

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

August 24, 2005

Informal Opinion 2005-INF-0824

Donald R. Thompson, Ph.D., Superintendent
Montgomery County Educational Service Center



Dear Dr. Thompson:

On February 17, 2005, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you are requesting guidance on behalf of the Montgomery County Educational Service Center (ESC) and the Mayor of the City of Dayton (City), The Honorable Rhine McLin.

You have explained that the ESC is fiscal agent for a program called Mentoring Collaborative (Collaborative), which is funded through a contract with the Montgomery County Commissioners. The program works with youth agencies in the county to recruit adult mentors for children served by the agencies. There are more than three thousand children who need mentors, but the agencies and Collaborative have been unable to identify enough mentors.

In order to recruit additional mentors, the ESC would like to employ Mayor McLin under a performance consultant contract to act as a recruiter for the Collaborative. The proposal is that the Mayor would talk with businesses, service clubs, and other groups to recruit mentors. Finally, you have stated that you, the ESC, and Mayor McLin do not wish to engage in the contract or any other action that would be a conflict of interest.

Brief Answer

As explained more fully below, the conflict of interest provisions in R.C. 102.03(D) and (E) prohibit the Mayor from entering into a consulting contract with the Collaborative because of the Mayor's authority regarding Montgomery County (which is the source of the Collaborative's funds).

Further, the honorarium provision in R.C. 102.03(H)(1) prohibits the Mayor from receiving compensation from any party for any speech given or personal appearance made. Therefore, the Mayor is prohibited from receiving any payment from the ESC, under its contract with the County, for performing the services you have described.

Conflict of Interest Restrictions—R.C. 102.03(D) and (E)

The conflict of interest provisions of the law would prohibit the Mayor from accepting compensation from the ESC under its contract with the County. R.C. 102.03(D) and (E) 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.

A city mayor is a "public official or employee" as that term is defined in R.C. 102.01(B) and (C) for purposes of the restrictions in Chapter 102. See Ohio Ethics Commission Advisory Opinion No. 91-008.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 1.03, 102.01(G); Adv. Ops. No. 82-002 and 89-003. Compensation received by a public official or employee from private business activity is a "thing of value" for purposes of R.C. 102.30(D) and (E). Adv. Op. No. 96-004.

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of her position to secure anything of value for herself, her family members or business associates, or others where there is a conflict of interest. Adv. Ops. No. 79-002, 80-004, and 89-006. R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting anything of value that would have an improper influence upon her with respect to her duties. Unlike R.C. 102.03(D), which prohibits a public official or employee from using the authority or influence of her office to secure a thing of value, R.C. 102.03(E) prohibits a public official or employee from merely soliciting or accepting an improper thing of value even if she does not use her official authority or influence to secure it. Adv. Op. No. 90-004. The application of both prohibitions to a specific situation is dependent upon the facts and circumstances. Adv. Op. No. 87-008.

The Ethics Commission has determined that the relationship between a public official or employee and the source of a thing of value determines whether the receipt of the thing of substantial value may improperly influence the public official or employee with respect to her official duties. Adv. Ops. No. 86-011 and 92-015. The Commission has explained that the receipt of a thing of substantial value will improperly influence a public official's or employee's objectivity and independence of judgment with regard to her official duties if she were to solicit or accept the thing of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with her own public agency. Adv. Op. No. 83-007.

Therefore, R.C. 102.03(E) prohibits a public official or employee from engaging in private employment or business activity with a party that is interested in matters before, regulated by, or doing or seeking to do business with the public agency she serves. In certain situations, a public official or employee who engages in private employment or business activity may be able to withdraw from consideration of matters as a public official or employee that could pose a conflict of interest. Adv. Ops. No. 89-006 and 89-010. However, some high-level public officials and employees are charged with unique authority from which they cannot withdraw. Adv. Op. No. 92-004. Because they cannot withdraw from the performance of their official duties, it is impossible for these officials and employees to pursue certain kinds of private activity.

