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December 23, 2008

Informal Opinion 2008-INF-1223

Steve Wall
Ohio Department of Administrative Services

Dear Mr. Wall:

On October 16, 2008, the Ohio Ethics Commission received your request for an advisory opinion. Your questions involve the establishment of a 501(c) nonprofit organization to raise and disburse private funds in order to implement a Kaizen program for state government agencies. Kaizen is described as a method of continuous improvement designed to increase efficiency in governmental and other organizations. Funds raised by the nonprofit organization would be used to retain experts to manage Kaizen events and to train state employees to lead Kaizen events.

In your letter, you set forth three questions. First, you have asked whether the Ohio Ethics Law and related statutes prohibit state officials and employees from using state resources to establish the nonprofit organization. Second, you have asked whether the Ethics Laws and related statutes prohibit state officials and employees from serving as board members, or otherwise participating in the decision-making, of a newly established or existing nonprofit organization for that purpose. Finally, you have asked whether the Ethics Law either prohibits state officials and employees from soliciting contributions from individuals or entities to the nonprofit organization or sets any limits on which officials or employees can participate in these activities.

Summary of Opinion

As explained below, and in response to your questions:

(1) The Ethics Law and related statutes do not govern the ability of a state agency to establish a nonprofit organization, although general restrictions discussed below govern the operation and officials of such an organization;

(2) If a state agency creates or participates in a nonprofit organization, agency officials or employees are not prohibited from serving as directors of the nonprofit organization, or otherwise participating in the decision-making of the organization. However, as described in more detail, the state agency must: (a) Designate any official or employee serving as a director or otherwise working with the organization as a representative of the agency; (b) Formally instruct the official or employee to represent the state agency and its interests; and (c) Ensure that the official or employee has no other conflicts of interest related to service with the nonprofit organization;

(3) The Ethics Law and related statutes do not prohibit state officials or employees, whether serving as directors of the nonprofit organization or simply assisting the organization as a part of their state service, from soliciting contributions from private individuals or entities to the nonprofit organization. Further, the Ethics Law and related statutes do not control which officials or employees can be engaged in fundraising efforts. (There may be other provisions in the Revised Code that prohibit, or limit the ability of, certain officials, such as statewide elected officers, from serving with the nonprofit organization.)

However, the Ethics Law prohibits any official or employee from benefiting personally from fundraising for the nonprofit organization. Further, the agency must assure that potential contributors are informed that: (a) Contributions to the nonprofit are voluntary and are not being made in connection with or return for any state contracts, grants, or other financial benefits; (b) No company or individual may make a contribution, and the nonprofit organization will not solicit or accept a contribution from a company or individual, while a specific matter involving the company or individual is pending before the agency or it is reasonably foreseeable that a matter involving the company or individual will come before the agency soon after the solicitation or contribution is made; (c) No company or individual may make a contribution, and the nonprofit organization will not accept a contribution from a company or individual, if the contribution is designated to benefit a specific agency or event or otherwise limits the public agency's discretion regarding the use of the contribution; (d) A company making a contribution will not be given any ability, in a manner not afforded to other companies or the general public, to lobby or promote its activities with public officials and employees of the agency that will benefit from the contribution; and (e) Public officials and employees will not be influenced, in the objective performance of their public duties regarding a company or individual, by the company's or individual's decision to contribute or refrain from contributing. The agency can protect against the possibility of self-dealing and demonstrate compliance with these notice requirements by ensuring that the activities and records of the organization are open and accessible.

Creation of a Nonprofit Organization

The issue of whether state departments and agencies have the statutory authority to form nonprofit organizations to assist in the performance of their public duties is outside the jurisdiction of the Ohio Ethics Commission. R.C. 102.06 and R.C. 102.08. See also Att'y Gen.

Op. No. 96-028 (a statutorily created public body may participate in the establishment and operation of a nonprofit organization only if the power to do so is expressly conferred by statute or necessarily implied from expressly granted powers).¹ Depending on the agency, a legislative enactment may be required to enable the activity. You should contact the Attorney General's Office regarding the issue of a state department or agency creating, operating, or participating in a nonprofit organization.

While the Ethics Law does not govern whether an agency has the authority to form or join a nonprofit organization for the purpose of assisting in the performance of its public duties, it should be noted that whenever a public agency does so, it bears the responsibility and burden of ensuring that the public officials and employees working with the nonprofit organization comply with the Ethics Law and related statutes. The agency must also ensure that the organization does not exceed the authority delegated by the agency. When a public agency chooses to entrust a private entity with the performance of public duties, the agency must exercise sufficient diligence in overseeing the activities of the private entity to prevent any damage to the interests of the agency or the public.

