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June 15, 2012

Informal Opinion 2012-INF-0615-1

Christiane Schmenk, Director
Ohio Department of Development

Dear Director Schmenk:

In a letter received on March 20, 2012, you asked the Ohio Ethics Commission whether you can serve as a Trustee for Ohio Northern University (Ohio Northern) while you are the Director of the Department of Development (Department) and the Chair of the Third Frontier Commission. Ohio Northern receives funds from Department grants awarded by the Third Frontier Commission.

Brief Answer

Yes. Although Ohio Northern receives funds from the Department, you can serve as an Ohio Northern Trustee provided that you can: (1) meet an exception to the public contract prohibition; and (2) withdraw from matters before the Department that affect Ohio Northern.

Key Facts

- You have been the Director of the Department since August 1, 2011. As Director of the Department, you are also the Chair of the Third Frontier Commission, which issues some of the Department's grants.
- From March 14 to August 1, 2011, you were Chief Counsel of the Department.
- You have been asked to serve as a member of the Board of Trustees of Ohio Northern, a private university.
- Ohio Northern has been a collaborator (not a grantee) on projects awarded by the Third Frontier Commission.

Past Grants from the Department to Projects Involving Ohio Northern

You explained that there have been three recent projects in which Ohio Northern was a “beneficiary/participant.” From two of the three projects (one in 2008 and one in 2011), Ohio Northern received a total of \$125,000 and participated in the funded projects by contributing resources and technical expertise. In the third project, three wind turbines were installed on Ohio Northern’s campus. The turbines are not owned or controlled by Ohio Northern, but it receives the benefit of the electricity generated by them.¹

Serving as a University Trustee

In most situations, the Ethics Law does not prohibit a public official from also serving as a trustee of a private university. However, if the Department provides funds to Ohio Northern and receives goods or services in return, you would have a prohibited interest in a Department contract if you serve as an Ohio Northern trustee unless you can meet an exception to the public contract law. Further, the conflict of interest restrictions in R.C. 102.03(D) prohibit you from participating in matters before the Department that affect Ohio Northern.

There are three restrictions that apply to you if you accept the appointment: (1) the public contract law (R.C. 2921.42); (2) the conflict of interest law (R.C. 102.03(D)); and (3) the confidentiality law (R.C. 102.03(B)).

Public Contract Restrictions—R.C. 2921.42

A university trustee has a fiduciary relationship with the university. The trustee also has a fiduciary interest in any contracts awarded to the university.

If a university trustee is also a public official, she would have a fiduciary interest in any contracts awarded by her public agency to the university. There is a statute that prohibits a public official from having a fiduciary interest in the contracts of the public agency she serves.

The applicable statute is R.C. 2921.42(A)(4), which provides that no public official shall knowingly:

Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which the public official is connected.

As the Department Director, you are subject to this restriction.²

This restriction applies to the official even if she is not involved in the authorization of the contract. If the official knows that there is a contract between her public agency and an organization with which she serves, she has a prohibited interest in the contract. The application of the restriction depends on the facts and circumstances of each situation.³

A public contract exists whenever a public agency buys or acquires goods or services, from any source, regardless of whether there is a written contract.⁴ When a public agency makes grants, and acquires services in return, the grants are “public contracts.”⁵ If Ohio Northern receives funds to provide services to the Department on a project that is supported by a Department grant, the funds are a public contract between Ohio Northern and the Department.

If you were to serve as a Trustee for Ohio Northern, you would have a fiduciary interest in any grant funds that Ohio Northern receives for services it provides as a collaborator on a project funded by a Department grant.⁶ This is true whether Ohio Northern received the funds as the lead or as a collaborator on the project. You would have a fiduciary interest in projects that are currently funded and projects funded after you become a trustee.

Therefore, if you were to serve as an Ohio Northern Trustee, you would have a prohibited interest in these contracts unless you can meet the exception in R.C. 2921.42(C). You have the responsibility to establish that all four requirements in the exception are satisfied.⁷ If the requirements are not satisfied, you cannot serve on the board without violating the law.

Part One: Necessary Services

The services the Department acquires through these grant awards must be necessary.⁸ Provided that the grant funding that Ohio Northern receives is awarded and administered to carry out the statutory mandate and purpose of the Department, this requirement can be satisfied.

