

Ben Rose, *Chair*
Betty Davis, *Vice Chair*
Merom Brachman
Michael A. Flack
Maryann B. Gall



OHIO ETHICS COMMISSION
William Green Building
30 West Spring Street, L3
Columbus, Ohio 43215-2256
Telephone: (614) 466-7090
Fax: (614) 466-8368

www.ethics.ohio.gov

Paul M. Nick
Executive Director

August 23, 2011

Informal Opinion 2011-INF-0823

Ernie L. Moore

Dear Mr. Moore:

On May 6, 2011, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that:

- You are currently a board member of the Release Authority of the Ohio Department of Youth Services (DYS);
- You were an employee of the Ohio Department of Rehabilitation and Correction (DRC) for 23 years, and served as Director from February 1, 2010, until January 9, 2011;
- While you were the Director, DRC collaborated to design WinWin Academy, a public dropout recovery community school for youthful offenders that have been released from or are confined in a state correctional institution;
- The school will be established under R.C. 3314 (the statute governing community schools) and will be funded like other community schools. The school will have facilities within DRC institutions and in Ohio communities but will not receive funding from DRC.
- WinWin Academy is a unique school model that requires legislative changes. This legislation, SB 86, has passed the Senate and been introduced in the House. (SB 86 has since been modified by the Legislative Services Commission for consideration this fall.) You attached a copy of this bill to your request.
- While you were the Director of DRC, you testified before the House Education Committee in support of legislation to create the school.

Question and Brief Answer

Question: Can you work as an employee or independent contractor for WinWin Academy?

Answer: Yes. The Ethics law does not prohibit you from being an employee or independent contractor for WinWin Academy provided that you comply with the following restrictions:

- *As former DRC employee*, you are prohibited from representing the school before any local or state public agency in Ohio, including any school district, the State Board of Education, DYS, or DRC until after January 9, 2012; and
- *As a current member of the Release Board*, you are prohibited from: (1) participating in matters before DYS that definitely and directly affect the school; and (2) representing the school before any state agency, unless you can meet an exception to the law.

Former DRC Director and Employee or Contractor for WinWin—Revolving Door

As a former DRC employee, you are subject to R.C. 102.03(A)(1)¹, the “Revolving Door” prohibition of the Ohio Ethics Law, which reads:

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.

R.C. 102.03(A)(1) prohibits you from **representing** or acting in a representative capacity for any **person** on any **matter** in which the official **personally participated**. These terms—“represent,” “person,” “matter,” and “personal participation”—are defined in the Ohio Revised Code. Ohio Ethics Commission Advisory Opinions that have more fully explained these terms as applied to specific situations include Advisory Opinions No. 86-001, 87-001, and 92-005 (represent)², 82-002 and 89-003 (person), 84-005, 99-001, and 2004-04 (matter), and 86-001 and 91-009 (personal participation)³. The terms are defined in this opinion as they are defined in the law and previous opinions.

As the Director of DRC, you personally participated in the collaboration between WinWin and DRC and on the design of the school. Therefore, you are prohibited, for one year after leaving DRC, from representing WinWin, either as an employee or an independent contractor, before any public agency in Ohio, including a local school district, the State Board of Education, DRC, and DYS. For example, before January 9, 2012:

- You **cannot** consult with DYS or DRC, on any matters related to WinWin facilities or students;
- You **cannot** prepare or submit WinWin funding requests or fiscal documents to the Department of Education;
- You **cannot** appear at a local school board meeting to advocate on behalf of WinWin.

The representation restriction in R.C. 102.03(A)(1) does not prohibit you from working for WinWin on matters in which you did not personally participate at DRC, or from discussing or sharing non-confidential information or your expertise with other WinWin officials and employees on matters in which you did personally participate.⁴ (You must also comply with the restriction in R.C. 102.04, discussed in the next section, which applies to you while you are a DYS official.)

