
Tony Bledsoe

Ethical Considerations

Materials

Brinkman v. Budish

R.C. 2921.42

Ohio Constitution, art. II, sec. 4

Ethics Commission Information Sheets

Seeking New or Outside Employment

Post-Employment Restrictions

Board Member Seeking Employment with the Board

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Thomas E. Brinkman, Jr., <i>et al.</i> ,	:	
	:	Case No. 1:09-cv-326
Plaintiffs,	:	
	:	Chief District Judge Susan J. Dlott
v.	:	
	:	ORDER GRANTING PLAINTIFFS’
Armond D. Budish, Speaker of the Ohio	:	MOTION FOR SUMMARY
House of Representatives and Chairman of the	:	JUDGMENT AND ISSUANCE OF A
Joint Legislative Ethics Committee of the	:	PERMANENT INJUNCTION AND
Ohio General Assembly, <i>et al.</i> ,	:	DENYING DEFENDANTS’ MOTION
	:	FOR SUMMARY JUDGMENT
Defendants.	:	

This matter is before the Court on Plaintiffs’ Motion For Summary Judgment and the Issuance of a Permanent Injunction (doc. 29) and Defendants’ Amended Motion for Summary Judgment (doc. 34). Plaintiffs in this case challenge the constitutionality of Ohio Revised Code (“O.R.C.”) § 102.03(A)(4), a statute which prohibits former members of the General Assembly from representing another person or organization before the Ohio General Assembly for a period of one year subsequent to their departure from office. The Court previously issued an Order Granting Motion for Preliminary Injunction (“Injunction Order”) temporarily enjoining enforcement of § 102.03(A)(4). For the reasons that follow, the Court **GRANTS** Plaintiffs’ motion, **DENIES** Defendants’ motion, and **PERMANENTLY ENJOINS** enforcement of § 102.03(A)(4).

I. BACKGROUND

A. Factual Background

Plaintiffs are Thomas E. Brinkman, Jr., the Coalition Opposed to Additional Spending and

Taxes (“COAST”), and Mark W. Miller. COAST is an organization which advocates for the restraint of government taxing and spending in Ohio on the local, state, and national level. (Doc. 29-1 ¶¶ 2, 8-9.)¹ COAST conducts advocacy activities in numerous ways, including operating a blog, publishing an email newsletter, sending press releases, and direct lobbying. (*Id.* ¶ 3.) COAST has directly lobbied legislators through its leadership and by testimony before legislative bodies. (*Id.* ¶ 4.) Presently, COAST seeks to advocate on a number of budgetary issues before the Ohio General Assembly, including advocating against proposed operating subsidies for the Underground Railroad Freedom Center. (*Id.* at ¶ 5.)

Both Brinkman and Miller are members and supporters of COAST, and Miller serves as the treasurer of COAST. (*Id.* ¶¶ 8-10.) Brinkman served in the Ohio General Assembly from January 2001 until December 2008. (Doc. 31-2 ¶ 1.)² Brinkman has sought to represent COAST before the Ohio General Assembly on an uncompensated basis.³ (Doc. 31-2 ¶¶ 2, 6.) However, O.R.C. § 102.03(A)(4), as written, prohibited Brinkman from representing COAST before the Ohio General Assembly or any of its committees from the date he left the General Assembly through January 1, 2010. (*Id.* ¶¶ 4, 5; Doc. 29-1 ¶ 10.)⁴

¹ References to Plaintiffs’ Proposed Undisputed Facts (doc. 29-1) are limited to those facts Defendants admitted to be true in Defendants’ Response (doc. 38).

² References to Defendants’ Proposed Undisputed Facts (doc. 32-1) are limited to those facts Plaintiffs admitted to be true in Plaintiffs’ Response (doc. 37-1).

³ The parties have stipulated that COAST paid Curry Printing Company—which is owned by Kathy Brinkman, the wife of Plaintiff Brinkman—approximately \$13,195.00 for printing services performed on its behalf between January 1, 2001 and January 1, 2009. (Doc. 31-2 ¶ 7.)

⁴ The Court recognizes that Defendants were prohibited from enforcing O.R.C. § 102.03(A)(4) against Brinkman or any former member of the Ohio General Assembly from the August 4, 2009, the date this Court granted a preliminary injunction against Defendants, through

Defendants are the Joint Legislative Ethics Committee (“JLEC”), a twelve-member committee of the Ohio General Assembly with responsibility for governing former members of the General Assembly with respect to state ethics laws; Armond D. Budish, a member of the Ohio House of Representatives and a member and chairman of JLEC; eleven other members of JLEC;⁵ Tony W. Bledsoe, the executive director of JLEC; Joseph T. Deters, the Hamilton County Prosecuting Attorney; Ron O’Brien, the Franklin County Prosecuting Attorney; Richard C. Pfeiffer, Jr., the City Attorney for the City of Columbus; and John P. Curp, the City Solicitor for the City of Cincinnati. Defendants Deters, O’Brien, Pfeiffer, and Curp are sued in their official capacities only. (Doc. 4 ¶ 20.)

JLEC is responsible for enforcement of O.R.C. § 102.03(A)(4) and would be the body to receive or initiate complaints against Brinkman for violations of the statute. (Doc. 29-1 ¶ 33.) JLEC also is empowered to investigate complaints or charges for violations of the statute. (*Id.* ¶ 34.) If JLEC determines by a preponderance of the evidence that § 102.03(A)(4) has been violated, it must report the violation to the appropriate prosecuting authority. (*Id.* ¶ 35.)

B. Procedural Background

Plaintiffs filed their initial Verified Complaint and a Motion for Temporary Restraining Order and Preliminary Injunction on May 11, 2009. They filed an Amended Complaint on May

the present date.

Additionally, in his Affidavit, Brinkman states that he declined to join the Ohio League of Conservation Voters and the Right to Life of Greater Cincinnati because O.R.C. § 102.03(A)(4) would have prevented him from representing the groups before the Ohio General Assembly in 2009.

⁵ Bill Harris, William Batchelder, Capri Cafaro, Louis Blessing, John Carey, Jennifer Garrison, Matt Huffman, Dale Miller, Sue Morano, Tom Niehaus, and Matthew Szollosi.

