

# OHIO ETHICS COMMISSION

Merom Brachman  
*Commission Chair*

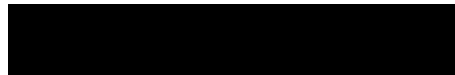
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December 14, 2001      Informal Opinion 2001-INF-1214-2

Margaret Anne Cannon, Esq.  
Director of Law  
The City of Shaker Heights



Dear Ms. Cannon:

In a letter received by the Ohio Ethics Commission on October 22, 2001, you asked whether the Ethics Law and related statutes prohibit an employee of the City of Shaker Heights (City) from accepting a bequest from the estate of an elderly resident that she had, as part of her duties, assisted for a period of years. You also ask, if the Ethics Law and related statutes prohibit the employee from accepting the bequest, whether the employee may instruct the administrator of the estate to give the bequest to her favorite charity.

## **Brief Answer**

As explained below, absent evidence of the existence of a longstanding personal friendship with the elderly resident that predates the employee's performance of her public duties of rendering assistance, R.C. 2921.43(A)(1) prohibits the City employee from accepting a bequest from the estate of an elderly resident that she had, as part of her public duties, assisted for a period of years. If the City employee were to instruct the administrator of the estate to give the bequest to the employee's favorite charity, then the employee would be exercising ownership rights over the bequest in violation of R.C. 2921.43(A)(1).

## **Facts**

You state that the employee has worked in the City's Senior Adult Office for twenty-two years as a social worker/ombudsman. In this capacity, the employee aids the City's elderly residents in a variety of matters to help them in their day-to-day lives. You state that about five years ago, the employee aided an elderly resident by keeping her gas service from being terminated and, afterwards, ensured that she was doing well.

You state that in July 2001, an attorney informed the City employee that the elderly resident had died and, in her will, had named the employee as a beneficiary of a five thousand dollar bequest. You state that you believe that the employee neither used her public position to secure the bequest nor treated the deceased person differently than any other elderly resident under her purview. You state that you believe that the bequest was “an expression of gratitude and not a payment for services rendered.”

### **Precedent Established by Advisory Opinion No. 86-003**

You state that you have examined the precedent of the Ohio Ethics Commission and the prohibition imposed by R.C. 102.03(D) and determined that because the City resident who is the source of the thing of value is deceased, the bequest cannot be of such a character as to manifest a substantial and improper influence on the City employee in the performance of her official duties with respect to her future duties involving the source of the thing of value. You have based your determination on Advisory Opinion No. 86-003, in which the Ethics Commission determined that R.C. 102.03(D) prohibits an employee of the Ohio Veterans Home from: (1) using his official position to secure his designation as an executor, administrator, or beneficiary of a resident's estate or any other thing of value from a resident and, (2) from soliciting or receiving gifts, gratuities, loans, or any other thing of value from a resident.

At the time Advisory Opinion No. 86-003 was rendered, R.C. 102.03(D) prohibited a public official or employee from using or attempting to use his official position to secure a thing of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties that “would not ordinarily accrue to him in the performance of his official duties.” The Ethics Commission addressed the issue of a Veteran’s Home employee being a beneficiary in a resident’s will, stating:

In the case of the designation of an employee as an executor, administrator, or beneficiary under a resident's will, the value accrues in the future. Also, the employee may not have sought the appointment or bequest and may be unaware that he has been included in the will. Under such circumstances, the appointment or bequest would not have a substantial and improper influence on the employee in the performance of his official duties. (Emphasis added).

Because the Commission was unable to determine that it was illegal for the employee to receive the bequest under such circumstances, it further advised in Advisory Opinion No. 86-003:

Nevertheless, it would create the appearance of impropriety, since the employees of the Veterans Home may appear to have undue influence upon a resident who makes such decisions concerning a will. Thus, an employee of the Veterans Home should decline designation as an executor, administrator, or beneficiary of a resident's estate, or the receipt of the proceeds of the estate.

You state a concern that, in the instant situation, the receipt of compensation by the City employee will also create a similar appearance of impropriety. Further, after Advisory Opinion No. 86-003 was issued, the General Assembly enacted R.C. 102.03(E), which prohibits a public official from soliciting or accepting anything of value that is of such a character as to manifest a substantial and improper influence on the official with respect to the performance of her duties, even if she did not use her position to secure the thing. While there is no suggestion that this has occurred in the instant situation, it is possible that a public employee may treat a citizen with whom the employee has dealings in a more favorable manner, in violation of R.C. 102.03(D) and (E), if the employee believes that the resident has the resources to leave the employee a bequest in his or her will. However, as explained below, R.C. 2921.43(A)(1) prohibits the City employee from accepting the bequest. Therefore, it is unnecessary for the Commission to further examine R.C. 102.03(D) and (E).

### **Prohibition Imposed by R.C. 2921.43(A)(1)—Supplemental Compensation**

In 1986, subsequent to the adoption of Advisory Opinion No. 86-003, the General Assembly authorized the Ethics Commission to issue advisory opinions interpreting R.C. 2921.43.

