

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

February 26, 2007

Informal Opinion 2007-INF-0226

Jonathan A. Allison

Dear Mr. Allison:

In a letter received by the Ohio Ethics Commission on January 16, 2007, you explained that you were the chief of staff for former Governor Bob Taft. You have asked for an advisory opinion regarding the application of the post-employment restrictions of the Ohio Ethics Law and related statutes to your contract to provide government and public affairs consulting services for the University of Akron (University). Specifically, you asked if you are prohibited from representing the University in matters involving the state budget, grant and regulatory requests, the North East Ohio Universities Collaboration and Innovation Study Commission (NEO Commission), and constitutional statewide offices.

You have explained that you resigned from your position with the Governor's Office effective December 29, 2006. On November 6, 2006, you sent a formal notice to former Governor Taft and Legal Counsel, Betsy Schuster, recusing yourself from any matters involving the University.

Brief Answer

As explained more fully below, the Ethics Law does not prohibit you from providing government consulting services for the University and representing it before any state agency on matters in which you did not personally participate, including new matters. However, the "Revolving Door" provisions contained in R.C. 102.03(A)(1) prohibit you, for one year from the date you left your position with the Governor's Office, from representing the University, or any other person, before any public agency, on any matter in which you personally participated as the Governor's chief of staff or as a member of any board or commission. This restriction applies to representation before any public agency, including, but not limited to, the Governor's Office where you were formerly employed.

The Revolving Door Prohibition—R.C. 102.03(A)(1)

Division (A) of Section 102.03 of the Revised Code, the “Revolving Door” prohibition of the Ohio Ethics Law, imposes restrictions on the ability of former public officials and employees to represent clients after leaving public service. R.C. 102.03(A)(1) provides:

No present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion. (Emphasis added.)

R.C. 102.03(A)(1) is designed to protect the public interest by prohibiting situations from arising where a former public official or employee “will engage in a conflict of interest or realize personal gain at public expense from the use of ‘inside’ information.” State v. Nipps, 66 Ohio App.2d 17, 21 (1979). The Court in State v. Nipps held that the Revolving Door prohibition was constitutional, and determined: “The state has a substantial and compelling interest to restrict unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government.”

As the former chief of staff for the former Governor, you are a “public official” subject to the revolving door prohibition for twelve months after you left the Governor’s Office. R.C. 102.01(B) and (C). A “person,” for purposes of R.C. 102.03(A)(1), includes the University of Akron. R.C. 1.59(C). See Ohio Ethics Commission Advisory Opinions No. 82-002, 89-003, and 93-011 (depending upon the level and extent of personal participation of the individual PUCO commissioner or employee, it is likely that R.C. 102.03(A) would prohibit a former PUCO commissioner or employee from serving as Consumers’ Counsel.)

The term “represent” is defined in R.C. 102.03(A)(5) to include “any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person.” (Emphasis added.) Adv. Op. No. 86-001. The prohibition in R.C. 102.03(A)(1) applies to any “matter” in which you personally participated in your position with the Governor’s Office.

The term “matter” is defined, in R.C. 102.03(A)(5), to include “any case, proceeding, application, determination, issue, or question.” “Matter” includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, or investigation, a legal proceeding, an application, and a settlement of a dispute or question. Adv. Op. No. 99-001. “Matter” also includes such items as a dispute of special or public importance and a controversy submitted for consideration. Id.

However, “matter” is not so broadly applied as to include a general subject matter. *Id.* The law also does not prohibit a former public official or employee from representing an employer or client on new matters or matters in which he had not participated as a public official or employee. Adv. Op. No. 84-005.

Notably, R.C. 102.03(A) prohibits a public official or employee, for one year after public employment, from representing any person on a matter in which he personally participated, before any public agency, and not just before the agency with which he was previously employed. Adv. Ops. No. 86-001, 87-001, and 92-005. This would include the Governor’s Office, the general assembly, the courts, and all state departments, boards, and commissions, and any other public agency at the state or local level.

