

OHIO ETHICS COMMISSION

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Advisory Opinion Number 99-003
September 17, 1999

Syllabus by the Commission:

- (1) Division (H) of Revised Code Section 102.03 prohibits a state employee who is required to file a financial disclosure statement from accepting an "honorarium" for any speech she delivers, regardless of the subject matter of the speech;
- (2) An "honorarium" is defined, in Division (H) of Revised Code Section 102.01, to include payment for any speech given or article published, but excludes income from any person for personal services that are customarily provided in connection with the practice of a bona fide business, if that business initially began before the public official or employee conducting that business was elected or appointed to her office or position of employment;
- (3) The term "bona fide business," as used in Division (H) of Revised Code Section 102.01, is defined to include any person, partnership, or corporation engaged in an authentic commercial, manufacturing, or service concern or profit-seeking enterprise;
- (4) Payment offered to a state employee for providing speaking or writing services that she customarily provided through her bona fide business that existed before she was employed by the state does not constitute an "honorarium" within the statutory definition, and Division (H) of Revised Code Section 102.03 does not prohibit the state employee from accepting the payment;
- (5) Payment offered to a state employee for providing speaking or writing services, where the opportunity to speak or write was offered to her through or because of her public employment, constitutes an "honorarium," and Division (H) of Revised Code Section 102.03 prohibits the state employee from accepting the payment;
- (6) Divisions (D) and (E) of Revised Code Section 102.03 prohibit a state employee from receiving compensation for writing articles or giving speeches, directly or through her sole proprietorship, if the compensation is from any party that is regulated by, doing or seeking to do business with, or interested in matters pending before, the state agency she serves.

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You have asked for an interpretation of a portion of the definition of the term "honorarium," as that term is used in the prohibition contained in R.C. 102.03(H). The term "honorarium" is further defined in R.C. 102.01(H). You have asked for clarification of the portion of the definition that refers to an exception from the prohibition for income received for personal services in connection with a business that began prior to an official's public service.

By way of history, you have explained that you are the deputy Secretary of State. You have stated that you file an annual financial disclosure statement. You have explained that you operated a sole proprietorship in another state for several years before you accepted a position with the Office of the Secretary of State. The business involved writing articles and speaking nationally on a variety of topics. You were paid for personal services that consisted of writing and speaking. You have also explained that, in your current position, you are asked by the Secretary of State to speak on a variety of topics, at the request of various organizations. While some, but not all, of those topics are related to your state employment, you have explained that you do include information about the Office of the Secretary of State in each presentation.

Specifically, you asked whether, now that you are a state employee, the honorarium restriction of the Ethics Law prohibits you from continuing to accept payment for writing and speaking offers made to you through the sole proprietorship you established before you began your state service. You have asked whether the Ethics Law prohibits you, as a state employee, from accepting compensation for speaking on topics unrelated to your state service, where the Secretary of State has asked you to speak as a representative of the Office.

As set forth more fully below, the honorarium restriction in the Ethics Law does not prohibit you from accepting payment for writing or speaking services you provide through the sole proprietorship established before you began your state service, unless the payment is made by a party that is doing or seeking to do business with, regulated by, or interested in matters before, the Office of the Secretary of State. The Ethics Law also prohibits you from accepting compensation for speaking on any topic where the Secretary of State has asked you to speak as a representative of the Office.

Honorarium Prohibition—R.C. 102.03(H)

R.C. 102.03(H), which contains the honorarium prohibition, provides as follows:

No public official or employee, except for the president or other chief administrative officer of or a member of a board of trustees of a state institution of higher education as defined in section 3345.011 of the Revised Code, 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.

The General Assembly enacted R.C. 102.03(H) in 1994 to prohibit a public official or employee who is required to file a financial disclosure statement from receiving honoraria from any source regardless of whether a connection exists between the donor and the public official's or employee's agency. Ohio Ethics Commission Advisory Opinion No. 94-006. Division (H) was enacted in specific response to allegations at the time concerning the payment and reporting of

honoraria to public officials. R.C. 102.03(H) was enacted to limit the influence that payments for speaking and writing, from outside parties, could have upon public officials and employees who serve in positions of authority.

R.C. 102.03(H) also prohibits a public official or employee who is not required to file a financial disclosure statement from receiving honoraria unless the honoraria are paid in recognition of interests that are unrelated to the official's or employee's public position, and are not paid by any improper source. The Ethics Commission has held that an improper source is any person or entity, or representative or association of persons or entities, that is regulated by, doing or seeking to do business with, or interested in matters pending before the public agency the official or employee serves. See generally Adv. Ops. No. 79-006, 84-010, and 86-011.

As an employee of a state agency, you are a public official or employee subject to the prohibitions in R.C. 102.03(H). R.C. 102.01(B) and (C); Adv. Op. No. 79-006. If you are required, by R.C. 102.02, to file a financial disclosure statement, R.C. 102.03(H) prohibits you from accepting an honorarium from any source on any topic. The question, then, is whether payments for speaking and writing, either as a representative of the state office you serve, or through your sole proprietorship, fall within the definition of honoraria.