Officials and Employees Serving as Board Members—R.C. 2921.42(A)(4)

State officials and employees are “public officials” for purposes of R.C. 2921.42(A)(4), which provides that no public official 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 in which the public official is connected.

A “public contract” is defined as the “purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of” any political subdivision of the state. R.C. 2921.42(I)(1)(a). Whether the nonprofit organization will disburse funds itself to acquire the services of Kaizen experts for the use of the agency or will disburse funds to the agency in order for the agency to acquire the services of experts, the agency is acquiring services from the nonprofit organization. In the first situation, the services are training services purchased by the nonprofit organization for the agency's benefit. In the second situation, the services are fundraising services to enable to agency to purchase the training services. The agency's acquisition of services from the nonprofit organization is a public contract.

The Commission has held that any definite and direct “interest” in a public contract is prohibited by R.C. 2921.42(A)(4), regardless of whether the interest is financial or fiduciary. Ohio Ethics Advisory Opinion No. 81-008. An officer or board member of a nonprofit

¹ R.C. Chapter 1702. (nonprofit corporation law) uses the term “person” to define the persons or entities eligible to form a nonprofit corporation. Unless indicated otherwise, “person” does not encompass governmental entities or the officers thereof. See Att'y Gen. Op. No. 96-028. Compare Att'y Gen. Op. No. 2008-03 (R.C. 183.061 expressly authorizes the Tobacco Use Prevention and Control Foundation to form a nonprofit corporation).

organization has a definite and direct fiduciary interest in the contracts of the organization.² Adv. Ops. No. 94-001 and 96-005. Because he or she would have a fiduciary interest in the nonprofit organization's contracts, R.C. 2921.42(A)(4) prohibits a public official from holding a fiduciary position with a nonprofit organization if the public agency he or she serves is acquiring services from the organization. Id.

Public Official Serving on Nonprofit Organization's Board in Official Capacity

In some situations, however, the Ethics Commission has held that a public official *can* serve on the board of directors of a nonprofit organization, for which the agency acquires services, *if* the official serves as a representative of his or her public agency. In that situation, because the official serves in his or her "official capacity," he or she does not have an unlawful interest in the agency's acquisition of goods or services from the nonprofit organization. Adv. Ops. No. 83-010, 84-001, and 93-012. See also 2008 Ohio Atty.Gen.Ops. No. 2008-03. The Commission has concluded that a public official who serves on the board of directors of a nonprofit organization in his or her "official capacity" continues to pursue the interests of the public agency and does not have a dual interest whereby his or her private concerns conflict with, or distract him or her from serving, the public interest. Adv. Op. No. 84-001. In Advisory Opinion No. 84-001, the Commission held that a public official serves as a fiduciary of a nonprofit organization in an "official capacity" when these four elements are established:

1. The public agency either creates or is a participant in the nonprofit organization;
2. The public agency's governing body formally designates an official or employee of the agency as the agency's representative;
3. The public agency's governing body formally instructs the public official to represent the agency's interests; and
4. There is no other conflict of interest on the part of the public official who is the agency's designated representative.

Application to Facts Presented

Therefore, in direct response to your second question, R.C. 2921.42(A)(4) would not prohibit officials or employees of the agency from serving as directors or officers of the nonprofit organization provided that they serve in their "official capacity." If agency officials and employees are serving the interests of the agency and, by extension, the taxpayers, they

² If officers or board members will also receive compensation from the nonprofit corporation for their service, they would also have a financial interest in the corporation's contracts. However, **compensation** to any agency official or employee for service to the nonprofit would raise additional significant issues under the Ethics Law and related statutes. If the officers or board members will receive compensation from the corporation, please contact the Commission for further guidance.

would not be subject to divided loyalties when making decisions about the nonprofit organization and its service to the agency's responsibilities to the public.

In order for an agency official to serve in his or her official capacity, the state agency must: (a) designate any official or employee serving as a director of the organization as a representative of the agency; (b) formally instruct the official or employee to represent the agency and its interests; and (c) ensure that the official or employee has no other conflicts of interest related to service with the nonprofit organization. (This opinion discusses conflict of interest more fully below.) To facilitate these requirements, the state agency should include provisions in the articles of incorporation or bylaws of the nonprofit organization that plainly establish the duties and authority of the organization's board members and officers.