12, 2009.⁶ Defendants opposed the issuance of a temporary restraining order and preliminary injunction. On August 4, 2009, the Court issued the Injunction Order preliminarily enjoining the enforcement of O.R.C. § 102.03(A)(4). The parties thereafter engaged in discovery and filed the pending summary judgment motions. Plaintiffs now seek and Defendants oppose the issuance of a permanent injunction enjoining the enforcement of O.R.C. § 102.03(A)(4). Plaintiffs contend that the statute violates the First Amendment and the Equal Protection Clause both facially and as applied.

II. THE STATUTE

Ohio's revolving door statute provides in relevant part:

(4) For a period of one year after the conclusion of employment or service as a member or employee of the general assembly, no former member or employee of the general assembly shall represent, or act in a representative capacity for, any person on any matter before the general assembly, any committee of the general assembly, or the controlling board. . . . As used in division (A)(4) of this section "person" does not include any state agency or political subdivision of the state.

O.R.C. § 102.03(A)(4).

"Matter" is defined in the statute to mean "the proposal, consideration, or enactment of statutes, resolutions, or constitutional amendments." O.R.C. § 102.03(A)(5). To "represent" includes "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." *Id.* Under the Ohio Revised Code generally, a "person" is defined as "an individual, corporation, business trust, estate, trust, partnership, and association," O.R.C. § 1.59(C), but the specific statute clarifies that "person" does not include "any state agency or political subdivision of the state" for purposes of O.R.C. § 102.03(A)(4).

⁶ Plaintiffs filed Notice of Verification of Amended Complaint on May 29, 2009. (Doc. 11.)

Violation of the statute is considered a misdemeanor offense of the first degree. *See* O.R.C. § 102.99(B).

JLEC has issued a memorandum interpreting O.R.C. § 102.03(A)(4) to apply to both compensated and uncompensated lobbying by former members of General Assembly on behalf of another person. (Doc. 29-1 ¶¶ 40-42.)

III. STANDARDS GOVERNING MOTIONS FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56 governs motions for summary judgment. Summary judgment is appropriate if “there is no genuine issue as to any material fact” and “the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c)(2). On a motion for summary judgment, the movant has the burden of showing that no genuine issues of material fact are in dispute, and the evidence, together with all inferences that can permissibly be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986).

The movant may support a motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). In responding to a summary judgment motion, the nonmoving party may not rest upon the pleadings but must go beyond the pleadings and “present affirmative evidence in order to defeat a properly supported motion for summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). The nonmoving party must “set out specific facts showing a genuine issue for trial.” Fed. R. Civ. P. 56(e)(2). The Court’s task is not “to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Liberty Lobby*, 477 U.S. at 249. A

genuine issue for trial exists when there is sufficient “evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252.

IV. ANALYSIS

A. First Amendment

The First Amendment to the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the government for redress of grievances.” U.S. Const. amend 1. “The Fourteenth Amendment extends these prohibitions against the States.” *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 379 (6th Cir. 2008), *cert. denied*, *Ohio v. Citizens for Tax Reform*, 129 S.Ct. 596 (2008). “[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). Lobbying the government falls within the gambit of protected First Amendment activity. *See F.T.C. v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 426 (1990) (“It is, of course, clear that the association’s efforts . . . to lobby District officials to enact favorable legislation . . . were activities that were fully protected by the First Amendment.”); *Roberts*, 468 U.S. at 627 (characterizing lobbying as being “worthy of constitutional protection under the First Amendment”). However, that right is not unfettered and can be the subject of appropriate regulation. *See, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 356 n. 20 (1995) (“The activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption.”); *United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding registration and reporting requirements for Congressional lobbyists).

Plaintiffs contend that O.R.C. § 102.03(A)(4) violates the First Amendment both facially and as applied. The statute prohibits former members of the Ohio General Assembly from representing another person or entity (except for a state political subdivision) on matters before the Ohio General Assembly for a period of one year after they leave office.⁷ The Court found in the Injunction Order that the constitutionality of § 102.03(A)(4) should be examined under a strict scrutiny analysis and Defendants now appear to concede this issue. (Doc. 16 at 8-10; Doc. 34 at 6-7.) As stated above, lobbying “is fully protected by the First Amendment.” *Superior Court Trial Lawyers Ass’n*, 493 U.S. at 426. First Amendment protection is “at its zenith” for “core political speech” which involves “interactive communication concerning political change.” *Buckley v. Amer. Const. Law Found.*, 525 U.S. 182, 186-87 (1999); *see also Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169, 185 (6th Cir. 2008) (“Speech advocating a campaign to affect government policy is the essence of protected, political speech.”). “When a State places a severe or significant burden on a core political right . . . the provision must be narrowly tailored and advance a compelling state interest.” *Citizens for Tax Reform*, 518 F.3d at 387 (citing *Meyer v. Grant*, 486 U.S. 414, 425 (1988); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

The statute operated in this instance to prohibit Brinkman from representing COAST on matters before the Ohio General Assembly. “The First Amendment protects appellees’ right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.” *Meyer*, 486 U.S. at 424; *see also Nat’l Ass’n of Social Workers v. Harwood*, 874 F.

⁷ The statute prohibits former members from acting on matters before the Ohio General Assembly, its committees, or a controlling board. O.R.C. § 102.03(A)(4). For simplicity, the Court will refer to all three types as matters before the Ohio General Assembly.

Supp. 530, 537 n. 8 (D.R.I. 1995) (“[I]ncorporated within the First Amendment protection of lobbying are the practical concerns of effectiveness and economic constraints.”), *rev’d on other grounds*, 693 F.3d 622. Likewise, “the right to choose a spokesperson to advocate a group’s collective views lies implicit in the speech and association rights guaranteed by the First Amendment.” *Fraternal Order of Police v. Mayor and City Council of Ocean City, Md.*, 916 F.2d 919, 923 (4th Cir. 1990); *cf. O’Brien v. Leidinger*, 452 F. Supp. 720, 725 (E.D. Va. 1978) (“The right to advocate would be hollow indeed if the state, rather than the association’s members, could select the group’s advocate.”) The statute severely burdened Plaintiffs’ First Amendment rights by prohibiting COAST from using Brinkman as its advocate before the General Assembly.

