

OHIO ETHICS COMMISSION

Sarah M. Brown, *Chairman*
Robert Browning, *Vice Chairman*



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.ohio.gov

David E. Freel, *Executive Director*

April 24, 2006

Informal Opinion 2006-INF-0424-1

Edmund J. Adams, Chair
Ohio Board of Regents

Dear Mr. Adams:

On March 21, 2006, the Ohio Ethics Commission received your request for an advisory opinion on behalf of the Board of Regents (Board). Your letter explained that Roderick G. W. Chu, Chancellor of the Board (Mr. Chu), will be resigning from that position effective May 12, 2006. You have asked for the Commission's guidance on the appropriate method, in compliance with Ohio's Ethics Law, to consider a "transition" of Mr. Chu to the Ralph Regula School for Computational Science, a virtual school (Virtual School) whose creation has been endorsed by the Board, to work on an initiative applying computational analysis to the educational system and its connections to the workforce and the economy. You note that the fiscal officer for the Virtual School is The Ohio State University (OSU).

Brief Answer

As explained more fully below, public contract and conflict of interest restrictions within the Ethics Law and related statutes prohibit Mr. Chu from profiting from a contract he authorized, or otherwise soliciting or using his position to secure improper things of value. However, as you have described, the action of the Board endorsing the new Virtual School does not fall within the public contract restrictions and the Board is not prohibited from independently considering and securing Mr. Chu's continued assistance to the Board by working on a project related to the Virtual School.

As with all opinions of the Commission, this opinion is based on and limited to the facts presented. Because of the early stage of the Virtual School, the facts and circumstances in this situation are also evolving.

Facts

By way of history, you have explained that your question involves Mr. Chu, the Chancellor of the Board. R.C. 3333.03 provides that the Chancellor is the “administrative officer” of the Board. The statute requires that the Chancellor shall be “qualified by training and experience to understand the problems and needs of the state in the field of higher education and to devise programs, plans, and methods of solving the problems and meeting the needs.”

Your request indicates that the Board endorsed the creation of the Virtual School by resolution in December 2005 but that it has not begun to operate. A planning board for the Virtual School has been established. While the Board’s resolution related to the Virtual School stated that Mr. Chu would make appointments to the planning board, the appointments were actually made by the Board. The planning board will be responsible for appointing an Interim Dean, approval of major grant activities, general oversight of planning and program development, and making recommendations for the permanent board of the Virtual School.

While the final organizational structure of the Virtual School is yet to be determined as the participants work together, it is expected that the Virtual School will have its administrative home at the Ohio Supercomputer Center and will work closely with the Ohio Learning Network. The fiscal agent for the Virtual School will be OSU. The Virtual School will be financed by federal grant funds passed to OSU through the Board. There may also be state funds provided by the Board. The employees of the Virtual School will be employees of OSU. According to the materials you provided, the Board’s staff will have a “very active” role in the planning and development stages of the Virtual School.

In its resolution endorsing the creation of the Virtual School, the Board acknowledged the recommendation of Mr. Chu. A March 21, 2006, press release issued by the Board announcing Mr. Chu’s transition to the Virtual School also acknowledged the creation of the School as an achievement accomplished during Mr. Chu’s tenure.

However, you have stated that, at the time the Board endorsed the creation of the Virtual School, there was no intention to have Mr. Chu serve with the Virtual School. The idea to have Mr. Chu work with the Virtual School was first discussed between Mr. Chu and members of the Board in March 2006, when the Board learned of Mr. Chu’s intent to resign. You have stated that the Board envisioned that Mr. Chu would work on a computer model of the educational system and its connections to the workforce and the economy. The model would be a tool to test how changes in the education system will affect the system and, ultimately, the economy.

The Board has asked the Ethics Commission how best to comply with the Ethics Law in considering structuring Mr. Chu’s future involvement with this initiative after his resignation date. Specifically, the Board has asked: (1) How to structure the flow of federal and state dollars to avoid any conflict of interest; and (2) Whether it would be permissible for Mr. Chu to be employed by OSU or another university.

Your question potentially raises issues under a number of provisions within the Ethics Law, including the public contract law, revolving door law, and conflict of interest provisions.

Profiting from a Public Contract—R.C. 2921.42(A)(3)

R.C. 2921.42(A)(3) provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

As an appointed officer of the state, the Chancellor of the Board of Regents is a “public official” subject to R.C. 2921.42(A)(3). R.C. 2921.01(A); R.C. 3333.01 and 3333.03(B). Therefore, R.C. 2921.42(A)(3) prohibits Mr. Chu, during his public service and after leaving his position with the Board, from profiting from any contract he “authorized.”

In Advisory Opinion No. 2001-02, the Ethics Commission explained:

A public contract will be deemed to have been authorized by a public official, legislative body, board, or commission for purposes of R.C. 2921.42(A)(3), where the public contract could not have been awarded without the approval of the public official, the position in which he serves, or the public entity with which he serves.

