OHIO ETHICS COMMISSION
8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368

www.ethics.ohio.gov

INFORMATION SHEET: ADVISORY OPINION NO. 2009-01
GIFT FROM SPOUSE'S EMPLOYER

What is the question addressed in the opinion?

Can a public official accept a gift from his or her spouse if: (1) the spouse received the gift from his or her employer; and (2) the spouse's employer is doing or seeking to do business with, regulated by, or interested in matters before the public agency the official serves?

What is the answer in the opinion?

Yes, provided that the employer is not giving the gift to the official's spouse in order to give it to the official. Factors that should be examined to determine whether the employer's intention is to give the gift to the official include: (1) whether the item is given to the employee at a time when a specific matter is before the official; (2) whether the employer routinely provides gifts or rewards to its employees; (3) whether the value and nature of the item is consistent with those the employer has provided to other employees in similar situations; and (4) whether the employee has met the requirements ordinarily considered by the employer when giving gifts or rewards.

To whom does this opinion apply?

The conclusions in this opinion apply to all individuals who are elected or appointed to, or employed by, any public agency, including but not limited to any state agency, county, city, township, school district, public library, and regional authority, regardless of whether the person is: (1) compensated or uncompensated; (2) serving full time or part time; or (3) serving in a temporary or permanent position.

When did the conclusions in the opinion become effective?

The opinion became effective when rendered by the Commission at its meeting on January 23, 2009.

For More Information, Please Contact:

David E. Freel, Executive Director, **or**
Jennifer A. Hardin, Chief Advisory Attorney
(614) 466-7090

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ADVISORY OPINION NO. 2009-01 IS ATTACHED.

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Advisory Opinion
Number 2009-01
January 23, 2009

Syllabus by the Commission:

(1) Division (E) of Section 102.03 of the Revised Code prohibits a public official or employee from accepting, and Division (F) prohibits any person from promising or giving a public official or employee, anything of value, including a gift, if it is of such a character as to manifest a substantial and improper influence upon the official or employee with respect to the performance of his or her public duties;

(2) R.C. 102.03(E) does not prohibit a public official or employee from accepting a gift or other thing of value from his or her spouse, which the spouse received from his or her employer, provided that the employer did not give the item to the official's spouse for the purpose of providing it to the official, and subject to the factors discussed in this opinion;

(3) R.C. 102.03(F) does not prohibit a company from giving anything of value to an employee, which the employee may share with his or her spouse who is a public official or employee, provided that the company is not giving the item to its employee for the purpose of providing it to the public official or employee, and subject to the factors discussed in this opinion;

(4) A public official or employee who files a financial disclosure statement pursuant to Division (A) of Section 102.02 is not required to disclose his or her spouse as the source of a gift, unless the gift was given to the spouse on the condition that he or she will provide it to the official or employee.

* * * * * *

The questions before the Ohio Ethics Commission are whether: (1) a public official or employee is prohibited from accepting or sharing a thing of value given to his or her spouse by the spouse's employer; or (2) a company is prohibited from giving a thing of value to an employee who is the spouse of a public official or employee and may share the item with or give the item to the official or employee.

The Ethics Law does not prohibit a public official or employee from accepting a gift from his or her spouse. Further, the Ethics Law specifically provides that, if an official is required to file a financial disclosure statement, he or she is not required to disclose his or her spouse as the source of a gift. R.C. 102.02(A)(7).

In some situations, employers provide gifts or incentives to their employees in recognition of retirement, holidays, or exemplary service. Examples of these gifts and incentives include cash, gift cards, dinners, receptions, tickets to sports or cultural events, retreats, and trips.

An official's or employee's spouse may be employed by an individual, company, organization, or public agency that: (a) provides gifts or incentives to its employees; and (b) is doing or seeking to do business with, interested in matters before, or regulated by the agency the official or employee serves. The official's or employee's spouse may want to share the gift with or give the gift to the official or employee.

<u>Accepting, Promising, or Giving Anything of Value</u>

R.C. 102.03(E) and (F) provide that:

> (E) 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.
>
> (F) No person shall promise or give to a public official or employee 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.

