

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF OHIO**

In the Matter of the 2018 Long-Term)	
Forecast Report on behalf of Ohio Power)	Case No. 18-0501-EL-FOR
Company and Related Matters.)	
In the Matter of the Application Seeking)	
Approval of Ohio Power Company's)	
Proposal to Enter into Renewable Energy)	Case No. 18-1392-EL-RDR
Purchase Agreements for Inclusion in the)	
Renewable Generation Rider.)	
In the Matter of the Application of Ohio)	Case No. 18-1393-EL-ATA
Power Company to Amend its Tariffs.)	

**DR. NOAH DORMADY'S MOTION FOR LEAVE TO FILE MEMORANDUM
CONTRA**

Now comes Dr. Noah Dormady, by and through undersigned counsel, and pursuant to Ohio Rev. Code §9.84 and Ohio Admin Code 4901-1-12 moves the PUCO to file the attached Memorandum Contra to Natural Resources Defense Council and Ohio Partners for Affordable Energy's Motion to Exclude the Direct Testimony of Noah Dormady. A Memorandum in Support is attached and incorporated herein.

s/ Nathan D. Painter
Nathan D. Painter (0076274)
PAINTER & ASSOCIATES, LLC
5123 Norwich St., Ste. 200

Hilliard, Ohio 43026

Phone: (614) 319-3306

Fax: (614) 594-7170

Email: nathan@painterandassociates.com

Counsel for Dr. Noah Dormady

MEMORANDUM IN SUPPORT

Pursuant to Ohio Rev. Code §9.84:

Except as otherwise provided in this section, any person appearing as a witness before any public official, department, board, bureau, commission, or agency, or any representative of a public official, department, board, bureau, commission, or agency, in any administrative or executive proceeding or investigation, public or private, if the witness so requests, shall be permitted to be accompanied, represented, and advised by an attorney, whose participation shall be limited to the protection of the rights of the witness, and who may not examine or cross-examine witnesses. The witness shall be advised of the right to counsel before the witness is interrogated. This section does not apply to proceedings before a grand jury or to an employee of an appointing authority, as defined in section 124.01 of the Revised Code, who appears only as a witness in an employment interview, investigation, or proceeding conducted by or for the appointing authority.

In interpreting Ohio Rev. Code §9.84 in *Kirch v. Ohio Bur. of Worker's Comp*, 154 Ohio App. 3d 651, Ohio Court of Appeals, 10th Appellate Dist. 2003 the Tenth Appellate District cited the Ohio Supreme Court's opinion in *In re Civ. Serv. Charges & Specs. Against Piper* (2000), 88 Ohio St.3d 308, 725 N.E.2d 659 which:

addressed whether a person was appearing "as a witness" under R.C. 9.84, and it rejected the proposition that a person is not appearing "as a witness" unless he or she is testifying under oath. The Supreme Court instead agreed with the Tenth District Court of Appeals' court's rationale in *State FOP Grand Lodge No. 1 v. State* (Dec. 31, 1981), Franklin App. No. 80AP-744, 1981 WL 3707, where it concluded that the term "witness" in R.C. 9.84 is used in its broadest sense and should not be interpreted to exclude a person who is also a party.

The majority in *Piper*, which was decided on April 5, 2000, did not address the meaning of other words or phrases in R.C. 9.84, but in a concurring opinion three justices joined to clarify the meaning of the term "administrative or executive proceeding or investigation." The concurring opinion made explicit what the majority opinion suggested: that appearing as a "witness" is not sufficient by itself to trigger the right to counsel under R.C. 9.84, because one must also be appearing in an administrative or executive proceeding or investigation for the statute to apply. *Piper*, 88 Ohio St.3d at 312, 725 N.E.2d 659. In the concurring opinion, the justices concluded that an informal interview does not trigger a right to counsel under R.C. 9.84 and that the benefits of the statute are triggered only where the

circumstances demonstrate "the requisite formality" that distinguishes an administrative or executive proceeding or investigation from an informal interview.

In reaching that conclusion, the concurring justices observed that the "level of formality in any proceeding or investigation is a function of the rules applicable to the manner in which the proceeding or investigation is conducted." Id. Reviewing the record in *Piper*, they noted a number of factors that reflected the requisite formality.

In this matter, Noah Dormady is appearing as a witness under oath and subject to cross-examination before a public commission: the Public Utilities Commission of Ohio ("PUCO") in these matters. The matters currently before the PUCO are administrative proceedings being conducted pursuant to the authority granted to the PUCO pursuant to Title 49 of the Ohio Revised Code. Thus, because Dr. Dormady is a witness under oath in these formal administrative proceedings before the PUCO he is entitled to counsel to protect his rights and interest.

Moreover, it is imperative that Dr. Dormady be allowed counsel and file the attached memorandum contra as on January 25, 2019, Mr. Robert Dove, counsel for the Natural Resources Defense Council, specifically and wrongfully represented to PUCO in a proceeding that Mr. Dormady was in violation of Ohio Revised Code §102.03(D) and (E) because he allegedly is an "employee" of the Ohio Consumers' Counsel. Movants have now submitted a written motion to the PUCO making the same baseless and meritless allegations.

Movants' allegations that Mr. Dormady is in violation of the Ohio Ethics Law are wrong, misinformed, and most likely driven by exterior motives in light of Mr. Dormady filing an application for the open commissioner position on PUCO. Thus, because of Movants baseless allegations and pursuant to the express words of Ohio Rev. Code §9.84 leave to file the

Memorandum Contra attached hereto as an Exhibit on behalf of Mr. Dormady must be granted for the "protection of the rights of the witness."

Respectfully submitted,

s/ Nathan D. Painter

Nathan D. Painter (0076274)

PAINTER & ASSOCIATES, LLC

5123 Norwich St., Ste. 200

Hilliard, Ohio 43026

Phone: (614) 319-3306

Fax: (614) 594-7170

Email: nathan@painterandassociates.com

Counsel for Witness Noah Dormady

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of Dr. Noah Dormady's Motion for Leave to File Memorandum Contra was served upon the persons listed below via electronic transmission this 29th day of January 2019.

s/ Nathan D. Painter

Nathan D. Painter (0076274)

PAINTER & ASSOCIATES, LLC

5123 Norwich St., Ste. 200

Hilliard, Ohio 43026

Phone: (614) 319-3306

Fax: (614) 594-7170

Email: nathan@painterandassociates.com

Counsel for Dr. Noah Dormady

SERVICE LIST

Thomas.mcnamee@ohioattorneygeneral.gov

v.kboehm@BKLlawfirm.com

jkylercohn@BKLlawfirm.com

mpritchard@mwncmh.com

fdarr@mwncmh.com

paul@carpenterlipps.com

Bojko@carpenterlipps.com

Dressel@carpenterlipps.com

mleppla@theOEC.org

jstock@beneschlaw.com

jrego@beneschlaw.com

dparram@bricker.com

mdortch@kravitzllc.com

cpirik@dickinsonwright.com

todonnell@dickinsonwright.com

wvorys@dickinsonwright.com

cluse@dickinsonwright.com

Attorney Examiners

Sarah.parrot@puc.oh.us.gov

Greta.see@puc.oh.us.gov

stnourse@aep.com

cblend@aep.com

tony.mendoza@sierraclub.org

rsahli@columbus.rr.com

cmooney@ohiopartners.org

mnugent@igsenergy.com

joliker@igsenergy.com

rdove@keglerbrown.com

whitt@whitt-sturtevant.com

glover@whitt-sturtevant.com

callwein@opae.org

mjsettineri@vorys.com

glpetrucci@vorys.com

ktreadway@oneenergyllc.co
m dborchers@bricker.com

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF OHIO**

In the Matter of the 2018 Long-Term)	
Forecast Report on behalf of Ohio Power)	Case No. 18-0501-EL-FOR
Company and Related Matters.)	
In the Matter of the Application Seeking)	
Approval of Ohio Power Company's)	
Proposal to Enter into Renewable Energy)	Case No. 18-1392-EL-RDR
Purchase Agreements for Inclusion in the)	
Renewable Generation Rider.)	
In the Matter of the Application of Ohio)	Case No. 18-1393-EL-ATA
Power Company to Amend its Tariffs.)	

**DR. NOAH DORMADY'S MEMORANDUM CONTRA TO MOVANTS' JOINT
MOTION TO EXCLUDE THE DIRECT TESTIMONY OF NOAH DORMADY**

I. PROCEDURAL POSTURE

During a hearing before the Public Utilities Commission of Ohio ("PUCO") on January 25, 2019, Mr. Robert Dove, counsel for the Natural Resources Defense Council, moved the PUCO orally to exclude Dr. Noah Dormady's direct testimony submitted on January 2, 2019 by the Office of Ohio Consumers' Counsel ("OCC"). Specifically, Mr. Dove, on behalf of his client, alleged that because Dr. Dormady is "seeking a position as a Commissioner at the PUCO" Dr. Dormady was in violation of Ohio Ethics Law generally and specifically Ohio Rev. Code §102.03(D) and (E). AEP LTFR VOL. VIII-Motion to Exclude p. 2018-19.

After the motion was made orally, the PUCO ordered The Natural Resources Defense Council to file a written motion by 5:00pm on January 28, 2019 and Memorandum in Opposition to such motion by noon on January 29, 2019.

Subsequently, on January 28, 2019, the Natural Resources Defense Council and Partners for Affordable Energy jointly moved the PUCO in writing to exclude Dr. Dormady's written testimony for the reasons primarily stated in Natural Resources Defense Council's oral motion of January 25, 2019. See Joint Motion.

Movants argue that even though Dr. Dormady is simply a witness in this matter, he "executes the sovereignty of the state" and thus his direct written testimony is in violation of the Ohio Ethics Law and therefore should be excluded. Id. at 2020; Jt. Mtn. p. 5.

II. FACTUAL BACKGROUND

On or about October 26, 2018, Dr. Dormady caused to be formed Dormady Associates, LLC. Exhibit A, Dormady Affidavit, ¶ 2. Dr. Dormady is the Sole Member of Dormady Associates, LLC. Dormady Associates, LLC has its own Federal Tax ID number and a written declaration was executed for Dormady Associates, LLC. Id. at ¶ 3. The purpose of Dormady Associates, LLC is to (i) provide expert analysis services and (ii) engage in any lawful act, activity, or business not contrary to and for which a limited liability company may be formed under the laws of the State of Ohio. Id. at ¶ 4.

On November 8, 2018, Dormady Associates, LLC entered into a Contract for Professional Services with the OCC. Id. at ¶ 5. The purpose of the contract was to assist the OCC in conducting an objective analysis on behalf of "Ohio's residential consumers on issues related

to the Navigant survey of customers' preferences on renewable energy" and deliver certain deliverables requested by the OCC. Id. at ¶ 6.