1. Compelling Government Interest

Given that the statute is subject to strict scrutiny, the Court next must determine whether O.R.C. § 102.03(A)(4) furthers a compelling government interest and is narrowly tailored to achieve that end. *See Citizens for Tax Relief*, 518 F.3d at 387. Defendants proffer the Affidavit of Defendant Tony Bledsoe, the executive director of Defendant JLEC, to establish the State of Ohio’s compelling interests. Bledsoe states that the General Assembly enacted § 102.03(A)(4) to effectuate three compelling interests: (1) to prevent unethical practices of public employees and public officials; (2) to promote, maintain, and bolster the public’s confidence in the integrity of state government; and (3) to prevent unequal access to the General Assembly by outside organizations by virtue of any significant relationships with current and former public officials who may be in a position to influence government policy. (Bledsoe Aff. ¶ 4.)

Plaintiffs attack these purported justifications on multiple grounds. To begin, Plaintiffs

assert that the Court need not accept Bledsoe's statements as true because he offers mere post-hoc justifications which are not based on his personal knowledge of the General Assembly's intent in enacting § 102.03(A)(4). However, Plaintiffs' argument discounts Bledsoe's experience as the executive director of JLEC, the body entrusted to enforce § 102.03(A)(4). Moreover, this Court in the Injunction Order implicitly recognized that substantially similar justifications could be gleaned from the text of the statute. (Doc. 16 at 11.)

Plaintiffs also attack the merits of each proposed justification. The Court will examine each of Defendants' purported compelling interests more closely. As to the first justification, Bledsoe states that Ohio "has a compelling interest in preventing legislators from taking official acts in exchange for employment as a lobbyist immediately upon leaving the legislature." (*Id.* ¶ 5.) Similarly, as to the second justification, Bledsoe states that Ohio has an interest in bolstering the public's confidence in the integrity of state government—regardless of any actual corrupt or unethical practices—because of past instances of government corruption. (Bledsoe Aff. ¶ 6.) Federal courts have found that the analogous interests of preventing corruption or the appearance of corruption are compelling governmental interests. *See, e.g., Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 388-89 (2000) (recognizing as compelling interests the restricting of *quid pro quo* corruption, the appearance of corruption, the appearance of improper influence, and opportunities for abuse); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 715-16 (4th Cir. 1999) (identifying as compelling state interests in the lobbying context prohibiting corruption and the appearance of corruption); *Ohio v. Nipps*, 66 Ohio App. 2d 17, 21, 419 N.E.2d 1128 (1979) (analyzing a more restrictive predecessor statute and holding that Ohio had compelling interest to restrict unethical practices of employees and public officials).

Importantly, the Supreme Court recently has emphasized that the “governmental interest in preventing corruption or the appearance of corruption, [is] limited to *quid pro quo* corruption.” *Citizens United v. Federal Election*, — S. Ct. —, 2010 WL 183856, at *23 (Jan. 21, 2010). Defendants concede that their first two justifications “depend upon the payment of compensation to the former-legislators.” (Bledsoe Aff. ¶ 8.) Accordingly, the Court finds that Defendants’ first two purported justifications are compelling interests for restricting compensated lobbying by former members of the General Assembly.

The first two justifications, however, cannot constitute a compelling interest to prohibit uncompensated lobbying by former members of the General Assembly, such as the lobbying Brinkman sought to perform on behalf of COAST. Defendants respond that the third justification constitutes a compelling interest supporting O.R.C. § 102.03(A)(4) regardless of whether the former legislators are lobbying on a compensated or uncompensated basis. Bledsoe states that the third justification “reflects the State of Ohio’s interest in preventing former legislators from using their close relationships with former colleagues and special knowledge of the legislative process to gain access as lobbyists in ways that provide them unequal access to public officials [in comparison] to that of others petitioning the government, and thereby allow them to play an undue role in crafting and passage of legislation.” (Bledsoe Aff. ¶ 7.) Plaintiffs attack this justification as an unlawful attempt to “level the playing field.”

The Supreme Court recently spoke against attempts to favor or disfavor certain speakers or viewpoints:

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these categories are interrelated: Speech

restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

Citizens United, — S. Ct. —, 2010 WL 183856, at *19. The Supreme Court concluded that “[w]e find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers.” *Id.* at *20. Moreover, the Supreme Court rejected the suggestion that political corruption necessarily follows from the fact that a speaker may be favored by or have special access to elected officials. *Id.* at *33. “The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.” *Id.* Though the Supreme Court spoke in the specific context of corporate expenditures to advocate for the election or defeat of a candidate, *id.* at *6, the Supreme Court’s reasoning refutes the premise that O.R.C. § 102.03(A)(4) is necessary to prevent former General Assembly members from having special access to the legislative process.

The Court concludes that Plaintiffs’ third purported justification does not constitute a compelling interest. As such, Defendants have failed to establish any compelling governmental interest justifying § 102.03(A)(4) as applied to uncompensated lobbying. The Court holds that § 102.03(A)(4) is unconstitutional as applied to prohibit Brinkman from representing COAST on an uncompensated basis.

2. Narrowly Tailored

Because Plaintiffs have challenged O.R.C. § 102.03(A)(4) both facially and as applied, and because the Court found above that Defendants have established compelling interests justifying O.R.C. § 102.03(A)(4) as applied to compensated lobbying, the Court next must examine whether the statute is narrowly tailored to achieve those ends. The statute must be narrowly tailored to achieve the objectives of avoiding corruption (*i.e.*, the prevention of unethical practices) or the appearance of corruption (*i.e.*, bolstering the public's confidence in the integrity of government). Defendants make two arguments that the statute is narrowly tailored: (1) the restriction in § 102.03(A)(4) lasts for only twelve months and (2) an Ohio appellate court in *Nipps* upheld a prior version of § 102.03(A)(4).

As to the twelve-month limit, Defendants have not articulated or presented evidence to establish that the temporally limited restriction adequately addresses the concern against *quid pro quo* corruption. “The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.” *Nixon*, 528 U.S. at 391. Courts do not “accept mere conjecture as adequate to carry a First Amendment burden.” *Id.* at 392; *see also Citizens for Tax Reform*, 518 F.3d at 387 (striking down statute where there was “no evidence in the record” to support a showing that the statute was narrowly drawn to meet the compelling state interest). Defendants have not established that the danger of *quid pro quo* corruption or the appearance of corruption is significantly lessened if the former legislator is permitted to lobby the General Assembly one year and one day after leaving the legislature.

