

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

December 1, 2006

Informal Opinion 2006-INF-1201

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 a prior opinion, the Commission considered the question of the Lieutenant Governor's ability to compete for the position of Director of the Inter-University Council. In this opinion, the Commission will consider the application of the Ethics Law if the Lieutenant Governor wishes to respond to employment offers from law firms that serve as special counsel for ODOD, or law firms and economic development firms that represent clients before ODOD. The Commission will consider whether the restrictions in the Ethics Law are affected if: (1) the Lieutenant Governor is working with a "headhunter" or professional recruiter to assist in his search for future employment; or (2) the Lieutenant Governor withdraws, during the last two weeks of his term, from decisions that involve firms that are prospective employers and engage in soliciting employment from them. As you have requested, the Commission will also provide guidance on the definition of "matter" as used in the revolving door law.

Brief Answer

You have asked for guidance in four remaining numbered situations. As explained more fully in the opinion:

- (1) The Lieutenant Governor is prohibited from seeking or accepting an employment opportunity from any law firm, economic development firm, or other party that may have contracts with or do business with, ODOD or the decision-making state boards and commissions upon which he serves;

- (2) The Lieutenant Governor is prohibited from seeking or accepting an offer of employment from a law firm or economic development firm that is representing a client before ODOD or the state boards and commissions on which he serves. The fact that a client has received a grant from ODOD does not prohibit employment as long as the Lieutenant Governor does not occupy a position of profit in the grant;
- (3) If the Lieutenant Governor is prohibited from seeking employment directly, the use of a headhunter would not resolve the prohibition and would not be a desirable alternative. Where there are no active matters before the agencies he serves affecting any party from whom he is seeking employment, the law does not prohibit the Lieutenant Governor from seeking future employment at the end of his term from parties that also have existing contracts with, or are regulated by or interested in matters before, the agencies;
- (4) During the first year after his public service, the Lieutenant Governor is prohibited from representing parties before any public agencies on matters in which he personally participated. The Lieutenant Governor is not absolutely prohibited from representing parties on issues related to the general *subject* matter under the authority of the agencies he served.

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 ways to improve 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. ODOD staffs the program operated by the Third Frontier Commission.

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

In its opinion issued on November 1, 2006, the Ethics Commission explained the application of R.C. 102.03(D) and (E) to job seeking activity. In summary, 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. Because the Director of ODOD is the ultimate decision-making authority at the Department, with broad powers and responsibilities, there is no other person to whom ODOD employees could report with respect to any matters before it. Currently, there is no statutory provision that would provide a remedy by allowing the Director to withdraw. As a member of a board or commission, the Lieutenant Governor would be able to withdraw from matters before those boards, because the other board members could consider those matters and make decisions without his participation.

Law firms that serve as special counsel for ODOD are doing business with ODOD. Law firms and economic development firms that represent clients before ODOD are parties that are interested in matters before ODOD. Therefore, R.C. 102.03(D) and (E) prohibit the Lieutenant Governor from seeking employment from any law firm that is serving as special counsel for the ODOD, and from any law firm or economic development firm that is representing clients before ODOD. The law also prohibits the Lieutenant Governor from seeking employment with any law firm or economic development firm that is representing clients before any decision-making boards or commissions on which the Lieutenant Governor serves, unless he is able to fully withdraw from any matters that affect those parties.

Soliciting Employment Using a Headhunter

You ask whether the Lieutenant Governor is prohibited from hiring a “headhunter,” or executive recruiter, to seek future employment on his behalf. By hiring a headhunter, you ask whether the Lieutenant Governor could “wall himself off” from conflicts of interest by shielding himself from knowledge or details of the headhunter’s discussion with a party that that is doing or seeking to do business with, regulated by, or interested in matters before, ODOD.