A **"public official or employee"** is "any person who is elected or appointed to an office or is an employee of any public agency." R.C. 102.01(B).[1] A "public agency" is "the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, or township, the five state retirement systems, or any other governmental entity." R.C. 102.01(C). Therefore, a "public official or employee" in R.C. 102.03(E) and (F) includes any person who is elected or appointed to, or employed by, any public agency, including but not limited to any state agency, county, city, township, school district, public library, and regional authority. The restrictions apply regardless of whether the official or employee is serving in a position that is: (1) compensated or uncompensated; (2) full-time or part-time; or (3) temporary or permanent.

[1] Teachers, instructors, and other educators are excluded from the prohibitions set forth in R.C. 102.03(D) and (E) if they do not perform or have the authority to perform supervisory or administrative functions. <u>See</u> Adv. Op. No. 2001-04.

"**Anything of value**" has "the same meaning as provided in section 1.03 of the Revised Code," and also includes campaign contributions. R.C. 102.01(G). R.C. 1.03 provides that "anything of value" includes:

> (A) Money, bank bills or notes, United States treasury notes, and other bills, bonds, or notes issued by lawful authority and intended to pass and circulate as money;
> (B) Goods and chattels;
> (C) Promissory notes, bills of exchange, orders, drafts, warrants, checks, or bonds given for the payment of money;
> (D) Receipts given for the payment of money or other property;
> (E) Rights in action;
> (F) Things which savor of the realty and are, at the time they are taken, a part of the freehold, whether they are of the substance or produce thereof or affixed thereto, although there may be no interval between the severing and taking away;
> (G) Any interest in realty, including fee simple and partial interests, present and future, contingent or vested interest, beneficial interests, leasehold interests, and any other interest in realty;
> (H) Any promise of future employment; [and]
> (I) Every other thing of value.

The Commission has held that "anything of value," as defined in R.C. 102.03(G) and 1.03, includes but is not limited to dinners, receptions, retreats, cash, gift cards, tickets to sports or entertainment events, and trips. Ohio Ethics Commission Advisory Opinions No. 91-010, 92-015, and 95-001.

A "**person**," as used in R.C. 102.03(F), includes "an individual, corporation, business trust, estate, trust, partnership, and association." R.C. 1.59. The Commission has held that "person" includes governmental agencies. Adv. Op. No. 89-003. <u>Contrast</u> R.C. 102.03(A)(4) ("As used in division (A)(4) of this section "person" does not include any state agency or political subdivision of the state.").

A thing of value is "**of such a character as to manifest a substantial and improper influence**" on a public official or employee if it is "of such a quality, nature or kind that it <u>could</u> have a substantial and improper influence on the public official or employee." Adv. Op. No. 76-005 (emphasis in original).[2] The Commission has explained that it is unnecessary that the thing

[2] R.C. 102.03(E), the statute under consideration in this opinion, was not enacted until 1986, after Advisory Opinion No. 76-005 was adopted. R.C. 102.03(D) was amended at the same time R.C. 102.03(E) was adopted. However, the phrase "of such a character as to manifest a substantial and improper influence" was not revised in or removed from R.C. 102.03(D), and was used again in R.C. 102.03(E).

of value actually has a substantial and improper influence on the official or employee provided that it is of such a character that it could have such influences. Id.

In later opinions interpreting R.C. 102.03(D) and (E), the Commission held that a "thing of value" will have a substantial and improper influence on a public official or employee if it could impair the official's or employee's objectivity and independence of judgment because: (1) it is of a substantial nature or value; and (2) it is from a source that is doing or seeking to do business with, regulated by, or interested in matters before the agency the official or employee serves. Adv. Ops. No. 2001-03 and 2004-03. See also Ohio Sup.Ct., Bd Comm'rs on Grievances and Discipline, CPR Op. 98-10 (1998) (acceptance of a thing of value by a judge is improper "in the presence of all three variables: 1) a thing of value, 2) substantial influence, and 3) improper influence").

