

OHIO ETHICS COMMISSION

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Advisory Opinion Number 2002-03
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Syllabus by the Commission:

- (1) The Ohio Ethics Law does not restrict ordinary campaign contributions given to an elected state officer;
- (2) Where there is evidence of wrongdoing as set forth in Division (G) of Section 102.03 of the Revised Code in connection with a campaign contribution to an elected state officer, and a nexus exists between the public office and the contributor, the conflict of interest protections set forth in Divisions (D), (E), and (F) of Section 102.03 of the Revised Code will apply;
- (3) A nexus exists between an elected state officer and a person making a contribution if the contributor is doing or seeking to do business with, regulated by, or interested in matters pending before, the state office he holds, as described herein;
- (4) Where a person serves simultaneously as an elected state officer, with authority to distribute public funds or enter into contracts, and as a significant local political party official, the potential for a prohibited conflict of interest is heightened because of the duality of roles and responsibilities.

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In this opinion, the Ohio Ethics Commission first considers whether the Ethics Law applies when an elected state officer, who also serves as a significant local political party official, solicits or accepts a campaign contribution from a person that is doing or seeking to do business with, regulated by, or interested in matters before, the public office the official serves. This appears to be the first time the question has been considered, either by the Ethics Commission or by the other two state appropriate ethics commissions with authority under Revised Code Chapter 102. See R.C. 102.01(F) (Joint Legislative Ethics Committee and Board of Commissioners on Grievances and Discipline of the Supreme Court). The Commission issues this opinion as a part of its ongoing responsibility to provide advice and guidance regarding issues of public concern that are within its jurisdiction.

Brief Answer

As described more fully below, the Ethics Law does not restrict ordinary campaign contributions given to a public official. The Ethics Law, as amended in 1986, however, expressly restricts campaign contributions to a public official where evidence of wrongdoing as described by law is present.

Where there is evidence of wrongdoing as set forth in R.C. 102.03(G), in connection with a campaign contribution to an elected state officer, and a nexus exists between the officer and the contributor, the conflict of interest protections set forth in R.C. 102.03(D), (E), and (F) will apply to the parties to the contribution. A nexus exists between an elected state officer and a person making a contribution if the contributor is doing or seeking to do business with, regulated by, or interested in matters pending before, the state office he holds.

Where a person serves simultaneously as an elected state officer, with authority to distribute public funds or enter into contracts, and as a significant local political party official, the potential for conflict of interest is heightened because of the duality of roles and responsibilities. Because a state officer who is also serving as a local political party official may be unable to avoid a conflict of interest, the Ohio Ethics Commission recommends that state officers with such authority decline to serve as local party officials.

1986 Amendment to Ohio Ethics Law-Am. Sub. H.B. 300

The Ohio Ethics Law was significantly amended in Am. Sub. H. B. 300, enacted by the 116th General Assembly and effective September 17, 1986. In the preface to the Act, the General Assembly explained the purpose of the omnibus revisions in Am. Sub. H.B. 300:

[T]o restrict the circumstances under which candidates and others may use their campaign funds for personal and business use, to restrict the circumstances under which candidates and others may accept funds for personal and business use from other campaign committees, political action committees, and political parties, to make other changes in the Campaign Finance Law, to extend bribery and other prohibitions against public officials and employees using their position for personal gain, to protect employees who report violations of laws or rules or misuse of public resources and to extend the respective jurisdictions of the Ohio Elections Commission, the Ohio Ethics Commission, the House and Senate Legislative Ethics Committees, and the Board of Commissioners on Grievances and Discipline of the Supreme Court to include such matters.

Within the Ethics Law, Am. Sub. H.B. 300 extended the definition of "anything of value," for purposes of the conflict of interest provisions to include "contributions," as defined for purposes of the Elections Law. As amended, R.C. 102.01(G) provides: "'Anything of value' has the same meaning as provided in section 1.03 of the Revised Code and includes . . . a contribution as defined in section 3517.01 of the Revised Code." (Emphasis added.)

