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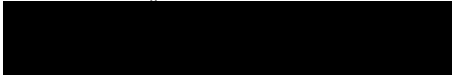
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David E. Freel, *Executive Director*

November 18, 2004

Informal Opinion 2004-INF-1118

Susan Russell, Staff Counsel
School Employees Retirement System



Dear Ms. Russell:

On August 12, 2004, the Ohio Ethics Commission received your request for an advisory opinion. In your request, submitted on behalf of Ohio's five state retirement systems, you asked four questions about the revisions to the Ethics Law and related statutes, as they apply to the board members and employees of retirement systems, contained in Sub. S.B. 133. The Commission answered three of the questions in a letter dated October 4, 2004. This opinion addresses the final question.

You have asked whether R.C. 102.03(G), which defines Ethics Law parameters related to campaign contributions, applies to candidates for positions on the five state retirement boards.

Brief Answer

In direct response to your question, the provision in R.C. 102.03(G) applies, as further described below, to sitting members of retirement system boards who are running for re-election to their board positions. R.C. 102.03(G) also applies to candidates for board positions who are "public officials and employees," as that term is defined in R.C. 102.01(B). However, it does not apply to candidates for board positions, such as retirees and some teachers, who are not "public officials or employees," as that term is defined in R.C. 102.01(B).

The Commission will further address the issue of campaign contributions in the Ethics Policies of the five state retirement systems, over which it has authority. The Commission strongly urges candidates for positions on the retirement system boards to become familiar with and abide by your Ethics Policies, including limitations on those who may be solicited for campaign contributions.

Individuals Subject to R.C. 102.03(G)

Sub. S.B. 133 sets forth guidelines related to campaign activity of individuals who are running for positions on the five state retirement systems. R.C. 102.03(G) applies to any "elected public officer" or other "public official or employee who seeks elective office."

Positions on the retirement system governing boards are elected public offices. See, e.g., R.C. 145.04(C) and (D). Therefore, any retirement board member who is running for re-election to a retirement system board is subject to R.C. 102.03(G).

Any person who is running for a position on a retirement system board, and falls within the definition of "public official or employee," is also subject to R.C. 102.03(G). The term "public official or employee" is defined in R.C. 102.01(B) as any "person who is elected or appointed to an office or is an employee of any public agency." For example, a state employee who is running for the position as state employee member of PERS is a public employee, seeking elective office, and is therefore subject to R.C. 102.03(G).

However, R.C. 102.01(B) specifically provides that any teacher who does not perform, or have the authority to perform, supervisory or administrative functions, is not a "public official or employee," for purposes of any provision in R.C. 102.03, including R.C. 102.03(G). See R.C. 102.01(B); Adv. Op. No. 93-017. Therefore, a teacher who is running for a position on the STRS board, is not already on the STRS board, and is not actively serving in any other public office or employment, is not a "public official or employee" subject to R.C. 102.03(G), even though he is running for an elected office. However, once a teacher has been elected to a position on a retirement board, or appointed because he is the only nominated candidate for the position, he is a public official subject to R.C. 102.03(G) for all future races for the position.

Likewise, individuals who are retired from public office or employment, and are members of a retirement system running for a retiree position on the board, are not "public officials or employees" if they are no longer actively serving in public office or employment. For example, a retired highway patrol officer who is running for a position on the Highway Patrol Retirement System Board, is not already on the Board, and is not actively serving in any public office or employment is not a "public official or employee" subject to R.C. 102.03(G), even though he is running for a public office. Once a retiree has been elected to a position on a retirement board, or appointed because he is the only candidate nominated for the position, he is a public official subject to R.C. 102.03(G) for all future races for the position.

Campaign Contributions—R.C. 102.03(G)

R.C. 102.03(G) provides:

In the absence of bribery or another offense under the Revised Code or a purpose to defraud, contributions made to a campaign committee, political party, legislative campaign fund, political action committee, or political contributing entity on behalf of an elected public officer or other public official or employee who seeks elective office shall be considered to accrue ordinarily to the public official or employee for the purposes of divisions (D), (E), and (F) of this section.

