

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

December 29, 2003

Informal Opinion 2003-INF-1229-1

Fred W. Recktenwald


Dear Mr. Recktenwald:

In a letter received by the Ohio Ethics Commission on October 29, 2003, you ask whether the Ohio Ethics Law and related statutes prohibit you from continuing to serve as a member of the Board of Trustees of the Terra State Community College Foundation (Foundation) in light of the fact that you that you have been appointed to the Board of Trustees of Terra State Community College (College).

Brief Answer

As explained below, based upon the facts that you have presented, the Ohio Ethics Law and related statutes do not prohibit you from continuing to serve as a member of the Foundation Board in light of the fact that you that you have been appointed to the College Board. However, R.C. 102.03(D) and (E) would prohibit you, as a member of the College Board, from participating in any matter that would affect the interests of the Foundation.

Facts

You state that you have been a member of the Foundation Board for five years and had served as the Foundation Board's Chairman. You state that, upon your appointment to the College Board, you resigned from the Chairman position but remained as a member of the Foundation Board. You provided a copy of the Foundation Charter with your letter. The Foundation is a 501(c)(3) non-profit corporation that engages in a variety of fund-raising and investment activity to provide financial assistance to the College and its students. The Foundation Charter states that no part of the net earnings of the Foundation shall benefit the members of the Foundation Board. In addition, members of the Foundation Board are prohibited from sharing in the distribution of the Foundation assets upon its dissolution.

The Ohio Ethics Law and Related Statutes—Application to the Foundation

The first issue is to determine whether the Ethics Law and related statutes apply to your conduct as a member of the Foundation Board.

The Ohio Ethics Law and related statutes include prohibitions against public officials and employees misusing their official positions for their own personal benefit, the benefit of their family members or business associates, or where there is otherwise a conflict of interest. Two provisions of law define who is subject to these prohibitions. R.C. 102.01(B) defines the term "public official or employee" for purposes of Chapter 102. of the Revised Code as "any person who is elected or appointed to an office or is an employee of any public agency." R.C. 102.01(C) defines the term "public agency" as:

[T]he general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, township, and the five state retirement systems, or any other governmental entity. "Public agency" does not include a department, division, institution, board, commission, authority, or other instrumentality of the state or a county, municipal corporation, township, or other governmental entity that functions exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes; does not expend more than ten thousand dollars per calendar year, excluding salaries and wages of employees; and whose members are uncompensated.

One related statute, R.C. 2921.42 applies to any "public official" which is defined, for purposes of R.C. Chapter 2921., in R.C. 2921.01 as:

[A]ny elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and including without limitation legislators, judges, and law enforcement officers. (Emphasis added).

As stated above, the Foundation is organized as a non-profit corporation. According to the material and description you have provided, the Foundation is not a department, division, institution, board, commission, authority, bureau, or other instrumentality of the state, or a political subdivision. The Ethics Commission has generally addressed the issue whether the Ohio Ethics Laws and related statutes apply to persons who are members of the board of trustees of a non-profit corporation. Ohio Ethics Commission Advisory Opinions No. 75-013 and 75-019. In Advisory Opinion No. 75-013, the Ethics Commission held:

The provisions of Chapter 102 of the Revised Code apply to "public officials and employees" and "persons elected or appointed to an office or employed by" an agency of the state, county, township, municipal corporation or other governmental entity. The governmental or public agencies referred to in Chapter 102 of the Revised Code are entities created by the Constitution or legislative bodies of the state, county, township, or municipal corporation.

Non-profit corporations formed under Section 1702.04 of the Revised Code can be distinguished from these public or governmental agencies in that the non-profit corporations, by virtue of Section 1702.04 of the Revised Code are created by:

“(A) Any person, singly or jointly with others, and without regard to residence, domicile or state of incorporation, may form a corporation by signing and filing with the secretary of state articles of incorporation, . . .”

Thus, although the activities and functions of a non-profit corporation may be of a public nature, the [non-profit] corporation is not a governmental agency for purposes of Chapter 102 of the Revised Code.

The prohibitions of Chapter 102 of the Revised Code, therefore, do not apply to persons participating through non-profit corporations in services to their community.

Based upon the information you have provided, the Foundation is not an entity created by the Constitution, or a legislative body of the state, county, township, or municipal corporation. Therefore, it is not a “public agency” for purposes of Chapter 102.

