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Advisory Opinion 2007-001

September 12, 2007

Syllabus by the Committee:

- 1) A Member of the General Assembly may remain employed by a state institution of higher education (University) as both a professor and the Director of the University's Columbus Program in Intergovernmental Issues (Program), while a Member of the Ohio House of Representatives.
- 2) The Member's employment with a University does not require the Member to abstain from voting on certain legislation, except where the legislation will provide the Member with a definite and particular benefit.
- 3) The Member may continue to conduct Program classes in Statehouse rooms, so long as the rooms are available to the public on the same terms.
- 4) The Member may use public resources in furtherance of the Program, so long as those resources, such as public speakers and public meeting rooms, are available to the general public and the Member does not use the resources of the Member's office to obtain access to the public resources. A Member may not use legislative staff, equipment owned by the House of Representatives, his title, legislative office space, etc., in furtherance of his outside employment.

Jurisdiction and Question Presented

Pursuant to sections 101.34 and 102.08 of the Revised Code that direct the Joint Legislative Ethics Committee to act as an advisory body to the Members and employees of the General Assembly on questions relating to ethics, conflicts of interest, and financial disclosure, the Joint Legislative Ethics Committee advises the Members and employees of the General Assembly on the following questions:

- (1) May a Member remain employed as a professor and director of a Program at a state institution of higher education, while a Member of the Ohio House of Representatives?
- (2) Does the Member's employment with the University require the Member to abstain from voting on certain legislation?
- (3) May the Member conduct classes for the Program on Statehouse grounds?
- (4) What are the guidelines for the use of state resources when conducting the Program?

Background

A Member currently holds the position of professor with a state institution of higher education. The position includes serving as director of a program in intergovernmental affairs, which offers internships in Columbus for students to learn how public policy is developed at the state level. The professor/program director conducts classes and oversees the interns' coursework in Columbus. These classes are held in available Statehouse hearing rooms. State public officials are classroom guest speakers. The Member held the position of professor/director prior to being elected to the General Assembly. The Member has relied on JLEC Advisory Opinion 98-001, which held that a Member may be employed by a state institution of higher education as a professor and is not prohibited from voting on legislation that is being actively advocated by the university.

Consideration of the Issues

The Committee has released prior opinions regarding the topic of outside employment, and pursuant to O.R.C. §102.08, those opinions apply to those Members similarly situated. O.R.C. §102.08 provides, when the Committee renders an Advisory Opinion that has been

publicly sought and that relates to a special set of circumstances involving ethics, conflicts of interest, or financial disclosure under §2921.42, §2921.43 or Chapter 102 of the O.R.C., the person to whom the opinion was directed or who was similarly situated may reasonably rely upon such opinion and shall be immune from criminal prosecutions, civil suits, or actions for removal from his office or position of employment for a violation of §2921.42, §2921.43 or Chapter 102 of the O.R.C. based on the facts and circumstances covered by the opinion.

The facts and circumstances relating to serving as professor at a public university were addressed in JLEC Advisory Opinion 98-001. The facts and circumstances relating to a Member's ability to vote in light of outside employment by an entity, which also employs a legislative agent were also addressed in JLEC Advisory Opinion 98-001. The facts and circumstances relative to a Member's ability to vote in light of outside interests generally were addressed in JLEC Advisory Opinion 99-002. The use of state resources, not specific to a Member's office and generally available to the public, in furtherance of outside employment, was addressed in JLEC Advisory Opinion 95-015.

1. May a Member remain employed by the University as both a professor and the Director of the Program, while a Member of the Ohio House of Representatives?

In JLEC Advisory Opinion 98-001, the Committee specifically held that a Member of the House of Representatives may in fact be employed as a professor at a public university. The rationale and conclusions of JLEC Advisory Opinion 98-001 are incorporated in their entirety, by reference, for purposes of this opinion.