On November 10, 2018, Dr. Dormady, through Dormady Associates, LLC, began working on this matter for OCC. Id. at ¶ 7. On or about November 21, 2018, OCC issued a purchase order to Dormady Associates, LLC. Id. at ¶ 8. On December 18, 2018, Dormady Associates, LLC submitted an invoice to the OCC for services rendered by it pursuant to the contract with the OCC dated November 8, 2018. Id. at ¶ 9.

On January 2, 2019, Dr. Dormady's written direct testimony developed pursuant to Dormady Associates, LLC's contract with the OCC was submitted by the OCC in this matter. Id. at ¶ 10. Pursuant to the contract with the OCC, Dormady Associates, LLC controlled the means of performing the work and was only responsible to the OCC for providing the deliverables required under the contract. Id. at ¶ 11.

Further, Dr. Dormady controlled the hours he worked for services contracted to be performed by Dormady Associates, LLC pursuant to its contract with the OCC. Id. at ¶ 12. Additionally, Dormady Associates, LLC controlled the tools and programs used to perform its' duties under its' contract with the OCC. Id. at ¶ 13. Moreover, Dormady Associates, LLC does not do regular work for the OCC; the work performed by Dormady Associates, LLC for the OCC is not of the type usually performed by the OCC internally; Dormady Associates, LLC has its own business address; Dormady Associates, LLC is available to perform other services to other entities; Dormady Associates, LLC incurs its own expenses; Dormady Associates, LLC retains control over its schedule, number of hours worked, jobs accepted and performance of such jobs;

and Dormady Associates, LLC is responsible for its own taxes, insurance and other expenses typical of an independent business. Id. at ¶¶14-20.

After his testimony was submitted in this matter on January, 2, 2019, Dr. Dormady became interested in applying for the open commissioner's seat on the PUCO. Id. at ¶21. Subsequently, he notified the OCC's counsel on January 16, 2019 of his interest in serving on the PUCO commission. Id. at ¶22. Dr. Dormady submitted his application to the PUCO commission on January 17, 2019. Id. at ¶23.

After submitting his application, Dr. Dormady, along with counsel for the OCC, contacted the Ohio Ethics Commission and spoke with John Rawski, Advisory Attorney. Id. at ¶24. Based on this conversation with the Ohio Ethics Commission, it was Dr. Dormady's understanding that no ethics laws had been violated by his submission of an application for a commissioner's seat on the PUCO. Id. at ¶25.

III. APPLICABLE LAW AND ANALYSIS

The fundamental linchpin to Movants' arguments to exclude Dr. Dormady's written direct testimony is that he is a "public employee" and as such he is subject to Ohio Ethics Law. See Jt. Mtn.

Pursuant to Ohio Rev. Code §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.

Thus, per the plain language of these sections of the statute that the Movants cite as the basis to exclude Dr. Dormady's testimony they are only applicable to a "public official or employee."

Ohio Rev. Code §102.01(B) defines "public official or employee" as follows:

any person who is elected or appointed to an office or is an employee of any public agency. "Public official or employee" does not include a person elected or appointed to the office of precinct, ward, or district committee member under section 3517.03 of the Revised Code, any presidential elector, or any delegate to a national convention. "Public official or employee" does not include a person who is a teacher, instructor, professor, or other kind of educator whose position does not involve the performance of, or authority to perform, administrative or supervisory functions.

Dr. Dormady is not an elected official nor has he been appointed to a public office.¹ Hence, Dr. Dormady can only be considered subject to these sections of the law if he is deemed a "public employee."

The Ohio Ethics Commission, however, has determined that independent contractors of public agencies such as the OCC are "not generally within the class of persons who are subject to the Ohio Ethics Law." See Exhibit B, Spack Advisory Opinion citing Advisory Opinions No. 75-010, 75-012, 75-016, 77-008, 89-003 and 89-009.

Recently, the Tenth District Court of Appeals set forth the applicable law in determining whether or not a person or entity is an independent contractor rather than an employee. The Tenth District stated:

In *Gillum v. Industrial Com.*, 141 Ohio St. 373, 48 N.E.2d 234, 1943 Ohio LEXIS 427, 25 Ohio Op. 531 (Ohio 1943), paragraph 2, syllabus, the Supreme Court of Ohio set forth the test for determining whether a person is an independent contractor, as follows:

Whether one is an independent contractor or in service depends upon the facts of each case. The principal test applied to determine the character of the

¹ While Dr. Dormady is a professor at The Ohio State University, his analysis and subsequent testimony provided to the PUCO in these matters was pursuant to Dormady Associates, LLC's contract with the OCC.

arrangement is that if the employer reserves the rights to control the manner or means of doing the work, the relation created is that of master and servant, while if the manner or means of doing the work or job is left to one who is responsible to the employer only for the result, an independent contractor relationship is thereby created.

In determining the amount of control exercised over the alleged employee in order to determine his status, the Supreme Court has set forth certain factors to be considered. These factors include such indicia as who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools, and personnel used; who selects the routes traveled; the length of employment; the type of business; the method of payment; and any pertinent agreements or contracts. *Bostic v. Connor*, 37 Ohio St.3d 144, 146, 524 N.E.2d 881, 1988 Ohio LEXIS 164 (Ohio 1988).

Generally, independent contractors provide goods or services to another entity under terms specified in a contract or within a verbal agreement. Unlike an employee, an independent contractor does not work regularly for an employer. Independent contractors usually perform a special service that is not in the normal course of business of the employer. Independent contractors often advertise, maintain a visible business location, and are available to work in a trade, or some other service. Contractors often work through a sole proprietorship, LLC, or franchise, which they themselves own. As a business owner, the independent contractor incurs its own expenses to provide the contracted service. Independent contractors also typically retain control over their schedule and number of hours worked, jobs accepted, and performance of their job. In addition, they may have a major investment in equipment, furnish all their own supplies, provide their own insurance and repairs, and cover all other.

State ex rel. Ohio Valley Selective Harvesting, LLC v. Buehrer, 2017 Ohio 369 - Ohio; Court of Appeals, 10th Appellate Dist. 2017, 2017-Ohio-369.

Dr. Dormady's affidavit and the documents submitted along with his affidavit make it clear that Dr. Dormady's company was an independent contractor for the OCC; not its employee. Pursuant to Dr. Dormady's affidavit, in performing its contractual obligations, Dormady Associates, LLC was in control of the means of performing its contractual obligations under the contract and was responsible only to the OCC for delivering the contracted for deliverables.

Exhibit A, Dormady Affidavit, ¶ 11. Moreover, pursuant to Dr. Dormady's affidavit and the contract between Dormady Associates, LLC and the OCC, the OCC exercised no control over Dormady Associates, LLC sufficient to establish a master-servant/employer-employee relationship. Id. at ¶¶5-20 and Exhibit 2 attached thereto.

Moreover, as set forth in the Tenth District Court's opinion in *Buehrer, supra*, the factors articulated by the Ohio Supreme Court in determining if an independent contractor relationship exists are present here: Dormady Associates, LLC controlled the details and quality of work; hours worked on the contracted for services; the material, tools and personnel used; the work performed is not that typically believed to be undertaken by the OCC; Dormady Associates, LLC has its own business address, tax identification number and responsible for its own insurance and business expenses; and can accept work from sources other than the OCC. Exhibit A, Dormady Affidavit, ¶¶5-20. Thus, the evidence in this matter clearly establishes that Dr. Dormady was providing his written direct testimony pursuant to and in accordance with the independent contract that Dormady Associates, LLC had with the OCC.

Movants argue, however, that Dr. Dormady is a "public employee" because he "executes the sovereignty of the state." See Jt. Mtn. p. 5; AEP LTFR VOL. VIII-Motion to Exclude p. 2020. This argument is misplaced and inapplicable to these circumstances.

In Advisory Opinion 98-005, attached hereto as Exhibit C, the Ohio Ethics Commission stated the "sovereign" power of the state is the "discretionary, decision making duties made on behalf of the public authority which the official or employee serve." See also Adv. Ops. No

75-004 and 85-005. The Ohio Ethics Commission continued “[i]f an individual or firm serving a political subdivision is given the authority and administrative discretion to exercise the sovereign power of the government, then the individual or firm become subject to the Ohio Ethics Law regardless of the contractual arrangements of his service.” Ad. Op. 98-005 citing Ad Ops. 77-004 and 89-003.

In this matter, Movants do not and cannot cite to any evidence demonstrating that Dormady Associates, LLC and/or Dr. Dormady has any authority or administrative discretion to exercise the sovereign power of the State of Ohio via the OCC or the PUCO. Indeed, Dormady Associates, LLC and/or Dr. Dormady have absolutely no ability, power or discretion to exercise any authority of the State of Ohio; rather, all Dormady Associates, LLC and/or Dr. Dormady were contracted to do under these circumstances is provide an objective analysis of the issues related to the Navigant survey on behalf of the OCC. Indeed, Dr. Dormady and/or Dormady Associates, LLC did not even have the discretion to submit direct written testimony to the PUCO as it was within the sole discretion of the OCC itself to determine whether or not to submit such written direct testimony to the PUCO. In other words, neither Dormady Associates, LLC nor Dr. Dormady had the ability or discretion to submit such analysis to the PUCO in these matters as that decision was left solely to the OCC’s counsel.

Movants cite and quote *State ex rel Milburn et. al. v. Pethtel*, 153 Ohio St. 1, 6 (1950) in support of their argument that Dr. Dormady was exercising “sovereign authority” of the OCC. It. Mtn. p. 5. To begin with the quote Movants provide is incomplete. The full quote is as follows:

If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.

Id. It must first be noted that the paragraph is written in the conjunctive and evidence allegedly fulfilling one of the clauses cited above is not enough to make a finding of exercising "sovereignty of the state." Second, a full reading of the Supreme Court's quote demonstrates that Dr. Dormady is not exercising "sovereign authority." Movants offer no evidence that Dr. Dormady is offering his testimony pursuant to statutory and/or independent duties he is under; that he is invested with independent power as to public property or has power to incur financial obligations on behalf of the State or the OCC; is empowered to act in business and political dealings of the State generally or the OCC specifically; and that he must act through or on behalf of the OCC. Simply, as an independent contractor submitting written direct testimony Dr. Dormady is not exercising the "sovereignty of the state."

It must also be noted that *Milburn* dealt with individuals appointed to a local Board of Elections. *Id.* As the *Milburn* court stated, "The relators as required by statute have been appointed to office for a definite term and have taken an oath of office. Primarily, the question presented is whether, under the authority granted to them by Section 4785-13, General Code, they are "invested by law with a portion of the sovereignty of the state and authorized to exercise functions either of an executive, legislative or judicial character." *Id.* at p. 8-9. Thus, the *Milburn* Court found that the members of the Board of Elections were public officials under the Ohio Constitution.

