

OHIO ETHICS COMMISSION

Merom Brachman
Commission Chair

David E. Freel
Executive Director



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

Website: <http://www.ethics.state.oh.us>

August 11, 2000

Informal Opinion 2000-INF-0811

The Honorable Charles F. Horn
Ohio Senator, 6th District
Senate Office Building
Columbus, Ohio 43215

Dear Senator Horn:

In a letter received by the Ethics Commission on May 5, 2000, you asked whether the Ethics Law and related statutes would prohibit you from participating as an investor in a tax credit program while sitting as an appointed member of the Industrial Technology and Enterprise Advisory Council (ITEAC). You explain that a three-person committee established by the ITEAC makes the final determination as to whether an investor is approved for the tax credit under the conditions set forth in the applicable statute. You also stated, in a telephone conversation, that the company in which you may wish to make an investment has already been approved by the ITEAC as a qualified trade or business that may receive investments that would be subject to the tax credit issued by the ITEAC.

Opinion Summary

As discussed more fully below, you are prohibited from receiving a tax credit from the ITEAC for any investment that you place in a company after that company was approved by the ITEAC to receive investments subject to such a tax credit. You are not prohibited from receiving a tax credit from the ITEAC for any investment that you place in a company that was approved by the ITEAC after you invested in that company, or that was approved by the ITEAC before you became a member of the ITEAC, so long as you do not use the authority or influence of your position, in any way, to secure any definite and direct personal financial benefit from your participation in the tax credit program. For instance, you are prohibited from using your position on the ITEAC to influence the decision of the members of the ITEAC with respect to your application for a tax credit, or from taking advantage of your unique access to the committee or to the ITEAC generally, in any way and at any stage of the committee's or the ITEAC's decision-making process, to secure any greater or particular benefit or privilege for yourself or for a company in which you invest funds.

Facts

In your letter to the Commission, you state that you are an appointed member of the ITEAC. You further state that you desire to become an investor in a "qualified trade or business" and to

The Honorable Charles F. Horn
August 11, 2000
Page 2

therefore become eligible for a tax credit. You explain that, pursuant to Ohio Revised Code Sections 122.15 through 122.154, investors in businesses that are designated as a "qualified trade or business" may apply to an Edison center for a tax credit under Section 122.151. If the Edison center determines that the investor should be recommended for a tax credit, it notifies the ITEAC of its determination. A three-person committee established by the ITEAC makes the final determination as to whether an investor is approved for the tax credit under the conditions set forth in the statute.

You state that you do not sit on the three-person committee that determines if an investor should be approved for the tax credit. You also state that you would not participate in any of the decisions regarding a company in which you intended to invest. In a telephone conversation, you explained that the company in which you may invest has already been approved by the ITEAC to receive investments subject to the tax credit. Based on the information that you have presented to the Commission, you ask whether the Ethics Law and related statutes would prohibit you from participating in the tax credit program while sitting as an appointed member of the ITEAC.

Before directly addressing the question that you have presented to the Commission, it should be noted that the Ethics Commission does not have jurisdiction over you in your capacity as a member of the general assembly. See R.C. 102.01(F)(1) (the joint legislative ethics committee has jurisdiction over members of the general assembly). The question remains, however, whether you, as a member of the ITEAC, are a "public official or employee" within the definition of R.C. 102.01(B), and therefore subject to the prohibitions contained in R.C. 102.03. In order to answer this question, it is necessary to examine the statutorily prescribed powers of the ITEAC.

"Public Official or Employee"—R.C. 102.01(B) and (C)

For purposes of Chapter 102. of the Revised Code, "public official or employee" is defined as "any person who is elected or appointed to an office or is an employee of any public agency." R.C. 102.01(B). As used in the definition of "public official or employee," "public agency" includes the general assembly, all courts, any department, division, institution, board commission, authority, bureau or other instrumentality of the state. R.C. 102.01(C). "Public agency" does not include a department, division, institution, board, commission, authority, or other instrumentality of the state that functions exclusively for cultural, educational, historical humanitarian, advisory, or research purposes, that does not expend more than ten thousand dollars per calendar year, excluding salaries and wages of employees, and whose members are uncompensated. Id. The question at this juncture is whether the ITEAC is a "public agency."