The Commission has concluded that items of nominal value will not have a substantial influence upon a public official or employee, unless they are given repeatedly and reach a substantial cumulative value. See Adv. Ops. No. 86-003, 89-014, and 92-015. See also Ohio Sup.Ct., Bd Comm'rs on Grievances and Discipline, CPR Op. 98-10 (1998) ("Substantial influence is present if the thing of value is more than de minimis.").

When determining whether a thing of value could have an improper influence upon a public official or employee, the Commission has held that the focus is primarily upon the source of the item. Adv. Op. No. 86-011. If a public official or employee accepts a thing of substantial value from a person or entity that is interested in, regulated by, or contracting with the public agency he or she serves, the thing of value can manifest a substantial and improper influence upon the official or employee by impairing the independence and objectivity of his or her judgment in matters that affect the giver. Adv. Ops. No. 84-010 and 2001-03. See also Ohio Sup.Ct., Bd Comm'rs on Grievances and Discipline, CPR Op. 98-10 (1998) ("Improper influence is present if the thing of value is from a party that is interested in matters before, regulated by, or doing or seeking to business with the public official's or employee's agency.").

Application

R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting anything of value, including a gift of substantial value, from a person, company, organization, or public agency if the source of the item is doing or seeking to do business with, regulated by, or interested in matters before his or her public agency. R.C. 102.03(F) prohibits any person that is doing or seeking to do business with, regulated by, or interested in matters before, a public agency, from promising or giving anything of value, including a gift of substantial value, to any official or employee of the agency. A substantial gift from an improper source would have a substantial and improper influence on the official or employee with respect to his or her duties. See *Cleveland v. Wade* (Aug. 10, 2000), 8th Dist. App. No. 76652 (For example, the Court concluded that, in this case, R.C. 102.03(E) is violated where a public official has received a thing of value from a regulated party that influenced the official in regulatory activity).

However, a public official's or employee's spouse is not an improper source of a gift to the official or employee. An official or employee of a public agency will not be influenced, in actions before the agency, by a gift from his or her spouse because the official or employee is already prohibited from participated in matters before the agency that affect the interests of his or her spouse. Adv. Op. No. 89-009.

If a person receives a gift, trip, or other benefit from his or her employer, the person may want to share the item with or give the item to his or her spouse. Where the person's employer is doing or seeking to do business with, regulated by, or interested in matters before a public agency and his or her spouse is a public official or employee of the agency, it must be determined whether it is the spouse/employee or the employer that is the source of the thing of value to the official or employee.

R.C. 102.03(F) would prohibit any person from giving anything of value to the spouse of a public official or employee for the purpose of giving the item to the official or employee.[3] R.C. 102.03(E) would prohibit any public official or employee from accepting anything of value from any person who gave the item to the official's or employee's spouse when the factors indicate that the item was provided to his or her spouse for the purpose of giving the item to the official or employee. In either of these situations, the "source" of the thing of value is not the public official's or employee's spouse, but the person who gave the item to the spouse.

Factors that should be examined to determine whether an employer gives a gift or reward to an employee for the purpose of providing it to the employee's spouse include: (1) whether the gift or reward is given at or near the time when a specific matter that affects the employer is before the official or employee; (2) whether the employer routinely provides gifts and rewards to its employees; (3) whether the value and nature of the gift or reward is consistent with those the employer has provided to other employees in similar situations; and (4) whether the employee who is married to a public official or employee has met the requirements or milestones ordinarily considered by the employer when giving gifts or rewards to its employees.

