

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

June 30, 2004 Informal Opinion 2004-INF-0630

John E. Patterson
Assistant Attorney General
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Dear Mr. Patterson:

In a letter that the Ethics Commission received on March 8, 2004, you ask whether the Ohio Ethics Law and related statutes prohibit the Office of Hispanic/Latino Affairs (Office) from soliciting and receiving grants and gifts. You state that the Commission on Hispanic and Latino Affairs (Commission) desires to have the Office solicit gifts and grants to raise funds that the Commission would use to conduct additional meetings and perform additional services that it cannot fund under the current state budget.

Specifically, the Commission desires to use the additional funds to increase its annual number of meetings from six to twelve. In addition, the Commission desires to instruct the Office to use the additional funds to either hire additional employees or contract with outside providers to provide additional services.

Brief Answer

As explained below, the Commission and Office are not prohibited from soliciting and receiving grants and gifts to raise funds that the Commission would use to conduct additional meetings and perform additional services that it cannot fund under the current state budget.

Facts—The Commission and Office on Hispanic and Latino Affairs

The Commission is a statutorily created state commission consisting of eleven members appointed by the Governor with the advice and consent of the Senate. R.C. 121.31. Generally, the Commission creates awareness of the problems of Spanish-speaking people in the state by providing a program of public education. In addition, through a variety of activities, the Commission assists public and private agencies in the development and implementation of policies, programs, and procedures designed to address the needs of Spanish-speaking people.

R.C. 121.31 requires the Commission to meet at least six times a year. Each member of the Commission is authorized to receive reimbursement for expenses incurred in the performance of his duties and compensation for each day he is actually engaged in the performance of his duties. Id. However, no member can be compensated for more than one day each month. Id.

The Office is a statutorily created entity that is accountable to the Commission. R.C. 121.33. The chief administrator of the Commission is the director of the Office. The director appoints employees to perform the tasks that the Commission assigns to it. If assigned by the Commission, the Office is authorized to apply for and receive grants and gifts from governmental and private sources to be administered by the Office or subcontracted to local agencies. R.C. 121.32(H); 121.33(B).

Receiving Supplemental Compensation—R.C. 2921.43(A)(1) and (2)

R.C. 2921.43(A)(1) provides that no public servant shall knowingly solicit or accept and no person shall knowingly promise or give to a public servant:

- (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.

R.C. 2921.43(A)(1) prohibits a public servant from soliciting or accepting any "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. Ohio Ethics Commission Advisory Opinions No. 92-014 and 92-015. R.C. 2921.43(A)(2) prohibits a public servant from soliciting or accepting additional or greater fees or costs than are allowed by law to perform his official 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), (H), or (I)¹ 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

¹ The exceptions set forth in R.C. 102.03(G) to (I) concern campaign contributions, honoraria, and travel, meal and lodging expenses. Gifts and grants provided to a state commission for the purpose of conducting meetings and performing additional services do not fall within these exceptions.

compensation. Adv. Op. No. 90-001. R.C. 2921.43(A)(2) prohibits any person from promising or giving additional or greater fees or costs to a public servant than are allowed by law for the public servant to perform his official duties.

The term "public servant" is defined for purposes of R.C. 2921.43 to include any employee of a political subdivision of the state. R.C. 2921.01(A) and (B)(1). Thus, a member of the Commission and employees of the Office are "public servants" who are subject to the prohibitions of R.C. 2921.43. The term "person" includes any individual, corporation, partnership, association, or other similar entity and governmental agencies.

The word "compensation" is not defined for purposes of R.C. Section 2921.43. In Advisory Opinion No. 90-014, 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). The Commission has stated that the term "compensation," as used in R.C. 2921.43, includes such things as compensation for legal services, "frequent flyer" benefits earned through public travel, and travel, meal and lodging expenses. See Advisory Opinions No. 89-012, 89-014, and 91-010.

