

OHIO ETHICS COMMISSION

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THE OHIO ETHICS LAW AND UNIVERSITY OF AKRON ADMINISTRATORS

David E. Freel, Executive Director
Ohio Ethics Commission
February 9, 2005

- I. INTRODUCTION TO THE ETHICS LAW AND RELATED STATUTES
- II. THE OHIO ETHICS COMMISSION – ASSISTANCE AND INFORMATION
 - A. Purpose and Composition – R.C. Chapter 102
 - B. Advice – Immunity through Written Opinions Prior to Action
 - C. Education
 - D. Financial Disclosure
 - E. Investigation – Confidential Fact-finding
- III. APPLICATION OF THE ETHICS LAW TO UNIVERSITY OFFICIALS AND EMPLOYEES
 - A. Conflicts of Interest --- R.C. 102.03 (D), (E), (F)
 - B. Supplemental Compensation --- R.C. 2921.43
 - C. Post-Employment Restrictions --- R.C. 102.03(A), (B); 102.04(A), (C)
 - D. Public Contract Restraints --- R.C. 2921.42; R.C. 102.04(B), (D)
 - E. Other Restrictions and Requirements
 - 1. Honoraria --- R.C. 102.03(H)
 - 2. Required copy of the Ethics Law --- R.C. 102.09(D)
- IV. SUMMARY

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I. THE OHIO ETHICS COMMISSION

A. **Statutory Authority**

- Created as part of Ohio's Ethics Law by the Ohio General Assembly in 1973
- Administers Chapter 102. and related statutes in R.C. 2921.42 and 2921.43 that govern public sector conflicts of interest
- One of three state ethics entities overseeing all public servants in Ohio

B. **Composition**

- The Commission is a bipartisan body comprised of six members who are appointed by the Governor and confirmed by the Senate. The members serve staggered, six-year terms, and are compensated \$75 per meeting, to a maximum of \$1800 per year. Current members are:
 - Prof. Josiah Blackmore, Columbus [Term expires: 01-01-2009]
 - Merom Brachman, Chair, Bexley [Term expires: 01-01-2005]
 - Sarah Brown, Vice Chair, Alliance [Term expires: 01-01-2008]
 - Dr. Robert Browning, Worthington [Term expires: 01-01-2007]
 - Prof. Ann Marie Tracey, Cincinnati [Term expires: 01-01-2010]
- The Ethics Commission employs an Executive Director who supervises a staff of 19 that carries out the duties of administering the Ethics Law on a day-to-day basis.

C. **Jurisdiction**

- The Ethics Commission administers the Ethics Law and related statutes for most public officials at the state and local levels of government.
- The Ethics Law created new ethical standards for public officials and employees by:
 1. Requiring personal financial disclosure,
 2. Creating new restrictions upon unethical conduct with *criminal* sanctions, and
 3. Establishing uniform review of ethics issues by statewide commissions of the three branches of government.
 - The Commission's jurisdiction extends to an estimated 18,700 elected officials and 590,000 public officials and employees at the state and local levels.
 - The Commission's jurisdiction *includes* private parties who do business with public servants.

D. **Purpose of the Ethics Law**

- To protect the public from the conflicts of interest of public servants.
 - Conflict of interest statutes generally apply to personal financial, family, or business matters.
- To assist public servants to be impartial in deciding what is in the public's interest; public servants cannot discuss or vote on matters where they have conflicts.
- To bolster the public's confidence in the actions of its public officials and employees.

E. Responsibilities of the Ohio Ethics Commission

The Commission has five major responsibilities under Ohio's Ethics Law: Education, Advice, Investigation, Financial Disclosure, and Legislative recommendation.