The Ethics Commission is empowered to administer, interpret, and enforce Section 2921.42 of the Revised Code, as well as R.C. Chapter 102.¹ R.C. 2921.01(A) and (B) include definitions that determine whether an individual is subject to the prohibitions imposed by R.C. 2921.42. Since these statutory definitions differ from the definitions in Chapter 102., an individual may be subject to some, but not all, of the prohibitions imposed by the statutes under the Ethics Commission’s jurisdiction. Adv. Op. No. 93-013.

As noted above, the Foundation is a non-profit corporation and is not a state entity or political subdivision. Therefore, the members of the Foundation Board are not officers or employees of the state or a political subdivision for purposes of R.C. 2921.01.

R.C. 2921.01 also includes “agents” of the state, as well as officers and employees, within the definition of “public official” for purposes of R.C. 2921.42. The issue remains, therefore, whether a member of the Foundation is an “agent” of the state and subject to the prohibitions imposed by R.C. 2921.42.

¹ R.C. 2921.43(A), which prohibits a “public servant” from accepting compensation, other than allowed by law, to perform his official duties, also falls within the Commission’s authority. A “public servant,” includes “[a]ny person performing ad hoc a governmental function.” It is possible that a member of the Foundation Board could be considered a “public servant” for purposes of R.C. 2921.43. However, in the circumstances you describe, the prohibitions imposed by R.C. 2921.43 are not an issue and the application of R.C. 2921.43 need not be addressed.

The Ethics Commission has held that an individual is an "agent" of the state when the state has empowered him, or the entity with which he serves, to act on the state's behalf, and to bind the state. Adv. Op. No. 92-001. As described above, the Foundation solicits and receives donations to support the College and its students. While the Foundation aids the College, it cannot be said that the College has empowered the Foundation to act on behalf of, or bind, the College. Therefore, a member of the Foundation Board is not an "agent" of the state who is subject to Section 2921.42 of the Revised Code.

While a member of the Foundation Board is not subject to the Ethics Law and related statutes because of his service on the Foundation Board, a member of the College Board of Trustees is subject to the Ethics Law and related statutes due to his service to the College. Therefore, it is necessary to examine these prohibitions with respect to your actions as a member of the College Board.

Restrictions Imposed by R.C. 2921.42(A)(4)

Your attention is first directed to R.C. 2921.42(A)(4), which reads:

(A) No public official shall knowingly do any of the following:

. . .

(4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

The term "public official" is defined to include "any elected or appointed officer, or employee, or agent of the state. A state university is an instrumentality of the state. See R.C. 3325.01 ("state university" means a public institution of higher education which is a body politic and corporate"); Wolf v. Ohio State University Hosp. (1959), 170 Ohio State 49. Therefore, a member of the board of trustees of a state college or university is a "public official" for purposes of R.C. 2921.42.

R.C. 2921.42(A)(4) prohibits a public official from having an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision with which he serves or by which he is employed. Adv. Op. No. 89-008. An interest that is prohibited under R.C. 2921.42(A)(4) must be definite and direct and may be either pecuniary or fiduciary. Adv. Ops. No. 78-005 and 81-003.

The issue becomes whether a member on the College Board who also serves on the Foundation Board has a prohibited interest in a public contract for purposes of R.C. 2921.42(A)(4).

R.C. 2921.42(G)(1)(a) defines the term "public contract" as the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of a political

subdivision or any of its agencies or instrumentalities. A public contract is created whenever a political subdivision acts to purchase services from a provider or acquires services as part of the contractor's responsibility under the contract. Adv. Ops. No. 91-011, 93-009, and 93-012.

An interest that is prohibited by R.C. 2921.42(A)(4) must be definite and direct and may be either pecuniary or fiduciary in nature. Adv. Op. No. 81-003. An officer or board member of a non-profit corporation has a fiduciary interest in the contracts of the corporation for purposes of R.C. 2921.42. Adv. Ops. No. 81-005, 81-008, and 87-003. In addition, an officer or board member of a public agency is deemed to have an interest in the public agency's contracts. See generally Adv. Op. No. 81-005.