As to the *Nipps* precedent, the prior statute only prohibited advocacy on behalf of a client on matters about which the former public official had personally participated when he or she was

in office. 66 Ohio App. 2d at 20.⁸ The statute’s stated purpose—to ensure that “no public official or employee will engage in a conflict of interest or realize personal gain at public expense from the use of ‘inside’ information”—was closely tied to its narrow restriction against advocacy on matters on which the official had personally participated. *Id.* at 20-21.⁹ Conversely, under the current version of the statute, former General Assembly members are prohibited from representing clients on any matter before the General Assembly, regardless of whether it is a matter in which they personally participated while in office and on which they had the opportunity to gain “inside” information. The *Nipps* decision, therefore, does not support a finding that the current statute is narrowly tailored. Rather, it provides an example of how the current statute could be narrowed.

Additionally, the current § 102.03(A)(4) is over-inclusive because it does not restrict only compensated lobbying, but rather restricts both compensated and uncompensated lobbying. Several other states, by way of contrast, have more narrowly tailored revolving door statutes that

⁸ The former statute provided as follows:

No public official or employee shall represent a client or act in a representative capacity for any person before the public agency by which he is or within the preceding twelve months was employed or on which he serves or within the preceding twelve months had served on any matter with which the person is or was directly concerned and in which he personally participated during his employment or service by a substantial and material exercise of administrative discretion.

Nipps, 66 Ohio App. 2d at 18-19 (quoting O.R.C. § 102.03(A)).

⁹ Additionally, in the current statute, a different subsection similarly prohibits former public officials from representing clients or other persons “on any matter in which the public official . . . personally participated as a public official . . . through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.” O.R.C. § 102.03(A)(1).

restrict only compensated lobbying activities. *See, e.g.*, Ala. Code § 36-25-13(a); Haw. Rev. Stat. 84-18(b); Md. Code Ann., State Gov't § 15-504(d)(1). Finally, § 102.03.04(A)(4) is under-inclusive because it does not restrict other behaviors or activities of former members of the General Assembly that might give rise to actual or perceived corruption, such as the acceptance of gifts or offers for employment unrelated to lobbying.

For all these reasons, the Court finds that the statute is not narrowly tailored. Therefore, O.R.C. § 102.03(A)(4) does not withstand strict scrutiny analysis. The statute violates the First Amendment facially and as applied to Plaintiffs.

3. Remedy

The Court next must determine whether a permanent injunction is the appropriate remedy. The standard for granting permanent injunctions is similar to the familiar standard for the issuance of a preliminary injunction. The party seeking relief must demonstrate the following:

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

U.S. v. Matusoff Rental Co., 494 F. Supp. 2d 740, 756 (S.D. Ohio 2007) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-13 (1982), and *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987)); *see also Beeker v. Olszewski*, 415 F. Supp. 2d 734, 754 (E.D. Mich. 2006) (similar statement of law). The party seeking a permanent injunction must establish success on the merits rather than a probability of success on the merits. *See Beeker*, 415 F. Supp. 2d at 754; *State of Ohio E.P.A. v. U.S. Dept. of Labor*, 121 F. Supp. 2d 1155, 1168 (S.D. Ohio 2000).

These factors support the issuance of a permanent injunction here. Plaintiffs have established a violation of the First Amendment here. Even a minimal infringement upon First Amendment rights results in irreparable harm. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001). Further, “[t]here are no available remedies at law that are adequate to compensate for a loss of First Amendment rights.” *Am. Booksellers Found. for Free Expression v. Strickland*, 512 F. Supp. 2d 1082, 1106 (S.D. Ohio 2007), *question certified to the Ohio Supreme Court*, 560 F.3d 443 (6th Cir. 2009). Finally, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994). The Court will permanently enjoin the enforcement of O.R.C. § 102.03(A)(4).

B. Equal Protection

The Court need not and will not address the parties’ equal protection arguments because the Court has found that O.R.C. § 102.03(A)(4) must be struck down on the basis that it violates the First Amendment.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion For Summary Judgment and the Issuance of a permanent Injunction (doc. 29) is **GRANTED** and Defendants' Amended Motion for Summary Judgment (doc. 34) is **DENIED**. It is hereby **ORDERED** that Defendants, together with their officers, agents, servants, employees, and attorneys, as well as all other persons who are in active concert or participation with any of the foregoing individuals, are hereby **PERMANENTLY ENJOINED** from enforcing Ohio Revised Code § 102.03(A)(4) and rules promulgated thereto against Plaintiffs and any others similarly situated.

IT IS SO ORDERED.

s/Susan J. Dlott
Chief Judge Susan J. Dlott
United States District Court

2921.42 Having an unlawful interest in a public contract.

(A) No public official shall knowingly do any of the following:

(1) Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public official's business associates has an interest;

(2) Authorize, or employ the authority or influence of the public official's office to secure the investment of public funds in any share, bond, mortgage, or other security, with respect to which the public official, a member of the public official's family, or any of the public official's business associates either has an interest, is an underwriter, or receives any brokerage, origination, or servicing fees;

(3) During the public official's term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by the public official or by a legislative body, commission, or board of which the public official was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder;

(4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which the public official is connected;

(5) Have an interest in the profits or benefits of a public contract that is not let by competitive bidding if required by law and that involves more than one hundred fifty dollars.

(B) In the absence of bribery or a purpose to defraud, a public official, member of a public official's family, or any of a public official's business associates shall not be considered as having an interest in a public contract or the investment of public funds, if all of the following apply:

(1) The interest of that person is limited to owning or controlling shares of the corporation, or being a creditor of the corporation or other organization, that is the contractor on the public contract involved, or that is the issuer of the security in which public funds are invested;

(2) The shares owned or controlled by that person do not exceed five per cent of the outstanding shares of the corporation, and the amount due that person as creditor does not exceed five per cent of the total indebtedness of the corporation or other organization;

(3) That person, prior to the time the public contract is entered into, files with the political subdivision or governmental agency or instrumentality involved, an affidavit giving that person's exact status in connection with the corporation or other organization.