Consequently, the question is whether the action of the Board endorsing the creation of the Virtual School or Mr. Chu in recommending the Virtual School constituted authorization of a public contract. While the documentation provided does not fully outline Mr. Chu’s specific actions taken during his service in relation to this matter, it indicates that Mr. Chu recommended the creation of the Virtual School and that the Board’s actions related to the Virtual School had his approval and support.

The term “public contract” is defined, in R.C. 2921.42(G)(1)(a), 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.” The Board’s action in endorsing the creation of the Virtual School, under its authority as set forth in R.C. 3333.04(C) and (D), and later appointing a planning board to move forward with implementing the plan, facilitated the actions of the Board’s staff related to the Virtual School. While the Board has not funded the Virtual School, the Commission understands from conversations with Board staff members that there has been a request to reassign forthcoming federal funds allotted to the Board to be used for the Virtual School.

However, the Board's actions related to the Virtual School did not result in any purchase or acquisition of property or services by the Board. There has been no current funding provided by the Board to the Virtual School. There is no formal governing board or administrative body for the Virtual School. There is no building or campus related to it. Based on the facts provided, the actions of Mr. Chu and the Board to date do not constitute the authorization of a public contract within the definition of R.C. 2921.42(G), because the Board has not purchased and is not acquiring goods or services as a result of its actions. For that reason, the restriction in R.C. 2921.42(A)(3) does not apply to the facts presented here.

Revolving Door Law—R.C. 102.03(A)(1)

The "revolving door law," R.C. 102.03(A)(1), provides:

No present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

As a person who is appointed to an office of the state, Mr. Chu is a "public official," and is subject to the revolving door restrictions set forth in R.C. 102.03(A)(1). R.C. 102.01(B) and (C). In order to determine the application of the restriction, it is necessary to define several terms.

The term "represent" is defined as "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." R.C. 102.03(A)(5). A "person," for purposes of R.C. 102.03(A)(1), includes governmental agencies, individuals, corporations, business trusts, estates, trusts, partnerships, and associations. See R.C. 1.59(C) and Ohio Ethics Commission Advisory Opinions No. 82-002 and 89-003. The Virtual School and OSU would both fall within the definition of "person."

Representation of a person before a public agency can include appearances in formal proceedings, informal lobbying of agency personnel in person or by telephone, and the preparation of any written communications submitted to a public agency, such as filings, informal letters, notes, and e-mails, regardless of whether the former official or employee signs the communication. Adv. Ops. No. 86-001, 87-001, and 92-005. Any formal or informal written or oral communication Mr. Chu would have, on behalf of the Virtual School, with the Board, any college or university, or any other state or local public agency, in the creation of the computational analysis you have described, would be "representation."

The prohibition in R.C. 102.03(A) applies to any "matter" in which the official or employee "personally participated." The term "matter" includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, investigation, a legal

proceeding, an application, and a settlement of a dispute or question. Adv. Op. No. 99-001. "Matter" also includes such abstract items as a dispute of special or public importance and a controversy submitted for consideration. Id. In the instant situation, the creation and administration of the Virtual School is a "matter" for purpose of R.C. 102.03(A)(1).

R.C. 102.03(A)(1) defines "personal participation" to include "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion." In Advisory Opinion No. 91-009, the Ethics Commission held that "personal participation" in a matter also includes the exercise of "supervision or general oversight" over other personnel in their work on that matter, since supervision of a public official's or employee's activities involves decision-making, approval or disapproval, recommendation or advice, and other exercises of administrative discretion, by the supervisor, regarding that matter. See also Adv. Op. No. 92-005. Based on your description of the facts, and the supporting documents you have provided, Mr. Chu recommended the creation of the Virtual School and may have otherwise personally participated through a "substantial exercise of administrative discretion," in the matter.

Therefore, R.C. 102.03(A)(1) prohibits Mr. Chu, for one year after he leaves his employment with the Board, from representing a new employer or client before the Board, any college or university, or any other public agency on any matter in which he personally participated as Chancellor, including the Virtual School. See Adv. Op. No. 91-009. However, the General Assembly has created an exception to this prohibition, to allow public agencies to make independent decisions on whether to retain the services of public officials, which is applicable to these facts.

Exemption to the Revolving Door Prohibition—R.C. 102.03(A)(6)

R.C. 102.03(A)(6) provides:

Nothing contained in division (A) of this section shall prohibit, during such period, a former public official or employee from being retained or employed to represent, assist, or act in a representative capacity for the public agency by which the public official or employee was employed or on which the public official or employee served. (Emphasis added).

The Ethics Commission has explained that the exception of R.C. 102.03(A)(6) is available to a former public official or employee only where the official or employee is representing, assisting, or acting in a representative capacity for his former public agency. Adv. Ops. No. 91-005 and 91-009.