The Ethics Commission explained R.C. 102.03(G) in Advisory Opinion No. 2002-03:

R.C. 102.03(G) provides that a contribution will ordinarily accrue to a public official "in the absence of bribery or another offense under the Revised Code or a purpose to defraud." The language in the exception set forth in R.C. 102.03(G) makes clear the General Assembly's intention that most contributions, regardless of any ties between the public official and the contributor, "ordinarily accrue" to the official who received them, and are not subject to Ethics oversight. However, when wrongdoing of the kind described in R.C. 102.03(G) is specifically present in connection with a contribution, the contribution does not ordinarily accrue to the official, and the exception set forth in R.C. 102.03(G) does not apply. In that case, the contribution comes within the conflict of interest law and presents a potential impropriety under the Ethics Law if the contribution was also solicited or received by a public official from a contributor that is doing or seeking to do business with, directly regulated by, or interested in matters before, the official's public agency. (Emphasis in original.)

R.C. 102.03(G) does not specifically prohibit a public official or employee who is a candidate for elected office in a public agency from accepting campaign contributions from parties with a nexus to the agency, unless there is wrongdoing in connection with the campaign contribution. R.C. 102.03(G) is an exception to the law that was enacted in 1986 for those competing in local and state elections. Without the exception in R.C. 102.03(G), such a candidate would be prohibited from accepting campaign contributions from parties with direct business before the public agency served by the office. However, there are some situations where a public official or employee, such as a candidate for the role of a public pension system director or trustee, must take actions that not only meet the test of law, but are above reproach.

In Sub. S.B. 133, the General Assembly expressed a clear legislative intent to limit or prohibit members of retirement system boards from receiving things of value from parties doing or seeking to do business with the system. These limits were imposed in response to reports of a pattern of improper gratuities provided by investment firms and consultants to members or employees of some retirement system boards. With increased prohibitions, including those in Sub. S.B. 133 upon any type of travel, meals, and lodging, and other payments provided to retirement system board members that extend beyond existing statutory restrictions on conflicts of interest, the General Assembly recognized a clear and concrete risk of conflict of interest arising from the actions of consultants or investment firms who might attempt to gain improper influence upon retirement system board members, including providing campaign contributions to those making investment decisions. For that reason, the Ethics Commission has addressed this potential conflict in limitations within the Retirement System Ethics Policies over which the General Assembly has dictated that the Commission has final approval authority. The Commission strongly urges any person who is a candidate for a position on a retirement system board, regardless of whether that person is a "public official or employee" for purposes of

R.C. 102.03(G), to become familiar with and abide by the Ethics Policy adopted by the board of the system he wishes to serve.¹

Conclusion

In direct response to your question, the provision in R.C. 102.03(G) applies, as further described below, to sitting members of retirement system boards who are running for re-election to their board positions. R.C. 102.03(G) also applies to candidates for board positions who are "public officials and employees," as that term is defined in R.C. 102.01(B). However, it does not apply to candidates for board positions, such as retirees and some teachers, who are not "public officials or employees," as that term is defined in R.C. 102.01(B).

The Commission will address the issue of campaign contributions in the Ethics Policies of the five state retirement systems, over which it has authority. The Commission strongly urges candidates for positions on the retirement system boards to become familiar with and abide by your Ethics Policies, including limitations on those who may be solicited for campaign contributions.

The Ohio Ethics Commission approved this advisory opinion at its meeting on November 1, 2004. The Commission appreciates the retirement systems' inquiry and cooperation in the implementation of the provisions of Sub. S.B. 133.

The opinion is based on the facts presented. 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 feel free to contact Jennifer Hardin, Chief Advisory Attorney, or me again.

Sincerely,



David E. Freel
Executive Director

cc: Julie Becker, General Counsel (PERS)
Jimmie Kinnan, General Counsel (SERS)
Diane Lease, General Counsel (OP&F)
Bill Neville, General Counsel (STRS)
Dan Weiss, Chief Financial Officer (HPRS)

¹ Candidates should also be aware that there may be federal guidelines, laws, rules, or policies regarding campaign contributions from individuals connected with investment firms or others involved in the investment activity of the system or fund.