



OHIO ETHICS COMMISSION

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Advisory Opinion Number 91-010
December 5, 1991

Syllabus by the Commission:

(1) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a state official or employee from accepting, soliciting, or using the authority or influence of her position to secure, for personal travel, a discounted or free "frequent flyer" airline ticket or other benefit from an airline if she has obtained the ticket or other benefit from the purchase of airline tickets, for use in official travel, by the department, division, agency, institution, or other entity with which she serves, or by which she is employed;

(2) Division (A)(4) of Section 2921.42 and Division (A) of Section 2921.43 of the Revised Code prohibit a state officer or employee from accepting or using, for personal travel, a discounted or free "frequent flyer" airline ticket or other benefit from an airline if she has obtained the ticket or other benefit from the purchase of airline tickets, for use in official travel, by the department, division, agency, institution, or other entity with which she is connected.

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You have asked whether the Ohio Ethics Law and related statutes prohibit a state official or employee from using, for her own personal travel, "frequent flyer" miles accrued while she was engaged in travel for state business. Your question concerns state officials and employees who are required to travel on state business as a part of their official duties. Occasionally, state officials and employees are required to fly, rather than drive, to their destinations. "Frequent flyer" mileage is a bonus offered by most major airlines to individuals who take flights on their airlines. "Frequent flyer" is typically a plan whereby the passenger accrues the mileage traveled on a specific airline and, based upon the mileage for which she has purchased tickets, she may receive free, upgraded, or discounted tickets, or other benefits, such as hotel and rental car discounts.

Divisions (D) and (E) of Revised Code Section 102.03 provide:

(D) No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his 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 him with respect to his duties.

The term "public official or employee" is defined, for purposes of Chapter 102., in R.C. 102.01 (B) and (C), to include any person who is an official or employee of any department, division, institution, board, commission, authority, bureau or other instrumentality of the state. The term "anything of value" is defined for purposes of R.C. 102.03 to include money, goods, chattels, any interest in realty, a promise of future employment, and every other thing of value. See R.C. 102.01 (G) and 1.03. The Commission has, for example, identified travel, meal, and lodging expenses as falling within this definition of "anything of value." See Ohio Ethics Commission Advisory Opinions No. 84-010, 86-011, 87-005, 87-007, 89-013, 89-014, and 90-001. Similarly, a discounted or free ticket for airline travel or any other discounts fall within the definition of "anything of value" for purposes of R.C. 102.03.

A public official or employee is prohibited, by R.C. 102.03 (D) and (E), from accepting, soliciting, or using the authority or influence of her position to secure anything of value, where the thing of value is of such character as to manifest a substantial and improper influence upon her with respect to her official duties. See Advisory Opinions No. 80-007, 85-006, 86-003, 86-007, 88-004, and 89-006. The Ethics Commission has held that Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a public official or employee from accepting, soliciting, or using the authority or influence of her position to secure anything of value or the promise or offer of anything of value from a party that is interested in matters before, doing or seeking to do business with, or regulated by, the agency with which she serves. See Advisory Opinions No. 79-002, 79-006, 80-004, 84-010, 87-006, 87-009, 89-006, 89-013, and 89-014. A public official or employee is also prohibited from accepting, soliciting, or using the authority or influence of her position to secure anything of value that could otherwise impair the official's or employee's objectivity and independence of judgment with respect to her official duties. See Advisory Opinions No. 84-009, 89-006, 90-003, and 90-008. The application of R.C. 102.03 (D) and (E) is dependent upon the facts and circumstances of each individual situation. See Advisory Opinions No. 87-008, 89-003, and 89-006. The issue, then, is whether the acceptance by a state official or employee of a free or discounted airline ticket or other benefit which is based upon miles logged in the course of air travel made for purposes of state business and paid for by the state is of such character as to manifest a substantial and improper influence upon the public official or employee with respect to her duties.