The term "contribution," as defined in R.C. 3517.01(B)(5), is:

"Contribution" means a loan, gift, deposit, forgiveness of indebtedness, donation, advance, payment, transfer of funds or transfer of anything of value including a transfer

of funds from an inter vivos or testamentary trust or decedent's estate, and the payment by any person other than the person to whom the services are rendered for the personal services of another person, which contribution is made, received, or used for the purpose of influencing the results of an election. "Contribution" does not include:

- (a) Services provided without compensation by individuals volunteering a portion or all of their time on behalf of a person;
- (b) Ordinary home hospitality;
- (c) The personal expenses of a volunteer paid for by that volunteer campaign worker;
- (d) Any gift given to a state or county political party pursuant to section 3517.101 [3517.10.1] of the Revised Code. As used in division (B)(5)(d) of this section, "political party" means only a major political party.

Am. Sub. H.B. 300 expanded the prohibitions against the coercion of campaign contributions. R.C. 2921.43(C). The bill also extended the Ethics Commission's jurisdiction to include issues arising under R.C. 2921.43. R.C. 102.06 and 102.08.

R.C. 102.03(G)-Campaign Contribution Exception

Am. Sub. H.B. 300 also amended the conflict of interest restrictions in R.C. 102.03, and enacted R.C. 102.03(G), which provides an exception to the conflict of interest restrictions:

In the absence of bribery or another offense under the Revised Code or a purpose to defraud, contributions made to a campaign committee, political party, legislative campaign fund, political action committee, or political contributing entity on behalf of an elected public officer or other public official or employee who seeks elective office shall be considered to accrue ordinarily to the public official or employee for the purposes of divisions (D), (E), and (F) of this section. (Emphasis added.)

The amendment to the definition of "anything of value" in R.C. 102.01(G) to include campaign contributions, and the enactment of R.C. 102.03(G) and 2921.43(C), as parts of an omnibus revision of ethics and elections statutes in Am. Sub. H.B. 300, make clear that the General Assembly intended for the Ohio Ethics Law and its related statutes to restrict select and limited campaign finance activity where types of conduct involving conflicts of interest are present. Further, it is clear that the General Assembly intended that the authority of the three ethics agencies, extended in Am. Sub. H.B. 300, include limited campaign finance issues regulated by R.C. 102.03(G) and 2921.43(C). See R.C. 102.08.

Application of Ethics Law to Campaign Contributions-R.C. 102.03(G)

R.C. 102.03(G) provides a clear exception to the general Conflict of Interest restrictions in the Ethics Law contained within three interrelated statutory sections of R.C. 102.03(D), (E), and (F), which provide:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of

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.

(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.

Generally, R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting, accepting, or using his position to secure anything of value of a substantial nature, if the thing of value is provided by a source that is doing or seeking to do business with, interested in matters before, or regulated by, the agency that the official serves. Ohio Ethics Commission Advisory Opinions No. 95-001 and 2001-03. See also *State v. Lordi*, 140 Ohio App.3d 561, 569 (2000), discretionary appeal not allowed, 91 Ohio St.3d 1523; 91 Ohio St.3d 1526 (2001) (involving a county commissioner convicted of a violation of R.C. 102.03(E) for concurrently discussing public business and soliciting private business from a township seeking road improvement funds from the county). R.C. 102.03(F), in turn, prohibits any person, including an individual or corporation, that is doing or seeking to do business with, interested in matters before, or regulated by a governmental entity, from promising or giving anything of a substantial nature to a public official or employee connected with the entity. Adv. Op. No. 90 001.

R.C. 102.03(G) provides that a contribution will ordinarily accrue to a public official "in the absence of bribery or another offense under the Revised Code or a purpose to defraud." The language in the exception set forth in R.C. 102.03(G) makes clear the General Assembly's intention that most contributions, regardless of any ties between the public official and the contributor, "ordinarily accrue" to the official who received them, and are not subject to Ethics oversight. However, when wrongdoing of the kind described in R.C. 102.03(G) is specifically present in connection with a contribution, the contribution does not ordinarily accrue to the official, and the exception set forth in R.C. 102.03(G) does not apply. In that case, the contribution comes within the conflict of interest law and presents a potential impropriety under the Ethics Law if the contribution was also solicited or received by a public official from a contributor that is doing or seeking to do business with, directly regulated by, or interested in matters before, the official's public agency.