Even if the agency decides it does not want its officials or employees to serve on the board of directors, or as officers, of the nonprofit organization, the law does not prohibit state officials or employees from participating in decisions affecting the organization. Provided that he or she has no fiduciary or financial connection to the nonprofit organization, an agency official would not have an interest in the contracts of the agency through the organization. However, regardless of his or her role with the nonprofit organization, an agency official would be required to comply with the restrictions in the law regarding conflicts of interest.

Conflicts of Interest—R.C. 102.03(D) and (E) and 2921.42(A)(1)

One element that an official or employee *must* demonstrate to establish that he or she is serving in an official capacity as a fiduciary of a nonprofit organization is that the official or employee does not have any conflict of interest. R.C. 102.03(D) and (E), and 2921.42(A)(1), are all relevant to this demonstration. 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 state official or employee is subject to R.C. 102.03(D) and (E). R.C. 102.01(B) and (C).

Anything of value is defined to include money and every other thing of value. R.C. 1.03; 102.03(G). Compensation and other benefits given to individuals who are providing Kaizen training are within the definition of anything of value. 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 the official’s or employee’s objectivity and independence of judgment with respect to his or her public duties. Adv. Ops. No. 91-010 and 95-001. The Commission has stated that voting on, recommending, deliberating upon, discussing, lobbying, or taking any other formal or informal action within the scope of a public official’s or employee’s public authority is “use of,” or “authorization of the use of” the authority or influence of a public official’s or employee’s office or employment. Adv. Op. No. 88-005.

The Commission has also held that a public official’s or employee’s objectivity and independence of judgment will be impaired if his or her business associate or a member of his or her family receives anything of value as a result of decisions before his or her public agency. Adv. Op. No. 89-009 and 88-005. A definite and direct benefit to his or her business associate or relative is of such a character as to have a substantial and improper influence on a public official or employee even if the official or employee will not personally receive anything of value. Adv. Op. No. 92-012.

A public official or employee who is working with a nonprofit organization in his or her official capacity is subject to the restrictions of R.C. 102.03(D) and (E) while performing those job duties. R.C. 102.03(D) would prohibit the public official or employee from using his or her authority or influence over members of the board of directors of the nonprofit organization to secure contracts, payments, compensation, or any other thing of value from the nonprofit organization for the official or employee, or his or her family members or business associates. Adv. Op. No. 89-004. R.C. 102.03(E) prohibits the public official or employee from soliciting anything of value for himself or herself, or for a family member or business associate.

R.C. 2921.42(A)(1), one of the public contract restrictions, will also govern agency officials or employees serving as board members or officers of a nonprofit organization in their official capacity. R.C. 2921.42(A)(1) provides that no public official shall knowingly:

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

As noted above, the purchase of Kaizen services for the use of a state agency is a public contract regardless of whether the agency purchases the services directly or the nonprofit organization purchases the services for the benefit of the agency. R.C. 2921.42(A)(1) would prohibit a public official or employee from using the authority or influence of his or her office or employment to secure any contracts, related to the services provided by the organization to the agency, if his or her family member or business associate has an interest in the contract.

The agency must be careful when selecting any official or employee to represent its interests that the official or employee will not likely be subject to these types of conflict of interest or public contract issues. For example, an agency official with a family member or

business associate who is a consultant or professional in business or process improvement and may be interested in providing Kaizen services to the agency would not be a good candidate for service on the board of the nonprofit organization because of the potential for conflict of interest. Further, if the agency is using one provider to host Kaizen events, any official or employee with a private relationship (such as employment) with the provider should not be selected for service on the board. It is important to emphasize once again that any agency officials and employees whose public job duties include working with the nonprofit organization are subject to these restrictions even if they are not board members or officers of the organization in their official capacity.

Soliciting Funds

Your final question is whether the Ethics Law either prohibits state officials and employees from soliciting contributions from individuals or entities to the nonprofit organization or sets any limits on which officials or employees can participate in these activities.

State officials and employees serving in their official capacity as board members of the nonprofit organization or otherwise involved in its operation, including its solicitation and disbursement of funds to support the Kaizen program, are “public officials and employees” who are subject to R.C. 102.03(D) and (E). (See above.) Any corporation, organization, or individual that contributes to the organization is a “person” subject to R.C. 102.03(F) which provides:

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.

Contributions made to the nonprofit organization for purposes of retaining Kaizen experts to manage Kaizen events and to train state employees are within the definition of “anything of value,” as are disbursements from the organization for these services. See Adv. Op. No. 2006-03. If any person or entity were to make a contribution to the nonprofit organization with the intent to influence the decisions of officials or employees of the agency, such a contribution would violate R.C. 102.03(F) and possibly criminal provisions outside the Ethics Commission’s jurisdiction. See, e.g., R.C. 2921.02 (bribery).