Although the Director position is considered separate from that of Assistant Professor, the Member, in fact, receives one salary for both positions. Of importance is that the nature of the Director position does not involve a substantial and material exercise of administrative discretion in the formulation of public policy, expenditure of public funds, enforcement of laws and rules of the state or a county or city, or execution of other public trusts. As discussed by the Committee in JLEC Advisory Opinion 98-001, Ohio law does not prohibit Members of the General Assembly

from serving an educational institution of the state, supported in whole or in part by funds from the state treasury, in a capacity other than as trustee, officer, or manager. Therefore, based upon the interpretation of what constitutes a manager or employee, set forth in JLEC Advisory Opinion 98-001, the Member may serve as Director of the Program while a Member of the Ohio General Assembly.

2. Does the Member's employment with the University require the Member to abstain from voting on certain legislation?

It is necessary to answer this question in two parts. First, we must consider the fact that the University is the employer of a legislative agent. Second, we must address the standard for voting abstention generally.

The University as the Employer of a Legislative Agent:

Currently the University is the Employer of a Legislative Agent; this necessarily involves O.R.C. §102.031(B), which provides:

(B) No member of the general assembly shall vote on any legislation that he knows is then being actively advocated if he is one of the following with respect to a legislative agent or employer that is then actively advocating on that legislation:

- (1) An employee;
- (2) A business associate;
- (3) A person, other than an employee, who is hired under contract to perform certain services and such position involves a substantial and material exercise of administrative discretion in the formulation of public policy.

In JLEC Advisory Opinion 98-001, the Committee found that a Member who is engaged as a professor at a state institution of higher education does not fall within the purview of O.R.C. §102.031(B). In reaching this conclusion, the Committee found that "employee" does not include a Member of the General Assembly whose non-legislative position of employment does not involve the performance of, or the authority to perform, administrative or supervisory functions or whose non-legislative position of employment, if he is a public employee, does not involve a

substantial and material exercise of administrative discretion in the formulation of public policy, expenditure of public funds, enforcement of laws and rules of the state or a county or city, or execution of other public trusts. As in the case of a professorship, the position of Director of the Program does not meet the definition of “employee” or “business associate” as defined in JLEC Advisory Opinion 98-001. Therefore, the Member is not prohibited by O.R.C. §102.031(B) from voting on legislation that is being actively advocated by the University.

General standard for determination of whether Member may vote on specific legislation:

The determination of whether a Member may vote on legislation, without violating the prohibition on the use of office for personal gain, requires an analysis of O.R.C. §102.03(D). The Committee provided such an analysis in JLEC Advisory Opinion 99-002:

As stated previously, pursuant to R.C. 102.03(D), a Member is prohibited from participating in legislative matters where the outcome has a definite and particular effect on the Member's personal pecuniary interests. Unlike where direct revenue was to be received by the Member-shareholder's company in the current bill, in the substitute bill/amendment, no such direct revenue would be provided and in fact may never be realized unless various criteria are met and payment is authorized by the PUCO. Therefore, passage of the substitute bill/amendment would not have a direct impact on the Member-shareholder and the Member would not be prohibited from voting on the substitute bill/amendment. Accordingly, R.C. 102.03(D) does not prohibit a Member of the General Assembly from voting on legislation where the legislation does not have a definite and particular effect on the Member's personal pecuniary interests.

Lastly, the Committee further advises the Member that, notwithstanding this opinion, if the Member feels that the legislative matter is too directly related to the interests of the Member to allow the Member to vote in good conscience, the Member may, under Section 4 of the Legislative Code of Ethics request and receive permission to abstain from voting on legislation as follows:

A Member who has reason to believe that the Member has a substantial personal interest in legislation, may request permission of the chair to abstain from voting on the legislation and may state the Member's reason for the request. The request shall be granted by the chair pursuant to the rules of the Member's respective chamber of the General Assembly. The request and permission to abstain shall be entered in the House or Senate Journal, as it appropriate.

Applying this standard, the Member is not prohibited from voting on legislation, which may impact public universities generally, or the University directly, so long as the legislation does not have a **definite and particular effect** on his **personal** pecuniary interests. The Committee must also consider O.R.C. §2921.42(A)(1), which prohibits a Member from participating in a decision that would affect the terms and conditions, such as an increase in compensation, of an *individual* contract of employment for a member of his or her family. See JLEC Advisory Opinion 00-006. For example, while the Member would not be prohibited from voting on a bill, which would provide state funds to the University, the Member is prohibited from voting on any legislation, which specifically set the salary for, or directly funds, the position of Director of the Program.