Powers and Duties of the ITEAC

As stated above, the ITEAC is a "public agency" as defined by R.C. 102.01(C) if it is an instrumentality of the state that does not function exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes.

R.C. 122.30 provides that the ITEAC is vested with the powers and duties set forth in sections 122.28 to 122.36 of the Revised Code "to promote the welfare of the people of the state through the interaction of the business and industrial community and educational institutions in the development of new technology and enterprise." A review of the specific powers and duties of the ITEAC as set forth in R.C. 122.30 would seem to indicate that the ITEAC is an instrumentality of the state which engages in strictly advisory functions. Based on a review of other statutory provisions, however, the ITEAC has powers not mentioned in R.C. 122.30.

In particular, the ITEAC has powers with respect to the tax credit program involving small, Ohio-based research and development and technology transfer companies and investors of those companies. Under this program, an investor who proposes to make an investment of money in an Ohio entity may apply to an Edison center for a tax credit under R.C. 122.151. In order to qualify for the tax credit, the investment must be made in a "qualified trade or business," as defined by R.C. 122.15(C). Further, eight other requirements, as enumerated in R.C. 122.151(A), must be met.

The statutory provisions which describe the powers and duties of the ITEAC with respect to the tax credit program demonstrate that the ITEAC performs functions that are not exclusively advisory in nature. For instance, the ITEAC issues a tax credit certificate under R.C. 122.152 if the ITEAC is satisfied that an investor has made an investment in the proper form. The Director of Development may disapprove a credit for which a tax credit certificate has been issued under R.C. 122.152, if the director determines that the entity in which the applicant proposes to invest or has invested is not an Ohio entity eligible to receive investments that qualify for the credit. Therefore, while the director reviews the ITEAC committee's determination of whether an entity in which an applicant proposes to invest or has invested is an Ohio entity eligible to receive investments that qualify for the credit, the director does not review the ITEAC's decision to issue a tax credit certificate to an investor. Therefore, with respect to at least this one statutorily-prescribed duty, the ITEAC performs a function that is not advisory. In addition, the three-member committee composed of members of the ITEAC, and established by the ITEAC, performs many functions that are not exclusively advisory in nature. See R.C. 122.151(A) and 122.154. Because the ITEAC is an instrumentality of the state that does not function exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes, the ITEAC is a "public agency" as defined by R.C. 102.01(C).

Appointed to an Office

The question becomes whether the individual members of the ITEAC are appointed to an office of a public agency. Pursuant to R.C. 122.29(B), the ITEAC consists of seven members appointed by the governor with the advice and consent of the senate, one member of the senate appointed by the president of the senate, and one member of the house of representatives appointed by the speaker of the house of representatives.

In Advisory Opinion No. 74-007, the Ethics Commission reviewed existing case law and recognized factors that established a test to determine whether one is "appointed to an office"; which were, whether the person: (1) is appointed; (2) has a title; (3) exercises a function of government concerning the public; and (4) is not subject to a contract of employment. The Ethics Commission modified this test in Advisory Opinion No. 75-004 when it determined that whether the person exercises the "sovereign power" of government, as explained in case law, is an additional and essential criterion for determining whether one is "appointed to an office."

The Commission explained "sovereign power" in Advisory Opinion No. 75-004:

The concept of sovereign power originates with the idea that the office is created by public authority, be it executive order, the Constitution or some statute. Furthermore, it has been held that "if a man is placed in a position which is continuous and permanent and has certain powers which, under the law, only he can exercise; then he has sovereign power delegated to him." Shaw v. Jones, 40 O.N.P. 372 (1897).

