

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

April 21, 2008

Informal Opinion 2008-INF-0421-1

Kevin C. Shannon, Director of Law
Village of Groveport

Dear Mr. Shannon:

In your letter requesting an advisory opinion, you asked questions pertaining to the operation of the municipal golf course owned by the Village of Groveport (Village). You stated that, under the traditional system of golf course operation, the owner of a golf course hires a golf professional to serve as its Director of Golf (Golf Director) who is responsible for the care and operation of the course. In addition to the role of course manager, the Golf Director operates the pro shop as an independent contractor and provides individual golf lessons. You asked whether the Ethics Law prohibits the Golf Director from: (1) accepting compensation for providing private golf lessons to individuals using the Village course; and (2) operating and receiving profits from the operation of the pro shop as an independent contractor.

Brief Answer

As explained below, the Ethics Law does not prohibit the Golf Director, under the facts you have described, from receiving compensation from individuals for private golf lessons provided that: (1) the Golf Director does not exercise responsibilities in the operation of the golf course that could affect the financial interests of the individuals who are paying him or her for golf lessons; and (2) the employment relationship between the Village and the Golf Director does not formally or informally require, as an aspect of the job, that the Golf Director provide lessons to individuals using the course. Also, the Village must establish distinct mechanisms whereby the Golf Director accounts for his or her time and can demonstrate that he or she is working sufficient hours to fulfill the duties of that employment.

The Golf Director is prohibited from contracting with the Village to operate the pro shop as an independent contractor, unless he or she can meet an exception to the law. Within the facts you have described, it appears that the exception can be met.

Facts

You explain that the Village owns a golf course and is in the process of hiring a Golf Director. The Village would like to hire a person who is a qualified professional by the Professional Golfers' Association of America (PGA).

Under the traditional system of golf course operation, the proceeds derived from green fees and golf cart rentals are turned over to the owner of the course. The owner of the course leases space to the Golf Director for a pro shop. The Golf Director purchases the inventory for the shop, sells the merchandise, and retains the proceeds after paying for the operating costs. The Golf Director also charges individuals for golf lessons and retains the proceeds derived from this activity. Currently, the Village is not following the traditional model, and is having difficulty filling the Golf Director position with a qualified PGA professional.

The question involving the relationship between the Golf Director and the Village raises two issues under the Ethics Law and related statutes. The first is whether either the conflict of interest restriction in R.C. 102.03(E), or the supplemental compensation restriction in R.C. 2921.43(A)(1), prohibits the Golf Director from receiving compensation for golf lessons from individuals who are using the Village's course. The second is whether the public contract restriction in R.C. 2921.42(A)(4) prohibits the Golf Director from operating the pro shop as an independent contractor.

Receiving Compensation For Golf Lessons —R.C. 102.03(E) and R.C. 2921.42(A)(1)

The Village Golf Director is a "public employee" subject to R.C. 102.03(E), which provides:

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.

R.C. 102.01(B) and (C); Ohio Ethics Commission Advisory Opinions No. 92-013 and 92-006.

"Anything of value" includes money and every other thing of value. R.C. 1.03, 102.01(G); Adv. Ops. No. 82-002 and 89-003. The payments received by the Golf Director for providing golf lessons are things of value. See generally Adv. Op. No. 96-004.

A thing of value manifests a substantial and improper influence on a public official or employee if it could impair his or her objectivity and independence of judgment in matters affecting the source of the thing of value. Adv. Ops. No. 91-010 and 95-001. The Ethics Commission has explained that R.C. 102.03(E) prohibits a public official or employee from accepting or soliciting anything of a substantial nature, or the promise or offer of anything of a substantial nature, from a person that is doing or seeking to do business with, regulated by, or interested in matters before, the agency with which he or she serves. Adv. Ops. No. 91-010 and 95-001.

The cumulative value of the payments received by the Golf Director for providing golf lessons could be substantial. Individuals using the course, including those who may want private lessons, would pay for green fees and cart rentals. The proceeds derived from these fees are turned over to the Village. Thus, users of the course are "doing business with" the Village.

However, the determination of whether a thing of value could have a substantial and improper influence on a public employee in a particular situation depends on the facts and circumstances of that situation. Adv. Ops. No. 86-011 and 87-008. Unique and relevant facts in this situation include: (1) the traditional role of a Golf Director in the management of a golf course; (2) the desire of the Village to attract and retain a PGA professional in the Golf Director position; (3) the job description for the Golf Director position and any other employment expectations formally or informally communicated to him or her; and (4) the Golf Director's ability to affect the interests of patrons of the course who may also seek private golf lessons.