R.C. 102.03(A)(6) does not require that a former public employee be retained or employed by his former public agency in order to represent, assist, or act in a representative capacity for his former public agency. R.C. 102.03(A) is designed to protect the public interest

by prohibiting situations from arising where a former public official or employee “will engage in a conflict of interest or realize personal gain at public expense from the use of ‘inside’ information.” State v. Nipps, 66 Ohio App.2d 17, 17 (1979). The exception of R.C. 102.03(A)(6) recognizes an absence of a conflict of interest or the realization of personal gain at public expense provided that the former official or employee is retained to represent or assist the public agency by which he had been employed. But see R.C. 102.03(D) and (E) (discussed below) and Adv. Op. No. 87-008 (A member of a governing board of a public agency is prohibited from accepting employment with the public agency, even after he leaves the board position, if he used his position while on the board to secure the employment opportunity.)

Under the facts presented, the interests of the Board could be served if the Board, independent of Mr. Chu’s recommendation or involvement, decides to secure Mr. Chu’s ongoing assistance with the development of the computer model as an employee of the Board. In this situation, the ability of the Board to receive the advantage of the expertise of Mr. Chu could provide a benefit to the Board that is recognized by the exception.

Use of Position to Secure and Soliciting Anything of Value—R.C. 102.03(D) and (E)

Also applicable to your question is R.C. 102.03(D) and (E), which provides:

- (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.

The Chancellor of the Board of Regents is a public official for purposes of R.C. 102.03(D). “Anything of value” is defined to include money and the “promise of future employment,” for purposes of R.C. 102.03(D). R.C. 102.01(G); 1.03.

In Advisory Opinion No. 96-004, the Ethics Commission explained that a public official who engages in private outside employment or business activity is prohibited from receiving fees for providing services rendered on projects that he has recommended in his official capacity. Adv. Ops. No. 84-012, 84-013, and 85-013. R.C. 102.03(E) would prohibit Mr. Chu from soliciting anything of value, including the promise of future employment, in any improper manner.

However, the Ethics Law does not prohibit a public agency from utilizing an employee in another employment position to work on a project recommended or developed for the agency. While Mr. Chu recommended that the Board endorse the creation of the Virtual School, the facts you have described suggest that there was no intention, at the time that recommendation was made, that Mr. Chu would work on a project related to the Virtual School. In your letter, you stated: “[W]hen the Board passed its resolution creating the [Virtual School], there was no idea or intention to transition Chancellor Chu to this school.” Mr. Chu’s proposed future employment is to work on a project of the kind the Virtual School will complete. He will not be managing the Virtual School or implementing the Board’s creation of the Virtual School.

For these reasons, and within the facts you described, R.C. 102.03(D) and (E) do not prohibit Mr. Chu from working, as an employee of the Board, on the project you have described, as an employee of the Board.¹ The law does not prohibit the Board from making the decision to utilize Mr. Chu’s expertise in another employment position. However, Mr. Chu would be prohibited from using his authority or influence over the staff of the Board to secure any future employment or contract opportunity for himself.

Employment with a College or University

In your letter, you state: “[I]t is common for former state officials to become immediately employed by state colleges and universities.” You ask whether, in this context, it would be permissible for Mr. Chu to be employed by OSU or another university.

The Ethics Law does not prohibit Mr. Chu from accepting *all* types of employment from a college or university in Ohio after he leaves his position with the Board. However, as described above, Mr. Chu is prohibited from accepting employment with a university or any other party if he would profit, through that employment, from a contract he authorized while he served as Chancellor. Mr. Chu is also prohibited from taking a position with a state college or university in a position related to a project he recommended as Chancellor, as also described above. Further, R.C. 102.03(D) and (E) prohibit Mr. Chu from soliciting or using his authority to secure employment with a college or university during the remainder of his service to the Board. Finally, R.C. 102.03(A)(1) would prohibit Mr. Chu, within the first year after he leaves his public position, from representing any person, including a new employer, before any public agency, on any matter in which he personally participated as an employee of the Board.

If Mr. Chu is interested in seeking employment opportunities with Ohio colleges or universities, he is encouraged to contact the Commission for further guidance.

¹ Had Mr. Chu been a member of the Board, the restriction in R.C. 102.03(D) and (E) would have prohibited employment of this nature. Adv. Op. No. 87-008 (which also discusses the application of R.C. 2921.42(A)(3) to the employment of a governing board member by the board).

Edmund J. Adams, Chair
April 24, 2006
Page 8

Conclusion

The Board has asked how best to comply with the Ethics Law in structuring Mr. Chu's future involvement with this initiative after his resignation date. As explained more fully above, the Commission recommends that, if the Board independently determines Mr. Chu's continued service is valuable, the Board should structure Mr. Chu's involvement by utilizing him to work on the project as an employee of the Board. A specific exception in the law permits this continued employment, within the facts you have described. In response to your initial question regarding funding, the Board can use any state or federal dollars received by it to fund Mr. Chu's continued employment with the Board. However, Mr. Chu would be prohibited from otherwise working for any other public or any private agency on the project he recommended. The law does not absolutely prohibit Mr. Chu from working for OSU or any other college or university, although the law does limit his activities.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 21, 2006. The Commission commends Mr. Chu and the Board for requesting guidance on this matter.

This 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 this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney