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June 19, 2009

Informal Opinion 2009-INF-0619

Lloyd A. Jacobs, M.D.
President, University of Toledo

Dear Dr. Jacobs:

On April 15, 2009, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you asked whether the Ethics Law and related statutes prohibit a former University of Toledo (University) Trustee from being considered and appointed to the position of Interim Dean in the University's College of Education (College).

Brief Answer

As explained more fully below, based on the facts and circumstances you have presented, the Ethics Law and related statutes do not prohibit the former Trustee from being considered or appointed to the position of Interim Dean of the College. However, under the Ethics Laws, you (and to the extent necessary under other applicable laws and University procedures, other University officials and the Board of Trustees) must independently determine whether the former Trustee is a viable candidate and whether to select him for the position.

Facts

This advisory opinion is based on all of the facts and circumstances contained in your letter, the lengthy attachments you submitted, and the information you shared with the Commission at its meeting on May 12, 2009, although they are not all restated here. The key facts related to your question, as you state them to be, are:

In December 2008, the University was notified by the current Dean of the College that he will be resigning effective August 1, 2009. In your letter, you explained that the University would like to appoint an Interim Dean to serve the College while the University is reorganizing the College and selecting a permanent Dean. The University would like to consider "out of the box" candidates for the Interim Dean position. One of the candidates is Dr. Thomas Brady, who was a member of the Board of Trustees until April 10, 2009.

You approached Dr. Brady for the first time on February 23, 2009, to determine his interest in the position. On March 16, you asked Governor Strickland whether Dr. Brady could take a leave of absence from the Board of Trustees to serve in the position for eighteen months. On March 17, 2009, Chief Counsel for the Board of Regents responded to your letter, advising that the Governor's Office and Chancellor would "require that Mr. Brady resign as a member of the University Board of Trustees prior to taking any action in pursuit of the position of interim dean of the University's college of education." Dr. Brady resigned from the Board of Trustees on April 10, 2009, and his resignation was accepted by the Board on April 13, 2009.

You included, with your request, e-mails that Dr. Brady sent to various University officials and employees regarding the interim dean position. At the Ethics Commission's May meeting, you described Dr. Brady as an active and inquisitive Trustee, and a frequent e-mail correspondent on a variety of issues before the University.

Authority of the Commission

At the outset, the Ethics Commission notes that it does not engage in an investigation or fact-finding with respect to advisory opinion requests. Adv. Op. No. 90-013. Advice provided by the Ethics Commission to any requester is based on *all* of the facts presented, and provides protection under the law only to the extent those facts are true and complete. Further, an opinion of the Ethics Commission provides immunity only for actions taken in compliance with the opinion after it has been issued.

In your letter and your comments at the Ethics Commission's May meeting, you expressed strong support for the consideration of the former Trustee as Interim Dean. While the University community—trustees, administrators, faculty, and students—has an interest in the selection of the best and most-qualified candidate for the position of Interim Dean, this opinion can only address the question of whether the former Trustee can be a candidate for or, if he were to be chosen by the University Trustees and administrators to do so, serve as the person carrying out these important responsibilities. The Commission and the opinion do not reach conclusions as to whether the former Trustee is the best candidate for the position of Interim Dean.

Soliciting or Accepting Anything of Value—R.C. 102.03(D) and (E)

R.C. 102.03(D) and (E) provide:

- (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.

While he was a Trustee, Dr. Brady was a "public official" subject to R.C. 102.03(D) and (E), R.C. 102.01(B) and (C); Ohio Ethics Commission Advisory Opinion No. 88-003. The term "anything of value" has "the same meaning as provided in section 1.03 of the Revised Code," and also includes campaign contributions. R.C. 102.01(G). R.C. 1.03 provides that "anything of value" includes: "[a]ny promise of future employment" and every other thing of value.

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his position to secure anything of value if the thing of value impairs his objectivity and independence of judgment with regard to his official decisions and responsibilities. Adv. Ops. No. 86-011 and 89-006. By contrast, R.C. 102.03(E) prohibits a public official from merely soliciting or accepting a thing of value that can have a substantial and improper influence on the official or employee, even if he did not use his position to secure it. Adv. Op. No. 86-011.

In Advisory Opinion No. 87-008, the Commission considered whether the Ethics Law prohibits a governing board member from seeking employment with the public agency he serves. In that opinion, the Commission stated:

Division (D) of Section 102.03 . . . prohibits a school board member from voting, deliberating, discussing, or otherwise using or attempting to use his official authority or influence to secure for himself employment with the school district. (Citations omitted). Division (E) of Section 102.03 prohibits a board member from merely soliciting employment with the board. He may not seek such employment from other board members, board employees, or other persons of authority or influence. . . .