Current Release Authority Member and Employee or Contractor for WinWin

Representing WinWin before State Agencies and Instrumentalities—R.C. 102.04(A)

As a current Board member of the Release Authority, you are subject to R.C. 102.04(A), which provides that no person appointed to a state board, or commission shall:

[R]eceive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

You are prohibited from receiving compensation from WinWin for personally rendering services before any agency, department, board, bureau, commission, or other instrumentality, of the state, including the general assembly.⁵

A matter is “before” a governmental agency “when it is being considered by, decided by, or in the presence of or under the official purview of” the governmental agency.⁶ Personally rendering services includes, but is not limited to, representing, advising, preparing documents for, or consulting with, any person.⁷ Examples are: (1) negotiating or discussing matters with agency personnel or contractors; (2) appearing at an agency meeting or hearing; (3) preparing pleadings or documents to be filed with or submitted to an agency; and (4) preparing or submitting contract bid packages, responses to requests for proposals, or any other submission for financial support.⁸

For example, R.C. 102.04(A) **prohibits you from receiving compensation from WinWin for:**

- Preparing or submitting, to DRC, a memorandum of understanding regarding WinWin employees who will work in a facility located in a state correctional institution;
- Making telephone calls, sending e-mails, or meeting with an official or employee of the Ohio Department of Education to discuss payments made to WinWin; or
- Giving testimony before the General Assembly or lobbying state legislators regarding a matter in which WinWin has an interest.

Exceptions to the R.C. 102.04(A) Prohibition

There are two exceptions to the prohibition in R.C. 102.04(A).

- R.C. 102.04(A) does not prohibit you from receiving compensation from WinWin to perform ministerial functions, such as filing applications for permits and licenses, with state agencies.⁹ However, you would be prohibited from receiving compensation from WinWin to take any other action, such as participating in meetings, sending e-mails, or making telephone calls advocating on its behalf, regarding the permit or license.
- R.C. 102.04(D) allows you to receive compensation from WinWin for performing services on matters pending before a state agency ***other than DYS*** if, before accepting compensation, you file a statement with your public agency (DYS), the state agency before which the matter is pending, and the Ethics Commission. In this statement, you must also describe the services you will perform for WinWin. You must file one statement each year in which you will be receiving compensation for performing services on matters before state agencies ***other than DYS***.

By signing the R.C. 102.04(D) statement, you are agreeing to disqualify yourself, for a period of two years, from any participation as an employee of DYS in any matter involving any official or employee of other state agency before which the matter is pending. Once you have filed the required statement, R.C. 102.04(E) prohibits you from failing to disqualify yourself from participating in these matters.

- This exception does not apply to matters that are before DYS. If WinWin has matters before DYS, you are prohibited from receiving compensation from WinWin for personally rendering services in those matters.

Participating in Matters between DYS and WinWin—R.C. 102.03(D) and (E)

As a Release Authority board member, you are also subject to the conflict of interest restrictions in R.C. 102.03(D) and (E),¹⁰ which 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.

R.C. 102.03(D) and (E) prohibit you from authorizing, approving, voting, discussing, deliberating, recommending, lobbying other DYS officials or employees, or otherwise using the authority or influence inherent in your position with DYS in any matters that have a definite and direct impact on the interests of WinWin. A member of a board or commission can usually withdraw from matters by removing himself from all aspects of the board's consideration of those matters.¹¹ The other members of the board can then discuss, deliberate, and vote on the matter. In order to effectively withdraw from a matter, the board member must not take any action, within the scope of his public service, on the matter.

For example, the Release Authority is the final and sole authority for making decisions regarding the release and discharge of all children committed to the legal custody of DYS, with limited exceptions.¹² If you become a contractor or employee of WinWin, you must be able to fully withdraw from any actions of the Release Authority and DYS involving WinWin or prospective or current students of WinWin.

If WinWin will not be affected by any DYS decisions, or if you are able to withdraw from matters before DYS that could definitely and directly affect WinWin, R.C. 102.04(D) and (E) do not prohibit you from serving as a contractor or employee of WinWin. However, R.C. 102.04(A) still prohibits you from receiving compensation from WinWin to personally render services for it on matters before DYS.