If the Village Council were to establish and fix the rates that customers pay for green fees and golf cart rentals, as well as other general administrative guidelines such as the days and hours of the course's operation, then the Golf Director would not exercise responsibilities in the operation of the course that could directly affect the financial interests of the individuals who are paying him or her for private golf lessons at the course. However, the formal and informal understanding between the Village and the Golf Director, as represented by the job description and any other expectations communicated to him or her, must establish clear and distinct mechanisms whereby the Golf Director accounts for his or her time and can demonstrate that he or she is working sufficient hours to fully perform the required duties of Golf Director before accepting private students. See Adv. Op. No. 96-004. In such a case, because the facts and circumstances indicate that the Golf Director does not exercise authority over the individual sources of the payments, R.C. 102.03(E) does not prohibit the Golf Director from offering golf lessons and accepting compensation for the lessons from individuals using the course.

Were the Golf Director to give preferential treatment to individuals who pay him or her for private golf lessons in any way, such as not charging them the usage fees established by the Village, these actions could be a violation of R.C. 102.03(E). R.C. 102.03(D), which prohibits a public official or employee from using his or her authority or influence to secure anything of value that manifests a substantial and improper influence upon him or her, may also be implicated.¹ The Village should implement internal accounting or auditing controls to assure that the Golf Director's private students are paying the fixed fees established by the Village for the use of the course and that the fees are being turned over to the Village.

¹ In Advisory Opinion No. 96-004, the Commission identified general guidelines regarding the private employment and business activities of public officials and employees, based on the restriction in R.C. 102.03(D). For example, the Commission explained that a public employee is prohibited from using public resources for private business purposes. The Commission reasoned that a public agency provides resources to its officials and employees for the performance of their public tasks and not for the official's or employee's personal financial gain or benefit.

R.C. 2921.43(A)(1), which prohibits soliciting or accepting improper compensation, is also applicable to this question. R.C. 2921.43(A)(1) states that no public servant shall solicit or accept:

Any compensation, other than as allowed by . . . provisions of law, to perform the public servant's 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

Provided that the employment understanding between the Village and the Golf Director, as reflected by the job description and any formal or informal communications, does not require the Golf Director to provide private golf lessons as part of the position as course manager, then the prohibition imposed by R.C. 2921.43(A)(1) would not apply.

The Village must clearly convey that, although the Golf Director is permitted to provide private golf lessons, he or she will not be in a position to exercise responsibilities in the operation of the course that could affect the financial interests of the customers who are paying for private lessons. See generally Adv. Op. No. 96-004. The following statement made by the Ethics Commission in Advisory Opinion No. 89-010 is pertinent:

An employee of [a public agency] owes his responsibility to the exercise of the public trust by performing the tasks assigned to him by his employing agency. This duty must not be impaired by a public employee's concern for his own personal interests. . . There may be instances where [an] agency is willing to accommodate the personal interests of its employees . . . [however, the] agency's determination whether such action is possible or desirable is a matter within the discretion of the affected agency.

Operating the Pro Shop—R.C. 2921.42(A)(4)

R.C. 2921.42(A)(4), regarding interests in public contracts, provides that no "public official," which would include a Village employee, shall knowingly:

Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which the public official is connected.

R.C. 2921.01(A). A "public contract" includes the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of a political subdivision. R.C. 2921.42(I)(1)(a). An agreement between the Village and any person to operate the pro shop is a "public contract."

² There are three specific exceptions to this provision, set forth in R.C. 102.03(G), (H), and (I). The exceptions apply to campaign contributions, honoraria, and travel expenses, and are not relevant to your question.

A public official will be prohibited from having an interest in a public contract if the interest is definite and direct, and either financial or fiduciary. Adv. Ops. No. 78-005, 81-008, and 86-002. A person with an ownership interest in a business has a definite and direct fiduciary and financial interest in the contracts of the business. Adv. Ops. No. 86-005 and 89-008.

As an operator of a pro shop, a Village Golf Director would have a definite and direct financial interest in the business. Therefore, R.C. 2921.42(A)(4) would prohibit the Golf Director from owning and operating the pro shop at the municipal golf course as an independent contractor of the municipality that employs him or her. However, R.C. 2921.42(C) sets forth a four-part exception to the prohibition in Division (A)(4). In order to meet the exception, the official must show that he or she meets all four requirements.