Part Two: Continuing Course or Unobtainable Elsewhere for the Same or Lower Cost

The services provided in connection with the grant must be either: (1) furnished as part of a “continuing course of dealing” or (2) “unobtainable elsewhere for the same or lower cost.”⁹

The Commission has explained that a “continuing course of dealing” can be demonstrated by a contract or grant that was in effect prior to a public official’s association with the public agency.¹⁰ If the contract or grant is renewed with modifications or material changes, it is no longer a continuing course of dealing.¹¹

You can establish a “continuing course of dealing” for grants that were awarded before you started your service to the Department in March 2011. However, the exception applies only during the term of the existing grant agreements. Any material change in an existing agreement would be a “new” contract.

New contracts or grants awarded by the Department after March 2011 do not satisfy the “continuing course of dealing” condition in the exception.¹² However, it may be possible to satisfy the “unobtainable elsewhere” condition in the exception.

The Commission has concluded that, when the public contract at issue is a grant, there are two ways in which the requirement that the services the grant recipient is providing are “unobtainable elsewhere for the same or lower cost” can be satisfied. The requirement can be satisfied if: (1) all qualified and interested applicants for the Department grants have received grants and funds remain for the projects in which Ohio Northern is a participant; or (2) the Department accepts applications for grants on an ongoing first-come, first-served basis, in a fair and open application process in which all interested and qualified applicants receive funding, and where there has historically been enough money to fund all qualified grant applications.¹³

Part Three: Same or Better Treatment

In order to satisfy the third requirement, Ohio Northern must treat the Department either better than or the same as it would treat other customers or clients in similar transactions.¹⁴ In situations like this one, where the contract involves a grant program, the Commission has explained that organizations that wish to participate in the programs have no “customers or clients in similar transactions.”¹⁵ Therefore, this requirement can be satisfied.

Part Four: Arm’s Length Transaction with Full Knowledge and No Participation

For any grants awarded before March 2011, when you began your service with the Department, this requirement can be satisfied.

For any grants awarded after March 2011, this requirement can be satisfied if:

- The grants from which Ohio Northern receives a benefit were awarded as a result of arm’s length transactions;
- You were not involved, as the Department Chief Counsel or Director, in any Department discussions or decisions regarding current grants from which Ohio Northern receives a benefit;
- You will not be involved, as the Department Chief Counsel or Director, in any Department discussions or decisions regarding future grants from which Ohio Northern receives a benefit; and
- The Department’s legal counsel is informed about your interest in grants awarded to Ohio Northern.¹⁶

If the Department has a fair and objective procedure for determining whether to provide financing for a particular project, providing notice to prospective funding recipients, and selecting qualified projects, and does not give preference to organizations because Department officials are connected with them, you should be able to demonstrate that this requirement has been satisfied.¹⁷

If you are able to meet all four parts of the exception in R.C. 2921.42(C), you would not be in violation of R.C. 2921.42(A)(4). However, you must comply with other provisions of the Ethics Law while you serve as a Trustee.

Using Public Authority or Influence to Benefit a Private Entity

The Ethics Law prohibits a public official or employee from using the authority or influence of her public position to benefit her private interests. If you serve as a Trustee for Ohio Northern, you will be prohibited from using your position as the Director of the Department to secure any future benefit for Ohio Northern. There are two applicable statutes.

The first is R.C. 2921.42(A)(1), which provides that no public official shall knowingly:

Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public official's business associates has an interest.

R.C. 2921.42(A)(1) prohibits you from authorizing a public contract in which you have an interest. As a Trustee of Ohio Northern, you would have a fiduciary interest in any Department contracts from which Ohio Northern receives a benefit.¹⁸ Therefore, R.C. 2921.42(A)(1) will prohibit you from participating, in any manner, formally or informally, in the consideration, recommendation, or authorization of any Department grant awards or other funding if Ohio Northern is the lead grant applicant or a collaborator that receives funds from the grant.

The other applicable statute is R.C. 102.03(D), which 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.¹⁹ Any positive or negative financial impact of a decision made by a public entity is a thing of value.²⁰

If a public employee serves as a trustee of a private entity, her objectivity and independence of judgment as a public employee could be impaired when matters before her public agency definitely and directly affect the private entity.²¹ For that reason, R.C. 102.03(D) prohibits the employee from participating in matters that affect any private entity she also serves.²² R.C. 102.03(D) prohibits you, while you serve as an Ohio Northern Trustee, from participating in matters before the Department that definitely and directly affect Ohio Northern's interests.