Here, however, Dr. Dormady and Dormady Associates, LLC are not required by statute to be appointed to an office for a definite term, have not taken an oath of office and are not in anyway authorized to exercise a function of an executive, legislative or judicial character. Thus, again, Dr. Dormady and Dormady Associates, are not exercising “sovereign authority” as defined under Ohio law; hence Movants’ argument is without merit.

Therefore, in light of the applicable authority and facts relevant to these circumstances, the Ohio Ethics law were not violated in this instance as Dormady Associates, LLC and Dr. Dormady are not “public official or employee” subject to the Ohio Ethics Law nor are they exercising the “sovereignty of the state.”

b. The PUCO does not have jurisdiction to decide whether or not Dr. Dormady is in violation of the Ohio Ethics Law.

To the extent that Movants are seeking the PUCO to make a determination of whether or not a violation of Ohio Ethics Law occurred, this body is without jurisdiction to do so. The Ohio Ethics Commission has jurisdiction over Ohio's Executive Branch- that is for all public officials and employees at the state and local levels of government, except legislators, judges, and their staffs. See Ohio Revised Code Chapter 102 *et seq.* Thus, the PUCO has no jurisdiction to determine whether or not a violation of the Ohio Ethics Law occurred and any attempt to do so may violate Dr. Dormady and Dormady Associates, LLC’s due process rights and other legal interests.

Indeed, Movants concede that the Ohio Ethics Commission is the state agency that is “tasked with promoting ‘ethics in public service to strengthen the public’s confidence that Government business is conducted with impartiality and integrity.’” *Jt. Mtn.* p 4. As such, the PUCO should heed the Movants’ concession that the Ohio Ethics Commission is the proper state

agency to raise these issues in front of and not engage in the consideration and adjudication of issues outside of the PUCO's jurisdiction and purview.

c. The Ohio Rules of Evidence provide a proper vehicle for the Movants to protect any of their interests.

The Ohio Rules of Evidence, not the Ohio Ethics Law, provide a proper vehicle for Movants to explore whether or not Dr. Dormady's testimony is in any way biased or prejudiced in light of his application to become a commissioner of the PUCO. It must be noted, however, that Dr. Dormady's testimony was submitted on January 2, 2019-15 days before he submitted his application to PUCO; and it is hard for something to cause bias that did not even exist at the time testimony was filed or otherwise given.

d. Movants' argument that Dr. Dormady's Direct Testimony needs to be Excluded to Protect the Integrity and Fairness of the Process before the PUCO is logically inconsistent.

Lastly, Movants make much of an argument that it is necessary that the PUCO exclude Dr. Dormady's testimony to preserve the fairness, equity and integrity of the "process." Jt. Mtn. p. 2-5. Movants first state that it is not "unusual" for professionals who have worked for represented clients seek a position with the PUCO, such as Dr. Dormady is now doing. Id. at 2. Dr. Dormady, however, must for some reason be treated differently because Movants' "understanding" (with no evidence or authority cited to even shed light where this epiphany originated from) is that no person has ever sought to seek a position with the PUCO while a case in which they "participated" is before the PUCO. Yet, Movants go on to state that this situation is "common practice" and the solution in these types of situations is for the person to recuse him or herself from deciding or influencing the matter in the event that such person becomes employed by the PUCO.

In other words, despite conceding that it is “common practice” for individuals who participate in matters before the PUCO to seek employment with the PUCO, Movants are asking the PUCO to treat Dr. Dormady differently in this matter. As the OCC correctly pointed out at the hearing on January 25, 2019, and as occurs continuously throughout this State on a daily basis at all levels of government, the solution should Dr. Dormady even be appointed to the PUCO is for him to recuse himself from these proceedings.

Movants speculate that recusal would be a “hollow remedy” because if Dr. Dormady were to become a Commissioner then his direct written testimony in this matter would somehow then become gospel simply by virtue of him being appointed as a Commissioner.

Movants’ position is too much. It is based on speculation; not only that Dr. Dormady’s mere appointment as a Commissioner itself may raise his current testimony in the eyes of other Commissioners, but that somehow other Commissioners would actually give more credence to his testimony than each individual Commissioner otherwise would based on the merits of the testimony itself. The PUCO commissioners’ ability to be fair and impartial in weighing evidence should be given more credit than Movants want to give them.

IV. CONCLUSION

For the reasons set forth above, Dr. Dormady and Dormady Associates, LLC are not in violation of the Ohio Ethics law.

Respectfully submitted,

s/ Nathan D. Painter

Nathan D. Painter (0076274)

PAINTER & ASSOCIATES, LLC

5123 Norwich St., Ste. 200
Hilliard, Ohio 43026
Phone: (614) 319-3306
Fax: (614) 594-7170
Email: nathan@painterandassociates.com
Counsel for Witness Noah Dormady

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of Dr. Noah Dormady's Memorandum Contra was served upon the persons listed below via electronic transmission this 29th day of January 2019.

s/ Nathan D. Painter
Nathan D. Painter (0076274)
PAINTER & ASSOCIATES, LLC
5123 Norwich St., Ste. 200
Hilliard, Ohio 43026
Phone: (614) 319-3306
Fax: (614) 594-7170
Email: nathan@painterandassociates.com
Counsel for Dr. Noah Dormady

SERVICE LIST

Thomas.mcnamee@ohioattorneygeneral.gov
v kboehm@BKLawfirm.com
jkylercohn@BKLawfirm.com
mpritchard@mwncmh.com
fdarr@mwncmh.com
paul@carpenterlipps.com
Bojko@carpenterlipps.com
Dressel@carpenterlipps.com
mleppa@theOEC.org
jstock@beneschlaw.com
jregio@beneschlaw.com
dparram@bricker.com
mdortch@kravitzllc.com
cpirik@dickinsonwright.com
todonnell@dickinsonwright.com
wvorys@dickinsonwright.com
cluse@dickinsonwright.com

Sarah.parrot@puc.oh.us.gov
Greta.see@puc.oh.us.gov
stnourse@aep.com
cmblend@aep.com
tony.mendoza@sierraclub.org
rsahli@columbus.rr.com
cmooney@ohiopartners.org
mnugent@igsenergy.com
joliker@igsenergy.com
rdove@keglerbrown.com
whitt@whitt-sturtevant.com
glover@whitt-sturtevant.com
callwein@opae.org
mjsettineri@vorys.com
glpetrucci@vorys.com
ktreadway@oneenergylc.co
m dborchers@bricker.com

Attorney Examiners

s/ Nathan D. Painter
Nathan D. Painter (0076274)
PAINTER & ASSOCIATES, LLC
5123 Norwich St., Ste. 200

Hilliard, Ohio 43026

Phone: (614) 319-3306

Fax: (614) 594-7170

Email: nathan@painterandassociates.com

Counsel for Witness Noah Dormady

**BEFORE THE PUBLIC UTILITIES
COMMISSION OF OHIO**

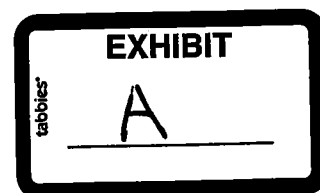
In the Matter of the 2018 Long-Term)	
Forecast report on behalf of Ohio Power)	Case No. 18-0501-EL-FOR
Company and Related Matters.)	
In the Matter of the Application Seeking)	
Approval of Ohio Power Company's)	
Proposal to Enter into Renewable Energy)	Case No. 18-1392-EL-RDR
Purchase Agreements for Inclusion in the)	
Renewable Generation Rider.)	
In the Matter of the Application of Ohio)	Case No. 18-1393-EL-ATA
Power Company to Amend its Tariffs.)	

AFFIDAVIT OF NOAH DORMADY

STATE OF OHIO :
 :
COUNTY OF FRANKLIN : SS

I, Noah Dormady, being duly cautioned and sworn according to law,
submit this Affidavit in support of my Memorandum in Opposition and depose
and state that:


1. I am a witness in the above-captioned case and I have personal
knowledge of the matters set forth herein.
2. On or about October 26, 2018, I caused to be formed Dormady
Associates, LLC. A true and accurate copy of the State of Ohio
Certificate is attached hereto as Exhibit 1 and incorporated herein.



3. I am the Sole Member of Dormady Associates, LLC. Dormady Associates, LLC has its own Federal Tax ID number and a written declaration was executed for Dormady Associates, LLC.
4. The purpose of Dormady Associates, LLC is to (i) provide expert analysis services and (ii) engage in any lawful act, activity, or business not contrary to and for which a limited liability company may be formed under the laws of the State of Ohio.
5. On November 8, 2018, Dormady Associates, LLC entered into a Contract for Professional Services with the Office of The Ohio Consumers' Counsel. A true and accurate copy of the contract is attached hereto as Exhibit 2 and incorporated herein.
6. The purpose of the contract was to assist The Ohio Consumers' Counsel ("OCC") in conducting an objective analysis on behalf of "Ohio's residential consumers on issues related to the Navigant survey of customers' preferences on renewable energy" and perform services requested by the OCC. See Exhibit 2, paragraph V.
7. On November 10, 2018, I, through Dormady Associates, LLC, began working on this matter for OCC.
8. On or about November 21, 2018, OCC issued a purchase order to Dormady Associates, LLC. A true and accurate copy of the Purchase Order is attached hereto as Exhibit 3 and incorporated herein.

9. On December 18, 2018, Dormady Associates, LLC submitted an invoice to the OCC for services rendered by it pursuant to the contract with the OCC dated November 8, 2018. A true and accurate copy of the Invoice is attached hereto as Exhibit 4 and incorporated herein.
10. On January 2, 2019, my written direct testimony developed pursuant to Dormady Associates, LLC's contract with OCC was submitted by the OCC in this matter.
11. Pursuant to the contract with the OCC, Dormady Associates, LLC controlled the means of performing the work and was only responsible to the OCC for providing the deliverables required under the contract.
12. Further, I controlled the hours I worked for services contracted to be performed by Dormady Associates, LLC pursuant to its contract with the OCC.
13. Additionally, Dormady Associates, LLC controlled the tools and programs used to perform its' duties under its' contract with the OCC.
14. Dormady Associates, LLC does not do regular work for the OCC.
15. My understanding is that the work performed by Dormady Associates, LLC for the OCC is not of the type usually performed by the OCC internally.
16. Dormady Associates, LLC has its own business address.
17. Dormady Associates, LLC is available to perform other services to other entities.