“Personal participation” includes “decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion,” and includes the direct supervision of other public officials and employees, including employees of the Governor’s Office. Adv. Op. No. 91-009. Where your role, as chief of staff, in any particular matter was to implement the policies and decisions of the Governor’s Office, your activities would involve the substantial exercise of administrative discretion. Those activities would be “personal participation” in the matter. Where your role, as chief of staff, in any matter was merely to communicate or provide information about the Office’s policies and decisions, without any exercise of your administrative discretion, that activity would not be considered personal participation.

Application of the Restriction—Budget Matters

In your letter, you asked about restrictions that apply to you regarding the biennial budget for Fiscal Years 2008 and 2009. You explained that you were a part of a group within the former Governor’s Office that consulted with the Office of Budget and Management (OBM) and set the parameters of OBM’s “Operating Budget and Guidance for Fiscal Years 2008 and 2009.” You explained that this document provided each state agency with the general parameters under which it could submit its proposed budget to the Taft OBM for each year of the coming biennium. After agencies made submissions, there was an appeals process administered by OBM in which you stated that you had limited personal involvement in Department of Development and Ethics Commission appeals of budget limits. You indicated that your participation with the FY08-09 budget was limited to consultation on guidance to agencies during the Taft Administration. You also noted that the new Administration has the discretion to accept or reject agency submissions and you have not played any role in assisting this Administration with its budget proposal.

R.C. 102.03(A)(1) prohibits you, within one year of the date you left your position with the Governor’s Office, from representing the University, or any other person, on any matter in which you personally participated, through substantial exercise of administrative discretion, while you were employed with the Governor’s Office. In this situation, you participated in the preparation of a document that provides details about the process and parameters of the general

budget request process to be used by all state agencies. However, based upon your description, where you did not participate in individual or specific budgetary issues or questions directly pertaining to the University within the FY08-09 budget, you are not prohibited from representing the University regarding the FY08-09 biennial budget.

Situations that could give rise to revolving door restrictions would include, *e.g.*, if you were asked to represent the University before the Controlling Board on a capital improvement project, or a project to be funded, in which you had personally participated as chief of staff, you would be prohibited from engaging in representation on those matters. If you were asked to represent the University in seeking emergency legislation, and you had personally participated as chief of staff in any matter directly related to the request, you would be prohibited from engaging in the representation.

In contrast, each biennial budget is a separate matter. The fact that you personally participated in one biennial budget does not mean that you have personally participated in future budgets.

Application of the Restriction—Other Matters

You also asked if you are prohibited from interacting with the work of the NEO Commission. The NEO Commission was created under HB 699 to recommend collaborations among certain state universities, including the University of Akron, and develop a more coordinated approach to the delivery of higher education in Northeast Ohio while maintaining the separate identities of the institutions. You stated that, because you had recused yourself from matters involving the University, you did not participate in the creation of the NEO Commission or the selection of the NEO Commission members. Where you did not personally participate in any matters regarding the NEO Commission, you are not prohibited from representing a party on matters involving the NEO Commission.

Additionally, you asked what restrictions apply to you with respect to representing the University before constitutional statewide offices that you interacted with while employed by the Governor's Office, specifically, the Attorney General, Auditor of State, Treasurer of State, and Secretary of State's Office. You are not prohibited from representing the University before these agencies on matters in which you did not personally participate. However, R.C. 102.03(A)(1) prohibits you from representing the University, before any public office including these agencies, on matters in which you personally participated as the Governor's chief of staff.

Finally, you asked if you are prohibited from representing the University or any other client on state grant or regulatory matters in which you did not participate or that are new matters that were not pending during the Taft Administration. The law also does not prohibit you from representing any person on new matters or matters in which you had not participated as a public official or employee.