R.C. 102.03(D) and (E) . . . prohibit a member of a board of education from taking action, formally or informally, to solicit or secure employment with the school district. He may not solicit, vote, deliberate, participate in discussions, or otherwise use or attempt to use the authority or influence of his office to secure, a position.

The purpose of these restrictions is to assure the public that, when a former public official is hired by the public agency he formerly served, the agency's decision was not influenced because of the official's solicitation or use of position to secure the employment.

However, the Commission also concluded that a former public official was not prohibited from soliciting employment from his former public agency after he resigned from his public position, provided that "a sufficient amount of time has passed since his tenure on the board to indicate that he did not use his authority or influence while on the board to secure a position for himself." Adv. Op. No. 87-008. The application of the Ethics Law is dependent on the facts and circumstances presented. *Id.*

Application of the Ethics Law to the Presented Facts

While he served as a Trustee, R.C. 102.03(D) and (E) prohibited Dr. Brady from soliciting, and from using or authorizing the use of the authority or influence of his office to secure, the promise of future employment with the University. The promise of future employment would have a substantial and improper influence on a University Trustee with respect to the performance of his duties to the public, and to the faculty and students of the University.

As the requester, and as President of the University, you have strongly asserted that Dr. Brady has not used, or attempted to use, the authority or influence of his position as Trustee to attempt to secure the position of Interim Dean. You stated that you initiated discussions about the position. You stated that the salary for the position was never discussed and that Dr. Brady did not solicit the position or inquire about what he would receive if he were chosen to serve as Interim Dean. At the Commission's May meeting, you stated that no promise or offer of employment had been made to Dr. Brady at the time he resigned. Further, you stated that the selection of the person who will serve as Interim Dean has not been pre-decided and that you felt no pressure to select the Trustee for the position.

If any offer or promise of future employment had been made by the University to Dr. Brady either before he resigned from the Trustee's position or immediately after his resignation, R.C. 102.03(D) and (E) would prohibit the former Trustee from accepting the position. However, you have explained in your letter and in your comments at the Commission meeting that the University's process to select the Interim Dean would take several months and involve a committee of University officials and employees. By the time the committee begins its work, two months will have passed since Dr. Brady's resignation from the Board of Trustees.

Based upon your letter and the enclosed attachments, as well as your statements at the Ethics Commission's May meeting that no promise or offer of employment has been made to Dr. Brady, R.C. 102.03(D) and (E) would not prohibit the former Trustee from being considered for or, after his consideration in a fair and open selection process, appointed to the position of Interim Dean.

Other Considerations

There are two other provisions in the law that could apply to the former Trustee. The first is R.C. 2921.42(A)(3), which provides that no public official shall knowingly:

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

The employment of an individual by a public agency is a "public contract," and the salary the employee would receive is a position of profit. Adv. Op. No. 90-010. A public official who serves on a board is subject to the prohibition of R.C. 2921.42(A)(3) regardless of whether he participates in discussions or votes on the public contract as a member of the board. Adv. Ops. No. 88-006, 88-008, and 91-005.

However, the information you have submitted indicates that the Board of Trustees did not authorize the employment of any person for the Interim Dean position during the former Trustee's service on the Board. For that reason, R.C. 2921.42(A)(3) does not apply to the situation you have described. Adv. Op. No. 87-008.

The second restriction is R.C. 102.03(A)(1), the revolving door law, which prohibits a former public official, for twelve months after his public service, from representing a client or other person, before any public agency, on any matter in which he personally participated during his public service. A former university trustee is a "former public official," subject to this restriction for one year after his resignation.

Therefore, if Dr. Brady were to accept employment with a *separate* public agency, R.C. 102.03(A)(1) would prohibit him from representing his new employer before any public agency on matters in which he participated as a Trustee. However, there is an exception to the prohibition: "Nothing . . . shall prohibit, during [the one year] 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 . . . on which the official or employee served." R.C. 102.03(A)(6).

The exception of R.C. 102.03(A)(6) applies because the University is the public agency that the former Trustee served. The exception allows the former Trustee, if he is appointed to the position of Interim Dean, to represent the interests of the University before other public agencies.

Conclusion

As explained above, based on the facts and circumstances you have presented, the Ethics Law and related statutes do not prohibit the former Trustee from being considered or appointed to the position of Interim Dean of the College of Education. However, under the Ethics Laws, you (and to the extent necessary under other applicable laws and University procedures, other University officials and the Board of Trustees) must independently determine whether the former Trustee is a viable candidate and whether to select him for the position.

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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on June 16, 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 black ink, appearing to read "Jennifer A. Hardin". The signature is written in a cursive style with a large initial "J".

Jennifer A. Hardin
Chief Advisory Attorney