A grant that is awarded by a public agency to an entity or individual is a "public contract" for purposes of R.C. 2921.42 because the public agency is acquiring a specific desired service by its award of the grant. Adv. Ops. No. 82-004 and 85-002. In addition, the Ethics Commission has explained that a grant of federal or other moneys that is awarded through a public agency to an entity or individual is a "public contract" for purposes of R.C. 2921.42 because the public agency is distributing the money to acquire a specific desired service or to shape a desired result. Adv. Ops. No. 82-004 and 85-002. In other words, a "public contract" is created whenever a public agency is taking an action, such as awarding a grant to an entity or individual that is saddled with conditions, to acquire, from that entity or individual, a specific desired service or result for itself.

As explained above, in the instant situation, the Foundation engages in fund-raising and investment activity to provide financial assistance to the College and its students. It is clear that the College is acquiring a desired service or result by the award of financial assistance from the Foundation. However, it is equally clear that the Foundation—not the College—is acting to provide the financial support. Accordingly, the financial assistance that the Foundation provides to the College and its students is not a "public contract" for purposes of R.C. 2921.42.

Therefore, assuming that the College and the Foundation do not have other contractual relationships and that there are no other public contracts in this situation, no provision of R.C. 2921.42 will prohibit or condition your service as a member of the College Board in light of the fact that you also serve on the Foundation Board.

Participation in Matters that Affect an Organization—R.C. 102.03(D) and (E)

Your attention is also 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.

A member of the board of trustees of state colleges and universities is a "public official" for purposes of R.C. 102.03(D) and (E).

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 102.01(G). A definite, pecuniary benefit to a person or entity is considered to be a thing of value under R.C. 102.03(D) and (E). Adv. Op. No. 88-004. The financial assistance that the Foundation provides to the College and its students is a "thing of value" for purposes of R.C. 102.03(D) and (E).

Interests of a Non-Profit Organization—R.C. 102.03(D) and (E)

R.C. 102.03(D) and (E) prohibit a public official or employee from participating in matters that will benefit parties with whom he has a close family, economic, business, or fiduciary relationship because the relationships may impair the public official's objectivity and independence of judgment. Adv. Ops. No. 89-008 and 97-002. In Advisory Opinion No. 90-012, the Ethics Commission held that R.C. 102.03(D) prohibited a member of the Respiratory Care Board from securing anything of value for an organization that he serves in a fiduciary capacity. The Commission stated: "R.C. 102.03(D) prohibits a [public official] who serves as an officer or board member of a professional organization from participating in any matter on which the organization has taken a position or which would directly benefit the interests of the organization." Adv. Op. No. 90-012. See also Adv. Op. No. 92-004 ("R.C. 102.03(D) . . . has been interpreted by the Commission as prohibiting a public official from participating in any matter that would provide a benefit to an organization which he serves as an officer or in another fiduciary capacity.").

It may appear that the interests of the College and Foundation are identical. However, it is possible that differences may arise concerning the methods or means by which the Foundation acts to help achieve the College's goals. In such a situation, a question could come before the College Board involving a decision that you had participated in making as a member of the Foundation Board. The Ethics Commission has explained that the prohibitions imposed by R.C. 102.03(D) and (E) serve the public interest in effective, objective, and impartial government by preventing the creation of a situation that may impair the objectivity and independence of judgment of a public official or employee, and, therefore, the effectiveness of the public agency with which he serves. Adv. Ops. No. 89-014 and 90-002. Therefore, in the instant situation, R.C. 102.03(D) and (E) would prohibit you as a member of the College Board from participating in any matter that would affect the interests of the Foundation.²

² An exemption to the prohibition imposed by R.C. 102.03(D) and (E) is set forth in R.C. 102.03(J), however, it is not available to a public official has a fiduciary relationship with the organization.

Conclusion

As explained above, based upon the facts that you have presented, the Ohio Ethics Law and related statutes do not prohibit you from continuing to serve as a member of the Foundation Board in light of the fact that you that you have been appointed to the College Board. However, R.C. 102.03(D) and (E) would prohibit you, as a member of the College Board, from participating in any matter that would affect the interests of the Foundation.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on December 17, 2003. The Commission commends you for requesting guidance before taking any actions that could be prohibited by the Ethics Law.

The opinion is based on the facts presented. The conclusions in this opinion do not apply to other Foundations, which may have other relationships with the public agencies they support. It 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 cursive script that reads "John Rawski".

John Rawski
Staff Attorney