In your question, you have asked about state officials and employees who are required to travel in the course of their state employment. When the officials or employees must travel on state business, they are compensated by the state for the time they spend in actual travel. The tickets are paid for, or the cost of the tickets is reimbursed by, the state. The purchase of airline tickets for state travel is, therefore, an expenditure of state funds for the purpose of conducting state business. The Commission has clearly held that any benefits which arise from the official business which the state conducts must accrue to the state, rather than to any public official or employee personally, and that an official or employee cannot benefit personally from business the state conducts. For example, the Commission has held that a public official or employee is prohibited from receiving a personal benefit or use from equipment donated to the state agency by which he is employed. See Advisory Opinion No. 89-002. In Advisory Opinion No. 84-008, the Commission held that a state employee is prohibited from receiving a "finder's fee," from a computer firm, based upon sales from the computer firm to the state commission with which the employee served. See also R.C. 2921.42 (A)(4) (discussed below) and Advisory Opinion No. 84-013. In a situation somewhat similar to the question you have asked, the Commission held that a public official or employee is prohibited, by R.C. 102.03 (D) and (E), from using for his personal

purpose, a trip taken in his official capacity. See Advisory Opinion No. 87-007. The Commission has also repeatedly stated that public officials and employees are prohibited, by R.C. 102.03 (D) and (E), from using state time, facilities, or resources for the pursuit of their own personal business interests. See Advisory Opinions No. 84-013, 85-013, 85-014, and 89-006. Cf. Advisory Opinions No. 81-007, 84-012, and 85-013 (a public official or employee is prohibited from performing for private compensation those specific duties the official or employee must perform as a part of his official employment, and from receiving outside compensation for performing specific services he has recommended in his official capacity); Advisory Opinion No. 84-013 (a public official or employee is prohibited from using his official position or title to market computer software developed by him, or demonstrating the computer software using a computer belonging to the political subdivision by which he is employed); Advisory Opinion No. 90-002 (a public official or employee who owns a private business is prohibited from performing his official duties in a way to provide an economic advantage for his business). As in the situations enumerated above, a state official or employee is prohibited from accepting, soliciting, or using her position to secure any personal benefit which stems from the conduct of state business.

Further, the tickets which a state official or employee uses to travel are paid for, or the cost is reimbursed to the employee, by the state entity which employs the individual. It is apparent that the airlines are doing business with state entities, since it is the state department, division, institution, board, commission, authority, or other instrumentality which ultimately bears the cost of the airline travel. The Commission has previously stated that public officials and employees are prohibited from accepting anything of substantial value, such as travel, meal, and lodging payments, from parties who are "doing business" with the agency by which the officials or employees are employed. See Advisory Opinions No. 89-013 and 89-014. These restrictions are intended to combat the influence that the provision of any valuable thing could have upon public officials and employees, and serve the public's interest in objective and impartial government by preventing the creation of situations where considerations of personal benefit could impair the objectivity and effectiveness of a public official or employee. See Advisory Opinions No. 86-011, 87-007, 89-013, 89-014, and 90-001. For example, in the question you have set forth, a public official or employee who is permitted to utilize "frequent flyer" benefits obtained during the course of state travel for her own personal travel could be swayed to reserve official flights with a specific airline in order to accrue "frequent flyer" miles, rather than to reserve flights with the most economically priced carrier. The offer of "frequent flyer" miles could result in an improper influence upon a public official or employee if she were permitted to use such "frequent flyer" miles for her own personal travel.

Therefore, Divisions (D) and (E) of R.C. 102.03 prohibit a state official or employee from accepting, soliciting, or using the authority or influence of her office or employment to secure, for personal travel, discounted or free air travel tickets or other benefits, based upon mileage accrued while traveling in her official capacity as a state official or employee.

Revised Code Section 2921.42 (A)(4) also prohibits state officials or employees from accepting free tickets and other benefits in the situation you have described. Division (A)(4) of R.C. 2921.42 prohibits a public official or employee from having an interest in the profits or benefits of a public contract entered into by or for the use of the governmental agency with which he is connected. A "public contract" is defined for purposes of this prohibition, in R.C. 2921.42 (E), as the purchase or acquisition or a contract for the purchase or acquisition of

property or services by or for the use of the state. The purchase of airline tickets to be used for state business is a public contract for purposes of this section. See generally Advisory Opinions No. 80-003 and 84-014. R.C. 2921.42 (A)(4) prohibits a state official or employee from receiving any profit or financial benefit from her public agency's purchase of airline tickets. See Advisory Opinions No. 84-008 and 84-013. Accordingly, R.C. 2921.42 (A)(4) prohibits a state official or employee from receiving any personal benefit, including free airline tickets, or other benefits, from her agency's purchase of airline tickets for state business.

