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July 26, 2011

Informal Opinion 2011-INF-0726-2

Andre T. Porter
Commission Member
Public Utilities Commission of Ohio

Dear Mr. Porter:

On April 28, 2011, the Ohio Ethics Commission received your request for an advisory opinion. In your request, you explained that:

- You have been appointed as a member of the Public Utilities Commission of Ohio (PUCO);
- You serve on the boards of directors of non-profit organizations;
- The non-profit organizations are members of associations; and
- The associations have intervened in matters before the PUCO.

Question and Answer:

Question: If you continue to serve on the organizations' boards, and are not informed of or direct the activities of the associations, can you participate in PUCO cases on which the associations have intervened?

Answer: Yes. You are not prohibited from participating in the PUCO's consideration of or decisions on these cases, provided that: (1) you do not hold a fiduciary position with the associations; and (2) the organizations in which you do hold a fiduciary position have not taken positions on the cases in which the associations have intervened.

However, if the organizations in which you hold fiduciary positions are definitely and directly affected by the PUCO's action in any case, in a manner that is differential from the affect on all other individuals, R.C. 102.03(D) prohibits you from participating in the PUCO's consideration of or decisions on the case.

Securing Things of Value for an Interested Party —R.C. 102.03(D)

A member of the PUCO is a public official¹ 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" includes money and every other thing of value.² "Anything of value" includes any definite and direct pecuniary benefit, or the avoidance of a detriment, resulting from the decisions of a public agency.³ A thing of value is of such a character as to manifest a substantial and improper influence on a public official if it could impair the official's objectivity and independence of judgment.⁴

Matters Affecting Nonprofit Organizations

The Ethics Commission has explained that R.C. 102.03(D) prohibits a public official from using the authority or influence of his position to secure anything of value for an organization that he serves in a fiduciary capacity.⁵ In Advisory Opinion No. 90-012, the Commission explained that, because of the close fiduciary relationship between a public official and an organization he serves as a board member or trustee, any benefit to the organization could affect his objectivity and independence of judgment. If an agency's decision on a matter before it will definitely and directly affect the interests of the organization, or the organization has taken an official position on the matter, R.C. 102.03(D) prohibits the official from participating in the matter.

Therefore, R.C. 102.03(D) prohibits you from participating in any cases before the PUCO that definitely and directly affect the interests of the nonprofit organizations that you serve as a board member. R.C. 102.03(D) does not prohibit you from participating in matters that affect the organization in the same manner as all other individuals, businesses, or organizations in the area of the state where the organization is located.

Specifically, R.C. 102.03(D) would prohibit you from participating in any case before the PUCO if an organization of which you are a board member:

- (1) Is a party to the case;
- (2) Has intervened on the case;
- (3) Has taken an official position on the case, even if not a party to or intervenor on the case; or
- (4) Is definitely and directly affected by the case, in a manner that is differential to all other individuals, businesses, or organizations affected by the case.

Matters Affecting Association

You have explained that the organizations you serve are members of associations. It is the associations, rather than the organizations, that have intervened in PUCO cases. You are not a member of the boards or an officer of the associations. Further, you are not personally a member of the associations. Rather, you serve on the boards of organizations that are members of the associations.

There is an exception to the conflict of interest law, in R.C. 102.03(J), which provides:

[T]he membership of a public official or employee in an organization shall not be considered, in and of itself, to be of such a character as to manifest a substantial and improper influence on the public official or employee with respect to that person's duties. . . . This division does not apply to a public official or employee who is an employee of an organization, serves as a trustee, director, or officer of an organization, or otherwise holds a fiduciary relationship with an organization. This division does not allow a public official or employee who is a member of an organization to participate, formally or informally, in deliberations, discussions, or voting on a matter or to use his official position with regard to the interests of the organization on the matter if the public official or employee has assumed a particular responsibility in the organization with respect to the matter or if the matter would affect that person's personal, pecuniary interests.

In other words, a public official who is a mere member of an organization will not be substantially and improperly influenced if a matter before his public agency affects the interests of the organization. If the official is a board member, officer, trustee, or employee of the organization, has assumed a particular responsibility in the organization with respect to a matter, or will be personally affected by the matter, the conflict of interest law prohibits the official from participating in the agency's consideration or decision on the matter. If the official is merely a member of the organization, the exception provides that he can participate in matters that affect the organization's interests.

While R.C. 102.03(J) does not apply directly to your situation because you are not individually a member of the associations, it does demonstrate that the General Assembly observed a difference in influence on an official when the official has a fiduciary role in an organization rather than a simple membership. In the situation you have described, you are even further removed from the interests of the associations, because you are not an individual member of the associations.

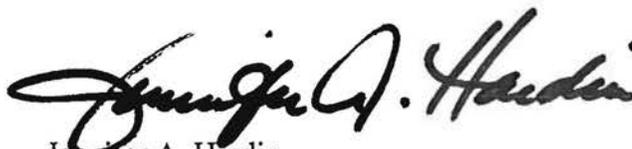
Therefore, R.C. 102.03(D) does not prohibit you from participating in cases before the PUCO if the associations you have described have intervened in the cases, provided that: (1) you do not hold a fiduciary position with the associations; and (2) the organizations in which you do hold a fiduciary position have not taken positions on the cases in which the associations have intervened become involved in the cases.

As a board member of organizations that are members of the associations, your objectivity and independence of judgment in matters before the PUCO affecting the associations will not be impaired. If, however, the organizations you serve as a trustee have taken a position on a case in which the associations have intervened, such as requesting that the associations become involved in particular cases, R.C. 102.03(D) prohibits you from participating in the case.

Finally, as stated above, if the organizations in which you hold fiduciary positions are definitely and directly affected by the PUCO's action in any case, in a manner that is differential from the affect on all other individuals, R.C. 102.03(D) prohibits you from participating in the PUCO's consideration of or decisions on the case. As a member of the organizations' boards, you are required to exercise caution and diligence to determine whether you are prohibited from participating in cases before the PUCO.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on July 26, 2011. This 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. It does not purport to interpret other laws or rules. If you have any questions or need additional information, please contact the Ethics Commission again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

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

1 Ohio Ethics Commission Advisory Opinion No. 93-011.

2 R.C. 1.03 and 102.01(G).

3 Adv. Ops. No. 88-004 and 92-019.

4 Adv. Op. No. 2001-03.

5 Adv. Ops. No. 85-012 and 90-002.