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Informal Opinion 2011-INF-0118

Jerome G. Solove, Chairman
Ohio Consumers' Counsel Governing Board

Dear Mr. Solove:

On December 9, 2010, the Ohio Ethics Commission received your letter requesting an advisory opinion on behalf of the Public Utilities Communication Nominating Council (PUCNC or council). As the Chairman of the Ohio Consumers' Counsel Governing Board, you also serve on the PUCNC.

The PUCNC is empowered to review and evaluate possible appointees to the Public Utilities Commission of Ohio (PUCO) and recommend four candidates from which the Governor can select one person to appoint. You have explained that the members of the PUCNC are concerned about the possibility of conflict issues arising for members of the PUCNC because of their relationships with candidates for nomination to the PUCO. In your letter and attached e-mail correspondence, you explained that you have been designated by the PUCNC to seek the guidance of the Commission on this matter.

Brief Answer

As explained more fully below, R.C. 102.03(D) and (E) prohibit a PUCNC member from soliciting, or using his or her position to secure, a nomination to the PUCO for a candidate if the candidate has such a close tie to the PUCNC member that his or her objectivity and independence of judgment in the consideration of the candidate will be impaired because the candidate will receive a definite and direct benefit from the selection process. The PUCNC member is required to withdraw from consideration of any candidate for nomination to the PUCO if the candidate has these kinds of current relationships with the PUCNC member:

- ▶ Partner in a partnership;
- ▶ Employer;
- ▶ Client;
- ▶ Fellow member of an LLC;

- ▶ Other kind of business associate where the PUCO candidate holds any position of authority over the PUCNC member; or
- ▶ Spouse, parent, child, sibling, or other close family member.

Background Information

Between eighty-five and sixty days prior to the end of a term of a PUCO Commissioner, or within thirty days after a PUCO Commissioner dies or his or her commission membership is terminated, the PUCNC is required to meet and develop a list of four candidates who are the most qualified individuals for appointment to the open position. The Governor must appoint one of the individuals on the list or reject all four individuals and reconvene the PUCNC to select four additional candidates. You have explained that the PUCNC generally meets one day per year. Members of the PUCNC are compensated and are required to file financial disclosure statements with the Ethics Commission.

In your e-mails, you explained that the members of the PUCNC are concerned about the possibility of conflict issues arising for its members of the PUCNC because of their relationships with candidates for nomination to the PUCO. For example, you explained that, because you are the Chairman of the Consumers' Counsel Governing Board, you were asked to abstain from the PUCNC's consideration of a candidate for nomination who was an employee of the Consumers' Counsel. Other members of the PUCNC have been asked to abstain in other situations. At that time, you proposed that the PUCNC should discuss the parameters of, and basis and procedures for withdrawal for any members of the PUCNC in the event of a conflict of interest or appearance of impropriety. The other members agreed.

As part of that process, you sent an e-mail to the Ethics Commission in June 2010 asking that the Commission participate in PUCNC's review. From your e-mail and its attachment, I gleaned seven key areas of concern for the PUCNC:

1. Determining whether members of the PUCNC are required to disclose to other members their financial interests in, or representation of, organizations that have an interest in matters before the PUCO;
2. Determining whether PUCNC members should disclose to other members any affiliation with entities that appear before the PUCO and current or prior relationships with candidates, or employers and affiliates of candidates, for appointment to the PUCO;
3. Determining how these disclosures should be shared with other PUCNC members and with the public;
4. Developing the criteria for recusal including the extent of recusal and the circumstances under which recusal is necessary;
5. Developing a process under which these issues will be resolved by PUCNC;
6. Determining the legal basis or precedent under which a member of the PUCNC should withdraw because of a conflict of interest; and

7. Distributing information to PUCNC members about the methodology used to decide which candidates for appointment will be interviewed by the PUCNC and copies of the recommendation submittal sheets and tally/analysis of those recommendation submittal sheets.

Of these seven items, this opinion will consider issue six, which is the only issue that falls within the Commission's jurisdiction. The opinion will also provide some information to assist the PUCNC with issue four. The remaining issues appear to be administrative matters to be decided by the PUCNC, in consultation with its legal counsel, within the scope of the statutes and rules that govern its operation.

Withdrawal for Conflict of Interest

The conflict of interest provisions in R.C. 102.03(D) and (E) read:

- (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.