Honorarium

The term honorarium is defined in R.C. 102.01(H):

"Honorarium" means 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. "Honorarium" does not include ceremonial gifts or awards that have insignificant monetary value; unsolicited gifts of nominal value or trivial items of informational value; or earned income from any person, other than a legislative agent, for personal services that are customarily provided in connection with the practice of a bona fide business, if that business initially began before the public official or employee conducting that business was elected or appointed to his office or position of employment.

Your question concerns the exclusion from the definition of honorarium for:

- (1) Earned income from anyone other than a legislative agent;
- (2) For personal services customarily provided in connection with a bona fide business;
- (3) If the business initially began before the official or employee conducting the business became a public servant.

You have asked whether compensation paid to you for speaking and writing provided in connection with your sole proprietorship falls within this exclusion. This opinion will now examine each of the requirements of the exclusion.

Source of Payments

First, R.C. 102.01(H) requires that the source of the earned income is not a legislative agent. If the source of the income is a legislative agent, the payment for services would fall within the definition of an honorarium. A "legislative agent," as set forth in R.C. 101.70(F), is:

[A]ny individual, except a member of the general assembly, a member of the staff of the general assembly, the governor, lieutenant governor, attorney general, secretary of state, treasurer of state, or auditor of state, who is engaged during at least a portion of his time to actively advocate as one of his main purposes.

The General Assembly has defined "actively advocate" as promoting, advocating, or opposing the passage, modification, defeat, or executive approval or veto of any legislation by direct communication with any member of the general assembly, any member of the controlling board, the governor, the director of any department listed in R.C. 121.02, or any member of the staff of any public officer or employee listed in this division. R.C. 101.70.

R.C. 102.03(H) prohibits you from accepting payment for speaking or publishing an article if the payment was made by any person who meets this definition of "legislative agent." For more information about whether a particular party is a legislative agent, you should contact the Office of the Legislative Inspector General and the Joint Legislative Ethics Committee.

Personal Services in Connection with a Bona Fide Business

Assuming that the source of the payment is not a legislative agent, the next requirement is that the payments are made to you for personal services that you customarily provide in connection with a "bona fide business." You have stated that your sole proprietorship pre-existed your state employment. Through the sole proprietorship, the personal services you have customarily provided are writing articles and speaking on a variety of topics. The question is whether you earn the income in connection with a bona fide business.

The term "bona fide business" is not defined in the statute. The Ethics Commission, in interpreting statutes containing words that are not statutorily defined, has consistently followed the rule of statutory construction that words used in a statute must be construed according to rules of grammar and common usage. R.C. 1.42; Adv. Ops. No. 75-004, 87-002, and 89-001. Furthermore, statutes "must be construed in the light of the mischief they are designed to combat." City of Mentor v. Giordano, 9 Ohio St. 2d 140, 144 (1967).

The word "business" is defined as "a person, partnership, or corporation engaged in commerce, manufacturing, or a service; profit-seeking enterprise or concern." Random House Webster's Unabridged Dictionary 283 (1987). See Adv. Op. No. 85-004 (business associates are persons engaged in a business enterprise for profit). See also Village of Mantua v. Marsillo, 110 Ohio App. 3d 227 (1996) (the definition of "business," adopted through the application of R.C. 1.42, includes "a commercial or industrial enterprise") and Ohio Attorney General Opinion No. 90-100 (in accordance with R.C. 1.42, the word "business," in the common, general sense, is defined as "employment, occupation, profession, or commercial activity engaged in for gain or

livelihood.") The term "bona fide" is defined as "authentic." Random House Webster's Unabridged Dictionary 237 (1987).

Therefore, for purposes of R.C. 102.01(H), a "bona fide business" would include any person, partnership, or corporation engaged in an authentic commercial, manufacturing, or service concern or profit-seeking enterprise. As stated above, you have been involved as a sole proprietor in an authentic service concern that is a profit-seeking enterprise. Accordingly, you appear to meet the second requirement, since you have stated that your sole proprietorship was a bona fide business through which you have customarily provided speaking and writing services.

Business Began before Public Service

If you meet the first two requirements, the third requirement is that the business initially began before you became a public servant. As stated above, you operated your sole proprietorship in another state for several years before you accepted a position with the Office of the Secretary of State. Therefore, it is clear that the business initially began before you became a public servant.

Accordingly, any payment you receive for the speaking and writing services that you customarily provide, through your sole proprietorship, is not an "honorarium," so long as the payment does not come from a legislative agent. If the payment is not an honorarium, R.C. 102.03(H) does not prohibit you from accepting the payment. However, payment from certain sources for speaking and other activities may be prohibited by R.C. 102.03(D) and (E), as discussed below.

Speeches in Connection with Public Position

It should be noted that if you are asked to speak or publish an article as an employee of the Office of the Secretary of the State of Ohio, or related to the duties and responsibilities of the Office, the requester is not seeking the kind of services that you customarily provide through your sole proprietorship. The offeror is seeking a speaker or writer who is a representative of the State of Ohio. This government connection is central to the request. Payments for these services would not fall within the exemption to the honorarium prohibition. R.C. 102.03(H) prohibits you from accepting payment for speaking or publishing an article, in this situation, regardless of the topic of the speech and regardless of whether the request is made to you by the Secretary of State, through the office of the Secretary of State, or directly to your sole proprietorship. See also R.C. 2921.43(A) (a public servant is prohibited from receiving compensation from anyone other than her public employer for the performance of her public duties); Adv. Op. No. 93-002.