For example, if a company employee wins a trip for outstanding performance, the employee's husband would not be prohibited from accompanying her on the trip, even if the husband is a township trustee and the company sells services to the township. However, any of these factors would be indications that the company's purpose for making the award to its employee is to provide the trip to her husband, the township trustee: (a) the company has not offered awards for performance in the past; (b) the company normally awards trips in December, but has made this award in June, when a specific matter affecting the company is being

[3] This activity may also be a violation of other provisions of Ohio law, including some requirements that are not within the Commission's jurisdiction. <u>See</u>, <u>e.g.</u>, R.C. 2921.02 (bribery); 2921.43 (supplemental compensation).

considered by the trustees; (c) the company has formerly offered restaurant gift certificates as awards, rather than trips; or (d) the employee did not meet the company's necessary targets to win the award. In any of these situations, R.C. 102.03(E) would prohibit the trustee from accepting the trip, notwithstanding that the ostensible source is his wife. *City of Parma Heights v. Schroeder* (1963), 26 Ohio Op. 2d 119 (a public official cannot do indirectly what he or she cannot lawfully do directly). R.C. 102.03(F) would prohibit the company from giving the trip to the trustee through its employee, the trustee's spouse.

However, if the situation does not meet any of these parameters, and the company is giving the item to its employee solely for the purpose of gifting or rewarding the employee, R.C. 102.03(F) does not prohibit the company from providing the gift to the employee even though the employee may give the item to or share the item with his or her spouse who is a public official or employee. R.C. 102.03(E) does not prohibit the official or employee from accepting the gift or reward from his or her spouse. The Commission reached a similar conclusion in 2001, when it held that the Ethics Law does not prohibit a public official or employee from accepting a discount from a company that would otherwise be a prohibited source, and does not prohibit the company from offering the discount, provided that the discount is offered to a large class of individuals regardless of their status as public servants or their specific public position. Adv. Op. No. 2001-08.

Even in situations where R.C. 102.03(E) does not prohibit the official or employee from sharing a gift or reward with his or her spouse, the official or employee may still choose to pay his or her own expenses in connection with the gift. For example, if an official's spouse is given tickets to a sporting event, it may be best practice for the official to pay the giver fair market value for the ticket if he or she attends the event.

Disclosure of Gifts—R.C. 102.02

The Ethics Law requires certain public officials and employees, including state, city, and county elected officials and candidates, and high-ranking state employees, to complete annual financial disclosure statements. R.C. 102.02. One of the requirements is that filers disclose sources of gifts. See *Disciplinary Counsel v. Taft* (2006), 112 Ohio St. 3d 155, 2006-Ohio-6525, at ¶4 ("These disclosures are designed to ensure that public officials do not '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.'"). R.C. 102.02(A)(7) specifically provides that a public official or employee is not required to disclose a spouse as a source of a gift, indicating that the General Assembly did not consider that a gift from a spouse would be of such as character as to manifest an improper influence on the official or employee.

However, if a public official's spouse receives a gift or other benefit from his or her employer, and an examination of the facts reveals that the employer's purpose is that the gift or benefit will be given to the public official, the source of the gift to the official is the employer, rather than the public official's spouse. In that situation, if the official accepts or shares the gift, he or she must disclose his or her spouse's employer as the source of a gift on his or her financial disclosure statement.

Conclusion

This advisory opinion is based on the facts described in the opinion. 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.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are advised as follows: First, Division (E) of Section 102.03 of the Revised Code prohibits a public official or employee from accepting, and Division (F) prohibits any person from promising or giving a public official or employee, anything of value, including a gift, if it is of such a character as to manifest a substantial and improper influence upon the official or employee with respect to the performance of his or her public duties. Second, R.C. 102.03(E) does not prohibit a public official or employee from accepting a gift or other thing of value from his or her spouse, which the spouse received from his or her employer, provided that the employer did not give the item to the official's spouse for the purpose of providing it to the official. Next, R.C. 102.03(F) does not prohibit a company from giving anything of value to an employee, which the employee may share with his or her spouse who is a public official or employee, provided that the company is not giving the item to its employee for the purpose of providing it to the public official or employee. Finally, a public official or employee who files a financial disclosure statement pursuant to Division (A) of Section 102.02 is not required to disclose his or her spouse as the source of a gift, unless the gift was given to the spouse on the condition that he or she will provide it to the official or employee.

By my signature below, I certify that Advisory Opinion No. 2009-01 was rendered by the Ohio Ethics Commission at its meeting on January 23, 2009.

Ben Rose, Chair
Ohio Ethics Commission