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 this section, to include any public official. R.C. 2921.01(A). "Public official" means any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity. R.C. 2921.01(A). Thus, a city employee is a "public servant" who is subject to the prohibitions of R.C. 2921.43. Ohio Ethics Commission Advisory Opinion No. 92-015.

R.C. 2921.43(A)(1) prohibits a public servant from soliciting or accepting "compensation," other than as allowed by R.C. 102.03(G)-(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 duties; or (3) as a supplement to his public compensation.

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See Adv. Ops. No. 89-012 (supplemental payment for legal services required to be performed by a law director); 91-010 ("frequent flyer" benefits earned through travel on state business); and 92-015 (a retail discount provided to members of a city police department as a community service acknowledgement and recognition for the performance of their public duties).

R.C. 2921.43(A)(1) also prohibits any person from promising or giving to public servants "compensation," other than as allowed by R.C. 102.03(G)-(I) or other provision of law, for: (1) performing any duty, act, or service required in their official capacity as public servants; (2) the general performance of their public duties; or (3) as a supplement to their public compensation. Adv. Op. No. 90-001. The term "person" is defined to include any individual, corporation, partnership, association, or other similar entity. R.C. 1.59. The exceptions set forth in R.C. 102.03(G) to (I) are not applicable to the question you have raised.

It must be stressed that, unlike the prohibition imposed by R.C. 102.03(D), the prohibitions imposed by R.C. 2921.43(A)(1) are not qualified or limited by either the source or the nature of the prohibited compensation. In addition, unlike R.C. 102.03(D), R.C. 2921.43(A)(1) prohibits a public servant from accepting improper compensation even if the public servant did not use the authority or influence of his public position to secure it. In fact, it is possible, as the instant situation illustrates, for a public servant to be unaware that he has been selected to receive compensation that he is prohibited from accepting under R.C. 2921.43(A)(1).

The word "compensation" is not defined for purposes of R.C. 2921.43. In Advisory Opinion No. 92-014, the Ethics Commission held:

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 (2d College Ed. 1972).

See also State v. Livesay, 91 Ohio Misc. 2d 208 (C.P. Jackson County February 19, 1998) (the use of the word "compensation" in R.C. 2921.43(A) requires an exchange of a thing in return for some obligation).

Prior to the Ohio Ethics Commission being granted the authority 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) holding, 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. See Somerset Bank v. Edmund, 76 Ohio St. 396, 81 N.E. 641 (1907); Debolt v. Trustees of Cincinnati Township, 7 Ohio St. 237 (1857); Gilmore v. Lewis, 12 Ohio 281 (1843); 1981 Op. Att'y Gen. No. 81-013. . . .

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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").

See also State v. Capko, Cuyahoga App. No. 56814, unreported, 1990 LEXIS 1287 (March 28, 1990).

Under the facts that you have provided, the City employee provided no special services to the elderly resident as consideration for receiving the bequest. Therefore, the bequest is not intended to be provided to the employee in exchange for the performance of a particular duty, act, or service which is required to be performed by the employee in the course of her duties as social worker/ombudsman. It is, however, apparent that, absent evidence of the existence of a longstanding personal friendship with the elderly resident that predates the employee's performance of her public duties of rendering assistance, the bequest is being provided to the employee, as you have stated, as "an expression of gratitude" for the general performance of the employee's public duties.

Therefore, a City employee who receives a bequest from the estate of a resident whom she had aided in the performance of her public duties would realize a personal pecuniary benefit or gain from the bequest and thus, would receive "compensation" other than as allowed by law for the general performance of her public duties and as a general supplement to her public compensation. Accordingly, R.C. 2921.43(A)(1) prohibits the City employee from accepting a bequest from the estate of an elderly resident that she had assisted as part of her public duties.

### **Directing the Bequest to a Charity**

You also asked if the Ethics Law and related statutes prohibit the employee from accepting the bequest, whether the employee may instruct the administrator of the estate to give the bequest to her favorite charity. If the City employee were to instruct the administrator of the estate to give the bequest to her favorite charity, then she would be exercising ownership rights over the bequest in violation of R.C. 2921.43(A)(1). Provisions of the Ohio Revised Code that are outside the Commission's jurisdiction, concerning the disclaimer of an interest in the distribution of a decedent's estate, may also be implicated in this situation. See R.C. 1339.68.

### **Conclusion**

As explained above, absent evidence of the existence of a longstanding personal friendship with the elderly resident that predates the employee's performance of her public duties of rendering assistance, R.C. 2921.43(A)(1) prohibits the City employee from accepting a bequest from the estate of an elderly resident that she had, as part of her public duties, assisted for a period of years. If the City employee were to instruct the administrator of the estate to give the bequest to her favorite charity, then she would be exercising ownership rights over the bequest in violation of R.C. 2921.43(A)(1).

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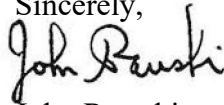
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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on December 14, 2001. The Commission commends the City employee for requesting guidance before taking any actions that could be prohibited by the Ethics Law.

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 black ink that reads "John Rawski". The signature is written in a cursive style with a large, prominent initial "J".

John Rawski  
Staff Attorney