

OHIO ETHICS COMMISSION

Merom Brachman, *Chair*
Sarah M. Brown, *Vice Chair*



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.ohio.gov

David E. Freel, *Executive Director*

September 29, 2005

Informal Opinion 2005-INF-0929

J. Nick Baird, Director
Ohio Department of Health



Dear Director Baird:

In your letter to the Ohio Ethics Commission, you have asked whether the Ethics Law prohibits employees of the Ohio Department of Health (ODH) from serving as unpaid adjunct faculty members at state colleges or universities. ODH has a number of contracts and grants with the Ohio State University and may have contracts and grants with other state colleges and universities.

Brief Answer

As explained more fully below and within the constraints described, the Ohio Ethics Law does not prohibit an ODH employee from serving as an unpaid adjunct faculty member with a state college or university or from participating in contract or grant activity affecting a college or university for which he serves as an unpaid faculty member, as long as the ODH employee has not used his or her position with ODH in any improper way to secure the faculty position. However, as a matter of general practice whenever possible, it would be best for ODH to assign matters affecting a particular college or university to employees without any ties with the college or university.

Facts

You have explained that one of ODH's primary values is fostering partnerships with others interested in furthering the public's health. One partnership you have sought to strengthen, as Director of ODH, is with the School of Public Health at The Ohio State University (OSU-SPH), the only accredited school of public health in Ohio. You have explained that ODH has issued a number of grants and contracts to OSU-SPH to provide ODH with needed expertise.

In order to retain its accreditation, OSU-SPH is strongly encouraged to have senior health professionals teach, as adjunct professors, entire courses. ODH employees have an interest in holding these adjunct teacher positions, as well as adjunct professor positions at other state-supported colleges or universities in Ohio. If ODH employees can hold these adjunct professor positions, ODH benefits from the employees' interaction with other instructors and students, who may be ODH employees or partners in the future. Some of the senior staff employees who serve as adjunct faculty members are also involved with the grant/contract approval and administration process involving OSU-SPH and other state colleges and universities.

You have asked whether an ODH employee, who possesses the authority to affect ODH's future contract or grant relationships with a state college or university, is prohibited from serving as an unpaid adjunct faculty member with the college or university. The Commission has considered this question in past advisory opinions.

Compensated Employment

In Advisory Opinion No. 88-002, the Ethics Commission was asked whether the Deputy Director of the Office of Budget and Management (OBM), who acts as the President of the Controlling Board, was prohibited from also being an employee of a state university. The Commission considered the application of R.C. 102.03(D) and (E) to the question. R.C. 102.03(D) and (E) prohibits a public official or employee from soliciting, accepting, or using his position to secure anything of value if the thing of value could have a substantial and improper influence upon the official or employee with respect to the performance of his duties. Employment and compensation for employment are within the definition of "anything of value."

The Commission explained that state agencies, including state universities, are regulated by the Controlling Board, and may be interested in specific matters before the Board on a recurring basis. Further, the president of the Controlling Board is statutorily charged with considering and deciding matters affecting state agencies that come before the Board. The Controlling Board president must fulfill those duties objectively and impartially as to each state agency. Therefore, the Commission concluded that R.C. 102.03(D) and (E) prohibit a deputy director of OBM who serves as the President of the Controlling Board from accepting employment with the university, as well as from soliciting, or using his official authority or influence to secure such employment. Adv. Op. No. 88-002.

The conclusion in Advisory Opinion No. 88-002 is pertinent to ODH employees in the question you have raised. Employees of ODH with job duties and authority related to grant and contractual relationships with a state college or university are prohibited from accepting compensated employment with the college or university. Your question, however, does not involve compensated employment. Rather, you have asked whether ODH employees can serve as unpaid adjunct instructors.

Uncompensated Adjunct Faculty

In Advisory Opinion No. 88-002, the Commission concluded that R.C. 102.03(D) and (E) would not prohibit the deputy director of OBM who serves as President of the Controlling Board from serving with a university as an instructor if he received no compensation. The Commission explained that, if the deputy director were to receive no compensation or other thing of value for providing teaching services to the university, then R.C. 102.03 would not apply to such an arrangement. Further, no other provision of the Ethics Law would prohibit the deputy director from acting as an instructor at the university if he received no compensation or other benefits.

However, the Commission also noted R.C. 2921.42(A)(1), which provides that no public official shall:

Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

A state department employee is a public official for purposes of R.C. 2921.42(A)(1).

The Commission considered the application of R.C. 2921.42(A)(1) to the question of a department official serving as an instructor for a state university, and concluded:

If the deputy director were to serve as an instructor with [the University], the University would be considered his "business associate" for purposes of R.C. 2921.42, regardless of whether he received compensation. See generally Advisory Opinions No. 85-004 and 86-002. Therefore, he would be prohibited, as deputy director and President of the Controlling Board, from authorizing, or discussing, deliberating, or voting upon the authorization of, any public contract in which [the University] has an interest. (Emphasis added.)

Even though the Commission concluded that the Ethics Law did not prohibit an OBM official from serving as an unpaid instructor at a state university, the Commission determined that R.C. 2921.42(A)(1) prohibits the official from participating, in his OBM role, in the authorization of any public contract in which the university had an interest.