18. Dormady Associates, LLC incurs its own expenses.
19. Dormady Associates, LLC retains control over its schedule, number of hours worked, jobs accepted and performance of such jobs.
20. Dormady Associates, LLC is responsible for its own taxes, insurance and other expenses typical of an independent business.
21. After my testimony was submitted in this matter on January, 2, 2019, I became interested in applying for the open commissioner's seat on the PUCO.
22. I notified OCC's counsel on January 16, 2019 about my interest in serving on the PUCO commission.
23. I submitted my application to the PUCO commission on January 17, 2019.
24. After doing so, I, along with counsel for OCC, contacted the Ohio Ethics Commission and spoke with John Rawski, Advisory Attorney.
25. Based on this conversation with the Ohio Ethics Commission, and after disclosing facts contained herein, it was my understanding that no ethics laws had been violated.
26. Further, affiant sayeth not.



Noah Dormady

BE IT REMEMBERED, That on this 28 day of January, 2019, before me, the subscriber, a Notary Public in and for said county, personally came Noah Dormady who under penalty of perjury in violation of Section 2921.11 of the Ohio Revised Code represented to me to be said person and acknowledged the signing thereof to be their voluntary act and deed.

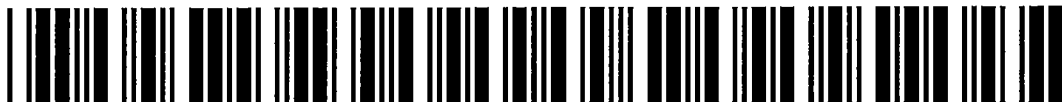
IN TESTIMONY THEREOF, I have hereunto subscribed my name and affixed my seal on this day and year aforesaid.



Notary Public



NATHAN D. PAINTER, Attorney At Law
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date
Sec. 147.03 R.C.



DATE	DOCUMENT ID	DESCRIPTION	FILING	EXPED	CERT	COPY
10/26/2018	201829902242	DOMESTIC FOR PROFIT LLC - ARTICLES OF ORG (LCP)	99.00	0.00	0.00	0.00

Receipt

This is not a bill. Please do not remit payment.

PAINTER & ASSOCIATES
5123 NORWICH STREET
SUITE 102
HILLIARD, OH 43026

STATE OF OHIO CERTIFICATE

Ohio Secretary of State, Jon Husted
4247541

It is hereby certified that the Secretary of State of Ohio has custody of the business records for

DORMADY ASSOCIATES, LLC

and, that said business records show the filing and recording of:

Document(s)

DOMESTIC FOR PROFIT LLC - ARTICLES OF ORG
Effective Date: 10/26/2018

Document No(s):

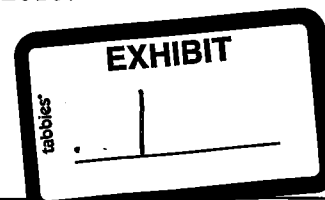
201829902242



United States of America
State of Ohio
Office of the Secretary of State

Witness my hand and the seal of the
Secretary of State at Columbus, Ohio this
26th day of October, A.D. 2018.

Jon Husted
Ohio Secretary of State



Contract No.: 19-055

RFP/ITB No.: Sole Source

OAKS No.: 232437

PUCO Case No.: 18-0501-EL-FOR; 18-1393-EL-RDR

**CONTRACT FOR PROFESSIONAL SERVICES
BETWEEN THE
OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND
DORMADY ASSOCIATES, LLC**

I. PARTIES

This Contract for Professional Services ("Contract"), by and between the **Office of the Ohio Consumers' Counsel ("OCC")**, State of Ohio, located at **65 E. State St. 7th Floor, Columbus, Ohio 43215**, and **Dormady Associates, LLC**, located at **70 Crestview Road, Columbus, OH 43202** (hereinafter referred to as "Independent Contractor") is effective as of the date of the signature by the parties.

II. CONTRACT AMOUNT

- A. The parties agree that the Independent Contractor shall provide OCC with expert technical assistance as outlined in **Article V. Scope of Work, Deliverable and Duties**.
- B. In consideration for the promises and performance of the Independent Contractor as set forth herein, OCC agrees to pay to the Independent Contractor for services rendered that are in conformance with this Contract. Payment will be made within thirty (30) days from the date of OCC's receipt of proper invoices and proof of performance for services performed in accordance with the Scope of Work, Deliverables and Duties of the Independent Contractor and the Terms and Conditions for Professional Services (Attached hereto and incorporated herein as "Exhibit A") of this Contract for Professional Services, as follows:

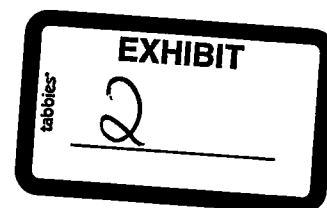
ESTIMATED BUDGET

<u>Deliverables</u>	<u>Rate Up To</u>	<u>Hours</u>	<u>Estimated Cost</u>
Task 1 – 6	\$ 200	55	\$11,000
<u>Total Cost (not to exceed)</u>			\$15,000

The invoices provided to OCC by the Independent Contractor shall be submitted as outlined below in **"Exhibit A", Section II. TERMS AND CONDITIONS OF PAYMENT, paragraph A. and B."**

The invoices provided by the Independent Contractor shall only reflect, and the OCC shall only pay for work actually performed. The total amount includes all travel and office expenses (meaning travel and office expenses cannot be separately charged to OCC).

Invoices shall be emailed to: OCC-Invoices@occ.ohio.gov



III. TERM OF CONTRACT AND APPROVAL

This contract is effective on the date it is signed by the OCC and approved by the Office of Budget and Management (Division of State Accounting).

As the current General Assembly cannot commit a future General Assembly to expenditure, this Contract shall expire at the close of business on June 30, 2019.

Prior to expiration of the original term or any renewed term, OCC may renew this Contract on the same terms and conditions by giving notice to the Independent Contractor of this Contract renewal. Such renewal shall begin upon the expiration of the original term or any renewed term, as applicable, and expire as set forth in an Amendment to this Contract. Any compensation to the Independent Contractor under the renewal contract will be subject to the *Total Costs* as set forth in this Contract unless a change in the amount is specifically requested by OCC.

Work performed after the contract ending date will not be paid. The Independent Contractor will only be compensated for work that is specifically requested by an OCC employee and is performed in accordance with Scope of Work, Deliverables and Duties of the Independent Contractor and the Terms and Conditions for Professional Services (Attached hereto and incorporated herein as "Exhibit A") of this Contract.

IV. COMMUNICATION WITH THE MEDIA

The Independent Contractor shall not communicate with the media – including, but not limited to newspaper, television, or radio personnel regarding any OCC Request for Proposal, Invitation to Bid or contract the Independent Contractor has responded to or entered into. The Independent Contractor shall direct any and all inquiries received from the media to the OCC.

V. SCOPE OF WORK, DELIVERABLE AND DUTIES OF INDEPENDENT CONTRACTOR

This section describes the scope of work and what the selected Offeror must deliver as part of the completed work (the "Deliverables") to meet the terms and conditions of a subsequent contract.

Scope of Work.

The selected Independent Contractor will, as directed by OCC staff and/or legal counsel, assist in representing the interests of Ohio's residential consumers on issues related to the Navigant survey of customers' preferences on renewable energy. AEP Ohio has used the results of the Navigant survey to support the need for renewable energy resources such as wind and solar projects in Ohio (400 MW of specific projects and 900 MW of generic projects). This contract will involve work in two related cases (which have been consolidated and split into 2 phases): 18-501-EL-FOR (long term forecast proceeding) and 18-1393-EL-RDR (rider proceeding).

AEP Ohio filed a long-term forecast report (LTFR) on April 16, 2018 in Case No. 18-501-EL-FOR and amended that forecast on September 19, 2018. The forecast case is directed to proving that there is a need for 900 MW of renewable generation. AEP's need for the 900 MW of renewable generation is based in part on a survey conducted by Navigant on behalf of AEP that assessed customer interest in and attitudes toward renewable energy generated in Ohio and delivered by AEP Ohio. AEP Witnesses Frye and Horner submit testimony on the customer survey.

AEP also proposed, in Case No. 18-1393-EL-RDR, specific renewable energy purchase agreements related to a 300MW solar facility and a 100 MW solar facility. In that case AEP claims that customers have a need for renewable energy resources and have expressed an interest in renewables, even if there are additional costs to secure the clean energy. Mr. Allen presents testimony in this regard, which is based primarily on the Navigant customer survey.

The selected Independent Contractor will perform specific tasks, as requested by OCC, including a critical review of the methodology, data collection, and conclusions in the Navigant survey regarding customer perceptions and attitudes regarding renewable energy. The Independent Contractor shall evaluate potential bias and shortcomings in the Navigant survey and provide an opinion on issues that are not addressed by Navigant. In addition, to the extent that information is available, the Independent Contractor may evaluate other surveys or reports that articulate customer perceptions regarding renewable energy.

Deliverables and Duties. The selected Independent Contractor shall work at the direction of counsel regarding the evaluation of surveys of customers preference and attitude toward renewable energy resources and customers' willingness to pay additional costs for renewable energy resources. Specifically, the selected Independent Contractor shall be responsible for the following:

Deliverables

1. Review the pertinent parts of the long-term forecast and amended long-term forecast filed by AEP Ohio in the long-term forecast proceeding, including testimony of Company witnesses Frye and Horner; review the pertinent parts of the rider proceeding testimony, including Mr. Allen.
2. Review and evaluate the Navigant survey and testimonies and identify possible bias and validity of the survey results.
3. Prepare discovery requests as needed to assess conclusions in the Navigant survey and related testimonies.
4. Evaluate other surveys and reports that may be available that articulate customer expectations and attitudes regarding renewable energy.
5. Provide written testimony on deliverables, at the direction of OCC. Written testimony is due to be filed on November 21, 2018 and is due at the OCC for review by November 14, 2018. Testimony needs are to be identified by OCC, and may include direct, supplemental, and/or rebuttal testimony responding to any witnesses in the proceeding, including utility, PUCO Staff, or intervenor witnesses.
6. At the direction of OCC,
 - a. Evaluate the testimony of witnesses (filed testimony and any future testimony by the Company and/or interested parties) and any Exhibits or subsequently filed documentation;
 - b. Prepare timely discovery questions (interrogatories and requests for documents) for the purpose of obtaining any additional information needed to fully evaluate the issues and perform deliverables 1 through 5;


- c. Timely review responses to discovery questions if applicable to your analysis, prepare additional discovery questions if necessary, and incorporate responses into deliverables 1-4;
- d. Assist OCC Counsel in preparing for depositions of the Utility, PUCO Staff, and/or other intervenor witnesses, as deemed necessary by OCC's Lead Attorney. Participation, through teleconferencing, may be requested at such depositions. Transcript review may also be requested;
- e. Attend deposition as a deponent (travel may be necessary) if deposition is requested;
- f. Attend hearings, scheduled to begin on December 4, 2018, as deemed necessary (will require travel) by OCC's Lead Attorney, including attending to present and defend written testimony presented on behalf of OCC;
- g. Assist and provide technical support, as deemed necessary by OCC's Lead Attorney, in preparing for prehearing and settlement conferences, evaluating witness testimony, opposing witnesses on cross-examination (may include the Utility, Staff, and other intervenors), preparing OCC's briefs, reply briefs, and related motions with respect to this proceeding; and
- h. Perform other related tasks as requested by OCC in these cases.