In order to understand the application of the conflict of interest provisions if a public official also serves as a local political party official, it is necessary to examine the first clause in R.C. 102.03(G). As stated above, R.C. 102.03(G) applies in the absence of specific wrongdoing, i.e., "bribery or another offense under the Revised Code or a purpose to defraud."

Bribery

"Bribery" is an offense set forth in R.C. 2921.02:

(A) No person, with purpose to corrupt a public servant or party official, or improperly to influence him with respect to the discharge of his duty, whether before or after he is elected, appointed, qualified, employed, summoned, or sworn, shall promise, offer, or give any valuable thing or valuable benefit.

(B) No person, either before or after he is elected, appointed, qualified, employed, summoned, or sworn as a public servant or party official, shall knowingly solicit or accept for himself or another person any valuable thing or valuable benefit to corrupt or improperly influence him or another public servant or party official with respect to the discharge of his or the other public servant's or party official's duty.

R.C. 2921.02, a felony of the third degree, was first codified in 1974, as part of the overall codification of the criminal code in Ohio. For purposes of R.C. 2921.02, "valuable thing or valuable benefit" includes, but is not limited to, a contribution. R.C. 2921.01(G). There is also a specific election-related bribery statute set forth in R.C. 3599.01.

It is not necessary, in order for a violation of R.C. 2921.02 to occur, that the public servant or party official personally receives or benefits from a valuable thing or benefit he solicits or accepts. For example, an elected state officer who is also a local party official is prohibited from soliciting a campaign contribution for himself, or any candidate, political party, or campaign committee, when the contribution will corrupt or improperly influence him or any other public servant or party official in the performance of that public servant's or local party official's duties. This prohibition applies regardless of whether the campaign contribution ultimately benefits the elected state officer or passes to his or any other campaign committee.

Another Offense Under the Revised Code

R.C. 2901.02(A) provides that, as used in the Revised Code:

Offenses include aggravated murder, murder, felonies of the first, second, third, fourth, and fifth degree, misdemeanors of the first, second, third, and fourth degree, minor misdemeanors, and offenses not specifically classified.

Further, R.C. 2901.03(B) provides:

An offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to meet such duty.

Therefore, an offense exists where there is a violation of a statutory provision and where the provision is classified as a felony, misdemeanor, or minor misdemeanor. However, the Ohio Supreme Court has also recognized the existence of a criminal offense where a penalty of more than \$100 is imposed for violation of a statutory provision and where the provision is not classified as a felony, misdemeanor, or minor misdemeanor. *State v. Tipka*, 12 Ohio St.3d 253 (1984). An offense can be present even where the person connected with the offense has not been convicted of a violation of the law. See *Clinton v. Leis*, 56 Ohio App.2d 30, 32 (1977) (The

word 'offense' "means the conduct constituting a violation of law, and not a conviction of that violation.").

There are a number of provisions set forth in the Revised Code that state a positive prohibition, and provide a penalty, which could be "another offense" for purposes of R.C. 102.03(G). Examples of other offenses include: R.C. 2921.13 (falsification), R.C. 3517.13(F) (prohibits cash contributions of over one hundred dollars in each election), R.C. 3517.13(G) (concealing or misrepresenting campaign contributions), R.C. 3517.13(I) and (J) (prohibits awarding of unbid government contracts over \$1000 to a contributor), R.C. 3517.13(W) (prohibits candidates from soliciting or accepting contributions from foreign nationals), and R.C. 3599.03 (prohibits, with certain exceptions, corporations and labor unions from aiding any candidate, party, political action committee, legislative campaign fund, or organization that supports or opposes such candidate).

Purpose to Defraud

The phrase "purpose to defraud" is not defined in the Ohio Revised Code. However, both "purpose" and "defraud" are defined in the Revised Code for their use in the criminal code, Title 29. Because R.C. 102.03 has criminal sanctions, it is helpful to examine the definitions set forth in Chapter 2921., for guidance as to the meaning of those words when used in R.C. 102.03(G).