(C) This section does not apply to a public contract in which a public official, member of a public official's family, or one of a public official's business associates has an interest, when all of the following apply:

(1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;

(2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision or governmental agency or instrumentality involved;

(3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;

(4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of the public official's family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

(D) Division (A)(4) of this section does not prohibit participation by a public employee in any housing program funded by public moneys if the public employee otherwise qualifies for the program and does not use the authority or influence of the public employee's office or employment to secure benefits from the program and if the moneys are to be used on the primary residence of the public employee. Such participation does not constitute an unlawful interest in a public contract in violation of this section.

(E) Whoever violates this section is guilty of having an unlawful interest in a public contract. Violation of division (A)(1) or (2) of this section is a felony of the fourth degree. Violation of division (A)(3), (4), or (5) of this section is a misdemeanor of the first degree.

(F) It is not a violation of this section for a prosecuting attorney to appoint assistants and employees in accordance with sections [309.06](#) and [2921.421](#) of the Revised Code, for a chief legal officer of a municipal corporation or an official designated as prosecutor in a municipal corporation to appoint assistants and employees in accordance with sections [733.621](#) and [2921.421](#) of the Revised Code, or for a township law director appointed under section [504.15](#) of the Revised Code to appoint assistants and employees in accordance with sections [504.151](#) and [2921.421](#) of the Revised Code.

(G) This section does not apply to a public contract in which a township trustee in a township with a population of five thousand or less in its unincorporated area, a member of the township trustee's family, or one of the township trustee's business associates has an interest, if all of the following apply:

(1) The subject of the public contract is necessary supplies or services for the township and the amount of the contract is less than five thousand dollars per year;

(2) The supplies or services are being furnished to the township as part of a continuing course of dealing established before the township trustee held that office with the township;

(3) The treatment accorded the township is either preferential to or the same as that accorded other customers or clients in similar transactions;

(4) The entire transaction is conducted with full knowledge by the township of the interest of the township trustee, member of the township trustee's family, or the township trustee's business associate.

(H) Any public contract in which a public official, a member of the public official's family, or any of the public official's business associates has an interest in violation of this section is void and unenforceable. Any contract securing the investment of public funds in which a public official, a member of the public official's family, or any of the public official's business associates has an interest, is an underwriter, or receives any brokerage, origination, or servicing fees and that was entered into in violation of this section is void and unenforceable.

(I) As used in this section:

(1) "Public contract" means any of the following:

(a) The purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either;

(b) A contract for the design, construction, alteration, repair, or maintenance of any public property.

(2) "Chief legal officer" has the same meaning as in section [733.621](#) of the Revised Code.

Effective Date: 06-23-1994; 2007 HB119 09-29-2007

OHIO CONSTITUTION ARTICLE II §4

Dual office and conflict of interest prohibited.

§4 No member of the General Assembly shall, during the term for which he was elected, unless during such term he resigns therefrom, hold any public office under the United States, or this state, or a political subdivision thereof; but this provision does not extend to officers of a political party, notaries public, or officers of the militia or of the United States armed forces.

No member of the General Assembly shall, during the term for which he was elected, or for one year thereafter, be appointed to any public office under this state, which office was created or the compensation of which was increased, during the term for which he was elected.

(1851, am. 1973)

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SEEKING NEW OR OUTSIDE EMPLOYMENT: Ethics Commission Information Sheet # 4

I. Introduction

The Ohio Ethics Law and related statutes are found in Ohio Revised Code (R.C.) Chapter 102. and Sections 2921.42 and 2921.43. These laws generally prohibit public officials and employees from misusing their official positions for their own personal benefit or the benefit of their family members or business associates.

The Ethics Law applies to all people who serve as officials and employees for public agencies in Ohio. "Public agencies" include state departments, boards, and commissions, counties, cities, villages, townships, school districts, public colleges and universities, public libraries, port authorities, and all other public entities.

The Ohio Ethics Commission was created to administer, interpret, and assist in the enforcement of the Ethics Law for all officials in the state, except members and employees of the General Assembly and judicial officers and employees.¹ In this information sheet, the word "official" includes any person who serves a public agency, whether elected, appointed, or employed.

II. Purpose of this Information Sheet

The Ethics Commission prepared this information sheet to explain how the Law applies when an official is searching for a new job or outside employment. These restrictions apply regardless of whether the

official is seeking a job with a private corporation, a non-profit organization, or another public agency.

Any official who is seeking new employment should also read the Commission's revolving door information sheet (Information Sheet # 5), discussing limitations on the official in a new job.

Any official who is seeking outside employment should also read Ohio Ethics Commission Advisory Opinion No. 96-004, the Commission's advisory opinion on outside employment. The opinion will explain limits on the official's activities regarding outside employment.

III. Summary of the Law

The Ohio Ethics Law and related statutes prohibit an official from soliciting or using his position to get a job from any person that is:

- Regulated by his public agency;
- Doing or seeking to do business with his public agency; or
- Interested in matters before his public agency.

IV. Seeking Employment from Related Parties

R.C. 102.03(D) and (E) prohibit an official from soliciting or using his position to get a job from any person that is regulated by, doing business or seeking to do business with, or interested in matters before the public agency he serves.² A person is “seeking employment” if he is responding to a specific job advertisement or posting, or sending resumes, making telephone calls, sending e-mails, or taking any other action to inquire about the availability of an employment position.

V. Withdrawal

There is an exception from this prohibition if the official can and does withdraw completely from any matter involving the party from whom he is seeking or has accepted employment.³

If the official is normally required to participate in a matter affecting the party, the public agency must approve his withdrawal.⁴ An official cannot effectively withdraw from a matter by simply refusing to perform his job duties. It must be clear that the withdrawal will not impede the official’s ability to perform his job duties.

In order to effectively withdraw from a matter, the official must inform his supervisor of his withdrawal. The supervisor must then either handle the matter herself or reassign the matter to another official or employee. If the matter is reassigned, the person to whom it is reassigned must report to someone who is a superior to, or on the same level as, the official who has withdrawn.⁵ The official cannot withdraw from a matter by delegating it to a subordinate employee.