The Independent Contractor shall not perform work unless specifically requested to do so by an OCC employee.

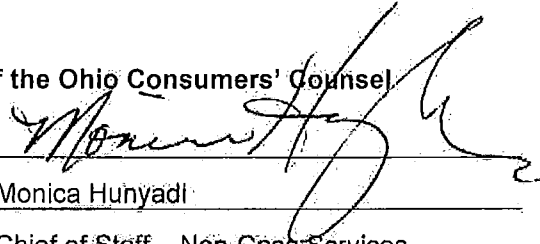
This Contract is not binding upon OCC unless executed in full.

Approved & Accepted by:

Dormady Associates, LLC

By: 
Printed Name: Noah Dormady
Title: Owner
Date: 11/8/2018

Office of the Ohio Consumers' Counsel

By: 
Printed Name: Monica Hunyadi
Title: Chief of Staff – Non-Case Services
Date: 11/8/2018

Purchase Order

Payment Provision: The purchase order number authorizing the delivery of products or services MUST be included on the Invoice.

Office of Consumers' Counsel

Supplier:
0000258902
Dormady Associates LLC
70 Crestview Rd
Columbus OH 43202

Dispatch via Print

Purchase Order	Date	Revision	Page
OCC01-0000002101	11/21/2018		1
Payment Terms	Freight Terms	Ship Via	
Net 30	FOB Destination, Prepaid	Not Applicable	
Phone			Currency
BUYER			USD

Ship To: Office of Consumers' Counsel
P003701
65 East State Street, 7th Fl.
Columbus OH 43215-4213
United States

Bill To: Office of Consumers' Counsel
65 East State Street, 7th Fl.
Columbus OH 43215-4213
United States

Line-Sch	Quantity	UOM	Unit Price	Extended Amt	Due Date
1- 1	1	AMT	15,000	15,000.00	

FY19 Contract 19-055

Schedule Total 15,000.00

<<See Contract for SOW.>>

Item Total 15,000.00

Total PO Amount 15,000.00

EXHIBIT

3

The Director of Budget and Management certifies that there is a balance available in the appropriation not already obligated to pay existing obligations in an amount at least equal to the portion of the contract, agreement, obligation resolution or order to be performed in the current fiscal year.

Department Head

Bruce J. Weston, Consumers' Counsel

By accepting this purchase order, Vendor hereby certifies that it is in full compliance with ORC Section 3517.13 as it relates to campaign finance contributions.

INVOICE

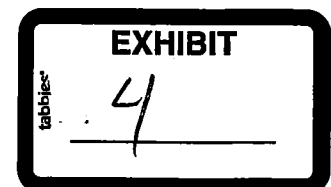
Date: December 18, 2018

To Office of Consumers' Counsel From
Suite 1800
10 West Broad Street 18th Floor
Columbus OH, 43215-3485
(614) 995-7778

Dormady Associates, LLC
70 Crestview Rd
Columbus OH 43202
614-707-2746

PO# OCC01-0000002101
Case # 18-0501-EL-FOR; 18-1393-EL-RDR
Contract # 19-055

Dates	Description	Hourly Rate	Total Hours	
Invoice #1: 11/10/2018 – 12/15/2018	Service as expert witness for OCC with evaluation of Ohio Power Company's Consumer Survey as Designed and Administered by Navigant Consulting LLC.	\$200.00	33.28	\$6,656.00
			Total	\$6,656.00





OHIO ETHICS COMMISSION
THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

June 21, 1990

John F. Spack
947 South Ohio Avenue
Columbus, Ohio 43206

Dear Mr. Spack:

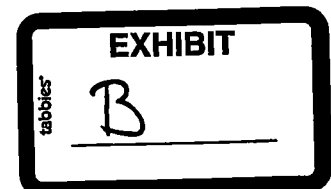
In your letter to the Ethics Commission you ask whether the Ohio Ethics Law and related statutes prohibit you from: 1) providing teaching or consulting services to schools which teach massage therapy and; (2) advocating the views of massage therapy professional organizations to the State Medical Board, in light of the fact that you are employed by the State Medical Board to aid in its conducting of licensing examinations for individuals wishing to practice massage as a limited branch of medicine.

The State Medical Board (Board) is a statutorily created state board. See R.C. 4731.01. The Board consists of twelve members appointed by the Governor with the advice and consent of the Senate. Id. One of the Board's duties is to examine and register persons desiring to practice any limited branch of medicine, including massage. See R.C. 4731.15. Such examinations are conducted under rules, and at times and places, determined by the Board; the examination must be given in subjects specified by statute and in other subjects which the Board determines to be appropriate. See R.C. 4731.16. The Board is statutorily authorized to "call to its aid" persons of known expertise in an area of a limited branch of medicine for the purpose of conducting the examinations described above. R.C. 4731.17. Such persons receive a maximum of fifty dollars per day for their services in addition to actual and necessary expenses as fixed and allowed by the Board. Id. You have stated that this year the Board conducted examinations only for six days.

Your attention is directed to Divisions (D) and (E) of Section 102.03 of the Revised Code, which read:

- (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 "anything of value" is defined for purposes of R.C. 102.03 to include money, a promise of future employment, and every other thing of value. See R.C. 1.03, 102.01(G). More specifically, the Ethics Commission has held that compensation received for providing teaching or consulting services is a thing of value. See Ohio Ethics Commission Advisory Opinions No. 88-002 and 84-009, respectively. See also Advisory Opinion No. 90-009.



The Ethics Commission has held that Division (D) of Section 102.03 of the Revised Code prohibits a public official or employee from using the authority or influence of his office or employment to secure anything of value, including employment, from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the public agency with which he serves, or where the thing of value could impair the official's or employee's objectivity and independence of judgment with respect to his official actions and decisions for the agency which he serves. See Advisory Opinions No. 79-002, 79-006, 80-004, 84-009, 84-010, 87-006, 87-009, and 89-006. Division (E) of Section 102.03 of the Revised Code prohibits a public official or employee from accepting anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the public agency with which he serves, or where the receipt of such thing of value could impair his objectivity and independence of judgment with regard to his official decisions and responsibilities. See Advisory Opinions No. 86-011 and 89-006.

The Ethics Commission recently issued Advisory Opinion No. 90-009 which describes the limitations R.C. 102.03 (D) and (E) place upon members of a state licensing board in their ability to provide teaching services or assistance in course and program development for sponsors of educational courses. Also, in Advisory Opinion No. 85-012 the Commission held that R.C. 102.03(D) prohibits a member of a state licensing board from securing anything of value from a state professional association whose members are regulated by the board with which he serves, and from participating in deliberations, voting or otherwise using his official position in any matter before the state board on which the association has taken a formal position. Advisory Opinions No. 85-012 and 90-009 have been enclosed for your convenience.

Other divisions of Chapter 102. also impose prohibitions on members and employees of state licensing boards. R.C. 102.04(A) prohibits a member or employee of a state licensing board from receiving compensation other than from the board with which he serves for any personal service rendered in any case, proceeding, application, or other matter that is pending before the board with which he serves, or any other department, agency, or entity of the state. See Advisory Opinions No. 89-006 and 90-009. R.C. 102.04 (B) prohibits a board member or employee from selling, except through competitive bidding, any services to the board or any other agency or instrumentality of the state. Id. (Division (D) of Section 102.04 provides an exception to the prohibitions of Divisions (A) and (B) and is available to non-elected officials and public employees. See Advisory Opinion No. 89-006 (describing exception)). Also, R.C. 102.03 (A) prohibits a member or employee of a state licensing board, during his public service and for one year thereafter, from representing a client or any other person before the board with which he serves or any other public agency on any matter in which he has participated as a board member or employee. See Advisory Opinions No. 87-001 and 90-009. Advisory Opinion No. 85-012 discusses the application of these prohibitions to a member of a state licensing board who also serves with a professional association. Finally, R.C. 102.03(B) prohibits a present or former board member or employee from disclosing, or using, without appropriate authorization, any confidential information acquired by him in the course of his official duties. See Advisory Opinions No. 88-003 and 89-009.

The prohibitions imposed by Chapter 102. of the Revised Code apply to any "public official or employee." The term "public official or employee" is defined for purposes of R.C. Chapter 102. to include any person who is appointed to an office or is an employee of a public agency. See R.C. 102.01 (B). The term "public agency" is defined to include any board of the state. See R.C. 102.01(C). The State Medical Board is a "public agency" for purposes of Section 102.03. See Advisory Opinion No. 82-006. The threshold issue is therefore, whether you are a "public official or employee" for purposes of Chapter 102.

The Ethics Commission has held that a board member or an employee of a state licensing board is a "public official or employee" for purposes of Chapter 102. and subject to the prohibitions therein. See Advisory Opinions No. 82-006 and 83-007, respectively. However, the Ethics Commission has determined that independent contractors of public agencies are not generally within the class of persons who are subject to the Ohio Ethics Law. See Advisory Opinions No. 75-010, 75-012, 75-016, 77-008, 89-003 and 89-009. The rationale of distinguishing between public employees and independent contractors is that the employees of a public entity share in the responsibilities of the public trust exercised by their elected and appointed superiors, but independent contractors do not exercise the public trust. See Advisory Opinions No. 75-012 and 89-003.

The Commission, in Advisory Opinion No. 75-012, applied the tests set forth in Gillum v. Industrial Commission, 141 Ohio St. 373, 381-82 (1943) to distinguish employees from independent contractors:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in that locality the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work;
- (f) length of time for which the person is employed;
- (g) the method of payment, whether by time or by job;
- (h) whether or not the work is a part of the regular business of the employer; and,
- (i) whether or not the parties believe they are creating a relationship of master and servant.

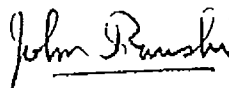
The Commission has held that the primary test is whether one is engaged in a distinct occupation or business but that this test, standing alone, seldom controls and the other tests must be also examined and balanced. See Advisory Opinions No. 75-028 and 77-008.