The ability of a public official to meet the requirements imposed by R.C. 102.03(D) and (E) depends upon his awareness of his private financial interests. Without awareness of his affairs, he would be unable to direct his official behavior in a manner that avoids any conflicts of interest. If a headhunter firm were seeking employment on the Lieutenant Governor’s behalf, he

would be unable to remain fully informed of his private interests. While it may seem beneficial for a public official to be shielded from knowledge about preliminary conversations with potential future employers, it could occur that the official is actively participating in matters that affect a private entity at the same time the recruiter is discussing his potential employment with that entity. Such a situation could result in at least embarrassment and the appearance of impropriety, if not an actual violation of the law. See City of Parma Heights v. Schroeder (1963), 26 Ohio Op. 2d 119, 122 (a public official is prohibited from doing indirectly that which he cannot do directly).

Further, while the Lieutenant Governor may not know what firms the headhunter has contacted, the firms that have the kinds of relationships described above with ODOD *would* be aware that they are promising or offering future employment to the director of the public agency with they have official relationships. See R.C. 102.03(F) (prohibiting persons from promising or giving anything of value to a public official or employee under certain circumstances). It could be beneficial, in its interactions with personnel at the agency, for a private company to know it is negotiating the future employment of the agency's director.

Therefore, R.C. 102.03(D) and (E) prohibit the Lieutenant Governor from using a headhunter firm to seek employment from any party with whom he cannot seek employment directly.

Seeking Future Employment in the Last Two Weeks of Service

You have suggested that the Lieutenant Governor use the last two weeks of his term of office to withdraw from decisions that involve firms that are prospective employers and engage in soliciting employment from them. It is impossible for a public official to declare a hiatus from performing the duties of his office for a specific length of time in order to seek employment from otherwise prohibited sources. However, the Lieutenant Governor is not prohibited, during the last few weeks in his term, from seeking employment from parties that had done business with, or represented parties before, ODOD during his term, as long as there are no active matters, involving those parties, before ODOD while he is seeking employment. During his term, R.C. 102.03(D) and (E) would prohibit the Lieutenant Governor from seeking employment from any party with active matters before ODOD, because he would be unable to withdraw from those matters.

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

As explained in the Commission's November 1, 2006, advisory opinion, the Lieutenant Governor is prohibited from profiting from any public contract authorized by him, or by a board of which he is a member, for one year from the date he leaves all of his public positions. 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). Any contract, grant, or loan awarded by ODOD or any of the boards or commissions on which the Lieutenant Governor served would be a public contract for purposes of this restriction. 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.

R.C. 2921.42(A)(3) prohibits the Lieutenant Governor from accepting employment with a law firm that serves as special counsel for ODOD, or any other party that is doing business with the ODOD, if he would occupy a position of profit in the prosecution of the special counsel or other contract. 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.

For example, you have asked whether the fact that a client of an economic development or law firm has received a grant from ODOD or TFC creates a conflict if the Lieutenant Governor were to seek or accept employment with the firm itself. The Lieutenant Governor would be prohibited from occupying a position of profit in the client's use of the grant, such as performing any services for the law firm or economic development firm in connection with its client's grant. However, R.C. 2921.42(A)(3) would not prohibit the Lieutenant Governor from accepting employment from the firm as long as he does not occupy a position of profit in the grant, and complies with the revolving door prohibitions discussed below.

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

As explained in its November 1, 2006, opinion, R.C. 102.03(A) prohibits a public official or employee, during or for one year after public employment, from representing any person, before any public agency, on any matter in which he personally participated. Adv. Ops. No. 86-001, 87-001, and 92-005. R.C. 102.03(A)(1) would prohibit 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. However, the Lieutenant Governor is not prohibited from representing 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.