Withdrawal

Whenever R.C. 102.03(D) prohibits a public employee from participating in matters, she must withdraw from those matters.²³ This means that the employee cannot participate in the decision-making, deliberations, or formal or informal discussions on the matter. The employee cannot make or influence decisions herself, and cannot delegate her decision-making authority to subordinate employees.

If a state department's director is required to withdraw from a matter because of a conflict of interest, the Commission has determined that she can be considered "absent" with respect to that matter.²⁴ Because the director is "absent" as a result of withdrawal, R.C. 121.05 statutorily enables the state department's assistant director to "act as director."²⁵

Therefore, if any matter affecting Ohio Northern were to come before you as the Director of the Department, you must withdraw from the matter. The Department's Assistant Director must then act as the Director on that matter.

Your letter indicates that you are familiar with the withdrawal requirement for a department director. You have stated that, if you become an Ohio Northern Trustee, you plan to withdraw from matters before the Department that involve Ohio Northern. You stated that this action is intended to result in you being deemed absent from the Department in order to ensure that the Department's Assistant Director will act in your place. If you follow this planned course of action, it will eliminate any conflict of interest issues under R.C. 102.03(D).

You stated that you also plan to abstain from discussing or voting on matters before Ohio Northern that involve the Department or its successor agency. The Ethics Law does not require you to withdraw from matters before Ohio Northern that affect the Department.²⁶ However, Ohio Northern may have its own policies or procedures that govern when an Ohio Northern Trustee is required to withdraw from matters before Ohio Northern.

Other Considerations

There are two other provisions in the law that will apply to you while you serve as the Department Director and an Ohio Northern Trustee. First, the representation restriction in R.C. 102.04(A) prohibits you from receiving compensation from any person to perform services on matters that are before the Department or any other state agency.²⁷ You cannot accept compensation from Ohio Northern to perform any services for it on matters that are before the Department or any other state agency. There is an exception to this requirement if Ohio Northern would like you to represent its interests before a state agency other than the Department. Advisory Opinion No. 2007-03, which explains this exception, is attached to this opinion.

Second, R.C. 102.03(B) prohibits you from disclosing or using any confidential information acquired during your service as a Department employee.²⁸ You cannot disclose the confidential information to Ohio Northern officials or employees.

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

cc: Diane Lease, Chief Legal Counsel, Department of Development
D. Michael Grodhaus, Chief Legal Counsel, Office of Governor John R. Kasich

Enclosure: Advisory Opinion No. 2007-03

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

¹ www.onu.edu/about_onu/onu_green.

² R.C. 2921.01(A)(1); Ohio Ethics Commission Advisory Opinion No. 90-003.

³ Adv. Op. No. 90-003.

⁴ RC. 2921.42(I)(1); Adv. Op. No. 87-003.

⁵ See, e.g., Ohio Ethics Commission Advisory Opinions No. 2009-06, 2001-02, 92-014, and 87-004; *State v. Lordi* (2000), 140 Ohio App.3d 561, 569, discretionary appeal not allowed, 91 Ohio St.3d 1523, 91 Ohio St.3d 1526, 91 Ohio St.3d 1536, motion for reconsideration denied, 92 Ohio St.3d 1422 (2001).

⁶ An officer, chief administrative official, or member of the board of an organization has a fiduciary interest in the contracts of the organization *even if* the individual is not compensated for the service. See Adv. Ops. No. 81-001, 92-004, and 96-005.

⁷ Adv. Op. No. 2009-06.

⁸ R.C. 2921.42(C)(2).

⁹ R.C. 2921.42(C)(2).

¹⁰ Adv. Ops. No. 82-007 and 88-008.

¹¹ Id.

¹² Adv. Op. No. 88-008.

¹³ See Adv. Op. No. 93-008 and 2001-02.

¹⁴ R.C. 2921.42(C)(3).

¹⁵ Adv. Ops. No. 84-011 and 2001-02.

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¹⁶ R.C. 2921.42(C)(4).

¹⁷ Adv. Op. No. 84-011.

¹⁸ See Adv. Op. No. 92-004.

¹⁹ R.C. 1.03, 102.01(G).

²⁰ Adv. Op. No. 2007-01.

²¹ 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.).

²² Adv. Ops. No. 91-006 and 2007-01.

²³ Adv. Op. No. 89-010.

²⁴ Adv. Op. No. 2011-02.

²⁵ Id.

²⁶ Adv. Op No. 75-013.

²⁷ Adv. Op. No.2007-03.

²⁸ Adv. Op. No. 88-009.