

OHIO ETHICS COMMISSION

Santiago Feliciano, Jr.
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>

December 17, 1999

Informal Opinion 1999-INF-1217-3

James P. Chapman
President, Shawnee State University

Dear Mr. President:

You asked whether the Ohio Ethics Law and related statutes prohibit a state university from hiring the spouse of the university president or the spouse of the university provost as a full-time faculty member if the university president or university provost, respectively, recuses himself from every aspect of his spouse's hire and from every aspect of his spouse's employment.

You explained that the university's normal hiring process for faculty begins with the advertisement of the position. A faculty screening committee reviews the applications, invites candidates for interviews, and then recommends a candidate for hire. The department chair negotiates a salary with the candidate and recommends approval of the candidate. The candidate must be approved by the dean and then by the provost. The president has the final approval of the candidate's hire and salary.

You stated that the president has the final authority to remove all university employees, except in the case of vice-presidents or deans, whose removal requires Board of Trustees approval. You also stated that the president has the final authority to award continuing contracts and promotions for all faculty, based on the recommendation of the provost. You explained that full-time faculty members are represented by a collective bargaining unit deemed certified by the State Employment Relations Board under Chapter 4117. of the Revised Code. You also explained that the president is the third level grievance authority for all faculty grievances under the existing collective bargaining agreement and that faculty dissatisfied with the president's response to their grievance may request arbitration. You have asserted that the Board of Trustees has granted the president wide latitude in faculty hiring, but can limit, withdraw, or otherwise modify the president's authority pursuant to R.C. 3362.03.

As explained more fully below, the Ohio Ethics Law and related statutes prohibit the president or provost from authorizing, or using the power and influence of his public position to secure the authorization of, his spouse's employment with the university with which he serves. However, provided that the university president or provost is able to withdraw from the hiring process, and that withdrawal is authorized by the appropriate university officials, a state

university is not prohibited from hiring the spouse of the president or provost. Once the president's or provost's spouse has been hired by the university, the Ethics Law and related statutes prohibit the president or provost from participating in any matter or decision that would affect the continuation, implementation, or terms and conditions of his spouse's employment with the university even though he did not participate in his spouse's hire. Finally, the Law prohibits the president or provost from using the authority or influence of his position, formally or informally, to act or to influence the decisions or actions of other officials or employees in matters that would affect his spouse's interest in her individual employment relationship with the university. If the president or provost is unable to withdraw from all aspects of the employment process related to his spouse, or matters related to her continued employment, the university is prohibited from hiring his spouse.

Prohibition against Authorizing a Family Member's Employment—R.C. 2921.42(A)(1)

A section of law that is particularly applicable to your question is R.C. 2921.42(A)(1), which provides that no public official shall knowingly:

Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

The term "public official" is defined, for purposes of R.C. 2921.42, to include any elected or appointed officer, employee, or agent of any political subdivision of the state. R.C. 2921.01(A). A state university official or employee is a "public official" for purposes of R.C. 2921.42. See Ohio Ethics Commission Advisory Opinions No. 83-003 and 92-001. Thus, a president or provost of a state university is a "public official" subject to the prohibitions of R.C. 2921.42.

The term "public contract" is defined in R.C. 2921.42(G)(1)(a), for purposes of R.C. 2921.42, to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either. Therefore, the employment of any person by a university would be considered a public contract under R.C. 2921.42.

R.C. 2921.42(A)(1) prohibits a public official from authorizing, or employing the authority or influence of his office to secure the authorization of, any public contract, including employment, in which "a member of his family" has an interest. See Adv. Ops. No. 90-010, 92-012, and 97-004. For purposes of R.C. 2921.42, a "member of his family" has been defined by the Commission as including, but not limited to, the public official's spouse, children (whether dependent or not), parents, grandparents, grandchildren, and siblings. *Id.* The Commission has also included in this definition any other person related to the official by blood or marriage who resides in the same household as the official. *Id.* The spouse of a university official is, therefore, a member of the official's family for purposes of this restriction.

