

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

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Informal Opinion 2006-INF-1101-2

John W. Barron
Chief Legal Counsel
Ohio Department of Development


Dear Mr. Barron:

On October 18, 2006, the Ohio Ethics Commission received your request for an advisory opinion on behalf of Lieutenant Governor Bruce Johnson, who is also the Director of the Department of Development (ODOD). The Lieutenant Governor also serves as a member of numerous state boards and commissions.

The Lieutenant Governor has requested guidance on several questions regarding the Ohio Ethics Law and related statutes as they apply to him in connection with his pursuit of private employment after the end of his term. In this opinion, the Commission will consider the question of the Lieutenant Governor's ability to compete for the position of Director of the Inter-University Council (IUC). The Commission will respond to the Lieutenant Governor's other questions in a separate advisory opinion.

Brief Answer

As explained more fully below, the Ethics Law does not prohibit the Lieutenant Governor from applying for a position with the IUC, and accepting the position if it is offered to him, as long as it is possible for him to withdraw from any matters affecting the IUC and its member universities during the time he is competing for the position and after he accepts it for the duration of his public service.

As the Lieutenant Governor and Director of ODOD, he would be unable to withdraw from matters affecting any parties that are doing or seeking to do business with, regulated by, or interested in matters before either of those offices. However, as long as the only matters affecting those parties are before the state boards or commissions on which the Lieutenant Governor sits, it would be possible for him to withdraw effectively from those specific matters.

Facts

As a part of his service as the Director of ODOD, the Lieutenant Governor also serves as a member of the Third Frontier Commission, Governor's Workforce Policy Board, and Ohio Partnership for Continued Learning. He was a member of the Governor's Commission on Higher Education and the Economy.

Executive Order 99-33T established the Governor's Workforce Policy Board for the purpose of assessing Ohio's employment needs and recommending performance goals and priorities to improve Ohio's workforce development system. R.C. 3301.41 established the Ohio Partnership for Continued Learning for the purpose of recommending methods to facilitate collaboration among providers of preschool through post-secondary education to meet the workforce needs of the state. The Lieutenant Governor formerly served as a member of the Governor's Commission on Higher Education and the Economy. The Governor created the Commission for the purpose of recommending means of improving Ohio's public universities. The Governor's Commission produced a report and made recommendations to the Governor. You explained that all three are advisory agencies with no decision-making authority.

However, pursuant to its statutory authority, the Third Frontier Commission can authorize grants to public universities. ODOD staffs the program operated by the Third Frontier Commission. You state that no Third Frontier grants have been sought or received by the IUC.

Job-Seeking Provisions—R.C. 102.03(D) and (E)

Your attention is first directed to R.C. Sections 102.03(D) and (E). These provisions restrict public officials and employees with respect to seeking new or outside employment:

- (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 Lieutenant Governor is a "public official or employee" and is subject to the prohibitions of R.C. 102.03(D) and (E). R.C. 102.01(B) and (C).

The term "anything of value" is defined to include money, an offer of future employment, and every other thing of value. See R.C. 102.01(G) and R.C. 1.03. Any offer of future employment and the compensation that the Lieutenant Governor would receive from the private employment is a thing of value for purposes of R.C. 102.03(D) and (E).

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his public position to secure an employment opportunity for himself. Ohio Ethics Commission Advisory Opinions No. 86-006 and 87-004. R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting employment opportunities from a party while performing his official duties with respect to that party. Adv. Op. No. 92-005. Therefore, in order to seek employment from any party that is regulated by, doing or seeking to do business with, or interested in matters before, the public agency with which he serves, a public official or employee must be able to fully withdraw from any use of his position or authority on matters affecting the interests of that party. See Adv. Ops. No. 91-009 and 92-005.

In order for a public official or employee to effectively withdraw from any matters, they must be handled by an official or employee whose position is superior to, or acts as a check upon, the official's or employee's authority. Adv. Ops. No. 92-004 and 92-008. The transfer of authority must also be permissible under relevant provisions of the Revised Code. A withdrawal by a public official or employee from a matter that poses a conflict of interest cannot interfere with the official's or employee's overall performance of his duties. Adv. Ops. No. 89-006, 89-010, and 90-002.

In some instances, a public official or employee occupies a position of such significant authority and responsibility within the agency he serves that his withdrawal from matters affecting the interests of a party with which he is seeking future employment would interfere with the overall performance of his public duties. In those situations, the public official or employee is unable to effectively withdraw in order to seek future employment. Adv. Ops. No. 89-015 (if the law firm of a city law director were to serve as opposing counsel in a case where the city is a party, the city law director could not effectively withdraw by assigning an assistant city law director to represent the city) and 92-009 (if the Executive Director of the Barber Board were to own a barber shop, he would be unable to withdraw from regulatory matters affecting his shop by delegating regulation of his shop to employees of the Board). If withdrawal is not possible, a public official or employee is prohibited from soliciting or accepting future employment from the kinds of parties discussed above, because the future employment would manifest a substantial and improper influence upon him with respect to his duties.