In the situation you have described, there are many cooperative activities in which both the City of Dayton and Montgomery County participate in order to provide services to citizens in the community. In a brief search on the Internet, the Commission was able to identify a number of examples of the relationships between the City and the County. Both the City and the County participate in or partner with the Dayton Metropolitan Housing Authority, Dayton Area Chamber of Commerce, Dayton Development Council, Dayton Metropolitan Port Authority, Dayton Regional Hazardous Material Response Team, the Shelter Policy Board (which oversees homeless service networks in Montgomery County), and the Greater Dayton Information Technology Alliance. The City of Dayton Board of Building Appeals serves as the appeals body for Montgomery County's certified building inspection department. Finally, the Mayor has recently initiated TeamGov, in which the City will partner with the County and other regional governments to provide services such as law enforcement and waste management to area residents.

Further, the City receives financial support from the County. For example, at its July 26, 2005, meeting, the Montgomery County Commissioners approved the award of \$600,000 from the County's Economic Development and Government Equity Fund (ED/GE) to the City. The City will use the funds to assist three Dayton-area businesses to reconstruct and upgrade their facilities in order to retain and expand their workforces. The ultimate goal of the ED/GE funds is to promote local and regional development objectives.

These are just a few examples of the numerous relationships between the City and the County. Because of these relationships between the City and the County, the Mayor is prohibited from accepting anything of substantial value, including compensation for consulting services, from the County. While another City official might be able to fully withdraw from matters affecting the

County in order to accept outside employment compensation from the County, the Mayor, as the head of the executive branch of the City, is unable to fully withdraw from all of these matters.

Therefore, R.C. 102.03(D) and (E) prohibit the Mayor from accepting or soliciting any payments from the Montgomery ESC, under a contract with Montgomery County, to provide any services for the Collaborative.

Honorarium Prohibition—R.C. 102.03(H)(1)

R.C. 102.03(H)(1) is also applicable to your question. R.C. 102.03(H)(1) provides that “[n]o public official or employee . . . who is required to file a financial disclosure statement under section 102.02 of the Revised Code shall solicit or accept, and no person shall give to that public official or employee, an honorarium.” As noted above, a city mayor is a “public official or employee,” subject to the prohibitions of R.C. 102.03, including those in division (H)(1). R.C. 102.02(A) provides that all city mayors are required to file financial disclosure statements with the Ohio Ethics Commission. Therefore, the Mayor of Dayton is subject to R.C. 102.03(H)(1).

The word “honorarium” is defined as “any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or similar gathering.” R.C. 102.01(H). In your letter, you have explained that the ESC would like to engage the Mayor to speak to businesses, service clubs, and other groups in order to recruit for the Collaborative. Even though you have described the ESC’s contract with the Collaborative as a performance consultant contract, any payments made under the contract would be payments in consideration for speeches given or attendance at meetings or similar gatherings. Therefore, the payments are “honoraria” for purposes of the Ethics Law.

The Mayor’s desire to assist the Collaborative is commendable. While there is no prohibition against the Mayor volunteering to make speeches and attend group meetings promoting the mentoring program, R.C. 102.03(H)(1) and 102.03(D) and (E) prohibit the Mayor from accepting payments from the ESC, under its contract with the County, or from any other person, for providing these services.

Conclusion

As explained more fully above, the conflict of interest provisions in R.C. 102.03(D) and (E) prohibit the Mayor from entering into a consulting contract with the Collaborative because of the Mayor’s authority regarding Montgomery County (which is the source of the Collaborative’s funds).

Further, the honorarium provision in R.C. 102.03(H)(1) prohibits the Mayor from receiving compensation from any party for any speech given or personal appearance made. Therefore, the Mayor is prohibited from receiving any payment from the ESC, under its contract with the County, for performing the services you have described.

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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on August 11, 2005. The Commission commends you and the Mayor 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,

A handwritten signature in black ink, appearing to read "Jennifer A. Hardin". The signature is written in a cursive, flowing style with a large initial "J".

Jennifer A. Hardin
Chief Advisory Attorney