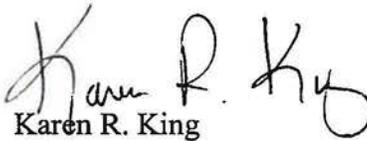
Other Matters

- A community school official or employee is a public official or employee subject to the Ohio Ethics Laws.¹³ If you become an employee of WinWin, you would be serving in two public positions. Whenever one person serves in more than one public position, it must be determined whether the two positions are compatible. The Ethics Commission does not have the authority to determine the compatibility of public positions or the application of laws outside of the Ethics Law.¹⁴ You should contact the legal advisor for DYS, or the Attorney General's Office, for guidance about compatibility of these two public positions.

- R.C. 5139.50 states: "The members of the release authority shall devote their full time to the duties of the release authority and shall neither seek nor hold other public office." You should also ask the legal advisor for DYS whether R.C. 5139.50 is applicable to your situation.
- If you become an employee of WinWin, the Ethics Laws will restrict your actions in that position as well. For example, R.C. 102.03(D) and (E) will not only prohibit you from participating in matters before DYS that affect WinWin but will also prohibit you from participating in matters before WinWin that affect DYS.
- R.C. 2921.42(A)(1) and (A)(4) prohibit you from authorizing or having an interest in any public contracts between DYS and WinWin. In a June 15, 2011, e-mail, you explained that there will be no interactions between DYS and WinWin, and that DYS will provide no funding to WinWin. If the facts change, and there are any contracts between DYS and WinWin in the future, you should contact the Ethics Commission for more information on this restriction.
- R.C. 102.03(A)(1) (Revolving Door Law), R.C. 102.03(B) (Confidentiality Restrictions), and R.C. 2921.42(A)(3) (Profiting from a Public Contract) apply to **former and current** public officials and employees. Therefore, they are also applicable to you in your service as a current board member of the Release Authority. For example:
 - R.C. 102.03(A)(1) prohibits you from representing WinWin before any public agency in Ohio on any matter in which you personally participated as a member of the Release Authority during and for one year after your Authority service; and
 - R.C. 102.03(B) prohibits you from releasing confidential information you acquire during your service with the Release Authority to WinWin.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on August 23, 2011. 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. It does not purport to interpret other laws or rules. If you have any questions or need additional information, please contact the Ethics Commission again.

Sincerely,


Karen R. King
Advisory Attorney

Enclosures: Advisory Opinions No. 2011-03, 2010-01, 2007-03, and 96-004
Revolving Door: Information Sheet #5

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's Web site: www.ethics.ohio.gov

¹R.C. 102.01(B) and (C). Ohio Ethics Commission Advisory Opinion No. 2011-03.

²R.C. 102.03(A)(5). The term "represent" is defined to include "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person". Examples of the types of activities that would fall within the definition of the term "represent" range from appearances in formal proceedings or meetings to informal "lobbying" of agency personnel by telephone or in person. Also included within the definition of "represent" is the preparation of any written communication that is submitted to a public agency, including formal documents, filings, informal letters, notes, and e-mails, regardless of whether the former employee signs the communication.

³R.C. 102.03(A) "Personal participation" includes decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion, including supervision or general oversight over other personnel in their work on a matter.

⁴Adv. Op. No. 89-003.

⁵Adv. Op. No. 2007-03.

⁶Adv. Op. No. 76-009

⁷Adv. Op. No. 2007-03.

⁸Id.

⁹R.C. 102.04(F).

¹⁰See R.C. 102.01(B) and (C).

¹¹Adv. Op. No. 2009-02.

¹²R.C. 5139.50(E).

¹³Adv. Op. No. 2010-01.

¹⁴Adv. Op. No. 91-006. See also Ohio Op. Att'y Gen. No. 90-037.