The Revised Code provides for the creation of the Department of Development and provides that the Director of the Department "shall exercise the powers and perform the duties vested by law" in the Department. R.C. 121.02(N). The Lieutenant Governor, as the Director of ODOD, is the ultimate authority to ensure the proper operation of ODOD including evaluating the performance of its employees in accomplishing their tasks. Because the Director is the ultimate decision-making authority at ODOD, with broad powers and responsibilities, there is no other person to whom ODOD employees could report with respect to any matters pending before the Department.

Seeking Employment from the Inter-University Council

The Inter-University Council (IUC) is an educational association representing Ohio's fourteen public universities. IUC engages in public relations, research, and government liaison work on behalf of its members. You state that, under current operations, the position of IUC Director is administered by Ohio State University for payroll operations. You further state that ODOD does not currently have a contract with the IUC and has not contracted with the IUC during the Lieutenant Governor's service as ODOD Director. Further, the Third Frontier Commission has not issued any grants to the IUC.

As explained above, R.C. 102.03(D) and (E) prohibit a public official or employee, during his public service or employment, from accepting, soliciting, or using the authority or influence of his position to secure, business opportunities or compensation therefore from a party that is regulated by, doing business or seeking to do business with, or interested in matters before, the public agency with which he serves, unless he is able to withdraw from matters affecting the interests of that party.

It is apparent that the Third Frontier Commission, Governor's Workforce Policy Board, the Ohio Partnership for Continued Learning, and the Governor's Commission on Higher Education participate in matters in which the IUC would be interested. Despite the fact that, except for the Third Frontier Commission, the boards and commissions are advisory in nature and have no decision-making authority, their ability to recommend actions regarding educational issues in the state could have an impact on the fourteen state universities that IUC represents. Therefore, the IUC and its member universities are parties that are interested in those matters.

The Lieutenant Governor cannot solicit future employment from the IUC unless he is able to withdraw from all matters that could affect the IUC and the fourteen public universities the IUC represents. The IUC does not appear to be a party that is interested in matters before the ODOD or Lieutenant Governor's Office. However, you have not stated whether the public universities would be parties that are doing or seeking to do business with, regulated by, or interested in matters before ODOD or the Lieutenant Governor's Office.

As noted above, because the Lieutenant Governor also serves as the Director of ODOD and is the ultimate authority to ensure the Department's proper operation, he would be unable to withdraw from matters before ODOD. By contrast, in his position as a member of a board or commission, the Lieutenant Governor is not the ultimate authority for those public agencies and he could withdraw from matters before them as long as other statutes or regulations do not prohibit his withdrawal. If the Lieutenant Governor were to withdraw, as a board member, from matters affecting the IUC or the fourteen public universities that the IUC represents, then the other members of the boards or commissions who are not affected by the prohibitions imposed by R.C. 102.03(D) and (E) can carry on with the operations of the board or commission.

Therefore, R.C. 102.03(E) prohibits the Lieutenant Governor from soliciting employment from the IUC unless he can withdraw, in all of the public positions he holds, from participation in any matters that affect the IUC and its fourteen members. As long as there are no matters

affecting these parties before ODOD or the Lieutenant Governor's Office, it would be possible for him to withdraw from matters before the Third Frontier Commission and other state boards and commissions. If the Lieutenant Governor were able to withdraw from these matters, so that he can compete for the position of IUC Director, and is offered the position, he would not be prohibited from accepting the position. However, for the remaining duration of his term, he is prohibited from participating in matters affecting the IUC or the universities it represents. Further, because the Third Frontier Commission has the authority to make grants to public universities, the Lieutenant Governor must also be aware of the restrictions imposed by R.C. 2921.42(A)(3).

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

The prohibition of R.C. 2921.42(A)(3) is pertinent whenever a former public official seeks employment or business opportunities with a party that has received a grant from his former public agency. 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.

The prohibition imposed by R.C. 2921.42(A)(3) applies only if the contract was not let by competitive bidding and was not awarded to the lowest and best bidder. Adv. Op. No. 91-009.

The Lieutenant Governor is a "public official" for purposes of R.C. 2921.42 and subject to the prohibitions of R.C. 2921.42(A)(3). See R.C. 2921.01(A). The term "public contract" is defined, for purposes of R.C. 2921.42 in Division (G)(1)(a) of that section, 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. A grant provided by the Third Frontier Commission to a public university is a "public contract" as defined in R.C. 2921.42 in Division (G)(1).

For purposes of R.C. 2921.42(A)(3), a public official will be deemed to have "authorized" a public contract if the contract could not have been awarded without the official's approval. Adv. Ops. No. 88-008 and 91-009. The term "profit" as used in R.C. 2921.42(A)(3) connotes a pecuniary or financial gain or benefit. Adv. Ops. No. 92-013 and 92-017. A "position of profit" must be definite and direct to be prohibited by R.C. 2921.42(A)(3). Id.