1. **Education:** The Commission provides free ethics education and informational materials related to ethics, conflicts of interest, and financial disclosure.
 - With only two staff assigned educational duties, the Commission delivered 161 educational sessions, generally well received, throughout Ohio in 2004.
 - The Commission maintains a website at www.ethics.ohio.gov where informational materials, its formal advisory opinions, and a subject-matter index can be found.
2. **Advice:** The Commission possesses the unique authority to interpret and provide advice regarding the Ethics Law. The Commission issues written advisory opinions on ethics statutes to public servants before they act.
 - Since 1974, the Commission has issued over 300 formal advisory opinions.
 - All written opinions provide full **immunity** to the person making the request, and others similarly situated, if they openly state the facts and comply with the opinion before they act. [*State v. Urbin* (2002), 148 Ohio App. 3d 293, appeal dismissed (2003), 100 Ohio St. 3d 1207]
 - This immunity protects those who comply with the advice provided in written responses, from criminal prosecution, civil actions, and actions for removal from office.
 - Two advisory attorneys are available to provide assistance, and receive hundreds of calls each month requesting general guidance based upon prior precedent.
 - The Commission does not give verbal advisory opinions.
 - In 2004, the Commission responded to 230 individual written requests for advice.
3. **Investigation:** The Commission investigates complaints and charges of alleged violations of the Ethics Law and related statutes.
 - Five special investigators, who often work with other law enforcement or prosecutorial agencies, an attorney, and an Investigative Chief, who often serves as an Assistant Special Prosecutor.
 - Among others, the 2004 and 1997 criminal prosecutions of a retirement system board member and a former chief of staff of a former Governor are examples of the application of this authority.
 - The Ethics Law requires this process to be kept confidential.
 - The Commission cannot independently prosecute public employees, but can seek alternative resolutions to less-serious violations.
 - The Commission receives and reviews 350-400 allegations a year, with 50-60 active investigations on average.
 - In FY 2002, 22 different individuals faced charges or prosecutorial review of their conduct.
4. **Financial Disclosure:** The Commission administers the financial disclosure requirement for most public employees required to file annual disclosure statements.
 - Approximately 10,500 forms are filed with the Commission annually.
 - Only three staff carry out these responsibilities and related communication to 1194 agencies.
 - Most elected state and local officials, candidates for office, and high-ranking state employees file a personal financial disclosure statement.
 - These statements disclose the previous year's financial information in order to remind the filer, and inform the public, of potential conflicts of interest.
 - Most forms filed with the Commission are available for public review.
 - The general filing deadline is April 15, with late fees assessed at \$10 for each day the statement is late, up to \$250; compliance rate of filing > 99%.
5. **Legislation:** The Commission recommends legislation to the General Assembly related to ethics, conflicts of interest, and financial disclosure.
 - S.B. 286 enabling public faculty to engage in technology entrepreneurship (2000)
 - S.B. 133 enacting reform in the public retirement systems (2004)

II. THE OHIO ETHICS LAW

A. General Protections to the Public Contained in the Ethics Law -- The Ohio Ethics Law contains *criminal* provisions, including those that:

- protect against the personal conflicts of interest of public servants;
- restrict personal, family, and business interests in public contracts;
- prohibit nepotism in public hires;
- condition post-employment activity for former officials and employees; and
- provide protections against influence peddling and misuse of public position for personal benefit.

General Rule: Whenever a public official's personal interests, or those of his family, or business associates are involved in a situation before him, there is an ethics issue.

B. **Conflict of Interest** - Three inter-related Revised Code sections, and other provisions:

1. R.C. 102.03(D) states that no public official shall use or authorize the use of the authority or influence of office 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 him with respect to his duties.
 - This prohibits a public official's active use of authority, including voting, discussing, deliberating, or formally or informally lobbying on matters of conflict to him.
 - Enforcement example of the former Chief of Staff of the former Governor [State v. Misfud (Oct. 9, 1997), Union C.P. No. 97-CR-0052, unreported]
2. R.C. 102.03(E) states no public official shall solicit or accept 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 her with respect to her duties.
 - This prohibits a public official's mere acceptance or solicitation of a substantial and improper thing of value.
 - Enforcement examples of former Ohio School Facilities Commission Director [State v. Fischer (July 9, 2003), Franklin Cty. M.C. No. 03 CRB-17044, unreported]; Superintendent of Consumer Finance [State v. Thomas (1990), Franklin Cty. M.C. No. 9007 CRB-017395, unreported]; and, former Mahoning County Commissioner [State v. Lordi (2000), 140 Ohio App. 3d 561, appeal denied (2001), 91 Ohio St. 3d 523, 91 Ohio St. 3d 1526, 91 Ohio St. 3d 1536, motions for reconsideration denied (2002), 92 Ohio St. 3d 1422]
3. Finally, R.C. 102.03(F) states that no person shall promise or give a public official 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 with respect to that person's duties.
 - *This has specific application to private parties that do business with public agencies. A private party is prohibited from giving a substantial thing of value to public officials they do or seek to do business with [OEC 90-001]*
 - Enforcement examples of private sector contractors [State v. Achterman (1999), Summit C.P. No. 99-10-2260, unreported; State v. Banks (Oct. 9, 1997), Union C.P. No. 97-CR-0051, unreported; State v. McClelland (1993), Muskingum C.P. No. CR93-233, unreported]
4. Key concepts underlying R.C. 102.03(D), (E), and (F):
 - *No quid pro quo* required; do not replace, but instead supplement, bribery and theft prohibitions
 - Anything of value is defined to include money, goods, chattels, future employment, interest in realty, and "every other thing of value" [R.C. 102.01(G)]
 - To determine "substantial," look to the value of the thing. Dependent upon facts and circumstances; something of substance, real or considerable value, not nominal or de minimis [OEC 89-014; 95-001; 2001-03; 2001-04; State v. Thomas]
 - To determine "improper," look to the source of the thing. "Improper" sources of things of value include parties doing or seeking to do business with, regulated by, or interested in matters before public agency [OEC 86-011; 95-001]

