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June 15, 2012      Informal Opinion 2012-INF-0615-2

Ann H. Womer Benjamin

Dear Ms. Womer Benjamin:

On April 18, 2012, you asked the Ohio Ethics Commission whether a nonprofit educational foundation for which you are the Executive Director can compete for and accept grant funds from the Ohio Department of Development (Development) or the Ohio Board of Regents (Board of Regents) while you serve on the Ohio Tuition Trust Authority (Authority).

**Questions and Brief Answer**

**Question 1:** Under your leadership, can the Northeastern Ohio Council on Higher Education (Council on Higher Education) continue to compete for, and be awarded, grants from the Board of Regents notwithstanding your position on the Authority Board and, if so, what are the restrictions or conditions on the award?

Yes, the Council on Higher Education can compete for and be awarded grants from the Board of Regents. However, you must comply with the restrictions discussed in this opinion.

**Question 2:** Under your leadership, can the Council on Higher Education continue to compete for, and be awarded, grants from Development notwithstanding your position on the Authority Board and, if so, what are the restrictions or conditions on the award?

Yes, the Council on Higher Education can compete for and be awarded grants from Development. However, you must comply with the restrictions discussed in this opinion.

**Question 3:** Are there any specific circumstances under which the Council on Higher Education is prohibited from receiving grants or awards from the Board of Regents while you serve as the Executive Director of the Council on Higher Education?

No, provided that you comply with the restrictions discussed herein.

### **Key Facts**

- You serve as a member of the Ohio Tuition Trust Authority (Authority), which oversees Ohio's 529 college savings plans.<sup>1</sup>
- The Authority was created within the office of the Chancellor of the Ohio Board of Regents (Board of Regents).
- The Chancellor serves on the Authority Board along with four legislators and representatives from the higher education, finance, and business communities.
- You are also the compensated Executive Director for the Northeast Ohio Council on Higher Education (Council on Higher Education).<sup>2</sup>
- The Council on Higher Education has competed for and been awarded contracts from state agencies, including the Ohio Department of Development (Department) and Board of Regents.

### **State Board Member and State Grants**

Most state board and commission members serve part time, and are uncompensated for their state roles. Many of these public officials also hold outside employment, frequently in fields that are related to the area over which their public board or commission has authority.

The Ethics Law does not usually prohibit a person from serving on a board or commission. However, while serving, the person is required to comply with the Ethics Law and related statutes.

### **Participating in Matters Affecting the Council on Higher Education—R.C. 102.03(D)**

As a member of the Tuition Trust Authority, you are subject to R.C. 102.03(D), which applies to "public officials."<sup>3</sup> R.C. 102.03(D) provides:

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.

"Anything of value" includes money, goods, and every other thing of value.<sup>4</sup> Any positive or negative financial impact of a decision made by a public entity is a thing of value.<sup>5</sup>

If a public official also serves as an officer or director of a non-profit organization, her objectivity and independence of judgment as a public official could be impaired if she participates in matters before her public agency that provide a definite and direct benefit to the non-profit organization.<sup>6</sup> For that reason, R.C. 102.03(D) prohibits a public official from participating in matters before her agency that affect the organization she also serves.<sup>7</sup>

The law does not prohibit the Council on Higher Education from competing for and accepting grants. However, R.C. 102.03(D) prohibits you, while you serve as the executive director of the Council on Higher Education, from using your position as a member of the Tuition Trust Authority to secure any benefits for the Council on Higher Education. If any matter comes before the Tuition Trust Authority that definitely and directly affects the interests of the Council on Higher Education, you may not vote on, discuss, deliberate about, or take any other action on that matter.

You have stated that you do not anticipate that the Council on Higher Education will do business with the Tuition Trust Authority. However, you are also prohibited from using the authority and influence of your state position to secure, from other public agencies, any benefit for the Council on Higher Education. For example, you cannot use your unique access to Board of Regents' officials and employees to affect the Board's decisions regarding the Council on Higher Education's grant applications.<sup>8</sup> You are also prohibited from formally or informally recommending or lobbying for the Council on Higher Education, and from taking any other formal or informal action to secure benefits for the Council on Higher Education from officials and employees of the Board of Regents or the Department of Development.