The Commission quoted from the Ohio Supreme Court case of State ex rel. Landis v. Butler, 95 Ohio St. 157 (1917), in the following explanation of the concept of "sovereign power" in Advisory Opinion No. 85-005:

If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with the independent power in the disposition of public property or with the power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.

The Commission emphasized that no one of the indicia controls and combinations of factors will determine whether a person is deemed to hold an office. See Adv. Op. No. 75-004.

The issue becomes whether the ITEAC exercises "sovereign power." As described above, the ITEAC has several duties with respect to the administration and implementation of the tax credit program. In particular, based on the language of R.C. 122.152, the ITEAC has discretionary authority to issue a tax credit certificate to investors. This discretionary authority is not reviewed by the Director of Development or any other individual or entity. Furthermore, the ITEAC's issuance of a tax credit reduces the state's tax revenue and thus has an impact on the amount of state resources that are available for distribution. Finally, in determining whether an individual has made an investment in the proper form, the ITEAC makes a decision in a situation where the public is required to act through a governmental body in receiving a tax credit. Therefore, based on the final, discretionary, decision-making authority of the ITEAC in a matter in which it has been statutorily empowered to render a decision that affects the state tax revenue,

the ITEAC exercises sovereign power, and, accordingly, a member of the ITEAC is appointed to an office of an instrumentality of the state for purposes of R.C. 102.01(B), and is subject to the provisions of R.C. Chapter 102.

Securing, Soliciting, or Accepting a Tax Credit—R.C. 102.03(D) and (E)

As a public official subject to the provisions of R.C. Chapter 102., you are bound by R.C. 102.03(D) and (E), which provide the following:

- (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.

The term "anything of value" has been defined, for purposes of R.C. 102.03(D), to include money, goods, and any other thing of value. R.C. 1.03; R.C. 102.01(G). A tax credit received by an investor of a qualified business would reduce the amount of state tax imposed on that investor and would thus fall within the definition of anything of value. See Adv. Op. No. 89-008.

Generally, R.C. 102.03(D) and (E) prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his public office or employment to secure anything of value, either for himself, or for another party, where the thing of value could impair his objectivity and independence of judgment with respect to his official actions and decisions for the agency that he serves. Adv. Ops. No. 87-009, 88-005, 92-009, and 92-019.

The Ethics Commission has held that R.C. 102.03(D) prohibits a public official from using the authority or influence of his office to secure a definite and direct thing of value for himself, or for another person, business, or entity, if the relationship between the official and that person, business, or entity, is such that the official's objectivity or independence of judgment could be impaired with regard to matters that affect the financial interests of that person, business, or entity. Adv. Ops. No. 88-004, 89-015, and 90-007. Whenever such a relationship exists, the Commission has concluded that the definite and direct thing of value that is secured for the person, business, or entity will manifest a substantial and improper influence upon the official with respect to his duties. Adv. Ops. No. 89-016 and 90-004. See also Adv. Op. No. 93-003 (identifying familial, economic, or fiduciary relationships that may manifest a substantial and improper influence upon a public official or employee).

R.C. 102.03(E) prohibits a public official or employee from merely accepting or soliciting a similar thing of value that could impair his objectivity or independence of judgment. For example, a public official is prohibited from receiving a definite and direct personal financial benefit from any matter pending before his agency, regardless of whether he has used the authority or influence of his position to secure the financial benefit. Adv. Op. No. 90-008. In some situations, the Commission has determined that the conflicts between a public official's private employment or interests and his public position are so compelling and unavoidable that R.C. 102.03(D) and (E) prohibit the public official from holding both the public position and pursuing his private business interests. Adv. Ops. No. 92-008 (a township clerk is prohibited from also holding employment with a bank that is a depository of township funds) and 92-009 (the executive director of the State Barber Board is prohibited from owning and operating a barber shop).

As stated above, the ITEAC issues tax credit certificates to investors who meet certain criteria. You state that you are interested in investing in a business that has been approved by the ITEAC to receive investments subject to the tax credit. The issue is whether the tax credit that you would receive as an investor in such a qualified business is of such a character as to manifest a substantial and improper influence upon you with respect to your duties as a member of the council that issues the tax credit certificate.

