

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

December 29, 2003 Informal Opinion 2003-INF-1229-3

Larry D. DeJane, Chair
Investment Committee
Youngstown State University

[REDACTED]

Dear Mr. DeJane:

In a letter that was received by the Ohio Ethics Commission on August 14, 2003, you asked whether the Ohio Ethics Law and related statutes prohibit Youngstown State University (YSU) employees or appointed officials who serve on YSU's Investment Committee (Investment Committee) of the Finance and Facilities Committee of the Board of Trustees or the Investment Advisory Screening Committee (Screening Committee) from participating in the hire of an Investment Advisor.

At its meeting on November 14, 2003, the Ethics Commission addressed your questions concerning YSU officials and employees who have stockholding, fiduciary, employment, and customer relationships with the financial institutions that seek to be hired as the Investment Advisor. This advisory opinion will address your remaining questions involving Investment Committee members, one of whom is a partner with a law firm that serves as general counsel to a financial institution that is seeking to be hired as the Investment Advisor and one of whom serves on an investment committee of a non-profit corporation that invests with one or more of the interested financial institutions.

Brief Answer

As explained below, an Investment Committee member who is a partner with a law firm that serves as general counsel to a financial institution that is seeking to be hired as the Investment Advisor is prohibited from voting and otherwise participating in discussions and deliberations on the issue of hiring an Investment Advisor. An Investment Committee member who serves on an investment committee of a non-profit corporation that invests with one or more of the interested financial institutions is not prohibited from voting and otherwise participating in discussions and deliberations on the issue of hiring an Investment Advisor.

Facts

R.C. 3345.05(C) requires that the board of trustees of state supported universities adopt an investment policy and establish an investment committee to advise the board on its investments. R.C. 3345.05(D) enables an investment committee to hire an Investment Advisor. R.C. 3345.05(D) also establishes the qualifications for an Investment Advisor.

You state that the YSU Board of Trustees, pursuant to R.C. 3345.05, has adopted an investment policy and established an Investment Committee. The YSU Investment Committee is a subcommittee of the Finance and Facilities Committee. The YSU Finance and Facilities Committee is comprised of the entire YSU Board of Trustees. The President of YSU is a non-voting ex-officio member of the Investment Committee. YSU employees aid the Investment Committee as needed.

You state that the Investment Committee submitted requests for proposals for the hiring of an Investment Advisor and that fourteen financial institutions responded. A screening committee comprised of YSU employees and consultants will evaluate the proposals and recommend a list to the Investment Committee, which will select the Investment Advisor.

Partner with a Law Firm that Serves as General Counsel

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.

Officials and employees of state universities whose duties are not restricted to serving as a teacher, instructor, professor, or educator whose position does not involve the performance of, or authority to perform, administrative or supervisory functions are "public officials or employees" for purposes of R.C. 102.03(D) and (E). See Ohio Ethics Commission Advisory Opinions No. 77-005 and 93-017.

The term "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. The client fees generated by the practice of law fall within the definition of "anything of value" for purposes of R.C. 102.03(D) and (E). Adv. Ops. No. 86-004, 89-015, and 89-016.

R.C. 102.03(D) prohibits a public official or employee from using his position to secure anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the public agency with which he serves, or anything of value that could impair the official's or employee's objectivity and independence of judgment with respect to his official actions and decisions for the agency with which he serves. Adv. Ops. No. 84-010, 87-006, and 87-009.

R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the public agency with which he serves, or where the receipt of such a thing of value could impair his objectivity and independence of judgment with regard to his official decisions and responsibilities. Adv. Ops. No. 86-011 and 89-006. The application of R.C. 102.03(D) and (E) is dependent on the facts and circumstances of each individual situation. Adv. Ops. No. 87-007 and 89-003.

In the instant situation, an Investment Committee member is a partner with a law firm that serves as general counsel to a financial institution that is seeking to be hired as the Investment Advisor. Therefore, the financial institution that is seeking to do business with YSU as the Investment Advisor is a client and source of legal fees for the law firm in which the Investment Committee member is a partner.

In Advisory Opinion No. 89-016, the Ethics Commission discussed the relationship between a public official who is an associate or employee of a law firm, and the law firm for which he works and stated that:

The relationship between [a public official] and his employing law firm and law partners or associates indicates that his objectivity or independence of judgment could be impaired in considering a matter in which his law firm and law partners or associates are interested, and that R.C. 102.03(D) would prohibit [the public official] from participating in matters in which his law firm is involved even though he does not personally receive a share of the client fees.

