

OHIO ETHICS COMMISSION

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October 21, 2002

Informal Opinion 2002-INF-1021-3

Hernan A. Vasquez

Dear Mr. Vasquez:

In a letter received by the Ohio Ethics Commission, you have asked whether the Ethics Law prohibits you from advocating, in your position as a member of the board of trustees for the University of Toledo (University), initiatives related to Latinos in higher education. You state that your spouse is the Executive Director of the Office of Latino Initiatives at the University.

Brief Answer

As explained more fully below, the Ethics Law does not prohibit you and your spouse from serving simultaneously in your respective positions with the University. However, the Ethics Law prohibits you, as a trustee of the University, from using your position, either formally or informally, in contractual and other matters before the board of trustees in which your spouse has a definite and direct financial or fiduciary interest. Examples of these matters are discussed below, and include issues related to the terms and conditions of your spouse's employment with the University, and matters that directly affect the operations of the Office of Latino Initiatives, if your spouse, as the Executive Director, has a definite and direct financial or fiduciary interest in those matters. You are not prohibited from participating in, or advocating, issues concerning general educational initiatives related to Latinos in higher education and unrelated to your spouse's specific position or office.

Facts

In your letter to the Ethics Commission, you explain that you were appointed to serve as trustee for the University of Toledo. You state that, in 1999, Dr. Dagmar Morales was appointed to design and implement the program of Latino Initiatives for the University. Dr. Morales is currently the Executive Director of the University's Office of Latino Initiatives. You state that, in 2000, you married Dr. Morales.

You explain that you have advocated the advancement of opportunities for Latinos in northwest Ohio for the past three decades. You explain that, as a first-generation college graduate Latino, you expect to provide cultural-related knowledge about Latino issues. You state that you would like to continue to be involved in matters related to Latino participation in higher education. You explain that you are concerned that, based on your spouse's position with the University, you may have, or be perceived as having, a conflict of interest with respect to such matters.

At the outset, it must be noted that the Ohio Ethics Law does not prohibit you and your spouse from serving the University in your respective positions. However, because you are a university trustee, you are prohibited from participating in matters in which your spouse has a definite and direct financial or fiduciary interest.

Securing or Soliciting a Definite and Direct Benefit for a Spouse—R.C. 102.03(D) and (E)

Your question implicates R.C. 102.03(D) and (E), which provide:

- (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.

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). An individual appointed to the University board of trustees is appointed to an office of the state and therefore a "public official or employee" for purposes of R.C. 102.03. See R.C. 3360.03 (the board of trustees shall employ, fix the compensation of, and remove, the president and such number of professors, teachers, and other employees as may be deemed necessary and shall do all things necessary for the creation, proper maintenance, and successful and continuous operation of the university and may adopt and from time to time amend bylaws, rules, and regulations for the conduct of the board and the government and conduct of the university). See also R.C. 3360.04 (the board of trustees may receive and hold in trust, for the use and benefit of the university, any grant or devise of land, and any donation or bequest of money or other personal property and may make and enter into all contracts and agreements necessary or incidental to the acquisition of property for, and the operation of, such university).

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 Ohio Ethics Commission Advisory Opinions 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.

You are not prohibited from participating in matters involving Latino interests generally, provided that you do not, as described above, participate, either formally or informally, in matters before the board of trustees that would have a definite and direct impact on your spouse's financial or fiduciary interests. For example, it is apparent that your objectivity and independence of judgment could be impaired with respect to matters involving your spouse's employment with the university. Therefore, R.C. 102.03(D) prohibits you from using your authority or influence, formally or informally, to secure the continued employment of your spouse, or to otherwise act with respect to your 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.

In addition to those matters described above that directly involve your spouse's employment contract with the University, there are other matters that may come before the board of trustees that would have a definite and direct impact on the financial or fiduciary interests of your spouse. For instance, matters may come before the board involving the Office of Latino Initiatives that would have a definite and direct impact on your spouse's salary or continued employment with the University. R.C. 102.03(D) and (E) prohibit you from participating in matters before the University board of trustees that have a definite and direct effect on the continued operation of the Office of Latino Initiatives. However, R.C. 102.03(D) and (E) do not require that you abstain from participating in matters that affect the office in common with other university offices, or that affect the office generally without a specific benefit or detriment to your spouse, such as the budget. See Adv. Op. No. 90-004. If your spouse's salary were determined based on the budget for the office, you would be prohibited from taking any action regarding the budget.

Securing Authorization of a Contract for a Spouse—R.C. 2921.42(A)(1)

The situation you have described also implicates 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 Adv. Ops. No. 83-003 and 92-001. Thus, as a member of the board of trustees for the University, you are a "public official" subject to the prohibitions of R.C. 2921.42. Adv. Op. No. 95-004.

The term "public contract" is defined in R.C. 2921.42(G)(1)(a), for purposes of R.C. 2921.42, to include 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, 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 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 you from participating in any part of the university's decision-making process with respect to your spouse's employment and from exercising the power and influence of your public position to affect the terms and conditions of your spouse's employment even though you did not participate in the original hiring decision. You are prohibited from participating in any actions involving compensation, benefits, promotions, discipline, lay-offs, or terminations with regard to your spouse, even if another person or entity would make the final decision. See Adv. Op. No. 92-012. R.C. 2921.42(A)(1) also prohibits you from using your position to secure any changes in your spouse's employment in any way, including discussion, recommendation, use of authority over other officials and employees, and formal and informal lobbying. Id.

Conclusion

As discussed above, the Ethics Law does not prohibit you and your spouse from serving simultaneously in your respective positions with the University. However, the Ethics Law prohibits you, as a trustee of the University, from using your position, either formally or informally, in contractual and other matters before the board of trustees in which your spouse has a definite and direct financial or fiduciary interest. Examples of these matters are discussed below, and include issues related to the terms and conditions of your spouse's employment with the University, and matters that directly affect the operations of the Office of Latino Initiatives, if your spouse, as the Executive Director, has a definite and direct financial or fiduciary interest in those matters. You are not prohibited from participating in, or advocating, issues concerning general educational initiatives related to Latinos in higher education and unrelated to your spouse's specific position or office.

On one final note, you state in your letter that, if it is determined that you do have a conflict of interest with respect to such matters, you would like to "request the administration of the university to provide an alternative position than that of the director of [the Latino Initiatives] program" in order for you to effectively function as a trustee. As discussed above, the Ethics Law does not prohibit you from participating in, or advocating, issues concerning general educational initiatives related to Latinos in higher education, as long as those issues are unrelated to your spouse's specific position or office. The question of whether the University wishes to reassign your spouse to another position in order to facilitate your ability to participate more fully, as a trustee, in matters related to the program is a matter for the University to determine.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 21, 2002. The Commission commends you for requesting guidance before any actions that could be prohibited by law are taken.

Hernan A. Vasquez

October 21, 2002

Page 6

The opinion is 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 and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer A. Hardin". The signature is fluid and cursive, with a large initial "J" and "H".

Jennifer A. Hardin
Chief Advisory Attorney