Accepting a Tax Credit Certificate Issued by the ITEAC

In the situation that you have described, the tax credit that the ITEAC provides is a uniform benefit that is available to any person who invests in a qualified business. Each investor would receive a tax credit in an amount equal to twenty-five percent of his or her investment. See R.C. 122.152(A). However, by virtue of your position on the ITEAC, and based on the sophisticated nature of the tax credit program, you have access to a greater volume of information pertaining to businesses that would be approved to receive investments subject to the tax credit while you are a member of the ITEAC. Although you have presented no information to suggest you have done so, a person in your position could acquire information pertaining to businesses that apply for approval to receive investments subject to the tax credit, and use the acquired information to determine the level of your investment. If you were to receive a tax credit for an investment that you place in a business after the business was approved by the ITEAC, the Commission concludes that you would be accepting a personal financial benefit that could manifest a substantial and improper influence upon you with respect to the performance of your public duties.

Therefore, R.C. 102.03(E) prohibits you from accepting a tax credit from an investment in a business that you placed after the business was approved by the ITEAC to receive investments subject to a tax credit, unless the business was approved by the ITEAC before you became a member of the ITEAC. If the business in which you invest is approved by ITEAC after you place an investment in the business, or if it was approved by the ITEAC before you became a member of the ITEAC, then, subject to further discussion described below, the tax credit that you would receive from the ITEAC is not generally of such a character as to manifest

a substantial and improper influence upon you with respect to your duties such that you would be prohibited from applying for, and accepting, a tax credit. See generally Adv. Op. No. 93-007.

Participation in Decisions Involving the Provision of Tax Credits

The issue becomes whether you may participate in the ITEAC's decision affecting either your application for a tax credit or an application tendered by a business that desires to become eligible to receive investments subject to the tax credit.

In Advisory Opinion No. 89-008, the Ethics Commission stated that R.C. 102.03(D) prohibits a city council member from participating in the award of a tax abatement to his private outside employer. In that opinion, the Commission held:

An employer holds a position of power and authority over the hiring, compensation, discipline, and termination of its employees. A city council member who is in the position of making an official decision regarding the pecuniary interest of his private employer would have an inherent conflict of interest impairing the council member's objectivity and independence of judgment.

Id. Similarly, in Advisory Opinion No. 93-007, the Commission stated that R.C. 102.03(D) prohibits a member of the Ohio Tuition Trust Authority, who also participates in the Ohio Prepaid Tuition Program, from voting, discussing, deliberating, formally or informally lobbying, or otherwise using the authority or influence of his position in any way with respect to any matter that would have a definite and particular effect on his financial interests or the interests of his beneficiaries under the program.

The application of the restrictions of R.C. 102.03(D) and (E) are dependent upon the facts and circumstances of each situation. Adv. Ops. No. 85-006 and 88-004. Therefore, it is necessary to examine the facts and circumstances of the present situation in light of the restrictions of R.C. 102.03(D) and (E).

R.C. 102.03(D) prohibits you from using your authority or influence in any way to secure a tax credit and R.C. 102.03(E) prohibits you from accepting a tax credit if you used the authority or influence of your position in any way to obtain the tax credit. Therefore, in order to be able to accept a tax credit, you must be able to demonstrate that you did not use the authority or influence of your position in any way to secure it.

If you were to participate in the ITEAC's decision with respect to a business that applies to receive investments subject to the tax credit, R.C. 102.03(E) would prohibit you from accepting a tax credit for any investment that you would make in that business. See generally Adv. Op. No. 93-007. Therefore, if you are an investor in a business, R.C. 102.03(D) and (E) prohibit you from voting, discussing, making recommendations or deliberating about, formally or informally lobbying for, or participating in any other way with respect to any aspects of the

ITEAC's decision-making process with respect to that business. This is true even though you would not receive a tax credit until after a business is determined eligible to receive investments subject to the tax credit and after it is determined that your investment meets the requirements of R.C. 122.151(A) and is made in the proper form.