The Commission has determined that a public official will be deemed to have "authorized" a public contract, for purposes of R.C. 2921.42, where the contract could not have been awarded without the approval of the public official or the position in which the official serves. See Adv. Ops. No. 87-004, 88-008, 90-010, and 92-012. Accordingly, a public official is prohibited by R.C. 2921.42(A)(1) from participating in any part of his public agency's decision-making process authorizing or approving an individual contract of employment for a member of his family. See Adv. Ops. No. 89-005, 90-010, and 92-012. Further, the Commission has determined that R.C. 2921.42(A)(1) prohibits a public official from using "the authority or influence of his office" by exercising the power and influence inherent in the position and prestige of his public office or employment to affect the decision-making process regarding the employment of a family member even if the official abstains subsequently from participating in official proceedings. See Adv. Op. No. 92-012.

The Commission has explained that the prohibitions contained in R.C. 2921.42(A)(1) do not create a "no relatives policy":

R.C. 2921.42(A)(1) does not prohibit a family member of a public official from being employed by the same political subdivision which the official serves; rather it prohibits the public official from taking any action to secure employment for his family member. The purpose of R.C. 2921.42(A)(1) is to prevent the possibility that a public official may show favoritism in the exercise of his discretionary, decision-making authority in authorizing a contract for public employment.

...

R.C. 2921.42(A)(1) will absolutely prevent employment of a public official's family member only in instances where the public official is the sole or ultimate hiring authority, and where there is no other person or entity who may exercise such hiring authority. A family member of an official will not be prevented from being employed by the same political subdivision in instances where the appointment may be made by some other person or entity who may exercise such hiring authority, where it is possible for a superior to authorize the employment, or where the official is not the appointing authority for that particular position. The official is, however, required under all circumstances to abstain from participating in the employment process.

Adv. Op. No. 90-010 (emphasis added) (citations omitted).

Therefore, R.C. 2921.42(A)(1) prohibits a state university president or provost from authorizing, or employing the authority or influence of his office to secure authorization of, the employment of his spouse by the university with which he serves. See Adv. Ops. No. 85-015, 90-010, and 92-012. You explained that the normal hiring process for faculty at the university you serve includes approval by the provost and final approval of hire and salary by the president. R.C. 2921.42(A)(1) would prohibit the provost or president from exercising this authority, and approving an employment contract for his spouse. The law also prohibits the university

president or provost from using his authority or influence in any other way to secure authorization of an employment contract for his spouse.

The Commission has further explained that the prohibition in R.C. 2921.42(A)(1) against a public official authorizing, or using the authority or influence of his public position to secure the authorization of, the employment of a family member by the public agency with which he serves extends beyond the initial hire of a family member. See Adv. Ops. No. 92-012 and 97-004. R.C. 2921.42(A)(1) prohibits a public official from participating in any matter or decision that would affect the continuation, implementation, or terms and conditions of a family member's employment. Id.

Therefore, R.C. 2921.42(A)(1) prohibits the president or provost from participating in any part of the university's decision-making process with respect to his spouse's employment and from exercising the power and influence of his public position to affect the terms and conditions of his spouse's employment even if he does not participate in the original hiring decision. The provost or president would be prohibited from participating in any actions involving compensation, benefits, promotions, discipline, lay-offs, or terminations with regard to his spouse, even if the final decision would be made by another person or entity. See Adv. Op. No. 92-012. He would also be prohibited, by R.C. 2921.42(A)(1), from using his position to secure any changes in his spouse's employment in any way, including discussion, recommendation, use of authority over other officials and employees, and formal and informal lobbying. Id.

You have explained that the president has the final authority to award continuing contracts and promotions for all faculty based on the recommendation of the provost. You have also explained that the president has the final authority to remove all employees of the university with the exception of vice-presidents or deans. You have explained that the president is also the third level grievance authority for all faculty grievances under the existing collective bargaining agreement.