### **Representing the Council on Higher Education Before State Agencies**

As a member of the Tuition Trust Authority, you are also subject to the restriction in R.C. 102.04(A). This law prohibits a member of a state board or commission from accepting compensation to perform services on any matter that is before any state agency. There is an exception to this prohibition if the matter is before a state agency other than the one the public official serves. Advisory Opinion No. 2007-03, which more fully explains the restriction and exception, is attached to this advisory opinion for your convenience.

Your employment at the Council on Higher Education is compensated. R.C. 102.04(A) prohibits you, as the Executive Director at the Council on Higher Education, from representing the Council on Higher Education before the Tuition Trust Authority. There is no exception to this prohibition. Therefore, if any matter affecting the Council on Higher Education should arise before the Tuition Trust Authority, the Council must select another person to represent its interests before the Authority.

R.C. 102.04(A) also prohibits you from accepting compensation to represent the Council on Higher Education, before any other state agency, unless you can meet the exception in R.C. 102.04(D). Therefore, when the Board of Regents or Department is considering a matter,

including a grant application, affecting the Council on Higher Education, you would be unable to represent the Council on Higher Education on that matter unless you can meet the exception.

In order to meet the exception, you must complete and file a statement describing your Tuition Trust Authority position and the matter on which you are providing services before another state agency.<sup>9</sup> You must also declare that you will not participate in any matter before the Tuition Trust Authority involving the individual interests of any official or employee of a state agency before you are representing the Council. A blank copy of the form is enclosed with this opinion, with directions for completing and filing the statement.

You are not prohibited from participating in matters before the Tuition Trust Authority that affect the other state agency as an organization. However, if a matter before the Tuition Trust Authority affects the individual interests of an official or employee of the other state agency, you must withdraw from that matter.

**Prohibition Against Having an Interest in a Public Contract—R.C. 2921.42(A)(4)**

There is one final restriction that may apply to you during your service on the Tuition Trust Authority. If, while you are serving as a member of the Tuition Trust Authority board, the Council on Higher Education seeks any kind of grant from or other contract with the Tuition Trust Authority, the public contract law will apply to you. In particular, R.C. 2921.42(A)(4), prohibits a public official from having any definite and direct, financial or fiduciary, interest in the contracts of a public agency with which she is connected.<sup>10</sup>

You have stated that the Council on Higher Education does not do any business with the Tuition Trust Authority. If the Council considers seeking contracts or grants from the Authority while you are serving on the Authority board, please contact the Commission for further guidance.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on June 15, 2012. 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

Enclosures: Advisory Opinion No. 2007-03  
Statement Required for R.C. 102.04(D) Exception

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

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<sup>1</sup> 26 U.S.C. 529 (a "529 program" is a college savings program established by and maintained by a state that allows individuals to purchase tuition credits on behalf of a beneficiary or contribute money to a account established to meet higher education expenses of a beneficiary).

<sup>2</sup> 26 U.S.C. 501(c)(3). The Council on Higher Education was established to bring together leaders in business and higher education for collective action to advance college attainment and economic development in the Northeast Ohio region.

<sup>3</sup> R.C. 102.01(B) and (C) ("public official" includes any person who is appointed to an office of a county).

<sup>4</sup> R.C. 1.03, 102.01(G).

<sup>5</sup> Ohio Ethics Commission Advisory Opinion No. 2007-01.

<sup>6</sup> See Adv. Ops. No.88-009. See also Adv. Op. No. 76-005 (The Commission has explained that it is unnecessary that the thing of value actually has a substantial and improper influence on the official provided that it is of such a character that it could have such influences.).

<sup>7</sup> Adv. Ops. No. 91-006 and 2007-01.

<sup>8</sup> See Adv. Op. No. 2001-02.

<sup>9</sup> R.C. 102.04(D).

<sup>10</sup> Adv. Ops. No. 78-005 and 81-003.