For example, during his job search, an official whose job involves making recommendations about equipment

purchases is prohibited from making recommendations about a private firm from whom he is seeking a job.⁶ Once the official has accepted a job offer from a private company or another public agency, he is prohibited from participating in matters affecting his new employer during his remaining public employment.⁷

VI. Board Member Seeking Job with Board

The Ethics Law also prohibits a board member from seeking employment with the board he serves. This restriction applies to both elected and appointed board members. For example, a city council member is prohibited from seeking employment with the city. Also, a member of a state commission is prohibited from seeking employment with the commission.

For more information about these restrictions, please read the Commission’s Information Sheet # 6 on board member’s seeking employment with their own boards.

VII. Other Considerations

Any official who is considering seeking employment with another public agency, or with a private organization or company, should ask his supervisor, or legal counsel for the public agency he serves, whether the agency has any additional policies or rules regarding job-seeking. (A public agency cannot create a policy or rule that is less restrictive than the prohibitions described above. However, an agency may have a policy or rule that is more restrictive than the Ethics Law.)

Any official who is seeking new employment should also read the Commission’s Information Sheet # 5 on

revolving door. The restrictions discussed in that information sheet will limit the official's activities in a new job.

VIII. Penalties

The Ethics Law and related statutes are criminal laws. If a person is convicted of violating an ethics law, that person may receive a jail sentence and/or have a fine levied against him.

Most of the ethics laws discussed in this information sheet (R.C. 102.03(D) and (E)) are first-degree misdemeanors, with a maximum penalty of six months in prison and/or a \$1000 fine.

IX. Conclusion

Please contact the Ethics Commission if you have questions about this information sheet or the Ohio Ethics Laws. This information sheet is not an advisory opinion, and is not intended to provide advice on specific facts. Copies of the Commission's formal advisory opinions can be obtained from: Ohio Ethics Commission, William Green Building, 30 West Spring Street, L3, Columbus Ohio, 432315-2256; telephone (614) 466-7090, and on the Commission's Web site: www.ethics.ohio.gov.

¹ The ethics agency with jurisdiction over ethics issues related to members and employees of the General Assembly is the Joint Legislative Ethics Committee. The ethics agency with jurisdiction over ethics issues related to judicial officers and employees is the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

² Ohio Ethics Commission Advisory Opinion No. 96-004.

³ Adv. Ops. No. 91-009 and 92-005.

⁴ Adv. Op. No. 96-004.

⁵ Id.

⁶ Adv. Op. No. 86-006.

⁷ Adv. Op. No. 91-009.

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POST-EMPLOYMENT RESTRICTIONS: Ethics Commission Information Sheet # 5

I. Introduction

The Ohio Ethics Law and related statutes are found in Ohio Revised Code (R.C.) Chapter 102. and Sections 2921.42 and 2921.43. These laws generally prohibit public officials and employees from misusing their official positions for their own personal benefit or the benefit of their family members or business associates.

The Ethics Law applies to all people who serve as officials and employees for public agencies in Ohio. "Public agencies" include state departments, boards, and commissions, counties, cities, villages, townships, school districts, public colleges and universities, public libraries, port authorities, and all other public entities.

The Ohio Ethics Commission was created to administer, interpret, and assist in the enforcement of the Ethics Law for all officials in the state, except members and employees of the General Assembly and judicial officers and employees.¹ In this information sheet, the word "official" includes any person who serves a public agency, whether elected, appointed, or employed.

II. Purpose of this Information Sheet

The Commission prepared this information sheet to explain how the Law applies when an official is leaving the public job he holds for a new job. An official who is seeking a new job should also obtain

Information Sheet # 4 on job seeking before beginning his search.

If an elected or appointed public board member would like to seek employment with the board he serves, other Ethics Laws are implicated. For more guidance on that issue, see Information Sheet # 6.

Except where otherwise noted, these restrictions apply to an official both during, and for one year after he leaves, his public position. They also apply whether the official is taking a new position with a private corporation, a non-profit organization, or another public agency.

III. Summary of the Law

The Ohio Ethics Law and related statutes prohibit an official from:

- Profiting from a contract of his public agency, if he authorized the contract or was part of a committee, board, or other authority that authorized the contract;
- Representing any person, before any public agency, on matters in which he personally participated during his public service; and
- Disclosing or using confidential information acquired while he was an official.

IV. Profiting from Public Contracts

R.C. 2921.42(A)(3) prohibits an official from profiting from a public contract authorized by him, or by a board or committee of which he was a member at the time the contract was authorized, unless the contract is let by competitive bidding to the lowest and best bidder. The restriction applies even if the official did not participate in the board action.

A public contract exists whenever a public agency buys or acquires goods or services, regardless of whether there is a written contract.² Examples are:

- Purchases of goods like computers, fire trucks, and paper products³;
- Purchases of services like insurance and accountants⁴; and
- Grants (because the agency acquires services by virtue of the grant).⁵

When an official has approved an unbid contract to a company, the official cannot accept employment from the company if he will profit from the contract. An official who becomes an employee of a company will profit from his employer's contract if: (1) the establishment or operation of the company is dependent upon the contract; (2) the creation or continuation of the official's position with the company is dependent upon the contract; (3) the contract funds would be used by the company to compensate the official or as a basis for his salary; or (4) he will otherwise profit from the contract.⁶

V. Representation

R.C. 102.03(A) prohibits an official from representing any person on any matter in which the official has personally participated.

The restriction applies regardless of whether the official is paid to represent the person. A "person" includes an individual, corporation, partnership, association, public entity, or similar entity.⁷

A former official is "representing" a person when the official makes any kind of formal or informal appearance before, or has any kind of written or oral communication with, any public agency, on behalf of that person.⁸ Examples of representation are:

- An informal appearance before a public agency (a former official has a meeting with an employee of a city, in which he discusses his client);
- Oral communication with a public agency (a former official discusses his new employer's concerns with a county employee in a telephone call or a conversation in a hallway).⁹
- Written communication with a public agency, even if the official does not sign the communication (A former official sends an e-mail to a village explaining his client's position, or prepares a letter to the village and the letter is signed by the client).¹⁰

The law prohibits a former official from representing any person before any public agency on matters in which he personally participated.¹¹ The former official is prohibited from representing anyone before his former public agency, and before any other public agency. The term "public agency" is defined on page one of this information sheet.