The Ethics Commission has stated that a former public official is deemed to profit from a public contract where: (1) the establishment or operation of the organization with which he receives compensation is dependent upon receipt of the contract; (2) the creation of the service that he would provide for the organization is dependent upon the award of the contract; (3) the contract money would be used by the organization to compensate him or as a basis for his compensation; or (4) he would otherwise profit from the contract. Adv. Op. No. 88-008.

Despite the fact that no Third Frontier grants are being sought or have been received by the IUC, it is possible, although not likely, that one of the fourteen public universities represented by the IUC may have received grants. Therefore, if the Lieutenant Governor wishes to seek employment with the IUC, he must assure that the universities do not use Third Frontier grant funds to support the operations of the IUC. As long as no Third Frontier grant funds are being used to support the IUC, the Lieutenant Governor would not be profiting from those awards if he were to be offered and accept employment with the IUC.

If the Lieutenant Governor is able to apply for employment with the IUC, and is offered and accepts a position, the revolving door prohibition would also apply to him.

The Revolving Door Prohibition—R.C. 102.03(A)(1)

Division (A) of Section 102.03 of the Revised Code, the “Revolving Door” prohibition of the Ohio Ethics Law, imposes restrictions upon the ability of former public officials and employees to represent a client after leaving public service. 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. (Emphasis added.)

R.C. 102.03(A)(1) 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, 21 (1979). The Court in State v. Nipps held that the revolving door prohibition was constitutional, and determined: “The state has a substantial and compelling interest to restrict unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government.”

The Lieutenant Governor is a “public official” subject to the revolving door prohibition for twelve months after he leaves his various public positions. R.C. 102.01(B) and (C). A “person,” for purposes of R.C. 102.03(A)(1), includes a governmental agency and a non-profit corporation, and would include the IUC and its fourteen member public universities. R.C. 1.59(C) and Ohio Ethics Commission Advisory Opinions No. 82-002 and 89-003.

The term “represent” is defined in R.C. 102.03(A)(5) to include “any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person.” (Emphasis added.) Adv. Op. No. 86-001. The prohibition in R.C. 102.03(A)(1) applies to any “matter” in which the Lieutenant Governor personally participated in any of the positions he holds. The term “matter” is defined in R.C. 102.03(A)(5) to include “any case,

proceeding, application, determination, issue, or question,” and would include any grant applications or awards by the Third Frontier Commission. Adv. Op. No. 99-001.

R.C. 102.03(A) prohibits a public official or employee, during or for one year after public employment, from representing any person on a matter in which he personally participated, before any public agency, and not just before the agency with which he was previously employed. Adv. Ops. No. 86-001, 87-001, and 92-005. This would include the Department of Development, other state departments, all state boards and commissions, state colleges and universities, the Governor’s office, and any other public agency at the state or local level. “Personal participation” includes “decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion,” and includes supervision of other public officials and employees, including employees of the ODOD. Adv. Op. No. 91-009.

R.C. 102.03(A)(1) prohibits the Lieutenant Governor, for a period of one year from the dates he leaves his various public positions, from representing a client or any other party before any public agency, on any matter in which he personally participated while he served as Lieutenant Governor. This would include, but is not limited to, any matters in which the Lieutenant Governor participated during his service as Director of ODOD or his membership on the boards and commissions.

For example, if the Lieutenant Governor participated, as a member of the Third Frontier Commission, in the award of a grant to one of the state universities, he would be prohibited from representing the IUC, the university, or any other party, before the Commission, ODOD, or any other public agency, on matters related to the grant or the program funded by the grant. However, the Lieutenant Governor is not prohibited from representing the IUC, a member university, or any party before ODOD, or any other public agency, on new matters or matters in which he did not personally participate. Adv. Op. No. 92-005.

Disclosure of Confidential Information—R.C. 102.03(B)

Division (B) of Section 102.03 of the Revised Code reads as follows:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official’s or employee’s official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

Pursuant to this section, the Lt Governor is prohibited from disclosing or using, without appropriate authorization, any confidential information that he acquired in the course of his public service. No time limitation exists for this prohibition. Adv. Op. No. 88-009.

Conclusion

As explained more fully above, the Ethics Law does not prohibit the Lieutenant Governor from applying for a position with the IUC, and accepting the position if it is offered to him, as long as it is possible for him to withdraw from any matters affecting the IUC and its member universities during the time he is competing for the position and after he accepts it for the duration of his public service.

As the Lieutenant Governor and Director of ODOD, he would be unable to withdraw from matters affecting any parties that are doing or seeking to do business with, regulated by, or interested in matters before either of those offices. However, as long as the only matters affecting those parties are before the state boards or commissions on which the Lieutenant Governor sits, it would be possible for him to withdraw effectively from those specific matters.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 27, 2006. The Commission commends the Lieutenant Governor for requesting guidance before taking any actions that could be prohibited by law.

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 this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

cc: David E. Freel, Executive Director