The activities of state officials and employees in the situation you have described are further restricted by Division (A)(1) of Section 2921.43 of the Revised Code, which reads:

(A) No public servant shall knowingly solicit or accept and no person shall knowingly promise or give to a public servant:

(1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform his 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.

For purposes of R.C. 2921.43, the term "public servant" is defined, in R.C. 2921.01 (A) and (B), to include "any elected or appointed officer, or employee" of the state. See R.C. 2921.01 (A). Therefore, an officer or employee of a department, division, institution, board, commission, authority, or other entity of the state is a "public servant" for purposes of R.C. 2921.43. See Advisory Opinion No. 89-013.

R.C. 2921.43 prohibits a state officer or employee from soliciting or accepting any compensation, other than as allowed by R.C. 102.03 (G)-(I) or other provision of law, to perform her official duties or any specific act within the scope of her public employment. See Advisory Opinion No. 89-012. Additionally, a state officer or employee is prohibited from soliciting or accepting additional compensation for the general performance of her public duties. See Advisory Opinions No. 89-012 and 90-001. There is no provision in state statutory law or in a state labor contract which authorizes the state to permit state officers or employees to use, for their personal benefit, "frequent flyer" benefits, accrued in the course of their official travel, as compensation or a fringe benefit. State officials and employees are compensated, by the state, for the travel they must do on behalf of the state. Any personal benefit for a state official or employee which is based upon travel which the state official or employee is required to perform as a part of her official duties and for which she is compensated by the state, would be additional compensation for the performance of her official duties that is not allowed by law. Therefore, R.C. 2921.43 prohibits a state official or employee from accepting free or discounted airline tickets or other benefits obtained through credits accrued while engaged in state travel.

An additional issue which emerges from your question is that the "frequent flyer" privileges accrued in the course of state travel belong to the state, and not to the state official or employee. In Advisory Opinion No. 87-007, the Ethics Commission was asked if Lottery Commission employees could accept payments for travel, meal, and lodging expenses, from a successful bidder on a Lottery Commission contract, in order to inspect a product or conduct

other state business, if the Lottery Commission included the requirement for the trips in the bid specifications and in the contract. The Ethics Commission stated:

[T]he requirement that roundtrip flights be provided by such parties is included by the Commission in its bid specifications, and subsequently, as a term of the contracts executed between the Commission and successful bidders. It is apparent that parties, in submitting a bid to the Commission, will include the cost of the trips in their proposals, and that such expenses are a cost included in the final contract price. Therefore, the travel expenses are a cost for which the Commission pays consideration. Ultimately, it is the Commission which bears the cost of the trips. Under these circumstances, the travel expenses are not of such a character as to manifest a substantial and improper influence upon a Lottery Commission officer or employee. (Emphasis added.)

Applying the same reasoning to the facts in your question, the state department which purchases air travel tickets has paid consideration for the "frequent flyer" program, and ultimately bears the cost of any resulting "frequent flyer" benefits, whether or not it chooses to use the benefits. "Frequent flyer" credits are an integral and inseparable part of the airline ticket purchase. Credits are generally available to all airline travelers, regardless of the cost of the ticket purchased. Some airlines even make the "frequent flyer" program available to the traveler after her trip is concluded, so long as she can produce a boarding pass to prove that she has traveled on the airline. The opportunity to qualify for and use "frequent flyer" miles is purchased with the ticket. The cost of the "frequent flyer" program is presumably figured, by the airlines, into the cost of all airline tickets sold. Therefore, when purchasing any air travel ticket, the state has also paid for the incidental "frequent flyer" benefits, and, in fact, owns the benefits, and may use the benefits in official state travel.

