

January 4, 2022

The Honorable Derek W. DeVine
Seneca County Prosecuting Attorney
79 S. Washington Street
Tiffin, Ohio 44883

SYLLABUS: 2022-001

1. For purposes of R.C. 3501.054, a “nongovernmental person or entity” is a person or entity that is neither an official nor a constituent part of a federal, state, or local government.
2. R.C. 3501.054 prohibits public officials from collaborating with nongovernmental persons or entities *only* when the public official is acting in his or her official capacity. It does not prohibit public officials from collaborating with nongovernmental persons or entities in the official’s private capacity. It does not, for example, prohibit a board of elections member from serving as a member or in a leadership role of a county political party central or executive committee.
3. As used in R.C. 3501.054, “collaborate” means to jointly administer a project.

4. The clause in R.C. 3501.054 that prohibits public officials from collaborating with non-governmental persons or entities does not prohibit a public official from performing any action that the public official is authorized to perform by a different section of the Revised Code.
5. R.C. 3599.32 provides the penalty for violating R.C. 3501.054.



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OPINION NO. 2022-001

The Honorable Derek W. DeVine
Seneca County Prosecuting Attorney
79 S. Washington Street
Tiffin, Ohio 44883

Dear Prosecutor DeVine:

You have requested an opinion asking multiple questions about R.C. 3501.054. That law states, in relevant part:

- (A) As used in this section, “public official” means any elected or appointed officer, employee, or agent of the state or any political subdivision, board, commission, bureau, or other public body established by law.
- (B) No public official that is responsible for administering or conducting an election in this state shall collaborate with, or accept or expend any money from, a nongovernmental person or entity for any costs or activities related to voter registration, voter education, voter identification, get-out-the-vote, absent voting, election official recruitment or training, or any other election-related purpose, other than the following:

- (1) The collection of any fee that is authorized by law;
- (2) The use of any building to conduct an election, including as a polling place;
- (3) The donation of food for precinct election officials at a polling place on election day.

Your letter asks whether a number of hypothetical scenarios would violate this statute. While I cannot answer each hypothetical, I can address four foundational questions that give rise to these hypotheticals. They are as follows:

1. What does the statute mean by “nongovernmental person or entity”?
2. Does the statute prohibit public officials from collaborating with nongovernmental persons or entities even when the public official is not acting in his or her official capacity?
3. What does the statute mean by “collaborate”?
4. Which statute provides the penalty for violating R.C. 3501.054?

I

You first inquire as to the meaning of “nongovernmental person or entity.” R.C. 3501.054.

The statute does not define the phrase. So, it must be understood to retain its ordinary meaning. See *State v. Dorso*, 4 Ohio St.3d 60, 62 446 N.E.2d 449 (1983); 1994 Op. Att’y Gen. No. 94-025, at 2-110. In ordinary English, the word “governmental” describes “the act or process of governing, especially the control and administration of public policy in a political unit” and “the agency or apparatus through which a governing individual or body functions and exercises authority.” *The American Heritage Dictionary of the English Language* 761 (5th Ed.2011). See also R.C. 9.23(D)(1); R.C. 2909.05(B)(2) (provisions defining “governmental entity” in other contexts). Thus, a “nongovernmental” person or entity is one who is neither a government official (in the case of a person) or a governing entity. This accords with one definition that is contained in R.C. 3501.054, and which shows that the statute is trained on official action. In particular, R.C. 3501.054(A) defines “public officials” as “any elected or appointed officer, employee, or agent of the state or any political subdivision, board, commission, or other *public body established by law*.” (Emphasis added).

Together, the ordinary meaning and the statutory definition show that a “nongovernmental person or entity” is a person or entity that is neither an official nor a constituent part of a federal, state, or local

government. Put differently, a “nongovernmental person” is a person who is not (or is not acting in the capacity of) a public official. A “nongovernmental ... entity” is any entity that is not a public body established by law.

I note specifically that a political party would be a nongovernmental entity. Although regulated by certain statutes, political parties are not established by law and are not governmental entities. 2002 Op. Att’y Gen. No. 2002-028, at 2-186 to 2-187 (“Because political parties are basically voluntary associations of persons who act together principally for party and community purposes, such parties are not governmental entities”) (internal citations omitted).

II

You ask several questions regarding whether R.C. 3501.054 prohibits public officials from working with certain nongovernmental organizations. For example, you ask whether public officials are prohibited from collaborating with their own reelection campaign committees, or whether a public official would be prohibited from serving on a political party’s central or executive committee.