See Adv. Ops. No. 86-004, 88-005, and 89-008.

R.C. 102.03(D) would, therefore, prohibit the Investment Committee member who is a partner with a law firm that serves as general counsel to a financial institution that is seeking to be hired as the Investment Advisor from voting, discussing or deliberating, or otherwise participating, formally or informally, in the consideration of matters pending before the Investment Committee, even if the Investment Committee member does not either represent the institution or personally receive a share of the client's fees. Adv. Ops. No. 89-016 and 90-008.

The Ethics Commission has also explained that R.C. 102.03(D) prohibits a public official from reviewing, in his capacity as a public official or employee, work that members of his law firm have prepared. Adv. Ops. No. 89-016 and 90-008. If a public official were to review and

act upon matters in which members of his law firm have earned client fees, then the official would be subject to an inherent conflict of interest which could impair his objectivity and independence of judgment in carrying out his official decisions and responsibilities with respect to that matter. Accordingly, R.C. 102.03(D) prohibits the Investment Committee member who is a partner with a law firm that serves as general counsel to a financial institution that is seeking to be hired as the Investment Advisor from taking any action, formally or informally, with regard to a matter in which a member of his law firm has provided legal services.

Further, R.C. 102.03(E) would prohibit the Investment Committee member who is a partner in a law firm from accepting a distributive share of the client fees earned by members of his law firm for representing clients on matters before YSU, including representation related to the contract for an Investment Advisor. Adv. Op. No. 90-008.

In addition to the prohibition imposed by R.C. 102.03(D), R.C. 102.04(A) prohibits the Investment Committee member who is a partner with a law firm that serves as general counsel to a financial institution that is seeking to be hired as the Investment Advisor from receiving compensation for representing a party or rendering services personally on any matter pending before the Investment Committee or any entity of YSU. See R.C. 102.04(A). However, the issue of the Investment Committee member representing parties where the prohibitions of R.C. 102.04(A) would be implicated is not raised by the facts and circumstances you have described and need not be addressed further.

Therefore, if the Investment Committee member who is a partner with a law firm that serves as general counsel to a financial institution retains his position on the Investment Committee, he is required, by R.C. 102.03(D) and (E), to withdraw from voting and otherwise participating in discussions and deliberations on the issue of hiring an Investment Advisor. Adv. Ops. No. 87-004 and 89-006. This restriction creates an irreconcilable conflict of interest that would prevent the Investment Committee member who is a partner with a law firm that serves as general counsel to a financial institution seeking to be hired as the Investment Advisor from fulfilling the duties that he is charged with performing as an Investment Committee member and, thus, would prevent him from being on the Investment Committee.

Your question regarding the member of the Investment Committee who is a partner in a law firm may also raise issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. These issues are not within the jurisdiction of the Ohio Ethics Commission, but should be referred to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

Service on an Investment Committee

The remaining question is whether a YSU official or employee who serves on the investment committee of a non-profit corporation that invests with an interested financial institution is prohibited from participating in the hire of an Investment Advisor.

As explained in the previous advisory opinion issued to you and in the issue addressed above, in order for the Ohio Ethics Law and related statutes to prohibit a public official or employee from participating in a matter before his public agency, he must have either a definite and direct personal financial or fiduciary interest in a public contract with his public agency or have a personal, business, or fiduciary relationship with a party that will realize a definite and direct pecuniary benefit as a result of his public agency's action.

In the instant situation, a YSU official or employee who serves on the investment committee of a non-profit corporation that invests with an interested financial institution has no personal, business, or fiduciary relationship with the financial institution. The fact that he serves a non-profit corporation and a public institution that would both be customers of same financial institution would not, under the facts that you have presented, trigger the prohibitions imposed by R.C. 102.03(D) and (E).

Conclusion

As explained above, an Investment Committee member who is a partner with a firm and who serves as general counsel to a financial institution that is seeking to be hired as the Investment Advisor is prohibited from voting and otherwise participating in discussions and deliberations on the issue of hiring an Investment advisor. An Investment Committee member who serves on an investment committee of a non-profit corporation that invests with one or more of the interested financial institutions is not prohibited from voting and otherwise participating in discussions and deliberations on the issue of hiring a Investment advisor.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on December 17, 2003. The Commission commends Youngstown State University for requesting guidance before any actions that could be prohibited by the Ethics Law were taken.

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 contact this Office again.

Sincerely,



John Rawski
Staff Attorney