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INFORMATION SHEET: ADVISORY OPINION NO. 2011-02
DEPARTMENT DIRECTOR'S ABSTENTION

What is the question addressed in the opinion?

In situations where a state department director has a conflict of interest such that R.C. 102.03(D) prohibits the director from participating in the department's review of a regulatory or similar matter, can another person act in the director's place?

What is the answer in the opinion?

When a conflict of interest under R.C. 102.03(D) requires that a department director withdraw from a matter before the department, the director will be considered absent from the department and the person described in R.C. 121.05 can act in the director's place. In departments with:

- One assistant director, the assistant director acts for the director in his or her absence;
- More than one assistant director, the assistant director previously designated by the director acts for the director in his or her absence; and
- No assistant director, the deputy director previously designated by the director acts for the director in his or her absence.

What prompted this opinion?

The opinion was prompted by questions about the ability of department staff to act on a regulatory or similar matter where a department director had a conflict of interest such that R.C. 102.03(D) would require him or her to withdraw from participating in the matters.

When did the conclusions in this opinion become effective?

The opinion became effective when it was rendered by the Commission at its meeting on February 17, 2011.

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ADVISORY OPINION NO. 2011-02 IS ATTACHED.**

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Advisory Opinion
Number 2011-02
February 17, 2011
Department Director Abstention

Syllabus by the Commission:

- (1) Division (D) of Section 102.03 of the Revised Code prohibits a director of a state department from participating in any matter before the department that results in a definite and direct benefit or detriment to the director, or to a family member or business associate of the director;
- (2) In such a situation, R.C. 102.03(D) also prohibits the director from delegating the matter to a subordinate official or employee at the department;
- (3) When a department director withdraws from a matter before the department because R.C. 102.03(D) prohibits the director from acting on the matter, the director will be considered absent from the department and the person described in Section 121.05 of the Revised Code can act in the director's place.

* * *

The Ohio Ethics Commission has been asked, in situations where a state department director has a conflict of interest such that R.C. 102.03(D) prohibits the director from participating in the department's review of a matter, whether another person can act in the director's place.

Conflict of Interest Prohibition—R.C. 102.03(D)

Directors of state departments are public employees subject to the general conflict of interest prohibition found in R.C. 102.03(D), which reads:

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.

R.C. 102.01(B) and (C) (Any person who is an employee of a department of the state is a public official).

“Anything of value” is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 102.01(G). The Ethics Commission has held that the beneficial or detrimental economic impact resulting from a decision of a public agency is a thing of value for purposes of R.C. 102.03. Ohio Ethics Commission Advisory Opinions No. 85-012, 90-002, and 90-012.

In numerous advisory opinions, the Commission has explained that R.C. 102.03(D) prohibits a public employee from using his or her authority or influence to secure any benefit or avoid any detriment for the employee and for the employee’s family members or business associates. See, e.g., Adv. Ops. No. 2009-06, 2009-02, and 88-005. The Commission has explained that, in these situations, public employees are required to refrain from participating in discussions, deliberations, or otherwise using their public position, formally or informally, with regard to any matter before their public agencies that will definitely and directly affect their private financial interests or the private interests of their family members or business associates. Id. In such matters, the employees cannot make or influence decisions themselves, and cannot delegate their decision-making authority to subordinate officials or employees.¹

With respect to state department directors, R.C. 121.02 creates the state department and places ultimate authority for the departments in the hands of their directors: “The director of each department shall exercise the powers and perform the duties vested by law in such department.” The Ethics Commission has held that a public employee who is the ultimate authority within an office is unable to withdraw, in order to avoid any conflict of interest, from any active matters that affect the director’s own interests, the interests of a family member, or the interests of a business associate. Adv. Op. No. 92-009. The public employee also cannot delegate his or her authority over a particular matter to a subordinate public employee in order to avoid a conflict of interest. Id.

The question that has arisen is whether there is another employee of the department who can act in the director’s place, by operation of law rather than delegation, in the event that the director has a conflict of interest such that he or she cannot participate in a particular matter.

R.C. 121.05—Acting in the Absence of the Director

R.C. 121.05 establishes the positions of assistant and deputy directors for state departments and the ability of those employees to act as director in specific circumstances:

¹ R.C. 102.03(D) does not prohibit a public employee from participating in a matter that will result in a general or uniform benefit or detriment to all or a large portion of the individuals regulated by the agency, even if the employee or the employee’s family members or business associates are among those affected. See generally Adv. Ops. No. 88-004 and 92-013.

Except as otherwise provided in this section, in each department, there shall be an assistant director designated by the director of that department. . . . In each department with an assistant director, the assistant director shall act as director in the absence or disability of the director and also shall act as director when the position of director is vacant, except that in the department of transportation, the department of health, the department of commerce, the department of administrative services, and the department of job and family services, the director shall designate which assistant director shall act as director in the director's absence. In each department without an assistant director, the director shall designate a deputy director to act as director in the absence or disability of the director. (Emphasis added).