The Ethics Commission has held that the contribution of money or other items of value to a public agency from a party that is regulated by, doing or seeking to do business with, or interested in matters before the agency is of such a character as to unduly influence or impair the objectivity of the officials or employees, and prohibited by R.C. 102.03(D), (E), and (F), in instances where the public official or employee benefits personally. The Commission has examined contributions to the agency in a variety of situations. The most closely applicable opinion is Advisory Opinion No. 89-002, in which the Commission considered whether the Ethics Law prohibited a private company that was regulated by a state department from donating equipment to the department.

The Commission held that “the Ohio Ethics Law and related statutes do not prohibit private companies from donating. . . equipment to the [department], *so long as* no official or employee of the [department] benefits personally from the equipment, and *so long as* the donation is voluntary.” Adv. Op. No. 89-002 (emphasis added). The Commission further held that the officials and employees of the agency were not prohibited from soliciting donations to the agency. The Ethics Commission stated:

In concluding that private companies are not prohibited by R.C. 102.03 from donating equipment to the [department], and that officials and employees of the [department] are not prohibited from accepting or soliciting items from private companies, *it must be emphasized that all donations must be voluntary. . . .* Private companies are prohibited from promising, offering, or giving equipment to the [department] with the purpose of improperly influencing officials or employees . . . with respect to their duties. [Department] officials and employees are prohibited from soliciting or accepting equipment to improperly influence them with respect to the discharge of their official duties, and from basing any official decisions, actions, or instructions on a company’s contributions or failure to contribute. Such conduct by a private company or a [department] official or employee would be in violation of R.C. 102.03, and possibly other criminal statutes that are outside the scope of the Ethics Commission’s jurisdiction. See, e.g., R.C. 2921.02. Furthermore, R.C. 102.03 would prohibit an official or employee from deriving any personal benefit or use from the donated equipment, even in situations where the equipment is of no further use to the [department].

(Emphasis added.) See also Adv. Op. No. 86-003 (The Ohio Ethics Law and related statutes do not prohibit a resident of the Veterans Home from making a gift, devise, bequest, or donation to the Veterans Home, provided that the action is voluntary. However, the Law does prohibit a resident from making a substantial gift, devise, or bequest to a Veterans Home employee). The Commission cautioned, however, that a company should not make donations, and the agency should refrain from accepting donations, when a specific matter before the agency involves the company or it is reasonably foreseeable that a matter involving the company will come before the agency soon after the donation is made. Adv. Op. No. 89-002.

Later the same year, in Advisory Opinion No. 89-013, the Ethics Commission held that a vendor is prohibited from reimbursing a state agency for the travel, meal, lodging and other expenses incurred in connection with a trip by agency officials and employees to view and evaluate the vendor’s product in a facility setting. The Commission stated that, in contrast to the facts considered in Advisory Opinion No. 89-002, the officials and employees of the state agency would, at the time of payment or promise of payment of expenses, be in the process of deciding whether to conduct business with the company. The Commission also held that the travel expense payment or reimbursement was intended to affect the decision making process because the traveling employees had an essential and immediate role in deciding the company’s interests. The Commission held that the payment of expenses to the Department by a vendor is an attempt to do indirectly what is directly prohibited by R.C. 102.03. See *City of Parma Heights v.*

Schroeder (C.P. 1969), 26 Ohio Op. 2d 119, 122 (a public official cannot do indirectly what he or she cannot do directly).

Therefore, R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting or accepting contributions on behalf of the agency if the official will benefit personally from the contributions. R.C. 102.03(D) and (E) also prohibit an official or employee from soliciting or attempting to secure a benefit, from contributions made to the organization or agency, for family members, business associates, or others with whom the official or employee has a close personal or business connection.