The provost would be prohibited by R.C. 2921.42(A)(1) from recommending that his spouse be awarded a continuing contract or promotion and from participating in any matter or decision that would affect his spouse's employment. The president would be prohibited by R.C. 2921.42(A)(1) from awarding a continuing contract or a promotion to his spouse and from participating in an action to remove his spouse. The president would also be prohibited from acting as a grievance authority in any grievance action involving his spouse, and from otherwise participating in any matter or decision that would affect his spouse's employment.

Withdrawal of the Public Official or Employee

As discussed above, the provost, and to a much greater extent, the president, would normally participate in both the faculty hiring process and in matters and decisions that affect a faculty member's employment. However, R.C. 2921.42(A)(1) prohibits the provost or president from participating in the hire of his spouse or in matters and decisions that would affect his spouse's employment.

The Commission has determined that when a public official is prohibited from participating in a particular matter by law, that official may withdraw from the matter which would create the conflict, if such withdrawal does not interfere with the performance of his duties, and is approved by the appropriate official or officials at his employing agency. See Adv. Op. No. 90-010. The appropriate officials to approve the withdrawal of a public official or employee must be officials at a level that is higher than the level at which the official or employee who wishes to withdraw serves. The appropriate officials will vary depending on the public agency involved in each individual case, but these officials must always be in positions where they have authority over the public official who wishes to withdraw. Accordingly, in some situations, a public official seeking to withdraw from a matter may need the approval of his direct supervisor in order to withdraw. In other situations, the public official may need the approval of the governing board or a central group which considers all withdrawal requests within the agency. In the provost's situation, you have indicated, and the Commission concurs, that the president or the Board of Trustees are the appropriate officials to approve the provost's withdrawal from this matter. In the president's situation, the Board of Trustees are the appropriate officials to approve the president's withdrawal from this matter.

If the withdrawal of the president or provost is approved, the hiring process and decision to hire must be assigned to an official or employee who is removed from the power and influence of the withdrawing public official. Such officials or employees should normally include an official or employee who serves at a supervisory level above, or equal to, the withdrawing public official, and may also include an official or employee at a level subordinate to the withdrawing public official so long as they directly report on the matter to a supervisor of the withdrawing public official. Adv. Op. No. 97-004. Thus, R.C. 2921.42(A)(1) will absolutely prevent employment of a public official's family member only in instances where the public official is the sole or ultimate hiring authority, and where there is no other person or entity who may exercise such hiring authority. See Adv. Op. No. 90-010.

R.C. 3362.03 provides, in part, as follows:

The board of trustees of Shawnee state university shall employ, fix the compensation of, and remove the president and such number of professors, teachers, and other employees, as may be deemed necessary. The board shall do all things necessary for the creation, proper maintenance, and successful and continuous operation of the university and may adopt and amend bylaws and rules for the conduct of the board and the government and conduct of the university.

If, under Chapter 3362. of the Revised Code or other governing instruments that apply, it is possible for the president or the Board of Trustees to act in the place of the provost in all matters pertaining to the employment of the provost's spouse, then the employment of the provost's spouse would not be prohibited. Again, as with the provost, the employment of the president's spouse would not be prohibited if the Board of Trustees may act in all matters pertaining to the employment of the president's spouse. However, the determination as to whether some other person or entity may act in these matters is a matter to be resolved by the

university's legal advisor, not the Ohio Ethics Commission. The university's legal advisor can also advise you if the university has any bylaws or rules applicable to your question.

Use of Authority or Influence to Secure or Affect Employment—R.C. 102.03(D)

In addition to R.C. 2921.42(A)(1), your question also implicates R.C. 102.03(D), which provides:

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.

A "public official or employee" is defined, for purposes of Chapter 102. of the Revised Code, to include any person who is elected or appointed to an office or is an employee of any instrumentality of the state. R.C. 102.01(B) and (C). The provost or president of a state university is a "public official or employee" for purposes of R.C. Chapter 102. and is, therefore, subject to the prohibitions of R.C. 102.03(D). See Adv. Op. No. 86-006.

The term "anything of value" is defined, for purposes of R.C. Chapter 102., to include money, a promise of future employment, and every other thing of value. See R.C. 102.01(G) and R.C. 1.03. An employee's continued employment, and the compensation received therefor, fall within the definition of "anything of value." See Adv. Ops. No. 92-012 and 97-004.