The application of each of the requirements depends on the facts and circumstances. Adv. Ops. No. 80-003 and 82-007. The burden is on the official to demonstrate that he or she is in compliance with the exception. Adv. Op. No. 84-011. The Commission has explained that the application of the (C) exception must be consistent with the underlying principle in R.C. 2921.42: “[A] public official should not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity.” *Id.* (Emphasis added).

R.C. 2921.42(C)(1) requires that the services provided by the Golf Director are necessary services for the operation of the Village golf course. This question is one for the Village to determine. Second, R.C. 2921.42(C)(2) requires that the subject of the public contract is “unobtainable elsewhere for the same or lower cost.” Adv. Op. No. 83-004. The Village and the Golf Director must be able to objectively demonstrate that the arrangement to engage the Golf Director as an independent contractor to operate the pro shop is the best or only alternative available to the Village for reaching its goals to: (1) operate the golf course for the highest financial return; and (2) attract the greatest number of customers. Because the Village wants to engage a PGA professional to act as Golf Director, the field of potential applicants is narrower than it would otherwise be.

Assuming that the Village determines that the individual it has engaged as Golf Director is the best or only alternative to operate the pro shop because of that person’s qualifications and familiarity with the golf course operations, facilities, and patrons, it must be clear that the job description and the contract fully describe the position and set forth the reasons why these factors are advantageous. For example, it must be clear that the Village requires a PGA professional to fill the position, and why the professional status is beneficial to the Village. In addition, the Commission has explained that in determining whether the exceptions of Division (C)(2) can be met, the political subdivision can take into consideration that necessary services should be “readily at hand.” Adv. Op. No. 84-006. All of these factors would aid the Village and Golf Director in demonstrating that the Village could not obtain the services the Golf Director provides from any other source for the same or lower cost, and therefore meeting the requirement of Division (C)(2).

The third requirement in the exception, contained in Division (C)(3), is that the treatment provided by the Golf Director to the Village is as good as or better than the services that he or she

would provide to other clients or customers. Finally, Division (C)(4) requires that the transaction be conducted at arm's length, that the Village has full knowledge of the Golf Director's interest in the contract, and that he or she takes no part in the deliberations and decisions to secure the contract from the Village to operate the pro shop.

If the Golf Director can show that he or she meets all four requirements of R.C. 2921.42(C), he or she would not be prohibited from entering into a contract with the Village to operate the pro shop at the Village's golf course.³ If the Golf Director cannot show that he or she meets all four requirements of the exception, R.C. 2921.42(A)(4) prohibits him or her from operating the pro shop as an independent contractor for the Village.

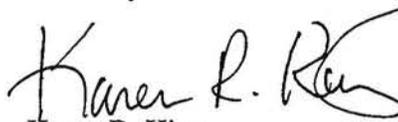
Conclusion

As explained above, the Ethics Law does not prohibit the Golf Director, under the facts you have described, from receiving compensation from individuals for private golf lessons provided that: (1) the Golf Director does not exercise responsibilities in the operation of the golf course that could affect the financial interests of the individuals who are paying him or her for golf lessons; and (2) the employment relationship between the Village and the Golf Director does not formally or informally require, as an aspect of the job, that the Golf Director provide lessons to individuals using the course. Also, the Village must establish distinct mechanisms whereby the Golf Director accounts for his or her time and can demonstrate that he or she is working sufficient hours to fulfill the duties of that employment.

The Golf Director is prohibited from contracting with the Village to operate the pro shop as an independent contractor, unless he or she can meet an exception to the law. Within the facts you have described, it appears that the exception can be met.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 11, 2008. 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,



Karen R. King
Advisory Staff Attorney

³You indicated that, customarily, a golf director operating a pro shop as an independent contractor receives free and discounted merchandise from golf equipment and apparel companies and vendor contributions to his or her PGA retirement accounts based on sales. Because the Golf Director is an employee of the Village, R.C. 102.03(E) prohibits him or her from accepting or soliciting these or any other things of substantial value from vendors. However, vendors are not prohibited from voluntarily donating merchandise to the Village for use at the course provided that no Village official or employee benefits personally from the donation. Adv. Op. No. 89-008.