These questions are best answered by clarifying that R.C. 3501.054 prohibits a public official from collaborating with nongovernmental persons or entities *only* while the public official is acting in his or her official capacity. Nothing in R.C. 3501.054 explicitly limits a public official’s ability to collaborate with nongovernmental persons or entities when acting in

his or her private capacity. The language of the statute is concerned strictly with the official duties of a public official as they relate to election matters. *See generally* R.C. 3501.054. Thus, a public official is free to partake in nongovernmental activities related to election matters when he or she is not acting as a public official.

Two interpretive principles bolster my interpretation.

First, a statute should not be construed to fundamentally alter a governing scheme through vague or ancillary terms. *See Whitman v. Am. Trucking Assns.*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L.Ed.2d 1 (2001). As Justice Scalia colorfully explained, legislatures tend not to “hide elephants in mouseholes.” *Id.* By design, Ohio’s election system includes partisan actors. The chief elections officer is the Secretary of State, a partisan elected official. R.C. 3501.04. Other partisan elected officials have smaller election roles. *See, e.g.*, R.C. 3501.34 (county sheriff to provide policing at polling places). By statute, county political parties recommend appointments to boards of election to the Secretary of State. R.C. 3501.07. Moreover, it is a common and longstanding practice for members of party central and executive committees to serve on boards of elections. *See, e.g.*, *State ex rel. Summit Cty. Republican Party Executive Comm. v. Brunner*, 118 Ohio St.3d 515, 2008-Ohio-2824, 890 N.E.2d 888, ¶¶3-13. Construing R.C. 3501.054 to prohibit elected officials from collaborating with their own parties or election campaigns, or to prohibit party committee members from serving on boards of elections, would fundamentally alter Ohio’s system of elections. Indeed, it would alter

the State's entire system of government. R.C. 3501.34 is too small a mousehole to fit an elephant like that.

Second, construing R.C. 3501.054 to prohibit public officials from collaborating with nongovernmental persons and entities, *even when not acting as a public official*, would create serious constitutional concerns. Public officials do not surrender their constitutional rights to freedom of speech and association upon taking office. *See, e.g.*, 2014 Op. Att'y Gen. No. 2014-005, Slip Op. at 6; 2-36 ("A person does not relinquish his constitutional right to freely express himself about governmental activities, operations, programs, and policies under the First Amendment of the United States Constitution and Article I, § 11 of the Ohio Constitution when he is elected to statewide office"); *see also* 1991 Op. Att'y Gen. No. 91-064, at 2-309 (Officials and employees of a board of education have a constitutional right of free speech, and individuals have the right to conduct certain activities in a private and uncompensated capacity). Furthermore, all statutes are presumed constitutional, R.C. 1.47(A), and I must interpret any ambiguity in a constitutionally permissible way. *See* 2021 Op. Att'y Gen. No. 2021-024, Slip Op. at 6; *State ex rel. Purdy v. Clermont Cty. Bd. of Elections*, 77 Ohio St.3d 338, 345-346, 673 N.E.2d 1351 (1997). Since construing R.C. 3501.054 to prohibit officials from collaborating with nongovernmental entities even in the officials' private capacities would create grave constitutional concerns, I must construe the statute to be limited to when the public official is acting as a public official. *See State ex rel. Crawford v. Indus. Comm. of Ohio*, 110 Ohio St. 271, 280, 143 N.E. 574

(1924); *accord Gonzalez v. United States*, 553 U.S. 242, 251, 128 S.Ct. 1765, 170 L.Ed.2d 616 (2008).

Therefore, I conclude that R.C. 3501.054 prohibits public officials from collaborating with nongovernmental persons or entities only when the public official is acting in his or her official capacity. It does not, for example, prohibit a board of elections member from serving on a political party central or executive committee.

III

Your letter presents the question of what the word “collaborate” means in R.C. 3501.054. I turn to that now.

Neither the statute nor any other part of the Revised Code defines “collaborate.” As such, it should be given its common, everyday meaning. *State v. Dorso*, 4 Ohio St.3d 60, 62, 446 N.E.2d 449 (1983); 1994 Op. Att’y Gen. No. 94-025, at 2-110. In ordinary speech, “collaborate” means “to work together, especially in a joint intellectual effort.” *The American Heritage Dictionary of the English Language* 361 (5th Ed.2011). It means “to work jointly with others or together esp. in an intellectual endeavor.” *Merriam Webster’s Collegiate Dictionary* 243 (11th Ed.2005). In sum, two or more parties “collaborate” when they combine their efforts to work toward a common goal. Succinctly stated, collaboration entails “jointly administering a project.”

Because collaboration entails the joint administration of a project, it *does not* cover a great many of the tasks in which officials might engage. Merely providing information to a third party—for example, answering a

non-profit organization’s questions about registration requirements—would not qualify as the joint administration of a project. Nor would setting up a booth to register voters or recruit poll workers at an event hosted by another entity. These activities do not combine the efforts of a public official and a nongovernmental entity towards a specific plan. Instead, such activities represent solo projects undertaken in mere proximity to one another, or in furtherance of a similar goal.