In Advisory Opinion No. 89-014, the Ethics Commission determined that R.C. 2921.43(A)(1) prohibited public officials and employees from accepting travel, meal, and lodging expenses from a vendor to view and evaluate the vendor's product. The Ethics Commission explained that viewing and evaluating the vendor's product is an act that is within the performance of the official's or employee's public duties. Adv. Op. No. 89-014. See also Adv. Op. No. 89-013. Therefore, the travel, meal, and lodging expenses provided to view and evaluate the vendor's product is prohibited supplemental compensation. The Ethics Commission stated that the prohibition imposed by R.C. 2921.43(A)(1) applies regardless of whether the additional compensation is paid directly to the public official or employee, or is paid to the public employer, and then given by the employer to the official or employee. Adv. Op. No. 89-013, 89-014, and 92-014.

R.C. 2921.43 addresses situations where a public servant would receive compensation other than as provided by law that is given to him for any one of three reasons. In order to fall within the prohibitions of R.C. 2921.43(A)(1), the compensation must be provided to the public servant for: (1) performing a 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. In order to fall within the prohibitions of R.C. 2921.43(A)(2), fees or costs provided to a public servant must be additional or greater than are allowed by law to perform his

official duties. Adv. Ops. No. 89-012 (payment for legal services required to be performed by a law director), 89-013 (travel, meal, and lodging expenses for travel on state business) and 91-010 ("frequent flyer" benefits earned through travel on state business). But see Adv. Op. No. 92-014 (a public servant is not prohibited from accepting rideshare incentives purchased with grant money provided by a regional planning commission to his public employer because the incentives are provided for the public servant's commute to and from work and are not given for the performance of his official duties, for the performance of any act or service within his public capacity, or for the general performance of the duties of his public employment).

In the instant situation, as stated above, R.C. 121.33(B) provides the Office of Hispanic Affairs with express statutory authority to apply for and accept grants and gifts from governmental and private sources to be administered by the Office or subcontracted to local agencies. Under this statutory authority, the grants and gifts are provided by governmental and private sources to the Office to be used for purposes as directed by the Commission.

R.C. 121.31 provides that a member of the Commission is authorized to receive reimbursement for expenses incurred in the performance of his duties and compensation for each day he is actually engaged in the performance of his duties. Therefore, if the Commission uses a portion of the funds it receives from gifts and grants to increase its annual number of meetings from six to twelve, the members of the Commission would be statutorily entitled to receive additional reimbursement and compensation. However, the maximum amount of compensation that a member of the Commission can receive is statutorily limited by R.C. 121.31, which states that no member of the Commission can be compensated for more than one day each month.

In addition to conducting additional meetings, the Commission desires to instruct the Office to use the additional funds derived from the gifts and grants to either hire additional employees or contract with outside providers to provide additional services. It must be noted that the Office, rather than the person who is providing the gift or grant, has the ultimate authority to decide whether to hire additional employees or contract with an outside provider.

Therefore, because of the express statutory authority provided by R.C. 121.33(B), the grants and gifts from governmental and private sources are being provided to the Office and Commission to enable the Office and Commission to perform their statutorily mandated duties in a manner that is to be determined by the Office and Commission. See generally Adv. Op. No. 87-007 (R.C. 102.03(E) does not prohibit a public agency from soliciting or accepting travel, lodging, and meal expenses, from a regulated party, that the agency is statutorily authorized to charge for the cost of inspecting or examining the party). In the instant situation, the grants and gifts that are received by the Office under the statutory authority provided by R.C. 121.33(B) are not being provided to any specific public servant for: (1) performing any duty, act, or service required in his official capacity as a public servant; or (2) the general performance of his public duties; or (3) as a supplement to his public compensation. The grants and gifts are generally

provided to the Office and Commission, which may use them to perform any of its statutorily assigned duties.

However, it must be noted that R.C. 121.31 limits the maximum amount of compensation a member of the Commission may receive. If a member of the Commission receives compensation that exceeds this statutory limitation, it would be both compensation that is not authorized by law and additional and greater fees or costs than are allowed by law to perform his official duties. In such an instance, it would not matter whether the source of the funds used to compensate him are derived from funds appropriated by the state budget or from gifts or grants received from outside sources.

Solicitation or Securing of Anything of Value—R.C. 102.03(D) and (E)

You should also note R.C. 102.03(D) and (E), which prohibit a public official or employee from soliciting or using his position to secure anything of value that is of such a character as to manifest a substantial and improper influence on the official or employee with respect to the performance of his duties. A member of a state commission is a “public official” for purposes of R.C. 102.03(D) and (E). See R.C. 102.01(B) and (C); Adv. Op. No. 92-009.