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

Your question also raises issues under the conflict of interest provisions in R.C. 102.03(D) and (E):

(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.

The term "anything of value" is defined in R.C. 1.03 to include money, goods and chattels, and "every other thing of value." R.C. 1.03; 102.01(G). The Commission has stated that an honorarium, or other payment for services, is within the definition of "anything of value." Adv. Ops. No. 79-006 (honorarium) and 94-006 (payment for services).

Therefore, R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting, accepting, or using her position to secure an honorarium, or other payment for speaking or writing services, if the payment can have a substantial and improper influence upon the official or employee.

Substantial and Improper Influence

The Ethics Commission has held that in order to be prohibited for purposes of R.C. Section 102.03, the thing of value must be of a substantial and improper character. Adv. Ops. No. 88-004, 89-006, and 89-014. An honorarium, or other payment for doing a speech or publishing an article, is of a substantial nature if it is not of a nominal or de minimis nature. Adv. Op. No. 89-006. Generally, the compensation that a public official or employee receives from private outside employment or business activity is not incidental or minimal in amount, and thus, would be of a substantial nature. Adv. Op. No. 96-004.

In Advisory Opinion No. 79-006, the Ethics Commission concluded that Division (D) of Section 102.03 of the Revised Code prohibits a public official or employee from soliciting or receiving an honorarium for delivering a speech, if the honorarium is received from a party that is either interested in matters before the agency with which the official or employee serves, or regulated by that agency. In Advisory Opinion No. 84-010, the Commission stated that a public official is also prohibited from receiving an honorarium from any party that is doing or seeking to do business with a public agency.

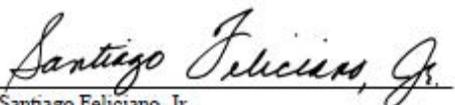
R.C. 102.03(D) was amended, and R.C. 102.03(E) was enacted, in 1986. Am. Sub. H.B. 300 116th Gen. A. (1986) (eff. September 17, 1986). Subsequently, the Commission issued Advisory Opinion No. 86-011, in which the Commission stated that R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting, accepting, or using her public position to secure anything of substantial value, including an honorarium, from any party that is doing or seeking to do business with, regulated by, or interested in matters pending before, the public official or the agency she serves. The Commission has explained that the direct or indirect payment to an official or employee from a party whose interests may depend upon the performance of the official's or employee's responsibilities could impair the official's or employee's objectivity and independence of judgment in future matters affecting the party. Adv. Op. No. 96-004. See also Adv. Ops. No. 84-010, 86-011, and 92-018. For this reason, the public

official or employee is prohibited from soliciting, accepting, or using her position to secure payment of expenses from a vendor, or a regulated or interested party.

Therefore, R.C. 102.03(D) and (E) would prohibit you from soliciting, accepting, or using your position to secure, an honorarium or payment for publishing an article, or any other payment for services, from any party that is doing or seeking to do business with, regulated by, or interested in matters pending before, the Office of the Secretary of State. See also R.C. 2921.43(A) (a public servant is prohibited from receiving compensation from anyone other than her public employer for the performance of her public duties). You are prohibited from accepting the honorarium from an improper source whether it is paid to you directly, or through your sole proprietorship. Further, you are prohibited from accepting the honorarium or other payment regardless of the subject matter of the services that you provide.

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (H) of Revised Code Section 102.03 prohibits a state employee who is required to file a financial disclosure statement from accepting an "honorarium" for any speech she delivers, regardless of the subject matter of the speech; (2) An "honorarium" is defined, in Division (H) of Revised Code Section 102.01, to include payment for any speech given or article published, but excludes income from any person for personal services that are customarily provided in connection with the practice of a bona fide business, if that business initially began before the public official or employee conducting that business was elected or appointed to her office or position of employment; (3) The term "bona fide business," as used in Division (H) of Revised Code Section 102.01, is defined to include any person, partnership, or corporation engaged in an authentic commercial, manufacturing, or service concern or profit-seeking enterprise; (4) Payment offered to a state employee for providing speaking or writing services that she customarily provided through her bona fide business that existed before she was employed by the state does not constitute an "honorarium" within the statutory definition, and Division (H) of Revised Code Section 102.03 does not prohibit the state employee from accepting the payment; (5) Payment offered to a state employee for providing speaking or writing services, where the opportunity to speak or write was offered to her through or because of her public employment, constitutes an "honorarium," and Division (H) of Revised Code Section 102.03 prohibits the state employee from accepting the payment; and (6) Divisions (D) and (E) of Revised Code Section 102.03 prohibit a state employee from receiving compensation for writing articles or giving speeches, directly or through her sole proprietorship, if the compensation is from any party that is regulated by, doing or seeking to do business with, or interested in matters pending before, the state agency she serves.


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