At its meeting on December 10, 2004, the Ohio Ethics Commission concluded that the members of the PUCNC are "public officials" subject to the financial disclosure requirement in R.C. 102.02. Members of the PUCNC are public officials subject to R.C. 102.03(D) and (E). R.C. 102.01(B) and (C) ("public official" means any person appointed to an office of any governmental entity.)

In previous opinions, the Commission has determined that R.C. 102.03(D) and (E) prohibit public officials from soliciting, or from using their public positions to secure, things of value for themselves, and for any other persons with whom they have close relationships. R.C. 102.03(D) prohibits any public official from using his or her position to secure a definite and direct benefit or avoid a definite and direct detriment for any other person if the relationship between the official and the person is such that the official's objectivity and independence of judgment will be impaired because of the benefit or detriment to the other person. Adv. Ops. No. 88-004, 88-005, and 89-005. R.C. 102.03(E) prohibits a public official from soliciting anything of value for any person with whom the official has a close relationship such that the official's objectivity and independence of judgment will be impaired because of the benefit to the other person.

The purpose of these restrictions is to ensure that, when making a decision in his or her public role, a public official is not substantially and improperly influenced by the beneficial or detrimental impact of the decision on the official's own interests or the interests of other persons with whom the official has close family, economic, business, or other connections. Adv. Ops. No. 91-001, 91-004, and 96-004. Specifically, the Commission has explained that R.C. 102.03(D) and (E) prohibit a public official from:

- ▶ voting, discussing, deliberating about, recommending, formally or informally lobbying on, or otherwise taking any action on any matter that results in a definite and director benefit or detriment to; or
- ▶ soliciting a benefit for;
 - the official;
 - a business associate of the official, including a partner, employer, client, or fellow member of an LLC;
 - a close family member of the official, including a spouse, parents, children, and siblings;
 - a business or organization with which the official has a fiduciary connection, including a non-profit organization the official serves as a board member; and
 - any other individual, business, or organization with which the official has a close economic relationship if the facts and circumstances suggest that the official's objectivity and independence of judgment would be impaired when considering matters that affect the interests of that individual, business, or organization.

Therefore, whenever a matter comes before a public agency that will result in a definite and direct "thing of value" to any person, business, or organization with which an agency official currently has the kinds of connections described above, R.C. 102.03(D) and (E) would require that the official or employee withdraw from any formal or informal actions of the agency on those matters.

However, the law applies differently to a public official regarding matters that affect individuals, businesses, or organizations with which the official formerly had close relationships. Provided that the public official's relationship with a person, business, or organization is fully and finally severed at the time a matter affecting that party is before the agency the official serves, R.C. 102.03(D) and (E) would not prohibit the official from participating in the matter. A public official is not prohibited from participating in matters affecting, for example, a former client, partner, or employer providing, again, that the relationship is fully and finally severed and there is no ongoing financial relationship between them. The same would apply to a public official's former spouse, provided that the divorce is final and there is no ongoing financial relationship between the official and his or her ex-spouse.

Application to PUCNC

This opinion cannot identify every possible permutation of relationships that may exist between and among members of the PUCNC and PUCO candidates. However, it can provide the members of the PUCNC with general guidelines to consider when determining whether they have the kinds of relationships with particular candidates that would require them to withdraw from the PUCNC's consideration of those candidates.

Members of the PUCO are compensated for their service. As a result, appointments to the PUCO are "things of value" for purposes of R.C. 102.03(D) and (E). While the PUCNC does not make the final appointments to the PUCO, it does make the decision about which four individuals will comprise the pool of four candidates from which the appointment will be made. Because any one of the four candidates could be selected by the Governor, the actions of the PUCNC to create the list could result in a definite and direct thing of value for any person on the list.

R.C. 102.03(D) and (E) prohibit a PUCNC member from soliciting, or using his or her position to secure, a nomination to the PUCO for a candidate if the candidate has such a close tie to the PUCNC member that his or her objectivity and independence of judgment in the consideration of the candidate will be impaired because the candidate will receive a definite and direct benefit from the selection process. The PUCNC member is required to withdraw from consideration of any candidate for nomination to the PUCO if the candidate has these kinds of current relationships with the PUCNC member:

- ▶ Partner in a partnership;
- ▶ Employer;
- ▶ Client;
- ▶ Fellow member of an LLC;
- ▶ Other kind of business associate where the PUCO candidate holds any position of authority over the PUCNC member; or
- ▶ Spouse, parent, child, sibling, or other close family member.