Definition of "Matter"

You have asked for specific guidance about the meaning of the word "matter." As the word is used in R.C. 102.03(A)(1), it includes "any case, proceeding, application, determination, issue, or question." R.C. 102.03(A)(5). While these words are not defined in the statute, the Commission has used the rules of grammar and common usage to construe them. See R.C. 1.42; Dougherty v. Torrence, 2 Ohio St. 3d 69 (1982). In Advisory Opinion No. 99-001, the Commission amplified the definition of matter:

The first four terms in the definition . . . have fairly concrete meanings. Random House Webster's Unabridged Dictionary (2nd ed. 1997) defines the term "case" as "a specific occurrence or matter requiring discussion, decision, or investigation" or "a suit or action at law; cause." "Proceeding" is defined as "the instituting or carrying on of an action at law." Id. "Application" is defined as "a written or spoken request or appeal for employment, admission, help, funds, etc." or "a form to be filled out by an applicant." Id. The definition of "determination" includes "the act of coming to a decision or of fixing or settling a purpose," "ascertainment, as after observation or investigation," and "the settlement of a dispute, question, etc., as by authoritative decision." Id.

The last two terms, "issue" and "question," are broader and have more abstract meanings than the first four terms in the definition of "matter." "Issue" is defined as "a point, matter, or dispute, the decision of which is of special or public importance." Id. "Question" is defined as "a problem for discussion," "a subject of dispute or controversy," or "a controversy that is submitted to a judicial tribunal or administrative agency for decision." Id.

In summary, the Commission stated that a "matter" can include concrete items, such as a specific occurrence or problem requiring discussion, decision, research, or investigation, a lawsuit or legal proceedings, an oral or written application, and a settlement of a dispute or question. Adv. Op. No. 99-001. It can also include abstract items, such as a dispute of special or public importance and a controversy submitted for consideration. Id. The Commission concluded that "matter" cannot be interpreted to mean general subject matter. Id.

For that reason, the Lieutenant Governor will not be absolutely prohibited, during the first year after he leaves his public positions, from representing parties on the general subject matters that were under the purview of ODOD and the other agencies he serves. However, he will be barred from representing any person, before any public agency, on specific decisions, contracts, grants, recommendations, reports, and other activities of the agencies, whether concrete or abstract, in which he personally participated.

The example you have given involves the Governor's Workforce Policy Board, of which the Lieutenant Governor is a member. You have asked, if the Board makes a report containing recommendations about employment in Ohio, whether the "matter" is employment in Ohio, the report on employment, or the recommendations contained in the report. In that example, the "matters," for purposes of the Ethics Law, are both the report and the recommendations in the report. Employment in Ohio is the subject matter of the report.

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 Lieutenant 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

You have asked for guidance in four remaining numbered situations. As explained more fully above:

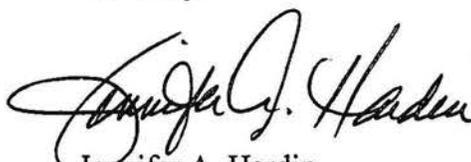
- (1) The Lieutenant Governor is prohibited from seeking or accepting an employment opportunity from any law firm, economic development firm, or other party that may have contracts with or do business with, ODOD or the state boards and commissions upon which he serves;
- (2) The Lieutenant Governor is prohibited from seeking or accepting an offer of employment from a law firm or economic development firm that is representing a client before ODOD or the state boards and commissions on which he serves. The fact that a client has received a grant from ODOD does not prohibit employment as long as the Lieutenant Governor does not occupy a position of profit in the grant;

- (3) If the Lieutenant Governor is prohibited from seeking employment directly, the use of a headhunter would not resolve the prohibition and would not be a desirable alternative. Where there are no active matters before the agencies he serves affecting any party from whom he is seeking employment, the law does not prohibit the Lieutenant Governor from seeking future employment at the end of his term from parties that also have existing contracts with, or are regulated by or interested in matters before, the agencies;
- (4) During the first year after his public service, the Lieutenant Governor is prohibited from representing parties before any public agencies on matters in which he personally participated. The Lieutenant Governor is not absolutely prohibited from representing parties on issues related to the general *subject* matter under the authority of the agencies he served.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on December 1, 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