5. Application to issues of Employment:

- A public official is prohibited from soliciting, accepting, or using his position to seek employment from “improper” sources [OEC 92-005; 96-004]
- Exception: A public official is not prohibited from soliciting or accepting a job from an improper source, if he can abstain from participating in any actions that affect the prospective employer and his abstention is approved by supervisors, where required. Official must abstain from all participation in official matters when he attempts to secure, or is approached about employment [OEC 89-010]

6. Application to Travel, Meals, and Lodging:

- Cannot accept anything of value, including travel, meals, and lodging, from an improper source [OEC 89-014]

7. Application to Gifts:

- Cannot accept gifts from any party that is doing or seeking to do business with, regulated by, or interested in matters before the public agency [OEC 92-015]
- Exclusive golf outings, travel and gifts, a season’s worth of baseball tickets [OEC 2001-03; 2001-04; 2003-03; OEC 95-001]

8. **Supplemental Compensation** - Separate notion of conflict, also applicable to private sector parties - R.C. 2921.43(A):

- Cannot accept (nor can one give) any compensation, other than as allowed by law, for the performance of any public duty or responsibility
- Cannot coerce a campaign contribution [State v. Conese (2004), 102 Ohio St.3d 435]
- Attempt to prohibit the conflict inherent in being compensated by dual employers

9. Bar on participation in license or rate-making processes - R.C. 102.03(C):

- Where public official or immediate family member owns more than 5%.

C. **Post-Employment and Representation Restrictions** - R.C. 102.03(A),(B); 102.04

1. General Revolving Door—R.C. 102.03(A)(1) states a public official is prohibited, during public service and for one year thereafter, from representing anyone on any matter in which he personally participated while he was a public official.

- Enforcement example of former Department of Welfare official [State v. Nipps (1979), 66 Ohio App. 2d 17] and former ODJFS Director [State v. Tompkins (Nov. 2, 2001), Franklin C.P. No. 01CR09-5177, unreported].

2. Statutory Definitions:

- Matter includes any case, proceeding, application, determination, issue, or question [R.C. 102.03(A)(5); OEC 99-001] – *Must be careful due to breadth of matter.*
- Personal participation includes decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion, including supervision [R.C. 102.03(A)(1)]
- Representation is formal or informal appearance before, or any written or oral communication with, *any* public agency [R.C. 102.03(A)(5)]
 - Includes preparing documents, regardless of who signs them [OEC 86-001]
 - Applies even if represented party is a public agency [OEC 93-011]
 - Does not include behind-the-scenes consultation [OEC 92-005]
 - Does not require financial gain

3. Exemptions:

- Not prohibited from representing public agency the official formerly served [R.C. 102.03 (A)(6); OEC 91-005]
- New matters and matters in which public official did not participate; prohibition is tied to personal participation [OEC 99-001]
- Ministerial functions - Not prohibited from performing functions like filing or amending tax returns, incorporation papers, and similar documents

4. **Confidentiality**—R.C. 102.03(B)
 - Lifetime prohibition on disclosure of confidential information both during and after leaving public position [OEC 93-012]
 - No financial gain required to trigger prohibition
 - Exception for appropriate authorization
 - Material is protected if it is:
 - a. Statutorily confidential; or
 - b. Clearly designated as confidential where designation is warranted because of the status of the proceedings under which received and preservation is necessary to proper conduct of government business. (Does not supercede Ohio Supreme Court decisions on what constitutes confidential information.)
5. Representation and Influence peddling—R.C. 102.04(A) and (C): Prohibition on state *and* local officials against receipt of compensation directly or indirectly other than from public agency for any service rendered personally on any case, application, or other matter before any public agency
 - Exemption contained in R.C. 102.04(D) applies to non-elected employees that sell goods and services to state agencies other than the agency they serve, when the employee files a statement with their public agency, the public agency they are selling to, and Ohio Ethics Commission, before the sale. The statement disqualifies the public employee, for two-years, from matters affecting employees of the agency they are selling to.