A member of the PUCNC would not be required to withdraw from the consideration of a candidate with whom the member formerly had a relationship of this nature, or with whom the member has a more remote relationship than the ones described above.

Specific Relationships

Partner in a Partnership

In your e-mails, you have described a number of different relationships between the members of the PUCNC and candidates under consideration for nomination to the PUCO. One of relationships you have described is a PUCNC member who is a partner in a law firm at the time another partner in the law firm is a candidate for appointment to a PUCO position. As

described above, R.C. 102.03(D) and (E) would prohibit a PUCNC member who is a partner in a law firm from participating in the council's consideration of a candidate who is a partner in the same firm.

Governing Board Member/Employee of the Board

In your situation, you serve as Chair of a public agency, the Consumers' Counsel Governing Board. An employee of the Consumers' Counsel was a candidate for nomination to the PUCO. A Chair of a public agency and an employee of the agency are not "business associates" because a governmental agency is not engaged in business activity. Adv. Op. No. 93-003.

The Commission has explained that a public official is prohibited from participating in matters that result in a definite and direct benefit or detriment to his or her employer, whether public or private. For example, R.C. 102.03(D) and (E) would prohibit a city council member who was also an employee of a public college from participating in matters before city council that affect the interests of the public college, because a person's employer occupies a position of power over the person. As a result, when matters before the council would affect the council member's employer, the college, the benefit or detriment to the college, its president, and its board of trustees would have a substantial and improper influence on the council member employed by the college. Adv. Op. No. 2007-01. However, an employee of a governing board does not occupy a position of power over the members of the governing board. Further, the Consumers' Counsel Governing Board appoints the Consumers' Counsel and the Deputy Consumers' Counsel. R.C. 4911.01 and 4911.20. All other employees are employed by and report to the Consumers' Counsel. Therefore, the reasoning in Advisory Opinion No. 2007-01 does not apply to the situation you described.

If the employee were the Consumers' Counsel or Deputy Consumers' Counsel, the relationship between the PUCNC member who is also the Governing Board Chair could be such that the benefit the employee would receive from his or her nomination for appointment would have a substantial and improper influence on the PUCNC member. However, in a situation such as the one you have described, where the agency employee has no authority or power over the agency chair, the relationship is not so close that a benefit to the employee would be of such a character as to manifest a substantial and improper influence on the PUCNC member.

Former Associates

Some of the other relationships you have described involve former affiliations. R.C. 102.03(D) and (E) would not require that a PUCNC member withdraw from consideration of candidates that formerly had these kinds of relationships with the PUCNC member, provided that the relationship is fully and finally severed and there is no ongoing financial connection between the parties. For example, R.C. 102.03(D) and (E) would not prohibit a member of the PUCNC from participating in the consideration of a PUCO candidate who was the official's former law partner.

In these three examples, provided that the affiliations have been fully severed, R.C. 102.03(D) and (E) would not prohibit these PUCNC members from participating in the council's consideration of these candidates:

PUCNC Member	PUCO Candidate
Lawyer who represents a utility	Former General Counsel for utility
Lawyer who represents a utility	Former employee of utility
Lawyer who represents a union of employees that work for a utility	Former employee of the utility

Other Relationships

The other two relationships you describe are more remote. These relationships are not close enough that any definite and direct benefit to the PUCO candidate would be of such a character as to have a substantial and improper influence on the PUCNC member with respect to the performance of his or her public authority. Provided that your descriptions capture all of the connections between the PUCNC members and PUCO candidates, R.C. 102.03(D) and (E) would not prohibit these PUCNC members from participating in the PUCNC's consideration of these candidates:

PUCNC Member	PUCO Candidate
Lawyer who represents utilities that are members of an association of utilities and also formerly served on the association's board	Executive Director of the association
Lawyer who represents a utility that is a member of an association of utilities	Executive Director of the association

Criteria for Recusal

The Commission can offer some guidance to the PUCNC in its development of criteria for recusal when a member of the PUCNC has a relationship with a candidate such that R.C. 102.03(D) and (E) prohibit the member from participating in the PUCNC's consideration of that candidate.