An official has "personally participated" in a matter if he has engaged in

the substantial exercise of administrative discretion regarding the matter such as:

- Decision;
- Approval;
- Disapproval;
- Recommendation;
- The rendering of advice; or
- Investigation.¹²

For example, if an official reviews a report, and makes a recommendation about the report to his supervisor, the official has personally participated in the matter that is the subject of the report, even if his participation was not the final action on the report. An official has also personally participated in a matter if he has supervised other public officials and employees on the matter.¹³

A “matter” includes any case, proceeding, application, determination, issue, or question.¹⁴ A matter can include concrete items, like an application or a problem. It can also include more abstract items, like a dispute or a policy decision. A matter is the underlying issue or question, regardless of whether it involves the same parties. Matter does not mean the same thing as subject matter.¹⁵

Examples of restricted activity are:

- A former city building inspector, who is now employed by a developer, is prohibited from calling a city employee to ask when an inspection he started while he was a city employee will be completed;
- An employee of the EPA is prohibited from sending an e-mail, on behalf of an environmental group for which he volunteers, to the environmental court

inquiring about the status of a case involving an inspection he completed;

- A former village council member, who is now employed by a law firm, is prohibited from speaking at a state board meeting, on behalf of his client, when the board is reviewing a policy decision made by the village council while he was a council member.

VI. Exceptions to the Prohibition

There are three exceptions to the Revolving Door Law:

- A former official is not prohibited from representing a client on a matter in which he did not participate.¹⁶
- A former official is not prohibited from assisting or aiding his former public agency.¹⁷
- A former official is not prohibited from doing ministerial activities, such as preparing tax returns and filing applications for permits or licenses.¹⁸

VII. Special Revolving Door Restrictions

There are three special revolving door restrictions. The first is a specific restriction for legislators and legislative employees.¹⁹ For more information about that restriction, contact the Legislative Inspector General.

The second applies to the former commissioners and attorney examiners of the Public Utilities Commission, and is in effect for two years.²⁰ It prohibits former commissioners and attorney examiners from representing utilities before state agencies.

The third is a two-year restriction that applies to any official who exercised discretion regarding solid or hazardous waste matters under R.C. Chapters 343. and 3734.²¹ For more information about these two revolving door provisions, please contact the Ohio Ethics Commission.

VIII. Confidentiality

R.C. 102.03(B) prohibits a current or former official from using or disclosing confidential information acquired by the official in the course of his duties. There is no time limit for this restriction.²²

The official is prohibited from disclosing confidential information unless he is appropriately authorized to do so. If an official needs guidance about whether information is confidential, or whether he has been appropriately authorized to disclose information, he should speak to the legal advisor for the agency he serves.

IX. Other Considerations

If the official is just beginning his search for a new job, the official should also read the Information Sheet # 4 on Job Seeking, which explains the Ethics Law as it applies to an official seeking employment.

If the official is an attorney, the official should contact the Board of Commissioners on Grievances and Discipline for the Ohio Supreme Court for guidance about D.R. 9-101(B) and other post-employment provisions in the Code of Professional Responsibility.

A state official should contact the Governor's Office to determine whether any executive order imposes limits on his post-employment activities.

If the official was required to file a financial disclosure statement during his public service, he will be required to file a statement in the year after his service concluded, reflecting financial information for his final year.

Any public official who is moving from one public position to another public position or to the private sector should ask his supervisor or legal counsel for the public agency he serves whether the agency has any additional policies or rules regarding post-employment. (A public agency cannot create a policy or rule that is less restrictive than the prohibitions described above. However, an agency may have a policy or rule that is more restrictive than the Ethics Law.)

X. Penalties

The Ethics Law and related statutes are criminal laws. If a person is convicted of violating an ethics law, that person may receive a jail sentence and/or have a fine levied against him.

The ethics laws discussed in this information sheet are first-degree misdemeanors with a maximum penalty of six months in prison and/or a \$1000 fine.

XI. Conclusion

Please contact the Commission if you have questions about this information sheet or the Ohio Ethics Laws. This information sheet is not an advisory opinion, and is not intended to provide advice on specific facts. Copies of the Commission's formal advisory opinions can be obtained from: Ohio Ethics Commission, William Green Building, 30 West Spring Street, L3, Columbus Ohio, 432315-2256; telephone (614) 466-7090, and on the Web site: www.ethics.ohio.gov.

Endnotes:

¹ The ethics agency with jurisdiction over ethics issues related to members and employees of the General Assembly is the Joint Legislative Ethics Committee. The ethics agency with jurisdiction over ethics issues related to judicial officers and employees is the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

² RC. 2921.42(G)(1).

³ Ohio Ethics Commission Advisory Opinions No. 84-013, 87-002, and 84-014.

⁴ Adv. Ops. No. 82-007, 92-017, and 97-004.

⁵ Adv. Op. No. 87-003.

⁶ Adv. Op. No. 88-008.

⁷ R.C. 1.59; Adv. Ops. No. 82-002, 89-003, and 99-001.

⁸ R.C. 102.03(A)(5).

⁹ Adv. Op. No. 86-001.

¹⁰ Adv. Op. No. 86-001.

¹¹ R.C. 102.03(A)(5).

¹² R.C. 102.03(A)(1).

¹³ Adv. Op. No. 91-009.

¹⁴ R.C. 102.03(A)(5).

¹⁵ Adv. Op. No. 99-001.

¹⁶ Adv. Ops. No. 82-002.

¹⁷ R.C. 102.03(A)(6).

¹⁸ R.C. 102.03(A)(7).

¹⁹ R.C. 102.03(A)(4).

²⁰ R.C. 102.03(A)(2).

²¹ R.C. 102.03(A)(3); Adv. Op. No. 91-003.

²² Adv. Op. No. 92-005.

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BOARD MEMBER SEEKING EMPLOYMENT WITH THE BOARD: Ethics Commission Information Sheet # 6

I. Introduction

The Ohio Ethics Law and related statutes are found in Ohio Revised Code (R.C.) Chapter 102. and Sections 2921.42 and 2921.43. These laws generally prohibit public officials and employees from misusing their official positions for their own personal benefit or the benefit of their family members or business associates.