Under these circumstances, as with a situation wherein the state includes the provision of travel, meal, and lodging within the terms of a contract, the use of free or discounted "frequent flyer" tickets by the state for official state travel would not be of such character as to render a substantial and improper influence upon the state official or employee involved in the official travel or in choosing the carrier since the state is paying consideration for participation in the "frequent flyer" program. Furthermore, the free or discounted ticket would not constitute compensation for the state officials and employees where the ticket is subsequently used for valid or legitimate state travel. Therefore, neither 102.03 nor 2921.43 would prohibit a state official or employee from using "frequent flyer" credits accrued in official departmental travel to obtain free or discounted air travel tickets from air carriers, so long as the free or discounted air travel tickets are also used for official departmental travel. But cf. Advisory Opinion No. 89-013 (a state official or employee is prohibited from accepting travel, meal, or lodging expenses from a vendor or potential vendor, for state travel to inspect the vendor's product, regardless of whether the benefits are paid directly to the official or employee, or paid to the state department which uses the funds to pay for the travel). See also Advisory Opinion No. 89-002 (although a state agency may accept donations of equipment from private companies, R.C. 102.03 (D) and (E) and R.C. 2921.43 would prohibit payment of officials' and employees' expenses directly to their agency by parties who are regulated by, interested in matters before, or doing or seeking to do business with, the public agency).

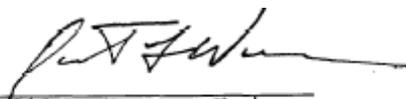
A "frequent flyer" benefit may even be an appropriate consideration for a state agency in planning its official travel. In a random survey of major airlines, the Commission has discovered

that most carriers offer the "frequent flyer" program. Further, as a practical matter, although mileage credits are not transferable from one traveler to another, most airlines allow travelers to redeem the accrued "frequent flyer" benefit for another person. In other words, if a state employee accrued, during the course of travel for the state, the mileage necessary to receive a free round-trip ticket, the mileage may be used on a ticket for that employee, or for another state employee. Therefore, a state agency may be able to use "frequent flyer" credits accrued by one employee in the course of state travel to obtain tickets for other employees engaged in state business travel. There are, of course, numerous considerations, such as space availability, projected savings, and administrative costs in keeping track of miles accrued and benefits due, but state agencies may wish to consider the feasibility of registering officials and employees who travel frequently for a "frequent flyer" benefit, so that the benefit can be used by the agency for the employee whose state travel earned the mileage, or perhaps for other agency travelers, when the mileage has accrued. See O.A.C. Rule 126-1-02 (rates and requirements for reimbursement of travel expenses of state agencies). The Ethics Commission understands, from conversations with staff at the Office of Budget and Management, that state agencies do have the discretion to pay slightly more for an air travel ticket in order to accrue "frequent flyer" credits, and then use the credits for state travel, so long as the agency ultimately saves money on official travel.

Although this opinion is written in response to your question concerning state officials and employees, it should be noted that the conclusions in the opinion also apply to all public officials and employees connected with any other governmental agency or political subdivision in the state.

This advisory opinion is based on the facts presented, and is rendered only with regard to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.

Therefore, it is the opinion of the Ethics Commission and you are hereby advised that: (1) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a state official or employee from accepting, soliciting, or using the authority or influence of her position to secure, for personal travel, a discounted or free "frequent flyer" airline ticket or other benefit from an airline if she has obtained the ticket or other benefit from the purchase of airline tickets, for use in official travel, by the department, division, agency, institution, or other entity with which she serves, or by which she is employed; (2) Division (A)(4) of Section 2921.42 and Division (A) of Section 2921.43 of the Revised Code prohibit a state officer or employee from accepting or using, for personal travel, a discounted or free "frequent flyer" airline ticket or other benefit from an airline if she has obtained the ticket or other benefit from the purchase of airline tickets, for use in official travel, by the department, division, agency, institution, or other entity with which she is connected.



David L. Warren, Chairman
Ohio Ethics Commission