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April 27, 2010

Informal Opinion 2010-INF-0427-2

Michelle Chavanne
Assistant General Counsel
Ohio Board of Regents

Dear Ms. Chavanne:

On January 22, 2010, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that the Chancellor of the Ohio Board of Regents (OBR) expects to hire a Vice Chancellor of Academic Affairs and System Integration (Vice Chancellor). You have asked whether the Chancellor can hire a person for this position whose spouse is a college dean at a public institution of higher education.

Brief Answer

As explained below, the Ethics Law and related statutes do not prohibit the Chancellor from hiring, as Vice Chancellor, a person whose spouse is a college dean at an institution of higher education. However, if the person is hired as Vice Chancellor, R.C. 102.03(D) prohibits the Vice Chancellor from authorizing, approving, voting upon, discussing, deliberating, recommending, or otherwise using the authority or influence inherent in the position in any academic issue before OBR if the Vice Chancellor's spouse would receive a definite and direct financial benefit as a result of the OBR decision.

Facts

You have explained that the Vice Chancellor would represent the Chancellor at meetings and conferences and perform many duties regarding academic issues that would affect all Ohio's colleges and universities. However, the Chancellor is the ultimate decision-making authority.

You stated that a candidate for the position has a spouse who is a dean at a college of education at a public institution of higher education. You stated that it is likely that the college where the candidate's spouse is a dean will seek to have OBR approve new programs or award grants or scholarships. You stated that this situation could create a possible conflict if this candidate is hired as Vice Chancellor because the Vice Chancellor would have duties regarding

these issues. You have asked whether the Chancellor can assign an Associate Vice-Chancellor to report directly to the Chancellor on these issues to avoid possible conflicts under the Ohio Ethics Law and related statutes.

Conflict of Interest

A Vice Chancellor of the OBR is a public official, as defined in R.C. 102.01(B) and (C), who is subject to 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.

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. R.C. 1.03, 102.01(G). The Ethics Commission has held that a position of employment and the beneficial or detrimental economic impact of a decision by a public entity 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.

R.C. 102.03(D) prohibits public officials or employees from using the authority or influence of their positions to secure anything of value for themselves, family members, business associates, or others where there is a conflict of interest. Adv. Ops. No. 79-002, 80-004, and 89-006. R.C. 102.03(D) prohibits any action or inaction by public officials or employees that could result in securing a substantial and improper thing of value.

Institutions of higher education are interested in academic issues before OBR and are, in certain instances, subject to the direct control and regulation of OBR. See R.C. 3333.04 (OBR formulates a master plan for higher education in the state, approves or disapproves the establishment of institutions and branches of higher education, recommends the nature of the programs, research, and services to be offered by, and approves or disapproves all new degree programs at, state-assisted institutions); R.C. 3333.06 (OBR does all things necessary for participation in federal acts relative to the construction of higher educational facilities); and R.C. 3333.071 (OBR approves expenditures for land for state-assisted institutions).

The Ethics Commission has explained that public officials and employees must exercise their duties without hindrance by any improper influence. Adv. Op. No. 89-010. The prohibition imposed by R.C. 102.03(D) serves the public interest in effective, objective, and impartial government by preventing the creation of a situation that may impair the objectivity and independence of judgment of a public official or employee, and therefore, the effectiveness of the public agency with which such official or employee serves. Adv. Ops. No. 89-014 and 90-002. The application of R.C. 102.03(D) is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 87-007 and 89-003.

The Ethics Commission explained, in Advisory Opinion No. 92-010, that R.C. 102.03(D) prohibits public officials and employees from participating, formally or informally, in issues that definitely and directly affect the private financial interests of their close family members because, in such circumstances, their objectivity and independence of judgment could be impaired. See also Adv. Ops. No. 90-004, 91-004, and 92-012. The law applies whenever matters before an official affects his or her close family members. See generally Adv. Ops. No. 79-008 (spouse), 88-005 (children), and 98-002 (siblings).