3. May the Member conduct classes for the Program on Statehouse grounds?

For the last several years, prior to returning as a Member of the House of Representatives, the Member has conducted Program classes on Statehouse grounds. The use of Statehouse grounds by a Member requires consideration again of O.R.C. §102.03(D). In JLEC Advisory Opinion 95-005, the Committee addressed O.R.C. §102.03(D) with respect to the Member's employment with a state institution of higher education. At page three of the Opinion the Committee stated:

The member is prohibited from making recommendations or otherwise using the member's position, formally or informally, to secure anything of value for the college or university with which he is seeking or has accepted employment. Additionally, the member is prohibited from:

- (1) using General Assembly time, facilities, or resources to perform work for the college or university; . . .

While the Member is, in fact, prohibited from using his legislative office space, legislative staff, legislative influence and the title of Representative in furtherance of the Program, **the prohibition does not apply to those facilities and resources, which are available to the**

general public. Program classes are held in available rooms of the Statehouse. These rooms are available for use by the general public, with prior approval of the House or Senate Clerk. The Statehouse committee rooms are NOT resources exclusively available to Members of the General Assembly. At page three of JLEC Advisory Opinion 95-015, the Committee recognized that Members are not prohibited from obtaining benefits available to non Members, “[S]o long as the Member does not use his authority or influence to procure a benefit that is different from others similarly situated.” Therefore, the Member may conduct Program classes in Statehouse rooms, which are available to the public on the same terms, with the caveat that the Member may not use his title, influence, legislative staff or other resources of public office to secure use of the room(s)¹.

4. What are the guidelines for the use of state resources when conducting the Program?

In the answer to Question Three, we identified that a Member may not use the resources of his office to further his outside interests. These resources include, but are not limited to, a Member’s legislative office space, legislative staff, equipment owned by the Ohio House of Representatives, the title of State Representative, official letterhead and the seal of the Ohio House of Representatives. While engaging in activities as Director of the Program, the Member may reference himself as Doctor, Professor or Director, but not as Representative. When requesting speakers for the Program or the use of a room for conducting classes, the Member may personally make the request using a personal or University phone line, personal or University e-mail account and personal or University stationary, so long as the Member’s access to the scheduler, room, and speakers, is no different from that available to any other citizen. For example, the Member may not discuss legislation of interest to a state department and during that conversation ask the department’s director to be a guest class speaker. Nor should the Member make such a request via an agency’s legislative liaison. **The Committee strongly recommends that a University student or staff person, other than the Member, make the room and**

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speaker requests, when such requests are directed to public officials or employees. To do so will remove the appearance of improper influence. The University student or staff person must not reference the Member's status as a public official when making the request.

This Committee recognizes that when a public official uses, to his advantage, the access or connections available only through his public office and that access is not available to the general public, the official may be considered to have used the authority or influence of his office, in violation of O.R.C. §102.03(D)

Conclusion

Accordingly, the Committee finds, and the Members and employees of the General Assembly are so advised: (1) A Member of the General Assembly may remain employed by a state institution of higher education (University) as both a professor and the Director of the University's Columbus Program in Intergovernmental Issues (Program), while a Member of the Ohio House of Representatives; (2) the Member's employment with a University does not require the Member to abstain from voting on certain legislation, except where the legislation will provide the Member with a definite and particular benefit; (3) the Member may continue to conduct Program classes in Statehouse rooms, so long as the rooms are available to the public on the same terms; and (4) the Member may use state resources in furtherance of the Program, so long as those resources, such as public speakers, are available to the general public and the Member does not use the resources of the Member's office to obtain the public resources.

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules.

A request for use of a Statehouse Hearing Room is not a "case, proceeding or application". Therefore, the prohibition of O.R.C. §102.04(A) is inapplicable.