However, R.C. 102.03(D) and (E) do not prohibit a public official or employee from soliciting or accepting contributions to a nonprofit organization, on behalf of the public agency, if the contributions are solely for the benefit of the public agency. Further, all public officials and employees involved in soliciting and receiving funds for the nonprofit organization must ensure that contributors are informed that:

- (1) Contributions to the organization are voluntary and are not being made in connection with or return for any state contracts, grants, or other financial benefits;
- (2) No company or individual may make a contribution, and the nonprofit organization will not solicit or accept a contribution from a company or individual, while a specific matter involving the company or individual is pending before the agency or it is reasonably foreseeable that a matter involving the company or individual will come before the agency soon after the solicitation or contribution is made;
- (3) No company or individual may make a contribution, and the nonprofit organization will not accept a contribution from a company or individual, if the contribution is designated to benefit a specific agency or event or otherwise limits the public agency's discretion regarding the use of the contribution;
- (4) A company making a contribution will not be given any ability, in a manner not afforded to other companies or the general public, to lobby or promote its activities with public officials and employees of the agency that will benefit from the contribution; and
- (5) Public officials and employees will not be influenced, in the objective performance of their public duties regarding a company or individual, by the company's or individual's decision to contribute or refrain from contributing.

As recommended above, in order to facilitate these requirements, the state agency should include provisions in the nonprofit organization's articles of incorporation or bylaws governing the

solicitation and acceptance of donations by the organization and individuals acting on its behalf. Other provisions should describe and limit the organization's or agency's use of the funds.

Transparency

In order to guard against the possibility of self-dealing and make certain that these notice requirements have been effectively communicated, the agency and nonprofit organization must ensure an open and transparent fundraising environment. Further, before undertaking any fundraising endeavor, the agency is required to establish a clear process to implement all of the requirements of the Ethics Law and related statutes as explained in this opinion.

Therefore, to protect against violations of the Ethics Law and related statutes, the agency should also include, in the nonprofit organization's articles of incorporation or bylaws, guidelines for disclosure of employees, vendors, and contracts of the nonprofit organization and for the reporting and disclosure of donors and donation amounts. The agency should outline requirements for regular financial statements from the nonprofit organization to the agency about the nonprofit organization's budget, expenditures, and processes, and a regular schedule of audits by the agency. Finally, the articles or bylaws should include provisions that the records of the nonprofit organization, regardless of whether they are provided to the agency, will be treated as public records and retained in accordance with a retention schedule established by the agency.

Conclusion

As explained above, and in direct response to your three questions:

(1) The Ethics Law and related statutes do not govern the ability of a state agency to establish a nonprofit organization;

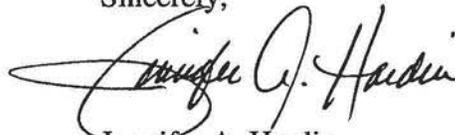
(2) If a state agency creates or participates in a nonprofit organization, agency officials or employees are not prohibited from serving as directors of the nonprofit organization, or otherwise participating in the decision-making of the organization. However, as described in more detail, the state agency must: (a) Designate any official or employee serving as a director or otherwise working with the organization as a representative of the agency; (b) Formally instruct the official or employee to represent the state agency and its interests; and (c) Ensure that the official or employee has no other conflicts of interest related to service with the nonprofit organization;

(3) The Ethics Law and related statutes do not prohibit state officials or employees, whether serving as directors of the nonprofit organization or simply assisting the organization as a part of their state service, from soliciting contributions from private individuals or entities to the nonprofit organization. Further, the Ethics Law and related statutes do not control which officials or employees can be engaged in fundraising efforts. (There may be other provisions in the Revised Code that prohibit, or limit the ability of, certain officials, such as statewide elected officers, from serving with the nonprofit organization.)

However, the Ethics Law prohibits any official or employee from benefiting personally from fundraising for the nonprofit organization. Further, the agency must assure that potential contributors are informed that: (a) Contributions to the nonprofit are voluntary and are not being made in connection with or return for any state contracts, grants, or other financial benefits; (b) No company or individual may make a contribution, and the nonprofit organization will not solicit or accept a contribution from a company or individual, while a specific matter involving the company or individual is pending before the agency or it is reasonably foreseeable that a matter involving the company or individual will come before the agency soon after the solicitation or contribution is made; (c) No company or individual may make a contribution, and the nonprofit organization will not accept a contribution from a company or individual, if the contribution is designated to benefit a specific agency or event or otherwise limits the public agency's discretion regarding the use of the contribution; (d) A company making a contribution will not be given any ability, in a manner not afforded to other companies or the general public, to lobby or promote its activities with public officials and employees of the agency that will benefit from the contribution; and (e) Public officials and employees will not be influenced, in the objective performance of their public duties regarding a company or individual, by the company's or individual's decision to contribute or refrain from contributing. The agency can protect against the possibility of self-dealing and demonstrate compliance with these notice requirements by ensuring that the activities and records of the organization are open and accessible.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on December 18, 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,



Jennifer A. Hardin
Chief Advisory Attorney