In this instance, you are engaged in a district occupation - the practice of massage, a limited branch of medicine; the Board retains your services due to your established reputation and known ability in your field; your services are retained only for the few days of the year that the Board conducts examinations; also, R.C. 473.17 is clear in prescribing that your duties are limited to aiding the Board in conducting examinations, and that you receive a maximum of fifty dollars per day for your services in addition to your actual and necessary expenses as fixed by the Board. These factors are all indications that you are an independent contractor rather than an employee of the State Medical Board. See Advisory Opinions No. 75-012, 75-016 and 77-008.

Therefore, under the facts presented, you are an independent contractor and not subject to the provisions of the Ohio Ethics Law and related statutes and the limitations imposed thereunder. The Ohio Ethics Law and related statutes would not prohibit you from providing teaching or consulting services to schools which teach massage therapy and advocating the views of massage therapy professional organizations to the State Medical Board. You may find the enclosed advisory opinions to be of interest, and while they may serve to guide you in your endeavor to avoid the appearance of favoritism or impropriety, you are not bound by the restrictions described in the opinions due to your status as an independent contractor.

This informal staff advisory opinion represents the views of the undersigned, based on the facts presented, and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. This informal opinion is based on an interpretation of the Ohio Ethics law and related statutes and does not purport to interpret other laws or rules. I apologize for the delay in responding to your request, and sincerely regret any inconvenience this delay may have caused. If you have any questions, or wish to request a formal advisory opinion from the Commission, please contact me.

Sincerely,



John Rawski
Staff Attorney

Enclosures
Advisory Opinions No.
85-012
90-009

JR/mw

OHIO ETHICS COMMISSION

Sister Mary Andrew Matesich
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Website: <http://www.ethics.state.oh.us>

Advisory Opinion Number 98-005
December 4, 1998

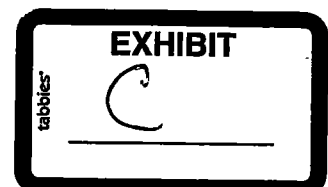
Syllabus by the Commission:

- (1) Division (E) of Section 102.03 of the Revised Code does not prohibit a publicly employed electrical safety inspector from teaching a recertification class for electrical contractors who work within the inspector's jurisdiction if the inspector receives no compensation for his services and follows the constraints discussed below;
- (2) Division (E) of Section 102.03 of the Revised Code does not prohibit a publicly employed electrical safety inspector, who follows the constraints discussed below, from receiving compensation for teaching a recertification class for electrical contractors who do not work within, and are not subject to, the inspector's jurisdiction;
- (3) Division (E) of Section 102.03 of the Revised Code prohibits a publicly employed electrical safety inspector from receiving compensation for teaching a recertification class for electrical contractors who work within the inspector's jurisdiction;
- (4) Division (A)(1) of Section 2921.43 of the Revised Code prohibits a public servant, including a publicly employed electrical safety inspector, from receiving compensation, from anyone other than the public agency he serves, for teaching recertification classes to any party, if the public servant is required to teach recertification classes as a part of his public job duties.

* * * * *

You have asked whether the Ethics Law and related statutes prohibit a publicly employed electrical safety inspector from: (1) teaching classes to contractors within his jurisdiction without receiving compensation for his services; (2) receiving compensation for teaching a recertification class for electrical contractors who do not work in his jurisdiction; and (3) receiving compensation for teaching a recertification class for electrical contractors who work within his jurisdiction.

As explained below: (1) a publicly employed electrical safety inspector is not prohibited from teaching classes to electrical contractors who work within his jurisdiction provided that he receives no compensation for his services; (2) a publicly employed electrical safety inspector is not prohibited from receiving compensation for teaching a recertification class for electrical



contractors provided that the contractors who are the source of the compensation do not work within his jurisdiction; and (3) a publicly employed electrical safety inspector is prohibited from receiving compensation for teaching a recertification class for electrical contractors who work within his jurisdiction. In addition, a publicly employed electrical safety inspector, who is required to teach recertification classes as a part of his public service, is prohibited from receiving compensation to teach the same classes from **any party** other than his public employer.

Outside Private Employment-General Conditions

The Ethics Commission has consistently held that the Ohio Ethics Law and related statutes do not prohibit public officials from engaging in private outside employment or the practice of a profession as long as no conflict of interest exists between the official's private interests and public duties. Ohio Ethics Commission Advisory Opinion No. 96-004. However, the Commission has explained that the Ethics Law and related statutes impose restrictions upon public officials and employees with regard to their ability to engage in private outside employment or the practice of a profession. These restrictions serve the public interest in maintaining effective, objective, and impartial government by preventing the creation of a situation which may impair the objectivity and impartiality, and therefore, the effectiveness, of a public official or employee, or the public agency with which he serves. Adv. Ops. No. 89-014 and 90-002.

Facts-Electrical Contractors

A person with at least two years of electrical contracting experience can obtain a qualification certificate as an electrical contractor from the electrical section of the Ohio Construction Industry Examining Board (OCIEB). R.C. 4740.01(A), 4740.01(D) and 4740.06(B)(5)(b); OAC 4101:16-4-03(E). OCIEB will issue an electrical contractor's certificate to any U.S. citizen of at least eighteen years of age whom it determines to be of good moral character and who successfully passes an examination and meets the experience requirement. R.C. 4740.06(B) and (C); OAC 4101:16-4-03. As a condition of renewal, a person holding an electrical contractor's certificate must complete thirty hours of approved continuing education courses over a three-year period. R.C. 4740.05(A)(3); OAC 4101:16-4-07(C). This thirty hours of approved continuing education must be comprised as follows: twenty hours on the National Electrical Code (NEC); five hours on business and administration skills; two and one-half hours on Occupational Safety and Health Administration (OSHA) and other safety regulations; and two and one-half hours on technology in the field of electrical contracting. OAC 4101:16-4-07(C).

The electrical section of the OCIEB must approve the training agencies that will provide the continuing education courses. R.C. 4740.05(A)(3); OAC 4101:16-4-07(A). The OCIEB electrical section must approve the training agency's proposed continuing education course of study or program of instruction. OAC 4101:16-4-07(B) and (D). The training agency must provide the OCIEB with the educational objectives and content of the proposed course or program, and the instructor's name and qualifications. OAC 4101:16-4-07(B)(1). Also, in order to meet the continuing education requirements for renewal of contractor certificates, the course of study or program of instruction must be in one or more of the four subject areas which are

required for contractor certificate renewal: (1) the current NEC; (2) business and administration skills; (3) OSHA and other safety regulations; and (4) technology in the field of electrical contracting. OAC 4101:16-4-07(D). OCIEB's electrical section has approved some publicly employed electrical safety inspectors to provide continuing education courses of study for electrical contractors.

The first issue presented by your request is whether all publicly employed electrical safety inspectors are subject to the Ohio Ethics Law.

Prohibition Imposed By R.C. 102.03(D) And (E) Upon "Public Officials And Employees"

Your attention is directed to R.C. 102.03 (D) and (E), which read:

(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 "public official or employee" is defined for purposes of R.C. 102.03 as any person who is elected or appointed to an office or is employed by any public agency; the term "public agency" is defined to include any department, division, board, commission, authority, bureau, or other instrumentality of a county, city, village, township, or other governmental entity. R.C. 102.01(B) and (C).

The term "electrical safety inspector" (ESI) is defined for purposes of Chapter 3738. of the Revised Code as a person who holds a certification of competency from the Board of Building Standards to engage in the "practice of electrical inspections" within the state. R.C. 3783.01(A) and 3783.06. The term "practice of electrical inspection" is defined in R.C. 3783.01(B) as:

"[A]ny ascertainment of compliance with the Ohio building code, or the electrical code of a political subdivision of this state by a person, who, for compensation, inspects the construction and installation of electrical conductors, fittings, devices, and fixtures for light, heat or power services equipment, or the installation, alteration, replacement, maintenance, or repair of any electrical wiring and equipment that is subject to any of the aforementioned codes.

Only a person who holds a certificate of competency may engage in the practice of electrical inspection. R.C. 3783.06.

Persons who are employees of a county or municipality serving as certified ESIs to determine compliance with the Ohio Building Code or the electrical code of the political subdivision are clearly "public officials or employees" under the definition of R.C. 102.01(B) and (C). This conclusion that ESIs who are employed by political subdivisions are "public officials or employees" as defined in R.C. Section 102.01 is consistent with the Attorney General's conclusion in 1981 Ohio Op. Att'y Gen. No. 81-078, in which he held:

Clearly, an individual who is hired by the state or a political subdivision to inspect electrical equipment and wiring and to ascertain whether it complies with the Ohio Building Code or a local electrical code holds a public employment.
(Emphasis added.)

It is noted that R.C. 307.13 authorizes county commissioners to "contract" for the services of an ESI. The fact that an ESI is hired by the board of county commissioners pursuant to an independent contract does not necessarily mean that the inspector is not considered to be a "public official or employee" for purposes of Chapter 102. of the Revised Code. Adv. Op. No. 77-004 (whether a person is "a public official or employee" for purposes of R.C. Section 102.03 depends on the authority and discretion he exercises, and not on the contractual or other arrangement under which he serves).

The Ethics Commission has held that public employees share in the responsibility of the public trust exercised by their elected and appointed superiors but, generally, independent contractors do not. Adv. Ops. No. 75-012 and 89-003. The Commission has held that the essential requirement that determines whether a position falls within the statutory definition of "public official or employee" is that the individual or firm holding the position exercises "sovereign power," which has been described as discretionary, decision-making duties made on behalf of the public authority which the official or employee serve. Adv. Ops. No. 75-004 and 85-005. If an individual or firm serving a political subdivision is given the authority and administrative discretion to exercise the sovereign power of government, then the individual or firm becomes subject to the Ohio Ethics Law regardless of the contractual arrangement of his service. Adv. Ops. No. 77-004 and 89-003.

As set forth in the definition above, "electrical safety inspectors" are persons who contract with political subdivisions to serve as ESIs and perform duties involving the exercise of discretionary decision-making authority on behalf of the political subdivisions they serve. As a result, an ESI is a "public official or employee" for purposes of R.C. Section 102.03, regardless of whether the ESI is employed by the political subdivision, or is engaged by an independent contract. This conclusion is also consistent with the Attorney General's holding in 1981 Ohio Op. Att'y Gen. No. 81-078

Therefore, persons holding a certificate of competency to engage in the practice of electrical inspection who are either employed, or hired pursuant to contract, by political subdivisions to inspect electrical wiring and equipment for compliance with state and local electrical codes are "public officials or employees" for purposes of R.C. Section 102.03. See generally Adv. Op. No. 75-033 (a building inspector employed by a city is a "public official or employee" for purposes of R.C. Section 102.03). See also Adv. Ops. No. 77-004 and 78-004

(individuals and firms who serve as municipal engineers pursuant to contract are "public officials or employees" for purposes of R.C. Section 102.03).