Profiting From a Public Contract—R.C. 2921.42(A)(3)

The prohibition of R.C. 2921.42(A)(3) is pertinent whenever a former public official seeks employment, consulting contracts, or business opportunities with a party that has received funding from his former public agency. R.C. 2921.42(A)(3) provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

As the former chief of staff of the Governor's Office, you are a "public official" for purposes of R.C. 2921.42 and subject to the prohibitions of R.C. 2921.42(A)(3). See R.C. 2921.01(A).

The term "public contract" is defined for purposes of R.C. 2921.42(G)(1)(a) to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for a political subdivision of the state. Although it does not appear that you participated in the authorization of any related public contracts in your position with the Governor's Office, you should note that if there were situations in which you participated in the authorization of public contracts, the restrictions in R.C. 2921.42(A)(3) would apply.

The term "profit" as used in R.C. 2921.42(A)(3) connotes a financial gain or benefit. Adv. Ops. No. 92-013 and 92-017. For example, you would profit from a contract awarded to an entity with which you are a consultant or by which you are employed: (1) the establishment or operation of the entity is dependent upon receipt of the contract; (2) the creation or continuation of your position with the entity is dependent upon the award of the contract; (3) the entity would use funds from the contract to compensate you or as a basis for your compensation; or (4) you would otherwise profit from the award of the contract to the entity. See Adv. Ops. No. 87-004, 88-008, and 89-006.

For purposes of this prohibition, the Ethics Commission has stated that a public official or board "authorizes" a contract where the contract could not have been awarded without the approval of the official, or the office or position in which the public official serves, or the board on which he sits. See Adv. Ops. No. 88-008, 91-009, and 92-017. This prohibition applies even if the public official does not take any action with respect to the award of the contract. Adv. Op. No. 2000-02.

Disclosure of Confidential Information—R.C. 102.03(B)

Division (B) of Section 102.03 of the Revised Code reads as follows:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

Pursuant to this section, you are prohibited from disclosing or using, without appropriate authorization, any confidential information that you acquired in the course of your official duties. No time limitation exists for this prohibition. Adv. Op. No. 88-009. It is effective while you serve in the public position and after you leave public employment. Id.

You should also be aware that Ohio law requires former state elected officials and specified staff members to disclose to the Joint Legislative Ethics Committee (JLEC) certain information for a 24-month period after leaving public service or public office. You should contact JLEC for more information on this requirement.

Conclusion

As explained more fully above, the Ethics Law does not prohibit you from providing government consulting services for the University and representing it before any state agency on matters in which you did not personally participate, including new matters. However, the "Revolving Door" provisions contained in R.C. 102.03(A)(1) prohibit you, for one year from the date you left your position with the Governor's Office, from representing the University, or any other person, before any public agency, on any matter in which you personally participated as the Governor's chief of staff or as a member of any board or commission. This restriction applies to representation before any public agency, including, but not limited to, the Governor's Office where you were formerly employed.

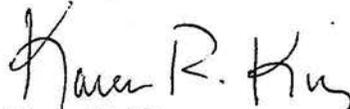
Therefore, as long as you did not personally participate in matters pertaining to the NEO Commission, the regulatory and grant requests you described, or the matters pending before the constitutional statewide offices that you listed, you would not be prohibited from representing the University on those matters. Furthermore, as long as you did not participate in individual or specific budgetary issues pertaining to the University, you are not prohibited from representing the University regarding the new biennial budget.

However, you should be aware that R.C. 2921.42(A)(3) prohibits you from profiting, within one year from the date you left your public position, from any public contracts authorized by you, or by a board or committee of which you were a member. Additionally, R.C. 102.03(B) prohibits you from using or disclosing confidential information that you acquired while in your public position. There is no time limit on this prohibition.

Jonathan A. Allison
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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on February 23, 2007. 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,



Karen R. King
Staff Advisory Attorney

Cc: Jennifer A. Hardin
Chief Advisory Attorney

David E. Freel
Executive Director