R.C. 102.03(D) also prohibits you from participating in any aspect of the decision-making process concerning your own application for a tax credit. R.C. 102.03(D) further prohibits you from using your position on the ITEAC to influence the decision of the three-person committee with respect to your application for a tax credit, or from taking advantage of your unique access to the committee or to the ITEAC generally, in any way and at any stage of the committee's or the ITEAC's decision-making process, to secure any greater or particular benefit or privilege for yourself or for a company in which you invest funds. Id.

Finally, R.C. 102.03(D) prohibits you from participating in both the ITEAC's review of whether your investment was made in the proper form and the ITEAC's issuance of a tax credit certificate to you under R.C. 122.152.

So long as you abstain from participation in all aspects of the ITEAC's decision-making process with respect to both (a) the qualified business in which you invest, and (b) your application for a tax credit, R.C. 102.03(E) does not prohibit you from accepting a tax credit issued by the ITEAC under R.C. 122.152 for an investment in a qualified business that was approved by the ITEAC to receive investments subject to such a tax credit after you placed your investment in the business or before you became a member of the ITEAC.

Conclusion

As discussed above, you are prohibited from receiving a tax credit from the ITEAC for any investment that you place in a company after that company was approved by the ITEAC to receive investments subject to such a tax credit. You are not prohibited from receiving a tax credit from the ITEAC for any investment that you place in a company that was approved by the ITEAC after you invested in that company, or that was approved by the ITEAC before you became a member of the ITEAC, so long as you do not use the authority or influence of your position, in any way, to secure any definite and direct personal financial benefit from your participation in the tax credit program. For instance, you are prohibited from using your position on the ITEAC to influence the decision of the members of the ITEAC with respect to your application for a tax credit, or from taking advantage of your unique access to the committee or to the ITEAC generally, in any way and at any stage of the committee's or the ITEAC's decision-making process, to secure any greater or particular benefit or privilege for yourself or for a company in which you invest funds.

R.C. 102.03(E) prohibits you from accepting anything of value that would manifest a substantial and improper influence on you with respect to your duties as a member of the ITEAC, including, but not limited to, a tax credit as an investor in a qualified business, if you used, or authorized the use of, the authority or influence of your position to secure the thing of value. Therefore, if you are an investor in a business whose investors may qualify for a tax credit, the

The Honorable Charles F. Horn
August 11, 2000
Page 9

Ethics Law requires that you abstain in any matters before the ITEAC pertaining to the qualified business in which you invested funds, and in any matters before the ITEAC pertaining to your application for a tax credit.

In closing, the Commission notes that, pursuant to R.C. 122.30, the purpose of the ITEAC is to "promote the welfare of the people of the state through the interaction of the business and industrial community and educational institutions in the development of new technology and enterprise." ITEAC fulfills this purpose by administering the award of tax credits to those citizens who have made monetary investments in the development of technology and enterprise, for the overall welfare of the State.

As fully described above, the Ethics Law does not absolutely prohibit a member of the ITEAC from receiving a tax credit from an investment in a qualified business that was placed before the business was approved to receive investments subject to a tax credit. However, in order to receive the benefit, the member would be required to abstain from participating in any matters that affect the qualifying business and the tax credit. This would mean that the citizens of the state would not be served by the full council whenever a council member, with unique access to information regarding the businesses that are applying for credits, considered investing in a business. It may be difficult for a member of the ITEAC to fully serve the objectives of the State if he becomes concerned with the pursuit of personal interests as an investor in the ITEAC's tax credit program, rather than with the pursuit of the overall welfare of the citizens of the State in the work of the ITEAC.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on August 11, 2000. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, 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,



David E. Freel
Executive Director

cc: Merom Brachman, Chair, Ohio Ethics Commission
Santiago Feliciano, Jr., Vice-Chair, Ohio Ethics Commission
Marlo Tannous, Chief Legal Counsel, Ohio Department of Development