R.C. 102.03(D) and (E) generally prohibit a member or employee of a state commission from soliciting or accepting, or using his position to secure, anything of value from a party that is doing or seeking to do business with, interested in matters before, or regulated by the commission. Therefore, a member of the Commission or employee of the Office is prohibited from soliciting or using his position to secure “anything of value” from any of these parties. “Anything of value” is defined to include money, goods and chattels, promissory notes, warrants, and check, and every other thing of value. R.C. 102.01(G); 1.03.

However, in Advisory Opinion No. 89-002, the Ethics Commission concluded that R.C. 102.03(D) and (E) do not prohibit a state agency from accepting a donation of equipment from a party that is regulated by the state agency, as long as the donation is voluntary and no individual official or employee would benefit personally. The Ethics Commission stated:

R.C. 102.03 has been interpreted to apply only to those situations where a public official or employee, or someone to whom he is related in his private capacity, would receive a thing of value. R.C. 102.03(D) and (E) prohibit individuals - public officials and employees - from improperly accepting, soliciting, or using their position to secure anything of value. The prohibitions of R.C. 102.03(D) and (E) do not apply to the receipt of items by the state, or any agency, board, or commission thereof. Similarly, R.C. 102.03(F) prohibits donations to individuals - public officials and employees - rather than to the state or an agency thereof.

The Ethics Commission also stressed that all donations made to the public agency must be voluntary. See Adv. Op. No. 86-003. "Private companies are prohibited from promising, offering, or giving equipment to the public agency with the purpose of improperly influencing officials or employees of the Commission with respect to their duties." Adv. Op. No. 89-002.

In the situation you have described, it must be clear that the parties who are making gifts or grants to the Commission and Office are doing so voluntarily, without the purpose of improperly influencing officials and employees of the Commission and Office. The officials and employees of the Commission and Office are prohibited from soliciting or accepting gifts or grants that are of such a character as to improperly influence them with respect to the discharge of their official duties, and from basing any official decisions, actions, or instructions on a party's contributions or failure to contribute. Adv. Op. No. 89-002. As the Ethics Commission explained in Advisory Opinion No. 89-002, such conduct by a private company or a public official or employee would violate R.C. 102.03, and possibly other statutes that are outside the scope of the Ethics Commission's jurisdiction.

The Ethics Commission also explained that R.C. 102.03 would prohibit an official or employee from deriving any definite and direct personal benefit from the donation. Adv. Op. No. 90-002. The gifts and grants in the situation you have described are provided to the Office and Commission, which may use them to perform any of their statutorily assigned duties. You have explained that the Office and Commission may use the gifts and grants to conduct additional meetings. While the Commission members are entitled to compensation from those additional meetings, the purpose of conducting the meetings is to enable the Commission to perform duties it cannot perform under its current budget, and not to provide additional compensation to its members. Therefore, R.C. 102.03(D) and (E) do not prohibit the Commission and Office from soliciting or accepting gifts and grants to the Commission and Office, pursuant to its statutory authority, from parties that are doing or seeking to do business with, regulated by, or interested in matters before the Commission or Office, in the situation you have described.

Finally, the Ethics Commission has cautioned that there could be specific instances where gifts or grants to a public agency would create the appearance of impropriety. Adv. Op. No. 89-002. For example, parties should refrain from making gifts or grants, and the Commission and Office should refrain from soliciting or accepting such gifts or grants, in instances where a specific matter is pending before the Commission or Office involving the source of the money, or where the Commission or Office could reasonably foresee that an action will come before the Commission. The Commission and Office will have to be vigilant in monitoring and controlling against the subtle influence that can result from gifts and grants.

Conclusion

As explained above, the Commission and Office are not prohibited from soliciting and receiving grants and gifts to raise funds that the Commission would use to conduct additional meetings and perform additional services that it cannot fund under the current state budget.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on May 18, 2004. The Commission commends you for requesting guidance before taking any actions that could be prohibited by law.

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,



John Rawski
Staff Attorney