The issue is whether a department director can be considered “absent” for purposes of R.C. 121.05 if he or she complies with the requirement of R.C. 102.03(D) by withdrawing from participation in a matter before the department that would affect the director’s personal financial interests, or those of a family member or business associate, in a manner that is not in common with all affected parties. If the department director would be considered absent, R.C. 121.05 provides a mechanism for another departmental employee to make decisions that would otherwise be the responsibility of the director.

The Courts in Ohio have considered similar situations. In the case of *Gitlin v. Berea* (Feb. 15, 1990), Cuyahoga App. No. 58062, five members of an eleven-member city planning commission did not participate in a zoning matter that would affect the financial interests of the church where they were members because of a conflict of interest. The Court noted that, where a member of a legislative body refuses to vote on a matter before the body, the legal effect of the refusal to vote is an acquiescence in the action of the voting majority. However, the Court distinguished the situation presented, where the five planning commission members did not attend the planning commission meeting where the matter was considered, from a refusal to vote.

The Court held: “Generally, where a member of a legislative body is disqualified due to interest, the disqualification is treated as a vacancy because the member is not qualified to act.” As a result, the court concluded: “It being conceded that five of the eleven commission members were disqualified, it follows that they cease to be members of the commission for matters on which they are disqualified.” See also *DiCarlo v. Clermont Cty. Bd. of Elections*, 2003-Ohio-5716, 1998 Op. Att’y Gen. No. 98-007, and 2006 Op. Att’y Gen. No. 2006-022.

Applying this reasoning to the question presented, if a department director were to withdraw from a matter because of a conflict of interest arising under R.C. 102.03(D), he or she would cease to be the director of the department on the matter from which the director is disqualified to act. While the director’s position is not vacant, he or she is effectively absent with respect to that matter. In that situation, the person described in R.C. 121.05 would act for the director in his or her absence.

Assistant or Deputy Director Empowered

In departments with one assistant director, R.C. 121.05 authorizes a specific individual (the assistant director) to “act as director” in the absence of the director. A director can comply with the prohibition in R.C. 102.03(D) by withdrawing from participation in a matter where he or she has a conflict of interest, as described above. Following the Court’s holding in *Gitlin*, the director would be absent from decision-making on the matter due to his or her conflict of interest regarding that matter. For those departments with one assistant director, R.C. 121.05 statutorily enables the assistant director to act as the director on that matter.

In departments without an assistant director, R.C. 121.05 authorizes a deputy director, who has been previously designated by the director, to “act as director” in the director’s absence. A director can comply with the prohibition in R.C. 102.03(D) by withdrawing from participation in a matter where he or she has a conflict of interest, as described above. Following the Court’s holding in *Gitlin*, the director would be absent from decision-making on the matter due to his or her conflict of interest. For those departments with no assistant director, R.C. 121.05 statutorily enables the designated deputy director to act as the director on that matter. In order to maintain his or her objectivity and independence of judgment, the director must designate a deputy director to act in his or her place without reference to any specific matter that creates a conflict of interest and before any such matter arises.

In departments with more than one assistant director, R.C. 121.05 authorizes an assistant director, who has been previously designated by the director, to “act as director” in the director’s absence. A director can comply with the prohibition in R.C. 102.03(D) by withdrawing from participation in a matter where he or she has a conflict of interest, as described above. Following the Court’s holding in *Gitlin*, the director would be absent from decision-making on the matter due to his or her conflict of interest. For those departments with more than one assistant director, R.C. 121.05 statutorily enables the designated assistant director to act as the director on that matter. In order to maintain his or her objectivity and independence of judgment, the director must designate an assistant director to act in his or her place without reference to any specific matter that creates a conflict of interest and before any such matter arises.

Other Limitation

Although R.C. 121.05 statutorily enables an assistant or deputy director to act as the director when the director has withdrawn from a matter where he or she has a conflict of interest, R.C. 102.03(D) prohibits the director from informally using the authority or influence of his or her position to affect the assistant or deputy director’s decision. See Adv. Op. No. 2001-02 (R.C. 102.03(D) prohibits public officials and employees from using their unique position and access and their working relationship with other public officers and employees to affect their decisions). When the director has withdrawn from a matter because of the prohibitions in R.C. 102.03(D), the director cannot suggest or recommend actions to the assistant or deputy, require that person to act in a particular manner, or otherwise attempt to influence his or her decision.

Conclusion

This advisory opinion 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.

Therefore, it is the opinion of the Ohio Ethics Commission, and the Commission advises that: Division (D) of Section 102.03 of the Revised Code prohibits a director of a state department from participating in any matter before the department that results in a definite and direct benefit or detriment to the director, or to a family member or business associate of the director. In such a situation, R.C. 102.03(D) also prohibits the director from delegating the matter to a subordinate official or employee at the department. Finally, when a department director withdraws from a matter before the department because R.C. 102.03(D) prohibits the director from acting on the matter, the director will be considered absent from the department and the person described in Section 121.05 of the Revised Code can act in the director's place.

By my signature below, I certify that Advisory Opinion No. 2011-02 was rendered by the Ohio Ethics Commission at its meeting on February 17, 2011.



Ben Rose, Chair
Ohio Ethics Commission