Application Of Prohibition-R.C. 102.03(D) And (E)

Having determined that all publicly employed ESIs are subject to the Ohio Ethics Law, the issue becomes whether the compensation that a publicly employed ESI receives for teaching a recertification class for electrical contractors is of such a character as to manifest a substantial and improper influence upon the ESI with respect to his public duties.

R.C. 1.03 defines "anything of value" for purposes of R.C. 102.03 to include money, the promise of future employment, and every other thing of value. R.C. 102.01(G). A definite pecuniary benefit is considered to be a thing of value for purposes of R.C. 102.03(D) and (E). Adv. Ops. No. 79-008, 85-006, and 86-007. Therefore, the compensation which a publicly employed ESI receives for teaching a recertification class for electrical contractors is a thing of value for purposes of R.C. 102.03(D) and (E).

R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his official position to secure anything of value if the thing of value could manifest a substantial and improper influence upon him with respect to his duties. Adv. Op. No. 90-003. 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. Generally, the compensation that a public official or employee receives from private outside employment or business activity would be of a substantial nature. Adv. Op. No. 96-004. R.C. 102.03(D) and (E), however, do not prohibit a public official or employee from engaging in private business activity so long as no conflict of interest exists between the public official's or employee's public position and private financial interests. Adv. Ops. No. 84-009, 84-012, and 92-009.

Soliciting Or Accepting Anything Of Value

Division (E) of Section 102.03 of the Revised Code was enacted as part of Am. Sub. H.B. 300, 116th Gen. A. (1986) (eff. September 17, 1986) to supplement the prohibitions imposed by R.C. 102.03(D). Prior to the enactment of Am. H.B. 300, Division (D) of Section 102.03 prohibited a public official or employee from using the authority or influence of his office or employment to secure a thing of value for himself that would not ordinarily accrue to him in the performance of his duties if the thing of value was of such a character as to manifest a substantial and improper influence upon him with respect to his duties. Adv. Op. No. 88-004. In its application of Division (D), before the enactment Division (E), the Ethics Commission held that a public official or employee was prohibited from using the authority or influence of his public position to solicit or receive privately earned consulting fees from a party that is interested in matters before, regulated by, or doing or seeking to do business with his public agency. Adv. Ops. No. 79-002 and 86-008.

R.C. 102.03(E) does not require that the public official or employee use the authority or influence of his office or employment to secure an improper thing of value. Rather, by its

language, R.C. 102.03(E) prohibits a public official or employee from merely soliciting or accepting an improper thing of value. Adv. Op. No. 90-004. The Ethics Commission has held that the relationship between the public official or employee and the source of the thing of value determines whether the thing of value received from that party is improper for purposes of R.C. 102.03(E). Adv. Ops. No. 86-011 and 92-015. The Commission has held that the objectivity and independence of judgment, of a public official or employee, in performing his official public duties could be impaired, and subsequent decisions in matters involving the source of the thing of value could be affected, if he were to solicit or accept a thing of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with his own public agency. Adv. Ops. No. 84-010, 87-006, 87-009, and 89-006. See also Adv. Ops. No. 87-008 and 93-004.

Thus, the Commission has held that a public official or employee who engages in a private outside business or the practice of a profession is prohibited from accepting, soliciting, or using his authority or influence to secure commissions, fees, or other payments from parties who have these ties to the official. A number of different opinions of the Ethics Commission have addressed conflicts in outside business opportunities for public servants. See, e.g., Adv. Ops. No. 79-002 (an engineering supervisor for a state agency is prohibited from providing engineering consulting services to a party that is subject to the agency's regulation), 87-009 (a city council member is prohibited from serving as the agent for landowners who have petitioned to have their land annexed into the city), 89-010 (a Department of Agriculture employee is prohibited from providing services as an independent contractor to a state institution to which he is assigned regulatory responsibilities), 92-008 (a township clerk is prohibited from being employed by a bank that is a depository of township funds), and 93-015 (a city treasurer and tax administrator is prohibited from providing tax preparation and accounting services for those who are required to file city income tax returns). See also Adv. Ops. No. 79-006, 80-004, 84-010, 86-011, 89-013, 89-014, and 90-001 (addressing the prohibitions against the receipt of an honorarium, registration fees, and travel, meal, and lodging expenses from a party that is interested in matters before, regulated by, or doing or seeking to do business with the agency with which he serves).

The Ethics Commission has explained that a public official or employee who is entrusted with the duty to perform regulatory responsibilities for his public agency and who has contracted to provide services for compensation to a regulated party in his private capacity would have an inherent conflict of interest or divided loyalties such that his independence and objectivity of judgment with regard to carrying out the decisions and responsibilities of his public agency could be impaired. For example, in Advisory Opinion No. 89-010, the Commission held:

[C]ertain circumstances could arise in which the [official or employee] is required, as part of his official duties, to suspend the institution's . . . operations or condemn its . . . products. The [official or employee] could be favorably disposed towards the institution due to his holding outside employment there as an independent contractor. On the other hand, if a controversy arises over the services which he has provided as an independent contractor, it could present an improper motivation for the suspension of operations or the condemnation of the . . . products.

This opinion will now apply the law and Commission precedent, set forth above, to your three questions.

Performing Teaching Services Without Compensation

You have asked whether the Ethics Law and related statutes prohibit a publicly employed ESI from teaching classes to contractors within his jurisdiction without receiving compensation for his services.

As explained above, R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting "anything of value." The teaching of a class by an publicly employed ESI without receiving compensation for his services would not result in the inspector receiving any monetary gain, absent facts indicating otherwise. See generally Adv. Op. No. 90-003. Therefore, the official would not be receiving "anything of value." R.C. 102.03(E) would not prohibit a publicly employed ESI from teaching classes to electrical contractors within his jurisdiction provided that he receives no compensation for his services.

Performing Teaching Services Outside His Jurisdiction

You also ask whether the Ethics Law and related statutes prohibit a publicly employed ESI from receiving compensation for teaching a recertification class for electrical contractors who do not work in his jurisdiction.

In Advisory Opinion No. 84-012, the Ethics Commission held that a service forester employed by the Division of Forestry of the Department of Natural Resources was prohibited from soliciting or receiving fees for services rendered on a project on which he provides, or is required to provide, technical assistance or advice in his official capacity. But in that opinion, the Ethics Commission also held that "Division (D) of Section 102.03 of the Revised Code does not, per se, prohibit the service forester from operating a private tree service outside his district." In Advisory Opinion No. 90-002, the Commission held that R.C. 102.03(D) and (E) did not prohibit a Department of Agriculture meat inspector from owning and operating a meat processing plant located in an inspection district other than his own, if the Department reviewed and authorized his outside business, despite the fact that the Department would regulate his plant.

As explained above, a publicly employed ESI has the responsibility to determine whether the work performed by electrical contractors complies with the Ohio Building Code or the political subdivision's electrical code. The issue of a publicly employed ESI receiving compensation for teaching a recertification class for electrical contractors who do not work in his jurisdiction is akin to the situations that were addressed in Advisory Opinions No. 84-012 and 90-002 in which a public employee is charged with performing an official duty within a specified geographical area.

Therefore, R.C. 102.03(E) would not prohibit a publicly employed ESI from receiving compensation for teaching a recertification class for electrical contractors who are not interested in matters before, regulated by, or seeking to do business with the political subdivision that the publicly employed ESI serves. A publicly employed ESI who receives compensation for

teaching a recertification class for electrical contractors who do not work in his jurisdiction, however, must take extreme care to determine that an electrical contractor who desires to attend his class and pay compensation is neither regulated by, nor interested in, any matters pending within his jurisdiction and that matters between the contractor and the inspector's jurisdiction are unlikely to arise. Also, as explained below, a publicly employed ESI is subject to the general restrictions upon private outside employment that are imposed by R.C. 102.03(D).

Performing Teaching Services for Compensation Within His Jurisdiction

Your final question is whether the ESIs are prohibited from receiving compensation to teach certification courses to electrical contractors who are regulated by the ESIs.

In the instant situation, electrical contractors who work within a particular jurisdiction are regulated by that jurisdiction's publicly employed ESIs. Because they are regulated by the ESI within that jurisdiction, receipt of compensation, by an ESI, from these electrical contractors for teaching a recertification class is of such a character as to manifest a substantial and improper influence upon the ESI with respect to his duties.

There are different aspects to the potential improper influence that could result from this compensation. For example, an ESI may be more favorably disposed towards those contractors who have paid for his teaching services. An ESI may, conversely, more closely scrutinize work done by contractors who elected to take courses taught by other sources. On the other side of the transaction, a contractor may feel compelled to receive instruction from an ESI who inspects his work. Contractors who choose not to receive instruction from an ESI who inspects their work may challenge the regulation of their work by that ESI on the basis that the ESI is more rigid in his application of the law with respect to contractors who have not attended his classes. In fact, the incident that ultimately brought this advisory question to the Ethics Commission was a question directed to a county prosecuting attorney's office, involving whether a county ESI was prohibited from teaching classes to, and inspecting the work of, electrical contractors within his jurisdiction. That issue was resolved when the county prosecutor's office issued an advisory opinion, based on Ethics Commission precedent, which concluded that the Ethics Law prohibits a county ESI from teaching classes to, and inspecting the work of, electrical contractors within his jurisdiction.

Based upon these concrete examples of conflict of interest, R.C. 102.03(E) prohibits publicly employed ESIs from soliciting or accepting compensation for teaching a recertification class for electrical contractors who work within their jurisdiction because the independence and objectivity of judgment of the inspectors could be impaired with regard to carrying out the decisions and responsibilities of their public agencies.

Exception to the Application of R.C. 102.03(E)

The Ethics Commission has held that in certain situations, a public official or employee who engages in private outside business activity may withdraw from consideration of matters that would create an impairment of his objectivity and independence of judgment. Adv. Op. No. 96-004. See also Adv. Ops. No. 89-006, 90-002, and 90-009. However, a public official's or

employee's withdrawal from consideration of issues concerning parties who are interested in matters before, regulated by, or doing or seeking to do business with his own public agency may be accomplished only when such a withdrawal: (1) does not interfere with the official's or employee's performance of his assigned duties; and (2) is approved by the appropriate officials at his employing agency to assure that no conflict of interest is present. Id. See also Adv. Op. No. 89-010.

The application of R.C. 102.03(E) is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 90-004 and 91-002. In some situations a public official or employee may not have any official duties that bring him into contact as a public official or employee with the party with which he desires to conduct private business, who is also regulated by, or does business with, the public agency of the public official. In such a situation, it is obvious that a withdrawal from matters affecting the interested party is unnecessary. But it is necessary, in that situation, that the appropriate officials at the affected official's or employee's agency approve the proposed activity of the official or employee because the existence of a private business relationship would affect his employing public agency's ability to assign new duties that could bring him into contact with the interested party in the future. Therefore, R.C. 102.03(E) prohibits a public official or employee from engaging in private outside employment or business activity with parties that are interested in matters before, regulated by, or seeking to do business with his own agency, unless he is able to withdraw from consideration of matters which would pose a conflict of interest and his withdrawal is approved by his employing public agency, or if he does not have any official duties that bring him into contact, as a public official or employee, with the party with whom he desires to conduct private business.