D. Public Contract Restraints - Extensive statute regarding any public contract - R.C. 2921.42

1. Five prohibitions in R.C. 2921.42. The three most common are:
 - A public official shall not authorize or use authority to secure a public contract for himself, family member, or a business associate [R.C. 2921.42(A)(1)]
 - A public official shall not have an interest in profits or benefits of a public contract entered into by a public agency he is "connected with" [R.C. 2921.42(A)(4)]
 - A public official shall not profit from a public contract he approved or that was authorized by a body of which he was a member unless the contract was competitively bid and awarded to the lowest and best bidder [R.C. 2921.42(A)(3)] [OEC 88-008]
2. Investing Public Funds
 - A public official is prohibited from authorizing investments, or employing authority to secure investments of public funds in any security, if he, a member of his family, or any of his business associates either has an interest, is an underwriter, or receives any brokerage, origination, or servicing fees [R.C. 2921.42(A)(2)]
3. Statutory definitions:
 - "Public contract" is defined as the purchase or acquisition of any property or services, *including employment*, and any design, construction, alteration, repair, or maintenance of any public property [R.C. 2921.42(G)]
 - "Public official" is defined to include any elected or appointed officer, or employee, or agent of the state or any political subdivision. Includes full-time, part-time, temporary, and permanent employees [R.C. 2921.01(A)]
4. Non-statutory definitions:
 - Interest in a public contract must be definite and direct, and may be either pecuniary or fiduciary [OEC 88-008; State v. Urbin (2002), 148 Ohio App. 3d 293, appeal dismissed (2003), 100 Ohio St. 3d 1207]
 - Member of his family includes two groups: 1) spouse, siblings, parents, grandparents, children and grandchildren; and 2) any other person related by blood or marriage who resides in the same household [OEC 80-001; 85-015]
 - Business associate is a person with whom a public official is engaged in an on-going business enterprise [OEC 92-003]; such as a private employer, or a partner, etc.
 - Connected with is defined as being related to or associated with the public agency [OEC 87-002; 89-004; 90-007; State v. Rousseau (Nov. 10, 2004) 2004 Ohio 5949]

5. Exceptions:
 - Stockholding below 5%; affidavit [R.C. 2921.42(B)]
 - Four-part exception—*All four must exist* and the burden is upon official to demonstrate [R.C. 2921.42(C)]:
 - Necessary supplies or services [OEC 79-005; 87-003];
 - Unobtainable elsewhere for the same or lower cost or continuing course of dealing [OEC 82-007, 88-008, 95-004];
 - Equal or preferential treatment given agency [OEC 2000-02]; and
 - Arm's length, full disclosure, no participation [OEC 92-002; 2000-02]
6. Nepotism implications of R.C. 2921.42:
 - Chapter 2921.42(A)(1) of the Revised Code states that a public official is prohibited from authorizing employment, or using authority to secure employment, or employment benefits, for any member of his family.
 - “Member of his family” includes parents, grandparents, children, grandchildren, spouse, and siblings, regardless of dependency or residence. Also includes any other person related by blood or by marriage and residing in the same household [OEC 80-001; 90-010; State v. Strabala (Mar. 21, 1994), Columbiana C.P. No. 93-C-212 unreported, affirmed (Aug. 30, 1994), Columbiana App. No. 94-C-22]
 - Conflict of Interest provisions in R.C. 102.03(D) and (E) also apply
7. R.C. 102.04(B): Restriction on state employees' business before other state agencies
 - See discussion of R.C. 102.04(D) above

III. COMMON SENSE SUMMARY FOR PUBLIC SERVANTS

- A. Cannot authorize a contract or use authority to secure any purchase or acquisition of any property or services for self, family, business associates
- B. Cannot solicit or accept improper things of value
- C. Cannot receive additional compensation for performance of official duties
- D. Cannot represent parties on matters in which public servant was involved
- E. Cannot participate in matters where public servant has a conflict of interest – i.e., where something of value may result for self, family members, others
- F. Cannot disclose or use confidential information
- G. **WHEN IN DOUBT, CALL THE ETHICS COMMISSION--(614) 466-7090**

Please note that this information summarizes the Ohio Ethics Law and related statutes set forth in Chapter 102. and Sections 2921.42, 2921.421, and 2921.43. For guidance, please call the Ethics Commission or refer to the specific provisions of the Ethics Law and related statutes; a link to the statutes can be found at www.ethics.ohio.gov. These laws are criminal statutes designed to protect the public from decisions that could be influenced by improper conflicts of interest for those who serve the public interest. Although the majority of public officials and employees meet or exceed these standards, these provisions serve to assist in deterring or sanctioning the conduct of the few who do not. Your careful consideration of the prohibitions is appreciated.

The Ohio Ethics Commission is an independent state agency charged with interpreting and administering the Ohio Ethics Law for many state and local public officials and employees. The Commission has been serving the public, and state and local government, since its formation as part of the Ohio Ethics Law in 1973. If you have any questions about how these restrictions apply to you, or for more information about the Ethics Law in general, please contact the Ethics Commission at (614) 466-7090 or visit www.ethics.ohio.gov.

The Ohio Ethics Commission prepared this material for informational purposes only. It is not intended as a substitute for the laws referenced or Ethics Commission advisory opinions construing those provisions which may be found at www.ethics.ohio.gov. It also does not address any additional conduct restrictions set forth in administrative regulations or policies of any specific agency or jurisdiction.