"Purpose," as defined in R.C. 2901.22, requires an intention to cause a certain result or to engage in conduct that will cause that result. R.C. 2901.022(A). R.C. 2913.01(B) provides that "'defraud' means to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another." "Deception" is defined in R.C. 2913.01(A) as:

[K]nowingly deceiving another or causing another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.

Therefore, a "purpose to defraud" is the intention to engage in, or engaging in, conduct to knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another. See also *State v. Hedrick*, 92 Ohio App.3d 618, 621-623 (1994).

Examples of offenses in the Revised Code that incorporate the notion of a purpose to defraud include R.C. 3517.10(C) (failure to file, late filing, or filing incomplete or inaccurate statement of contributions or expenditures), R.C. 3517.13(A), (B), (C), (D), (E), and (V) (failure to file, late filing, or filing incomplete or inaccurate campaign finance report), and R.C. 3599.02 (bribery concerning voters or potential voters). However, it is important to note that where a "purpose to defraud" is present, in and of itself, there is no requirement in the specific language of R.C. 102.03(G) that it must be accompanied by any other elements of any criminal offense.

Summary

R.C. 102.03(G) clearly establishes that the Ethics Law does not limit ordinary campaign contributions given to a public official. A contribution given to a public official "ordinarily accrues" to the official, and is not a violation of the Ethics Law, unless there is specific wrongdoing-bribery, another offense under the Revised Code, or a purpose to defraud-in connection with the contribution.

However, where there is evidence of wrongdoing, the contribution does not ordinarily accrue to the official, and the exception as defined in R.C. 102.03(G) does not apply. In such a case, R.C. 102.03(D) and (E) would prohibit the elected officer, who is also a local party official, from soliciting, accepting, or using his position to secure anything of value, including campaign contributions, from a person that is doing or seeking to do business with, interested in matters before, or regulated by the public agency he serves. The prohibition applies regardless of whether the contribution solicited is made to the elected official's own campaign fund, or to the campaign fund of another elected official or candidate. Further, the contributor is also subject to R.C. 102.03(F), which prohibits any person from promising or giving anything of value, including a campaign contribution, to a public official, if the contributor is doing or seeking to do business with, interested in matters before, or regulated by, the official.

Where one person serves both as an elected state officer, with authority to distribute public funds or enter into contracts using state money, and as a significant local party official, the duality of roles expands the person's umbrella of influence and widens the pool of potential contributors. With respect to contributors that have a nexus to the state office he held, because they are doing or seeking to do business with the office, interested in matters pending before the office, or regulated by the office, the respective responsibilities of the two roles inherently collide. This conflict in roles heightens the likelihood that the elected state officer will fail to properly and independently administer his respective duties, particularly involving contributors who have any tie to the state officer or his office.

By its enactment of Am. Sub. H.B. 300, and specifically R.C. 102.03(G), in 1986, the General Assembly evidenced its intent that provisions protecting against conflicts of interest have application to an elected state office holder who also acts in another role as an active local political party official and solicits a contribution from any person with a nexus to the state office held. Because a state officer who is also serving as a local political party official may be unable to avoid a conflict of interest, the Ohio Ethics Commission recommends that state officers with such authority decline to serve as local party officials.

This advisory opinion is based on the analysis and direction of the Commission. 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 opinion of the Ohio Ethics Commission that: (1) The Ohio Ethics Law does not restrict ordinary campaign contributions given to an elected state officer; (2) Where there is specific and verifiable evidence of wrongdoing as set forth in Division (G) of Section 102.03 of the Revised Code in connection with a campaign contribution to an elected state officer, and there is a nexus between the officer and the contributor, the conflict of interest protections set forth in Divisions (D), (E), and (F) of Section 102.03 of the Revised Code will apply to the parties to the contribution; (3) A nexus exists between an elected state officer and a person making a contribution to the officer if the contributor is doing or seeking to do business with, regulated by, or interested in matters pending before, the state office he holds, as described herein; and (4) Where a person serves simultaneously as an elected state officer, with authority to distribute public funds or enter into contracts, and as a significant local political party official, the potential for conflict of interest is heightened because of the duality of roles and responsibilities.


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