The Commission has held that R.C. 102.03(D) prohibits a public official or employee from participating, formally or informally, in any matter that directly affects his private pecuniary interests or the private pecuniary interests of any other party, if the relationship between the official or employee and the other party is such that the official's or employee's objectivity and independence of judgment could be impaired. See Adv. Ops. No. 88-004, 89-005, and 97-004. The Commission has specifically held that R.C. 102.03(D) prohibits a public official or employee from using his authority or influence, formally or informally, to secure anything of value for members of the official's or employee's family, including his spouse. See Adv. Ops. No. 90-004, 91-004, and 92-012.

It is apparent that the provost's or president's objectivity and independence of judgment could be impaired with respect to matters involving his spouse's employment with the university. Therefore, R.C. 102.03(D) prohibits the president or provost from using his authority or influence, formally or informally, to secure the employment of his spouse, or to otherwise act with respect to his spouse's public employment. See Adv. Ops. No. 92-012 and 97-004. These matters include, but are not limited to, any of the following: changes in compensation or benefits that are determined by individual working conditions, the assignment of duties, evaluations, and actions involving tenure, promotions, discipline, lay-offs, and termination. Id.

Thus, the provost would be prohibited from approving the hire of his spouse, recommending a continuing contract or promotion for his spouse, or otherwise acting with respect to his spouse's employment. The president would be prohibited from approving the hire of his spouse or removing his spouse. The president would also be prohibited from awarding a continuing contract or promotion for his spouse, serving as the grievance authority in any action involving his spouse, or otherwise acting with respect to his spouse's employment. Furthermore, R.C. 102.03(D) would prohibit the provost or president from using the authority or influence of his office, formally or informally, to influence the decisions or actions of other officials or employees in matters that would affect his spouse's interests in her individual employment relationship with the university. If the president or provost will be unable to withdraw from university actions, formally or informally, that affect his spouse's employment, the university will be unable to employ the spouse of the president or provost.

Conclusion

As explained more fully above, the Ohio Ethics Law and related statutes prohibit the president or provost from authorizing, or using the power and influence of his public position to secure the authorization of, his spouse's employment with the university with which he serves. However, provided that the university president or provost is able to withdraw from the hiring process, and that withdrawal is authorized by the appropriate university officials, a state university is not prohibited from hiring the spouse of the president or provost. Once the president's or provost's spouse has been hired by the university, the Ethics Law and related statutes prohibit the president or provost from participating in any matter or decision that would affect the continuation, implementation, or terms and conditions of his spouse's employment with the university even though he did not participate in his spouse's hire. Finally, the Law prohibits the president or provost from using the authority or influence of his position, formally or informally, to act or to influence the decisions or actions of other officials or employees in matters that would affect his spouse's interest in her individual employment relationship with the university. If the president or provost is unable to withdraw from all aspects of the employment process related to his spouse, or matters related to her continued employment, the university is prohibited from hiring his spouse.

It should be noted that the Commission assumes that the university employees who are participating in a hiring process will give no preference to the spouse of the provost or president, and that the hiring process will be fair and open to all qualified candidates. You have described a multi-part hiring process for faculty. The purpose of the process is, of course, to identify the candidate who can best perform the job duties described in the job advertisement. Whenever the family member of the provost or president is the candidate selected as a result of this process, it must be clear that the process was open and fair, and that the family member is the best and most-qualified person, among the candidates who responded, for the faculty position.

The Ethics Commission approved this informal advisory opinion at its meeting on December 17, 1999. The opinion is based on the facts presented and 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.

James P. Chapman
December 17, 1999
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If you have any further questions or desire additional information, please feel free to contact this Office again.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jennifer A. Hardin".

Jennifer A. Hardin
Chief Advisory Attorney

cc: Frank L. Waller, President, Shawnee State University Board of Trustees
Stephen P. Donohue, General Counsel, Shawnee State University
Saundra Schuster, Assistant Attorney General