethics Commission received on September 27, 2002, you ask whether the Ethics Laws and related statutes prohibit the Gallia County Health Commissioner (Health Commissioner) from receiving additional compensation from the Board of Health (Board) of the Gallia County Health District (District) for assuming an additional duty under the direction of the Board.

Brief Answer

As explained below, in light of the explicit grant of statutory authority by the General Assembly to the Board to appoint a health commissioner, establish the terms of his service, and determine, by contract, his specific duties concerning the operation of the district, R.C. 2921.43(A)(1) does not prohibit the Health Commissioner from receiving additional compensation from the Board for assuming the additional duty of operating a free clinic to provide personal health services for low-income county residents.

Facts

The District is a political subdivision of the state organized under R.C. Chapter 3709. Op. Att'y Gen. No. 91-016 at 2-80 ("health districts are political subdivisions of the state, governed by state law, and are separate from any city, county, township, or other local government"). The Board is charged with the duty to promulgate regulations relative to the public health and also provide for personal health and nursing services.

You state that the Board desires to open and operate a free clinic as a means of providing personal health services for low-income county residents. The Board proposes that the Health Commissioner operate the clinic in addition to the duties that he currently performs. The Health Commissioner is willing to assume the additional duty of operating the clinic in return for additional compensation based upon a percentage of the clinic's profitability. The Health Commissioner would receive no additional compensation for operating the clinic if the clinic operates at a loss.

Supplemental Compensation—R.C. 2921.43(A)

R.C. 2921.43(A) reads:

- (A) No public servant shall knowingly solicit or accept and no person shall knowingly promise or give to a public servant either of the following:
 - (1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform his official duties, to perform any other act or service in the public 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;
 - (2) Additional or greater fees or costs than are allowed by law to perform his official duties.

The term "public servant" is defined for purposes of R.C. 2921.43 to include any elected or appointed officer, employee, or agent of the state or any political subdivision, or anyone performing ad hoc a governmental function. Therefore, the Health Commissioner is a "public servant" for purposes of R.C. 2921.43(A)(1).

R.C. 2921.43(A)(1) prohibits a public servant from accepting, and any person from promising or giving to a public servant, "compensation," other than as allowed by R.C. 102.03(G) through (I) or other provision of law, for: (1) performing any duty, act, or service required in his official capacity as a public servant; (2) the general performance of his public duties; or (3) as a supplement to his public compensation. Adv. Op. No. 90-001. The exceptions set forth in R.C. 102.03(G) through (I) are not applicable to your question.

The issue becomes whether the additional compensation that the Health Commissioner could derive for operating the clinic in addition to the duties that he currently performs would be considered additional compensation for the performance of his official duties and thus, prohibited by R.C. 2921.43(A)(1). The word "compensation" is not defined for purposes of R.C. Section 2921.43. In Advisory Opinion No. 92-014, the Ethics Commission stated:

A primary rule of statutory construction is that words used in a statute must be construed according to rules of grammar and common usage. See R.C. 1.42. Furthermore, statutes "must be construed in the light of the mischief they are designed to combat." *City of Mentor v. Giordano*, 9 Ohio St. 2d 140, 144 (1967). "Compensation" is defined as "payment for services: esp., wages or remuneration." See Webster's New World Dictionary 289 (2nd College Ed. 1972).

Prior to the time that the Ohio Ethics Commission was empowered to interpret R.C. 2921.43, the Attorney General, in Att'y Gen. Op. No. 84-019, addressed the prohibition of R.C. 2921.43(A)(1). The opinion holds, in pertinent part:

R.C. 2921.43(A) is a codification of the common law rule that a public officer may not receive remuneration other than that allowed by law for the performance of his official duties. (Citations omitted.) . . . Public officials and employees are not permitted to receive payment other than that provided by law for performing those duties for which they are responsible in their official capacity. See generally *State v. McKelvey*, 12 Ohio St.2d 92, 95, 232 N.E.2d 391, 393 (1967) ("a public official cannot use his position for private profit"). (Emphasis added).