With respect to the extent of recusal, the Commission has explained that, where R.C. 102.03(D) requires that a public official withdraw from a matter, the official must withdraw from all activities on the matter. The official cannot, of course, take actions that arise within the exercise of his or her official authority. For example, the official cannot vote or deliberate on the matter, make motions on the matter, or vote to make the matter an emergency measure. R.C. 102.03(D) would also prohibit the official from taking less overt actions on the matter, such as discussing the appointee with other board members or lobbying them about a particular candidate. R.C. 102.03(E) prohibits the official from soliciting any benefit, so the PUCNC

member would be prohibited from merely recommending any candidate with whom he or she has any of the connections described above.

With respect to circumstances of recusal, R.C. 102.03(D) and (E) prohibit the official from taking any actions in official and unofficial circumstances. For example, if a PUCNC member is prohibited from participating in the PUCNC's consideration of a particular candidate, that prohibition would apply to formal activities at PUCNC meetings, and informal activities such as sending e-mails, making telephone calls, and having face-to-face discussions with other PUCNC members in social settings. The PUCNC member must be careful not to take any action to secure nomination for any candidate with which he or she has the kinds of relationships described on page four of this opinion.

The PUCNC may want to consider establishing a mechanism whereby members identify whether they have the kind of close relationships described earlier in this opinion with any candidates for nomination. While it is not required, the PUCNC member may choose to leave the room while the PUCNC is discussing a particular candidate. If the PUCNC member does not leave the room, he or she must refrain from participating in the PUCNC's consideration of the related person. If the council member does leave the room during the PUCNC's consideration of a candidate, the other PUCNC members have an obligation to inform that council member when its consideration of that candidate is concluded, so he or she can rejoin the meeting.

Application to Alternate

R.C. 4901.021 sets forth the membership of the PUCNC. The statute also allows some members of the PUCNC to designate an alternate to represent them at the meetings of the council. (The presidents of the Ohio State Bar Association, the Ohio Municipal League, and the Ohio Accountancy Board, and the Chairperson of the State Board of Registration for Professional Engineers and Surveyors, can designate alternates with the approval of their various boards.) R.C. 4901.021. The Chairperson of the Consumers' Counsel Governing Board is also empowered to designate the vice-chairperson to serve as a member of the PUCNC in his or her stead. R.C. 4911.17.

In your letter, you conjectured that, if a PUCNC member had a conflict of interest and could not participate in the council's consideration of a particular candidate, the prohibition would extend to his or her designated alternate. Certainly, the alternate is subject to the same restrictions described earlier in this opinion with respect to candidates with whom the alternate has relationships of the kind described above. The alternate would be prohibited from participating in any of the PUCNC's official actions or consideration of such a candidate. Further, any council member who designates an alternate is prohibited from directing his or her alternate to favor, or otherwise influencing the alternate's actions regarding, a candidate for nomination with whom the council member has the kind of close tie that is described above.

However, where the council member has designated an alternate for service on the board, R.C. 102.03(D) and (E) would not prohibit the designee from participating in the board's consideration of any candidate for nomination simply because the council member who made the designation had a personal affiliation with the candidate.

Conclusion

As explained more fully below, R.C. 102.03(D) and (E) prohibit a PUCNC member from soliciting, or using his or her position to secure, a nomination to the PUCO for a candidate if the candidate has such a close tie to the PUCNC member that his or her objectivity and independence of judgment in the consideration of the candidate will be impaired because the candidate will receive a definite and direct benefit from the selection process. The PUCNC member is required to withdraw from consideration of any candidate for nomination to the PUCO if the candidate has these kinds of current relationships with the PUCNC member:

- ▶ Partner in a partnership;
- ▶ Employer;
- ▶ Client;
- ▶ Fellow member of an LLC;
- ▶ Other kind of business associate where the PUCO candidate holds any position of authority over the PUCNC member; or
- ▶ Spouse, parent, child, sibling, or other close family member.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 13, 2011. 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

cc: Tom Green, Chairman, Public Utilities Commission Nominating Council
David A. Kutik, Designee, Public Utilities Commission Nominating Council
Kent Shimeall, Office of the Attorney General
Members, Public Utilities Commission Nominating Council