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October 20, 2010

Informal Opinion 2010-INF-1020

Anton J. Naess
[REDACTED]

Dear Mr. Naess:

At its meeting on October 8, 2010, the Ohio Ethics Commission considered your letter received on June 11, 2010. In your letter, you asked the Commission to reconsider an advisory opinion issued to you on November 30, 2009. The Commission also received a letter from Sherrie J. Passmore, Executive Director of the State Employment Relations Board (SERB), written in support of your request for reconsideration.

In your original request, dated May 14, 2009, you explained that you planned to retire from your position as a SERB mediator and return to work for SERB as an intermittent employee. At the same time, you planned to apply to the SERB's roster of neutrals so that you would be eligible to serve as a fact-finder. You asked if the law prohibited you from working as a mediator for the Board and simultaneously making your services available to parties interested in participating in the fact-finding process administered by SERB.

In a staff opinion dated November 30, 2009, the Commission concluded, based on the facts presented in your original request, that the Ethics Law prohibited you from simultaneously serving a fact-finder on SERB's roster of neutrals and as a SERB employee.

In your request for reconsideration, and Ms. Passmore's letter in support, you included information about your service as a fact-finder that had not been provided previously. After considering the original advisory opinion in light of the additional information you provided, the Commission reiterates the conclusions in the November 30, 2009, staff advisory opinion.

Brief Answer

While you are employed by SERB as an intermittent mediator, R.C. 102.04(A) prohibits you from being compensated by parties to personally perform fact-finding services in cases or other matters that are before SERB.

Personally Rendering Services Before a State Entity—R.C. 102.04(A)

R.C. 102.04(A) provides that no person appointed to an office of any instrumentality 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.

R.C. 102.04(A) prohibits you from receiving or agreeing to receive directly or indirectly compensation other than from SERB for any service rendered or to be rendered by you personally in any matter that is before SERB.

As a fact-finder on SERB's roster of neutrals, you would be paid by the parties to perform services under the fact-finding dispute settlement process administered by SERB. See *SERB Fact-Finding Guidebook, February 2008* and R.C. 4117.14(C)(5) (the parties share the cost of fact-finding). You would be subject to SERB's guidelines and requirements for appointment to, and continued service on, its roster. R.C. Chapter 4117 and O.A.C. 4117-9. Throughout the fact-finding process, matters may arise that require you to contact SERB officials or employees, such as the need to request SERB to issue a subpoena to compel the attendance of a witness or the production of a necessary document for an evidential hearing. O.A.C. 4117-9-05(H). You would also need to serve documents on, or submit them to, SERB, including written findings of fact, written recommendations on the unresolved issues, and a separate summary of each recommendation. O.A.C. 4177-9-05(L). In making your recommendations, you must follow guidelines prescribed by SERB. R.C. 4117.14(C)(4)(e). You would also be required to request authorization from SERB in order to make written adjustments to the fact-finding report. O.A.C. 4117-9-05(L).

In your current request, you have stated that SERB's functions in the fact-finding process are purely administrative. Additionally, SERB's Executive Director stated that SERB does not consider or adjudicate fact-finding matters but merely oversees the process. The phrase "before a public agency" as used in R.C. 102.04 includes those matters that are "in the presence of" or "under the official purview of" a public agency. Adv. Op. No. 92-006. The fact that SERB administers and oversees this process pursuant to statute is evidence that the process is in the presence of and under the official purview of SERB.

You also stated that, as a fact-finder, you would not be representing or advising the parties that have contracted your services, or preparing non-ministerial documents for consideration by SERB. As the Commission explained in its earlier opinion, personally rendering services includes, but is not limited to, negotiating or discussing matters with agency personnel or contractors; appearing at an agency hearing; and preparing pleadings or documents to be filed with or submitted to an agency. Adv. Op. No. 87-009. R.C. 102.04(A) prohibits a

state employee from personally rendering any services on a matter that is under the official purview of any state agency, even if the official does not personally appear before the agency on behalf of his client. Adv. Op. No. 92-006. As a fact-finder, you would have contact with SERB on issues related to your fact-finding services. You would also be required to prepare and file or submit findings of fact and recommendations with SERB. These actions constitute personally rendering services on matters that are before SERB.

You have also asserted that SERB's function in the fact-finding process is ministerial in nature. There is an exception to the prohibitions of R.C. 102.04(A) that applies to the performance of ministerial functions. R.C. 102.04(F) provides:

This section shall not be construed to prohibit the performance of ministerial functions including, but not limited to, the filing, or amendment of tax returns, application for permits and licenses, incorporation papers, and other documents.

The Ethics Commission, in Advisory Op. No. 75-017, applied the definition of the term "ministerial function," found in *Trauger v. Nash*, 66 Ohio St. 612 (1902), and held that for purposes of R.C. 102.04 "ministerial functions" are:

[F]unctions which are performed in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of personal judgment upon the propriety of the act being done.

The Commission has said that the "ministerial function" exception refers to the activity performed by a public employee, in his private capacity, with regard to the matter for which he is receiving compensation from a private client. Advisory Ops. No. 75-006, 83-001, and 96-002. The "ministerial function" exception does not refer to the matter which is pending before the public employee's own agency or the agency's duties with regard to the matter. *Id.* The issue is whether the services you are compensated to perform are ministerial. If any of the services you perform as a fact-finder require you to exercise your personal judgment, then that action would not be a "ministerial function." Adv. Op. No. 96-002.

It is clear that your responsibilities as a fact-finder, especially preparing and issuing findings of fact and recommendations, require you to exercise your personal judgment. See O.A.C. 4417 and R.C. 4117. The preparation of your fact-finding report that is filed with or submitted to SERB is not a 'ministerial function.' Therefore, the "ministerial function" exception does not apply to your service as a fact-finder and R.C. 102.04(A) will prohibit you from receiving compensation for rendering private fact-finding services in the dispute settlement process administered by SERB while you are also employed as an intermittent mediator for SERB.

As noted in the Commission's original opinion, your question also raises issues under the public contract and conflict of interest prohibitions of the Ethics Law. Specifically, R.C. 2921.42(A)(4) prohibits you from having an interest in a public contract entered into by *or for the use of* SERB, unless you can meet an exception to the law. The Commission has said that services purchased by a third party, for the use of a public agency, fall within the definition of the term "public contract," even if the public agency does not expend any money for the services. Adv. Op. No. 90-003.

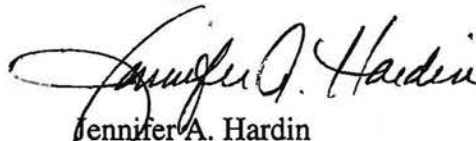
Furthermore, R.C. 102.03(E) prohibits you from accepting compensation from a party that is *interested in matters before*, regulated by, or doing or seeking to do business with SERB, unless you are able to fully withdraw from all matters before SERB that definitely and directly affect the party. However, because you are prohibited under R.C. 102.04(A) from providing fact-finding services as a member of SERB's roster of neutrals, it is not necessary for this opinion to discuss R.C. 2921.42(A)(4) or R.C. 102.03(E) further.

Conclusion

As explained above, and in the November 30, 2009, opinion, while you are employed by SERB as an intermittent mediator, R.C. 102.04(A) prohibits you from being compensated by parties to personally perform fact-finding services in cases or other matters that are before SERB.

The Ohio Ethics Commission approved the conclusions conveyed in this letter at its meeting on October 8, 2010. This letter 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

cc: Sherrie J. Passmore