

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2002-10

Issued August 9, 2002

[Former CJC Opinion-provides advice under the former Ohio Code of Judicial Conduct which is superseded by the Ohio Code of Judicial Conduct, eff. 3/1/2009.]

SYLLABUS: Ohio Ethics Law, Section 102.03(E) of the Ohio Revised Code, prohibits a probation officer employed in a municipal court department of probation from *soliciting or accepting* private employment by a for-profit company that operates a drivers' intervention program for defendants found guilty of operating a motor vehicle while under the influence of alcohol and sentenced by the court to attend a drivers' intervention program as a condition of probation, *unless* the municipal court judge determines that the probation officer may withdraw from his or her duties as a probation officer with regard to those defendants and have no involvement in informing or assisting any defendant in choosing which drivers' intervention program to attend. Whether a probation officer may withdraw from his or her duties is for the municipal court judge to determine based upon the duties, responsibilities, facts, and circumstances of both the public and private employment. In making the determination, the judge's concern should be the impact on the court and what is important for the court in the fair and impartial administration of justice, not the private business needs of the company or the private personal or financial needs of the employee.

Ohio Ethics Law, Section 102.03(D) of the Ohio Revised Code, prohibits a probation officer employed in a municipal court department of probation from using the authority or influence of his or her court employment to *secure* private employment by a for-profit company that operates a drivers' intervention program for defendants found guilty of operating a motor vehicle while under the influence of alcohol and sentenced by the court to attend a drivers' intervention program as a condition of probation. For instance, the promise of court referrals of defendants to a drivers' intervention program would be a misuse of the probation officer's court employment to secure private employment.

OPINION: This opinion addresses a question regarding outside private employment by a probation officer employed in a municipal court department of probation and discusses a judge's responsibilities as to whether to allow such outside employment by a judicial employee.

Is it proper for a full-time probation officer in a municipal court department of probation to work part-time for a private for-profit company that operates a drivers' intervention program for defendants found guilty of operating a motor vehicle while under the influence of alcohol?

A municipal court has statutory authority to appoint probation officers and to establish a municipal court department of probation. Ohio Rev. Code Ann. § 1901.33(A) and (B) (West Supp. 2002). “Probation officers have all the powers of regular police officers and shall perform any duties that are designated by the judge or judges of the court.” Ohio Rev. Code Ann. § 1901.33(A) (West Supp. 2002).

As judicial employees, probation officers are subject to the restriction within Ohio Ethics Law. The Board of Commissioners on Grievances and Discipline is the appropriate entity to advise judges and judicial employees on the application of Ohio Ethics Law. Ohio Rev. Code Ann. § § 102.01(F)(2), 102.08 (West 2002).

Operating a vehicle while under the influence of alcohol or drugs is a violation of Ohio law. Ohio Rev. Code Ann. § 4511.19 (West Supp. 2002). Penalties for operating a vehicle while under the influence of alcohol or drugs are established by the state legislature. Ohio Rev. Code Ann. § 4511.99 (West Supp. 2002). A drivers’ intervention program is one option available to judges in sentencing certain offenders.

When sentencing an offender pursuant to Section 4511.99(A)(1), a judge may suspend the execution of the mandatory three consecutive days of imprisonment, if in lieu of the suspended term of imprisonment, the judge places the offender on probation and requires the offender to attend a drivers’ intervention program for three consecutive days. Ohio Rev. Code Ann. § § 3793.10, 4511.99(A)(1) (West Supp. 2002). When sentencing an offender pursuant to Section 4511.99(A)(2)(a), a judge may require that in addition to serving a term of imprisonment, an offender attend a drivers’ intervention program. Ohio Rev. Code Ann. § § 3793.10, 4511.99(A)(2)(West Supp. 2002).

A drivers’ intervention program must be certified by the director of alcohol and drug addiction services. The program must meet state minimum standards that the director establishes by rule.

The rules shall include, but are not limited to, standards governing program course hours and content, qualifications of program personnel, methods of identifying and testing participants to isolate participants with alcohol and drug abuse problems, referral of such persons to alcohol and drug addiction programs, the prompt notification of courts by program operators of completion of the programs by persons required by courts to attend them, and record keeping, including methods of tracking participants for a reasonable time after they have left the program.