If Advisory Opinion No. 88-002 were applicable, any ODH employee who possesses the authority to affect ODH's future contract or grant relationships with a state college or university would be participating in contract or grant matters affecting any college or university for which he or she serves as an unpaid faculty member. If the employee could not withdraw from contract or grant matters affecting a particular college or university, he or she would be prohibited from serving as an unpaid adjunct faculty member with that college or university.

In its advisory opinions, the Commission has defined the term "business associate," which is used in R.C. 2921.42(A)(1). The Commission has explained that business associates are individuals or entities acting together to pursue a common business purpose. Adv. Ops. No. 85-004 and 86-002. Examples of business associates identified by the Ethics Commission include: (1) the employer of an employee or consultant; (2) a firm with which an agent or representative is affiliated; and (3) law partners and other business partners. Adv. Ops. No. 84-009, 84-013, and 85-004. In Advisory Opinion No. 86-002, the Commission quoted the definition of "associate," from Weir v. United States (7th Cir. 1937), 92 F.2d 634, 638:

In ordinary nomenclature it signifies, to connect closely or join with others in a common purpose, activity, or responsibility, to partake or share in a common design. It implies participation by each of the individuals, so united, in the achievement of a common purpose. In its general and ordinary sense it is said to signify confederacy or union for a particular purpose.

If such associates are conducting a common business enterprise, the prohibition of Division (A)(1) of Section 2921.42 of the Revised Code would apply.

However, in Advisory Opinion No. 93-003, the Ethics Commission was asked whether two school board members were "business associates," for purposes of R.C. 2921.42(A)(1), as a result of their mutual service on the school board. In that opinion, the Commission examined the definition of the term "business":

The term "business" is defined, in Black's Law Dictionary, as "[e]mployment, occupation, profession, or commercial activity engaged in for gain or livelihood" and "[a]ctivity or enterprise for gain, benefit, advantage or livelihood." Black's Law Dictionary 179 (5th ed. 1979).

The Commission concluded that, while a school board is engaged in the operation of the school district and the board members are associated with one another, the individual members of the school district are not associated with one another in a common business endeavor. Adv. Op. No. 93-003. The Commission concluded that the operation of a public entity is not the operation of a business, even though a public agency may engage in some of the same activities as a business, such as the ability to contract, to purchase and sell property, and to sue and be sued. However, a public agency is not a "business," in that it is not an occupation, profession, or commercial activity engaged in for gain, benefit, advantage, or livelihood. In Advisory Opinion No. 89-005, the Ethics Commission also noted that a labor union was not the business associate of a member of the union because a labor union is not engaged in a business. Adv. Op. No. 89-005.

By this same analysis, a public college or university is not ordinarily engaged in a business.¹ It is established to provide education to students matriculating at the college or university.

Therefore, under the facts you have presented, a state college or university is not a "business associate" of a person who serves as an adjunct faculty member of the college or university if the person does not receive any compensation or other benefit as a result of the service. R.C. 2921.42(A)(1) does not prohibit an ODH employee, who serves as an unpaid faculty member of a state college or university that has grant or contractual relationships with ODH, from participating, as an ODH employee, in matters that affect ODH contracts with the college or university.²

Please note that the conclusions in this opinion apply only to situations where the state employee receives no compensation, benefits, or other things of value, from the state college or university in return for his or her service as an adjunct faculty member. Also, it is assumed that the employee is not serving in a fiduciary position with the college or any collective bargaining union that represents faculty at the college. If a state employee were to be offered any compensation for his or her service to the college or university, or were to serve in a fiduciary position with the college or faculty collective bargaining union, R.C. 102.03(D) and (E), as discussed above, would apply to the state employee. Further, R.C. 102.03(D) would prohibit a state employee from using his or her position of authority over a state college or university, in any improper way, to secure a paid or unpaid faculty position with the college or university.

Therefore, the law does not prohibit ODH employees who serve as faculty members without compensation or benefits for state colleges or universities, and who have none of the fiduciary ties to the colleges or universities discussed above, from participating in ODH matters that affect those colleges and universities. However, as a matter of general practice whenever possible, it would best protect against any suggestion of improper action for ODH to assign matters affecting a particular college or university to ODH staff members who do not have any kind of tie with the college or university.

Conclusion

As explained more fully above, the Ohio Ethics Law does not prohibit an ODH employee from serving as an unpaid adjunct faculty member with a state college or university or from participating in contract or grant activity affecting a college or university for which he serves as an unpaid faculty member, as long as the ODH employee has not used his or her position with ODH in any improper way to secure the faculty position. However, as a matter of general practice whenever possible, it would be best for ODH to assign matters affecting a particular college or university to employees without any tie with the college or university.

¹ While a college or university is not primarily engaged in business, there may be some entities related to colleges and universities that are deemed to be engaging in business. For purposes of the facts presented here, it is unnecessary for the Commission to further consider this issue.

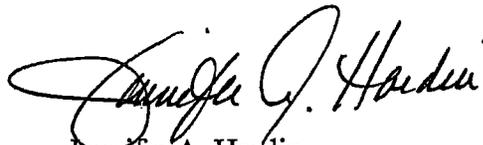
² In adopting this opinion, the Commission notes its conclusion, in Advisory Opinion No. 88-002, to the contrary.

J. Nick Baird
September 29, 2005
Page 6

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 19, 2005. The Commission commends ODH for requesting guidance on this matter.

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 fluid and cursive, with a large initial "J" and "H".

Jennifer A. Hardin
Chief Advisory Attorney