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May 29, 2009

Informal Opinion 2009-INF-0529-1

Susan E. Gilmore

Dear Ms. Gilmore:

On November 20, 2008, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you stated that you serve as a member of the Board of Trustees of the University of Toledo (University). You have asked about the application of the Ohio Ethics Law and related statutes to you if a public accounting firm (firm) in which you husband is a managing and tax partner bids on University contracts. The firm is not currently doing work with the University, but may want to seek University contracts in the future.

You have explained that the firm specializes in tax, audit, health care, and consulting services and that it may desire to participate in competitive bidding for contracts to provide internal auditing services to the University. Your husband's ownership interest in the firm may entitle him to a distributive share of earnings, regardless of whether he personally performs work for any specific client. The firm is affiliated with RSM McGladrey, Inc., which is a national network of accounting firms.

You stated that you are not a manager, officer, director, trustee, or employee of the firm. In a telephone conversation with Commission staff, you explained that you have no ownership interest in the firm. You stated that if the firm is not prohibited from bidding on University contracts, then you intend to refrain from any related discussions, deliberations, or votes whether in committee, executive session, informal board discussions, or formal board meetings. You have asked whether there are any further actions that you need to take.

Brief Answer

As explained below, the Ethics Law applies to you rather than to your husband's private firm. Because you have no fiduciary or financial interest in the firm, the law does not prohibit the firm from bidding on University contracts to perform services for the University. However, the law does prohibit you from taking any action, formally or informally, to authorize or secure any University contracts, payments, or other things of value from the University for your husband's firm. The steps you intend to take will help you comply with the prohibitions but there are additional steps you will be required to take.

Having an Interest in a Public Contract—R.C. 2921.42(A)(1) and (4)

A “public contract” is defined, in R.C. 2921.42(I)(1) as:

- (a) 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, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either;
- (b) A contract for the design, construction, alteration, repair, or maintenance of any public property.

The University’s purchase of internal audit or other services is a public contract.

A public official or employee has a prohibited interest in a public contract if she has a definite and direct fiduciary or financial connection with the contract. Adv. Op. No. 81-008. The determination of whether a public official has an interest in a public contract entered into by her public agency depends on the facts and circumstances of each particular situation. Adv. Ops. No. 84-009 and 89-006.

The Ethics Commission has held that a spouse is independent with the power to contract in his own right and that a public official does not have an interest in a contract with her public agency merely because her spouse has an interest in the contract, absent facts indicating otherwise. *See* Adv. Op. No. 88-007 (Even though a public official may receive an indirect benefit from a contract from which her husband will benefit, the official is not considered to have a definite and direct interest in a contract between her public agency and her husband.).

You have stated that you have no ownership interest in the firm, and that you are not a manager, officer, director, trustee, or employee of the firm. Because you have no direct connection with the firm, you will not have a definite and direct interest in the contracts of the firm. Adv. Op. No. 88-007. However, if you were to acquire an interest in your husband’s firm, R.C. 2921.42(A)(4) would apply to you. In that case, unless you were able to meet an exception to the Law, R.C. 2921.42(A)(4) would prohibit you from continuing to serve on the board of trustees if your husband’s firm were to sell goods or services to the University.

However, even if you do not have a definite and direct interest in contracts between the public agency and your husband’s firm, R.C. 2921.42(A)(1) prohibits you from participating, in any way, in the authorization of a contract between the University and the firm. If the firm bids or plans to bid on any University contracts, R.C. 2921.42(A)(1) prohibits you from authorizing, approving, voting upon, discussing, deliberating, or recommending, the contract. The steps you intend to take should the firm bid on contracts with the University are consistent with these requirements.

You have asked whether you must take any additional action to comply with the law. There are additional steps you should take. As a trustee, you occupy a unique position of authority and influence over other University officials and employees. You are prohibited from using this unique authority and influence to secure authorization of the University's acquisition of services from the firm.

Further, the prohibition of R.C. 2921.42(A)(1) extends beyond the initial award of a contract by the University to your husband's firm and prohibits you from participating in any matter or decision that could affect the continuation, implementation, or terms and conditions of the contract. Adv. Op. No. 93-009. In addition, R.C. 2921.42(A)(1) prohibits voting to approve payments under contracts that had been entered into between the University and the firm even if you have not participated in the award of the contract.

Another provision in the Ethics Law, R.C. 102.03(D), prohibits you from using the authority or influence of your public position 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 you with respect to your public duties. R.C. 102.03(D) prohibits a public official from using her public position to secure a thing of value for a family member, including a spouse. *See* Adv. Op. No. 92-010. Your spouse has a definite and direct interest in the firm's contracts and would receive a thing of value, through a distributive share of the firm's earnings, from the contracts of the firm.

Even if no contract is in place or under negotiation, R.C. 102.03(D) prohibits you from using your unique position as a University trustee in any manner that could provide an economic advantage for your husband's firm. You are prohibited from recommending the firm to University officials or employees, and from securing and disclosing access to information on competitors and competing prices and quotes.

You should also note R.C. 102.03(B), which prohibits you from disclosing or using confidential information you acquired in the course of your service as a trustee. If your husband's firm were to be selected to do work for the University, you would be prohibited from sharing any confidential information you acquired as a trustee that is related to the work the firm is doing for the University.

Matters Outside the Commission's Jurisdiction

Because it is beyond the purview of the Ohio Ethics Commission, this opinion does not address accounting standards or state and federal tax laws or guidelines that may limit the ability of your husband's firm to engage in business activity with the University while you are serving as a trustee. While the Ethics Law does not address these issues, your husband's firm may want to reconsider bidding on contracts to provide internal auditing or other services of that kind to the University.

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Conclusion

As explained above, the Ethics Law applies to you rather than to your husband's private firm. Because you have no fiduciary or financial interest in the firm, the law does not prohibit the firm from bidding on University contracts to perform services for the University. However, the law does prohibit you from taking any action, formally or informally, to authorize or secure any University contracts, payments, or other things of value from the University for your husband's firm. The steps you intend to take will help you comply with the prohibitions but there are additional steps you will be required to take.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 6, 2009. 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,

A handwritten signature in cursive script that reads "Jennifer A. Hardin". The signature is written in black ink and is positioned above the printed name and title.

Jennifer A. Hardin
Chief Advisory Attorney