This understanding of “collaborate” finds support from the just-discussed elephants-in-mouseholes canon. Numerous sections in the Revised Code explicitly or implicitly require, or authorize, elections officials to interact with nongovernmental persons or entities. For example:

- R.C. 3501.03 (boards of election “shall have authority to publicize information relative to registration or elections”);
- R.C. 3501.05(Z) (Secretary of State to “conduct voter education outlining voter identification, absent voters ballot, provisional ballot, and other voting requirements”);
- R.C. 3501.051 (Secretary of State may authorize youth mock voting program to be run by volunteers);
- R.C. 3503.12 (boards of election to advertise in newspapers advertising voter registration info);

- R.C. 3501.22 (boards of election shall work with non-public schools to recruit high school poll workers);
- R.C. 3501.302; 3506.03 (numerous provisions authorizing boards of elections to purchase elections supplies).

Any broader reading of “collaborate” would cause R.C. 3501.054 to implicitly repeal these and other laws. Statutes should not be read to implicitly effect so significant a change if they can be read not to do so.

Although I cannot answer whether every hypothetical interaction between elections officials and nongovernmental persons or entities would constitute collaboration, I can provide a few concrete examples of interactions that would *not* constitute “collaboration”:

- Providing election information to a nongovernmental person or entity, whether orally or in writing;
- Speaking at, providing election information at, or conducting election activities (such as registering voters or recruiting poll-workers) at an event hosted by a nongovernmental person or entity;
- Publishing election information on a medium owned or hosted by a nongovernmental person or entity (such as a newspaper, radio or television broadcast, website, or bulletin board), whether for free or as paid advertising.

None of these examples constitute jointly administering a project. In addition, R.C. 3501.054 would not prohibit elections officials from performing any actions that they are otherwise authorized to perform by the Revised Code.

IV

Finally, you ask what statute provides the penalty for violating R.C. 3501.054. There are just two potential candidates: R.C. 3599.32 and R.C. 3599.40. After analyzing both statutes, I conclude that R.C. 3599.32 provides the penalty.

R.C. 3599.32 states:

No official upon whom a duty is imposed by an election law for the violation of which no penalty is otherwise provided shall knowingly disobey such election law. Whoever violates this section is guilty of a misdemeanor of the first degree.

R.C. 3599.40 states:

Except as otherwise provided in section 3599.39, whoever violates any provision of Title XXXV of the Revised Code, unless otherwise provided in such title, and whoever violates division (D) of section 9.03 of the Revised Code, is guilty of a misdemeanor of the first degree.

Violating R.C. 3501.054 fits some of the requirements of both statutes—R.C. 3501.054 is an election law in Title XXXV, and does not contain a specific penalty. However, R.C. 3599.32 applies specifically to *officials*, while R.C. 3599.40 applies to everyone. As a more specific statute, R.C. 3599.32 prevails over the more general R.C. 3599.40. R.C. 1.51; see *State ex rel. Motor Carrier Serv. v. Rankin*, 135 Ohio St. 3d 395, 2013-Ohio-1505, 987 N.E.2d 670, ¶¶26-29. Therefore, a penalty for violating R.C. 3501.054 is “otherwise provided” in Title XXXV, and the penalty found in R.C. 3599.40 would not apply. As such, I conclude that R.C. 3599.32 provides the penalty for violating R.C. 3501.054.

A violation of R.C. 3599.32 is a misdemeanor of the first degree. If the person has previously been convicted of a violation of Title XXXV, the violation is a felony of the fourth degree. R.C. 3599.39.

Conclusion

Accordingly, it is my opinion, and you are hereby advised that:

1. For purposes of R.C. 3501.054, a “nongovernmental person or entity” is a person or entity that is neither an official nor a constituent part of a federal, state, or local government.
2. R.C. 3501.054 prohibits public officials from collaborating with nongovernmental persons or entities *only* when the public official is acting in his or her official capacity. It does not prohibit public officials from collaborating

with nongovernmental persons or entities in the official's private capacity. It does not, for example, prohibit a board of elections member from serving as a member or in a leadership role of a county political party central or executive committee.

3. As used in R.C. 3501.054, "collaborate" means to jointly administer a project.
4. The clause in R.C. 3501.054 that prohibits public officials from collaborating with nongovernmental persons or entities does not prohibit a public official from performing any action that the public official is authorized to perform by a different section of the Revised Code.
5. R.C. 3599.32 provides the penalty for violating R.C. 3501.054.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive style with a large, looping "D" and "Y".

DAVE YOST
Ohio Attorney General