For example, in Advisory Opinion No. 2009-02, the Ethics Commission held that, when a matter before a public agency affects the *employer* of a public official's family member, and the family member would receive a definite and direct benefit or detriment from the agency's decision on the matter, R.C. 102.03(D) prohibits the official from participating in the agency's decision-making on the matter. See also Adv. Op. No. 89-008. If a public official's family member will not receive a definite and direct benefit from, or suffer a definite and direct detriment as a result of, a matter affecting the family member's employer, R.C. 102.03(D) does not prohibit the official from participating in the matter. *Id.*

Application to Presented Facts

If the candidate were to become employed as Vice Chancellor, then R.C. 102.03(D) would prohibit the Vice Chancellor from authorizing, approving, voting upon, discussing, deliberating, recommending, or otherwise using the authority or influence inherent in the position of Vice Chancellor in any academic issue before OBR if the Vice Chancellor's spouse would receive a definite and direct financial benefit as a result of the decision. This prohibited activity would include participating in any formal or informal discussions with OBR officials or employees. But R.C. 102.03(D) would not prohibit the Vice Chancellor from participating in academic issues that affect the college where the Vice Chancellor's spouse is a dean if the Vice Chancellor's spouse receives no definite and direct financial benefit or detriment as a result of the OBR decision.

Withdrawal

The Ethics Commission has held that whenever R.C. 102.03(D) prohibits public officials or employees from participating in an issue, they may withdraw from the issue that would create the conflict. Adv. Ops. No. 89-010. In such an instance, the issue creating the conflict must be resolved by an individual who is superior to, and a check upon the actions of, the official or employee who faces the conflict. Adv. Op. No. 90-010. Further, a public official's or employee's withdrawal from consideration of issues before the public agency served may be accomplished only if such a withdrawal: (1) does not interfere with the person's performance of assigned duties; and (2) is approved by the public agency. Adv. Op. No. 90-002. In order to obtain approval, officials or employees who want to withdraw must review each situation with their supervisors and the chief counsels at their public agencies. Adv. Op. No. 96-004.

In your letter, you ask whether the Chancellor could assign an Associate Vice Chancellor to report directly to the Chancellor on academic issues that would affect the college of education at the public institution of higher education where the candidate's spouse is a dean. The method you have proposed, and requiring the Vice Chancellor to withdraw from all of these academic issues, goes beyond what is required to comply with R.C. 102.03(D) and would help remove any appearances of favoritism or impropriety.

However, it must be stressed that academic issues affecting the college where the candidate's spouse is a dean must be reviewed and decided by OBR officials who are superior to the Vice Chancellor on the OBR chain of command or who will not report to the Vice Chancellor regarding these issues. The Vice Chancellor must not take any action, or make any recommendations, regarding matters from which the Vice Chancellor has withdrawn. Adv. Op. No. 92-004. If, as you propose, these matters are assigned to an Associate Vice Chancellor by the Chancellor, and the Associate Vice Chancellor reports to the Chancellor, rather than the Vice Chancellor, on the matters, the Vice Chancellor can demonstrate effective withdrawal provided that he or she takes no action on the matters.¹

Conclusion

As explained above, the Ethics Law and related statutes do not prohibit the Chancellor from hiring, as Vice Chancellor, a person whose spouse is a college dean at an institution of higher education. However, if the person is hired as Vice Chancellor, R.C. 102.03(D) prohibits the Vice Chancellor from authorizing, approving, voting upon, discussing, deliberating, recommending, or otherwise using the authority or influence inherent in the position in any academic issue before OBR if the Vice Chancellor's spouse would receive a definite and direct financial benefit as a result of the OBR decision.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 22, 2010. 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,



John Rawski
Staff Advisory Attorney

¹ The Chancellor must clearly designate, in the event of his absence, to which official, at or above the level of the Vice Chancellor, the Associate Vice Chancellor will report on these matters.