See also *State v. Livesay* (1988), 91 Ohio Misc.2d 208.

Precedent—Supplemental Compensation

In Advisory Opinion No. 89-012, the Ethics Commission explained that R.C. 2921.43(A) prohibits a city law director from receiving additional compensation to represent the city school district, because a city law director is statutorily required to represent the city school district as a part of his duties. See also *State v. Capko* (1990), Cuyahoga App. No. 56814, unreported (R.C. 2921.43(A) prohibits a public servant from receiving things of value for properly performing his public duties).

In Attorney General Opinion No. 96-053, the Attorney General addressed a similar issue and held that absent express statutory authority, individual members of the board of trustees of a regional solid waste management authority are not entitled to receive compensation for attending meetings of the authority. In addition, the board of trustees could not either authorize the payment of compensation to individual members of the board or set the amount of such compensation. The Attorney General held that the absence of statutory authority demonstrated an intent by the General Assembly that members of the board of trustees a regional solid waste management authority cannot receive compensation for their service.

By contrast, in Attorney General Opinion No. 99-035, the Attorney General held that because R.C. 519.05 empowers a board of township trustees to determine the compensation of zoning commission members, the board possesses the discretion to determine whether a zoning commission member who performs the additional duty of zoning commission secretary will receive compensation in addition to the amount payable to zoning commission members for attending zoning commission meetings. The Attorney General held, however, that the additional compensation paid to a commission member for performing the duties of commission secretary must be commensurate with the additional duties that he performs. See also 1980 Op. Att'y Gen. No. 80-024 (pursuant to R.C. 5901.04, a member of a county soldiers' relief [(now veterans service)] commission who is selected as executive director of the commission and given

responsibility to operate the soldiers' relief program may receive compensation that exceeds the amount paid to the other members of the commission).

Therefore, R.C. 2921.43(A)(1) prohibits a public servant from receiving compensation unless express statutory authority either: (1) entitles the public servant to receive compensation for his duties; or (2) provides a public body that has authority over the public servant with discretion to establish a rate of compensation that is commensurate with the specific duties that he is assigned to perform.

Application of Precedent

The process for the appointment of a health commissioner, the establishment of his compensation, and the determination of his specific duties concerning the operation of the health district is set forth in R.C. 3709.11, which reads in pertinent part:

The board shall appoint a health commissioner upon such terms, and for such period of time, not exceeding five years, as may be prescribed by the board. . . . He shall be secretary of the board, and shall devote such time to the duties of his office as may be fixed by contract with the board. (Emphasis added).

The statutory scheme established by R.C. 3709.11, therefore, indicates that the General Assembly intended that a board of health of a general health district not only shall appoint a health commissioner and establish the terms of his service but also determine, by contract, his specific duties concerning the operation of the district. See generally *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102 (syllabus, paragraph one) ("In statutory construction, . . . 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage"). Thus, the instant situation differs from the one addressed by the Ethics Commission in Advisory Opinion No. 89-012 where the representation of the city school district by the city law director is statutorily mandated as a part of his official duties.

Conclusion

Therefore, as explained above, in light of the explicit grant of statutory authority by the General Assembly to the Board to appoint a health commissioner, establish the terms of his service, and determine, by contract, his specific duties concerning the operation of the district, R.C. 2921.43(A)(1) does not prohibit the Health Commissioner from receiving additional compensation from the Board for assuming the additional duty of operating a free clinic to provide personal health services for low-income county residents.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 17, 2003. The Commission commends the Board and Health Commissioner for requesting guidance before any actions were taken that could be prohibited by law.

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The opinion is based on the facts presented and 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 contact this Office again.

Sincerely,

A handwritten signature in cursive script that reads "John Rawski".

John Rawski
Staff Attorney