Ohio Rev. Code Ann. § 3793.10 (West Supp. 2002)

According to the request, the municipal court permits defendants to attend any of the state certified three-day drivers’ intervention programs. (In the county in which the municipal court is located, there are three state certified drivers’ intervention programs.)

The requester states that “[t]he Probation Department handles the referrals and lets the defendants choose which program to attend.”

The provisions of Ohio Ethics Law pertinent to this opinion are Sections 102.03 (D) and (E) of the Ohio Revised Code.

Section 102.03(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.

Section 102.03(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.

Ohio Rev. Code Ann. § 102.03(D), (E) (West 2002).

Section 102.03(F) should be noted, for it is a parallel provision prohibiting persons from giving prohibited things of value to a public official or public employee. Section 102.03(D) is set forth below, but not addressed further herein.

Section 102.03 (F) No person shall promise or give to a public official or employee anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person’s duties.

Ohio Rev. Code Ann. § 102.03(F) (West 2002).

Under Section 102.03(D) and (E), a probation officer employed by the court may not use the authority or influence of court employment to secure “anything of value” and may not solicit or accept “anything of value” that is such a character as to manifest a “substantial influence” and “improper influence” with respect to his or her duties as a judicial employee. “Anything of value” is defined to include “any promise of future employment.” Ohio Rev. Code Ann. §§ 1.03(H) (West 1994), 102.01(G) (West 2002). If a thing of value is more than nominal or de minimis it is considered a “substantial influence.” If a thing of value is from a party that is interested in matters before, regulated by, or doing or seeking to do business with the court, it is considered an “improper influence” upon a judicial officer or judicial employee. *See e.g.*, Ohio SupCt., Bd of Comm’rs on Grievances and Discipline, Op. 95-4 (1995).

Part-time private employment of a court probation officer by a for-profit company that operates a drivers’ intervention program for defendants found guilty of operating a motor vehicle while under the influence of alcohol and sentenced by the court to attend a drivers’ intervention program as a condition of probation is “anything of value.” The

employment is a “substantial influence” because the employment is more than nominal or *de minimis*. The employment is an “improper influence” because the private for-profit company is interested in receiving referrals of defendants sentenced by the court to attend drivers’ intervention programs.

The conflicts created by simultaneous court employment as a probation officer and private employment with a company that has a drivers’ intervention program that accepts referrals of defendants sentenced by the court are obvious. A court probation officer who works part-time for a private for-profit company that operates a drivers’ intervention program for defendants found guilty of operating a motor vehicle while under the influence of alcohol could easily prompt defendants to choose his or her employer’s drivers’ intervention program to ensure continued success of the employer’s program and to foster his or her own continued employment with the company. The pressure to steer defendants to the private employer’s drivers’ intervention program might come from the employer or might be self-imposed, but either way there is a conflict.

A court employed probation officer who works part-time for a for-profit company that operates a drivers’ intervention program for defendants found guilty of operating a motor vehicle while under the influence of drugs or alcohol is in an untenable situation of monitoring a defendant’s probation and reporting probation violations while providing the intervention services a defendant needs to complete probation. The proposed employment is of such a character as to manifest a substantial and improper influence on the probation officer because it impairs independence of judgment with respect to the probation officer’s duties and impairs the independent and impartial functioning of the court.

Nevertheless, if a judge determines that the probation officer can withdraw from all matters involving the probation of a defendant sentenced by the court to attend the drivers’ intervention program, the probation officer is not prohibited from accepting the outside public employment. The withdrawal must be from all duties as a probation officer with regard to defendants sentenced to attend a drivers’ intervention program as a condition of probation. The withdrawal must also remove the probation officer from any involvement in informing or assisting any defendant in choosing which drivers’ intervention program to attend. *See e.g.*, Ohio Ethics Commission, Op. 96-004 (1996) (discussing withdrawal from conflict).