The issue becomes whether a publicly employed ESI is able to sufficiently and completely withdraw from consideration of regulatory matters that affect the electrical contractors who work within his jurisdiction and who pay a fee to attend a recertification class taught by the ESI.

A public employee owes his responsibility to the exercise of the public trust by performing the tasks assigned to him by his employing agency. Adv. Op. No. 89-010. This public duty cannot be impaired by a public employee's concern for his own personal interests. Id. As explained above, a publicly employed ESI has the responsibility to determine whether the work performed by electrical contractors comply with the Ohio Building Code or the political subdivision's electrical code.

In the instant situation, a publicly employed ESI who would provide continuing education courses for electrical contractors would open his class to those electrical contractors who are in need of acquiring thirty hours of approved continuing education courses to renew their electrical contractor's certificates. Of course, this may well include electrical contractors who are regulated by the publicly employed electrical inspector. Thus, R.C. 102.03(E) would require the inspector to withdraw from determining whether the work performed by a contractor who has taken his class complies with the Ohio Building Code or the political subdivision's electrical code.

Whenever the publicly employed ESI would withdraw from matters affecting contractors, the political subdivision that he serves would have to arrange for another inspector to determine whether the electrical contractor's work complies with the Ohio Building Code or the political subdivision's electrical code. A means of assuring that electrical contractors are not inspected by the same ESIs from whom they take certification classes would be required to be kept by the political subdivision, the inspector, and the contractors to apply this standard. Because the publicly employed ESIs private outside employment interests would conflict with his public duties, the political subdivision that he serves would be burdened with the requirement to make special arrangements for an inspection to be conducted by an inspector who has no conflict. It is likely that contractors would be inconvenienced by possible delays while the political subdivision strained to arrange for special inspections. Furthermore, because of the large number of individual contractors who would take the courses during the three years in which a contractor must acquire thirty hours of approved continuing education courses, it is possible that a large number, or perhaps all, of the contractors within the jurisdiction of a publicly employed ESI may have taken the inspector's continuing education course. In such a situation, a withdrawal by a ESI from matters that pose a conflict of interest may result in withdrawal from most, or perhaps all, of the public duties that he is responsible to perform.

Therefore, it is apparent that the withdrawal of a publicly employed ESI from consideration of regulatory matters that affect electrical contractors who work in his jurisdiction and who attend a recertification class that he taught for a fee would create an insurmountable interference with the inspector's performance of his assigned public duties. Accordingly, R.C. 102.03(E) prohibits a publicly employed ESI from receiving compensation for teaching a recertification class for electrical contractors who work within the inspector's jurisdiction.

Restrictions On Private Outside Employment-R.C. 102.03(D)

As explained above, R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his position to secure anything of value for himself, family members, business associates, or others where there is a conflict of interest. Adv. Ops. No. 79-006, 87-009, and 89-006. R.C. 102.03(D) requires that a public official or employee take some action or inaction to secure the thing of value.

Generally, the Ethics Commission has held that the compensation that a public official or employee secures from engaging in private outside employment or business activity is of such a character as to manifest a substantial and improper influence upon him with respect to his duties when the fees result from the direct use of his official authority or influence, impair his performance, or burden the public resources entrusted to him for the benefit of his own personal financial interests.

Accordingly, in Advisory Opinion No. 96-004, the Ethics Commission identified general restrictions that apply to all public officials and employees who engage in private outside employment. The Commission held in Advisory Opinion No. 96-004 that R.C. 102.03(D) prohibits a public official or employee who engages in private outside employment or business activity from:

- (1) using public time, facilities, personnel, or resources in conducting a private business or while engaging in private outside employment including conducting demonstrations for clients using public equipment;
- (2) using his official title or identification on private business cards or other written materials or appearing in uniform while soliciting business or conducting demonstrations for clients;
- (3) using his relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding his private interests;
- (4) discussing, deliberating, or voting on any matter involving his private business, including recommending his outside employer's or business's services to his own public agency;
- (5) receiving fees for providing services rendered on projects that he has recommended in his official capacity;
- (6) participating in decisions or recommendations regarding his competitors; and,
- (7) using his public position or authority in any other way to secure a benefit for his outside employer or private business.

The Commission has established these general limitations on the conduct of a public official or employee who wishes to engage in a private business. The application of these limitations is dependent on the facts and circumstances of each individual situation. See generally Adv. Ops. No. 77-003, 86-007, and 92-009.

Application of R.C. 102.03(D) Prohibitions

In light of the restrictions set forth above, the compensation that a publicly employed ESI would receive from an electrical contractor who does not work within his jurisdiction would be unrelated to the official duties that he is entrusted to provide as a public official or employee. It must be reiterated that the publicly employed ESI is required to do his private outside work on his own time, using his own equipment. Also, he is prohibited from using his official title or identification on private business cards or advertising. While teaching a recertification class for compensation from electrical contractors who do not work within his jurisdiction, a publicly employed ESI is limited to identifying his public employer and describing the duties that he performs. He is prohibited from using his relationship with other public officials and employees to intervene in decisions that would affect contractors who have paid compensation to attend his class.

Receiving Supplemental Compensation-R.C. 2921.43(A)(1)

Your question does not indicate whether any of the ESIs would be required, as a part of the duties they perform for the public agencies they serve, to teach recertification classes. However, if any of the ESIs are required to teach recertification classes as a part of their job duties, your question also implicates R.C. 2921.43(A)(1), which provides as follows:

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

(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.

The term "public servant" is defined, in R.C. 2921.01(B), to include any "public official," and "any person performing ad hoc governmental function." The term "public official" is defined, in R.C. 2921.01(A), to include "any elected or appointed officer, or employee, or agent of the state or any political subdivision." As discussed more fully above, a publicly employed ESI is an employee of the political subdivision he serves, and is, therefore, a "public servant" for purposes of R.C. 2921.43(A)(1).

R.C. 2921.43(A)(1) prohibits a public servant from accepting compensation from any party, except as provided by law, for the performance of his official duties, for the general performance of the duties of his office or employment, or as a supplement to his public compensation. Generally, the Commission has stated that this section prohibits a public official from receiving compensation, from any party other than his public employer, for performing the duties of his public position. Adv. Op. No. 89-012 (a city law director is required, as a part of his job duties, to represent the city school district, and cannot accept additional compensation, from the school district, to represent it) and Adv. Op. No. 90-007 (a county prosecutor is required, as a part of his job duties, to represent townships within the county, and cannot accept additional compensation, from any township, to represent it.)

If the ESIs in your question are required, as a part of their public employment, to teach recertification classes for the political subdivisions they serve, the ESIs would be prohibited from receiving compensation from any other party to teach the same classes. The ESIs would be prohibited from receiving compensation from **any** party, other than their employers, for teaching recertification classes, including parties regulated by the ESIs and parties who are not regulated by the ESIs. Once again, the facts that you have presented do not indicate whether this situation could arise.

Conclusion

The Ethics Commission is aware that political subdivisions employ individuals as ESIs due to their professional expertise and that knowledgeable individuals may also desire to use their knowledge for private business endeavors. However, a public official or employee owes his first responsibility to the exercise of the public trust; this responsibility must not be impaired by the official's or employee's concern for his private business activities. As explained above, R.C. 102.03(D) and (E) are intended to prevent the creation of any situation that may impair the objectivity and impartiality, and therefore the effectiveness, of a public official or employee in the exercise of his public responsibilities. Adv. Op. No. 90-012. A publicly employed ESI occupies a position of great visibility in the profession such that teaching a recertification class for electrical contractors may create the appearance of impropriety by injecting the prestige of his public employment into his private business activities. A publicly employed ESI must take great care if he teaches a recertification class for electrical contractors to avoid creating the impression that the class is officially endorsed by the political subdivision that employs the inspector. All public officials and employees must accept necessary restrictions to avoid any possible interference with their official public responsibilities. Adv. Ops. No. 89-010, 90-009, and 90-012.

Therefore, as explained above: (1) a publicly employed electrical safety inspector is not prohibited from teaching classes to electrical contractors who work within his jurisdiction provided that he receives no compensation for his services; (2) a publicly employed electrical safety inspector is not prohibited from receiving compensation for teaching a recertification class for electrical contractors provided that the contractors who are the source of the compensation do not work within his jurisdiction; (3) a publicly employed electrical safety inspector is prohibited from receiving compensation for teaching a recertification class for electrical contractors who work in his jurisdiction; and (4) a publicly employed electrical safety inspector is prohibited from receiving supplemental compensation, from any party, for teaching recertification classes, if he is required to teach these classes as a part of his public employment.

A publicly employed electrical safety inspector should inquire whether there are charter provisions, local ordinances, collective bargaining provisions, or other restrictions within the political subdivision that he serves that may further restrict his ability to engage in private outside business activity. The Ethics Commission is statutorily authorized to address only issues arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code and cannot address the application of restrictions imposed by provisions of law outside its jurisdiction.

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 (E) of Section 102.03 of the Revised Code does not prohibit a publicly employed electrical safety inspector from teaching a recertification class for electrical contractors who work within the inspector's jurisdiction if the inspector receives no compensation for his services

and follows the constraints discussed below; (2) Division (E) of Section 102.03 of the Revised Code does not prohibit a publicly employed electrical safety inspector, who follows the constraints discussed below, from receiving compensation for teaching a recertification class for electrical contractors who do not work within, and are not subject to, the inspector's jurisdiction; (3) Division (E) of Section 102.03 of the Revised Code prohibits a publicly employed electrical safety inspector from receiving compensation for teaching a recertification class for electrical contractors who work within the inspector's jurisdiction; and (4) Division (A)(1) of Section 2921.43 of the Revised Code prohibits a public servant, including a publicly employed electrical safety inspector, from receiving compensation for teaching recertification classes to any party, from anyone other than the public agency he serves, if the public servant is required to teach recertification classes as a part of his public job duties.

Sister Mary Andrew Matesich

Sister Mary Andrew Matesich, Chair
Ohio Ethics Commission

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

1/29/2019 10:52:17 AM

in

Case No(s). 18-0501-EL-FOR, 18-1392-EL-RDR, 18-1393-EL-ATA

Summary: Motion Dr. Noah Dormady's Motion for Leave to File Memo Contra electronically filed by Mr. Nathan D. Painter on behalf of Mr. Noah Dormady