The Ethics Law applies to all people who serve as officials and employees for public agencies in Ohio. "Public agencies" include state departments, boards, and commissions, counties, cities, villages, townships, school districts, public colleges and universities, public libraries, port authorities, and all other public entities.

The Ohio Ethics Commission was created to administer, interpret, and assist in the enforcement of the Ethics Law for all officials in the state, except members and employees of the General Assembly and judicial officers and employees.¹ In this information sheet, the word "official" includes any person who serves a public agency, whether elected, appointed, or employed.

II. Purpose of this Information Sheet

The Ethics Commission prepared this information sheet to explain how the Law applies when a member of a public board is interested in seeking or being considered for employment by the public agency he serves as a board member.

III. Summary of the Law

The Ethics Law and related statutes prohibit a member of a board of from:

- Authorizing a contract for his own employment with a public agency while he is a member of the agency's board;
- Seeking or soliciting employment from the public agency while he is a member of the agency's board;
- Using his position as a board member, in any way, to create or secure an employment opportunity for himself; and
- Profiting from an employment position that was authorized by the board while he was a member.

The law does not prohibit a former board member from competing for an employment position with the public agency he formerly served in an open and fair employment

process if it is clear that he did not use his position, while on the board, to secure the job, and that the best and most qualified candidate is selected for the job.

IV. Authorizing Employment

R.C. 2921.42(A)(1) prohibits an official from authorizing, or using his position to secure, a public contract for himself.² A “public contract” is defined to include employment.³ Therefore, R.C. 2921.42(A)(1) prohibits a board member from authorizing, or using his position to secure authorization of, employment with the public agency he serves.⁴ R.C. 2921.42(A)(1) prohibits the board member from voting on his own employment contract, recommending himself for employment the board, or using his position of authority in any manner as a board member to secure the contract.

V. Soliciting or Using Position to Secure a Contract for Employment

R.C. 102.03(E) prohibits an official who serves as a board or commission member from soliciting anything of value if the thing of value could have a substantial and improper influence upon him with respect to his duties. R.C. 102.03(D) prohibits an official who serves as a board member from using his position to secure anything of value if the thing of value could have a substantial and improper influence upon him with respect to his duties.

“Anything of value” is defined to include money, which would include payment for employment, and any promise of future employment.⁵ Therefore, R.C. 102.03(E) prohibits a board member from soliciting employment from the agency he serves as a board member.⁶ R.C. 102.03(D)

prohibits a board member from using his public position to secure employment from the agency. The board member is prohibited from voting, discussing, deliberating, lobbying, or taking any other action to secure employment with the board while he is a member.

VI. Profiting from Public Contract

R.C. 2921.42(A)(3) prohibits an official from profiting from a public contract authorized by him or by a board of which he is a member at the time of authorization, unless the contract is competitively bid and awarded to the lowest and best bidder. “Public contract” includes employment, and employment contracts are not competitively bid. Therefore, a board member cannot accept any benefit, including compensation, from an employment contract authorized by him, or by the board of which he is a member, even if he does not participate in the authorization of the contract.

VII. Creating New Position

If a public agency is creating a new employment position, R.C. 102.03(D) prohibits any member of the board from participating in that matter if he intends to apply for the job. If a board member wishes to apply for a job that the board is considering creating, he should resign from the board as soon as possible, before any official action regarding the position is taken.⁷ He is also prohibited from lobbying other board members about the position.

VIII. Example of Restrictions

If the public agency has an open employment position, the members of the governing board of the agency are prohibited from applying for the job.

A board member is also prohibited from using his authority to persuade other board members, or employees of the public agency, to hire him.⁸

If a board member wants to apply for an open job with the board, he must resign from the board before he submits an application or takes any other action to secure the job or benefits related to holding the job. He must resign before he discusses the employment opportunity with any board members or board employees. He is prohibited from seeking the job while he is a board member, and then resigning to accept the employment.

For example, if a state board is hiring a new executive director, a member of the board is prohibited from applying for the job. The board member would also be prohibited from discussing the employment opportunity with the current Director and with other board members.

If the board member thinks he will apply for the position of executive director, he would be prohibited from acting to increase the salary or benefits for the position, or modifying the duties or authority of the position. If the board member wants to apply for the position, he must resign from his position on the board before he submits his application. In order for him to apply, it must be clear that he did not use his position as a board member, in any way, to solicit or secure the job.

In some situations, the board can consider employment of a former member who has not applied for a position with the board.⁹ There is an exception in the revolving door law that permits such employment situations. For more guidance in that situation, please read the

Commission's revolving door memorandum and contact the Commission.

IX. Other Considerations

Any board member official who is considering seeking employment with that board should ask legal counsel for board whether the board has any additional policies or rules regarding this matter. (A public agency cannot create a policy or rule that is less restrictive than the prohibitions described above. However, an agency may have a policy or rule that is more restrictive than the Ethics Law.)

X. Penalties

The Ethics Law and related statutes are criminal laws. If a person is convicted of violating an ethics law, that person may receive a jail sentence and/or have a fine levied against him.

Most of the ethics laws discussed in this information sheet (R.C. 102.03(D) and (E)) are first-degree misdemeanors, with a maximum penalty of six months in prison and/or a \$1000 fine. One of the laws discussed (R.C. 2921.42(A)(1)) is a fourth-degree felony. The maximum penalty is 18 months in prison and/or a \$5000 fine.

XI. Conclusion

Please contact the Ethics Commission if you have questions about this information sheet or the Ohio Ethics Laws. This information sheet is not an advisory opinion, and is not intended to provide advice on specific facts. Copies of the Commission's formal advisory opinions can be obtained from: Ohio Ethics Commission, William Green Building, 30 West Spring

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Endnotes:

¹ The ethics agency with jurisdiction over ethics issues related to members and employees of the General Assembly is the Joint Legislative Ethics Committee. The ethics agency with jurisdiction over ethics issues related to judicial officers and employees is the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

² Adv. Op. No. 87-008.

³ R.C. 2921.42(G)(1)(a); Adv. Op. No. 97-004.

⁴ Adv. Op. No. 87-008.

⁵ Adv. Op. No. 96-004.

⁶ Adv. Op. No. 87-008.

⁷ Id.

⁸ Id.

⁹ Id.