Whether a probation officer whose duties it is to supervise defendants on probation is permitted to withdraw from his or her duties is for the municipal court judge to determine. If a judge determines that a probation officer can withdraw from the public duties to accept the private employment without conflict, there are other considerations. For example, the probation officer should not use court time, facilities, personnel, or resources in conducting his or her private employment and should not use his or her public title in conducting his or her private employment. Restrictions on engaging in private business activities of public officials and employees are addressed by the Ohio Ethics Commission in Opinion 96-004 (1996). This Board recommends that judges and

judicial employees review that opinion for the related guidance it provides. In Opinion 96-004, the Ohio Ethics Commission advised that:

(1) The Ohio Ethics Law and related statutes do not prohibit public officials and employees from engaging in private outside employment or business activities provided that no conflict of interest exists between the private interest and public duties of the public official or employee, and there is no misuse of the public office or employment of the official or employee, as described below; (2) Divisions (D) and (E) of Section 102.03 of the Revised Code 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 doing or seeking to do business with his own public agency unless it is determined by his public employer that he is able to withdraw, as a public official or employee, from consideration of matters that affect the interests of the party with which he desires to engage in private outside employment or business activity; and (3) Division (D) of Section 102.03 of the Revised Code prohibits a public official or employee who engages in private outside employment or business activity from: (a) 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; (b) 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; (c) 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; (d) 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; (e) receiving fees for providing services rendered on projects that he has recommended in his official capacity; (f) participating in decisions or recommendations regarding his competitors; and (g) using his public position or authority in any other way to secure a benefit for his outside employer or private business.

A determination as to whether a judge will allow a probation officer to withdraw from public duties to avoid conflict in accepting private employment requires great thought by the judge. A judge must be mindful of the judge's administrative responsibilities with regard to judicial employees under Canon 3(C)(2) of the Ohio Code of Judicial Conduct.

Canon 3(C)(2) A judge shall require staff, court officials, and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

In this Board's view, allowing a probation officer to withdraw from a substantial part of his or her duties as a probation officer in order to gain private part-time employment with a drivers' intervention program does not comport with the high standards of fidelity and diligence that apply to the judge and judicial employees. Nevertheless, whether a probation officer whose duties it is to supervise defendants on probation may withdraw from his or her duties is for the municipal court judge to determine based upon the duties and responsibilities and the facts and circumstances of both the public and private employment. In making the determination, the judge's concern should be the impact on the court and what is important for the court in the fair and impartial administration of justice, not the private business needs of the company or the private personal or financial needs of the employee.

Lastly, it is not appropriate for a probation officer to use the authority or influence of court employment to secure private employment. Ohio Ethics Law, Section 102.03(D) of the Ohio Revised Code, prohibits a probation officer employed in a municipal court department of probation to use the authority or influence of his or her court employment *to secure* private employment by a for-profit company that operates a drivers' intervention program for defendants found guilty of operating a motor vehicle while under the influence of alcohol and sentenced by the court to attend a drivers' intervention program as a condition of probation. For instance, the promise of court referrals of defendants to a drivers' intervention program would be a misuse of the probation officer's court employment to secure private employment.

In conclusion, the Board offers this advice. Ohio Ethics Law, Section 102.03(E) of the Ohio Revised Code, prohibits a probation officer employed in a municipal court department of probation from *soliciting or accepting* private employment by a for-profit company that operates a drivers' intervention program for defendants found guilty of operating a motor vehicle while under the influence of alcohol and sentenced by the court to attend a drivers' intervention program as a condition of probation, *unless* the municipal court judge determines that the probation officer may withdraw from his or her duties as a probation officer with regard to those defendants and have no involvement in informing or assisting any defendant in choosing which drivers' intervention program to attend. Whether a probation officer may withdraw from his or her duties is for the municipal court judge to determine based upon the duties, responsibilities, facts, and circumstances of both the public and private employment. In making the determination, the judge's concern should be the impact on the court and what is important for the court in the fair and impartial administration of justice, not the private business needs of the company or the private personal or financial needs of the employee.

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Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office. Pursuant to Section 102.08 of the Ohio Revised Code, the requester may reasonably rely on the opinion as it applies to Ohio Ethics Law and related statutes.