



Oregon

Kate Brown, Governor

Government Ethics Commission

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March 10, 2017

Jessica M. Brubaker
Assistant General Counsel
Office of the President
Oregon State University
600 Kerr Administration
Corvallis, Oregon 97331-2128

Dear Ms. Brubaker:

At its March 10, 2017 meeting, the Oregon Government Ethics Commission (OGEC) adopted the following advisory opinion:

OREGON GOVERNMENT ETHICS COMMISSION ADVISORY OPINION NO. 17-001A

STATED FACTS: Oregon State University (OSU) is established as a public university in the state of Oregon pursuant to ORS 352.002(2) and maintains a Board of Trustees established under ORS 352.054. Board members are appointed by the Governor, confirmed by the Senate, and must include one voting member who is an enrolled student at OSU, as well as one faculty and one staff person who can be either voting or nonvoting members (ORS 352.076(2)). At present, certain Board members also have relatives (as defined at ORS 244.020(16)) who are enrolled students at OSU.

The OSU Board of Trustees' purpose is to manage University affairs, which includes setting tuition rates and fees.

When setting tuition and fees, the Board considers a number of factors... The Board's consideration of tuition and mandatory enrollment fees will be based on the recommendation of the President, who will... report to the Board the nature and outcomes of consultations with students and others... The President's recommendation will include considerations regarding historical tuition and fee trends, comparative data for peer institutions, the University's budget and projected costs, and anticipated state appropriation levels. (Oregon State University Tuition and Fee Process, Resolution No. 15-01)

OSU's Tuition and Fees Schedules are broad, established categories. Tuition rates are generally assessed by: resident, non-resident, or e-campus; graduate or undergraduate; college of study; and number of credit hours enrolled. Mandatory fees are similarly assessed by matriculation and the number of credit hours a student is enrolled.

Employees of Oregon public universities may also receive tuition and fees discounts as part of their compensation benefits as long as they are appointed to work at least .50 FTE and are not considered temporary or student employees. Eligible OSU faculty and staff may register for a maximum of twelve credit hours per term at a reduced "staff fee rate" under terms that are approved by the Board of Trustees, and on approval of the OSU President. Employees have the option to transfer this benefit to a relative.

The purpose of this inquiry is to determine whether Oregon Government Ethics conflicts of interest arise for members of the OSU Board of Trustees in setting tuition rates and fees, if the Board member or Board member's relative is a current or prospective student at OSU.

QUESTION 1: Would Board members have conflicts of interest when participating in Board matters regarding the setting of generally applicable tuition rates or fees (such as those directly subject to the Tuition and Fees Schedules), if the Board member or Board member's relative is (or might be) a student enrolled at OSU?

ANSWER 1: No. For the purposes of setting tuition rates and fees that are generally applicable to all enrolled students, members of OSU's Board of Trustees (or their relatives) would be affected to the same degree as other students who are similarly situated (see ORS 244.020(13)(b)). As such, they will not have conflicts of interest when participating in Board matters to set tuition rates and fees that financially affect them or their relatives as students.

The members of boards of trustees in Oregon's public universities are "public officials" per ORS 244.020(15) and as such are subject to ORS Chapter 244, Oregon Government Ethics law.

In relevant part, a conflict of interest arises when a public official is confronted with making any action, decision, or recommendation, while working in an official capacity, that "would" (an "actual conflict of interest") or "could" (a "potential conflict of interest") financially affect the public official or a "relative" (as defined at ORS 244.020(16)) (ORS 244.020(1), (13)). More specifically, when, at most, the result of the action, decision, or recommendation could financially impact the public official or a relative—*i.e.*, if resulting financial impact is uncertain—it is a potential conflict of interest (ORS 244.020(13)). When it can be said that the result would have such a financial impact—*i.e.*, if financial benefit or detriment is certain—it is an actual conflict of interest (ORS 244.020(1)).

It follows that conflicts of interest generally arise for any public official who is a member of a governing body responsible for making decisions that will (or might) personally financially affect the public official or a relative of the public official. Likewise a member of the Board of Trustees, who is tasked with setting OSU tuition rates and fees that he or she or a relative will be financially subject to as a student, would generally have conflicts of interest when participating in such matters. ORS 244.120(2) requires conflicted public officials appointed to serve on boards or commissions to publicly announce their conflicts of interest, and additionally refrain from participating in actual conflicts, *unless an exception applies*.

Relevant in this circumstance, ORS 244.020(13)(b) provides an exception to the conflict of interest requirements where the resulting financial impact "would affect to the same degree a class" of persons with "which the person, or the person's relative... is associated...." Here, the stated facts describe a circumstance involving several classes of persons (each tuition and fee category), where the result of any official deliberation or action by the Board of Trustees would affect all enrolled students in that class to the same degree. For example, a Board action to implement a 1% increase in resident undergraduate tuition would affect all resident undergraduates to the same degree (a 1% tuition increase). A \$25 increase in the mandatory matriculation fee would affect all students who matriculate at OSU the same (all must pay \$25 more). In short, it appears that the result of any official Board matters regarding tuition or fee rates would have the same financial impact on a Board member or Board member's relative as all other students who are similarly situated. As a result, members of OSU's Board of Trustees will not have conflicts of interest or be required to follow the requirements under ORS 244.120 in official matters regarding student tuition or fees that may affect the Board member or a relative as a student.

QUESTION 2: Would the two Board members appointed to the staff and faculty positions (as required by ORS 352.076) have conflicts of interest when participating in Board matters regarding the "staff fee rate" discount?

ANSWER 2: No. The conflict of interest class exception discussed in Question 1 appears to apply here as well (see ORS 244.020(13)(b)). As such, staff and faculty Board members will not have conflicts of interest when officially participating in Board matters to determine "staff fee rate" changes that may financially impact them (or their employee benefits package).

As discussed in Question 1 above, ORS 244.020(13)(b) is an exception to the conflict of interest requirements where the resulting financial impact will affect a larger class of persons with which the Board member is associated "to the same degree." Under the current policy on the "staff fee rate" for tuition and fees, the result of any official deliberation or action by the Board of Trustees would affect the compensation benefits of all qualifying OSU staff and faculty to the same degree. As a result, staff and faculty

Board members will not have conflicts of interest or be required to follow the requirements under ORS 244.120 in official matters regarding student tuition or fees that may affect them or a relative as a student.

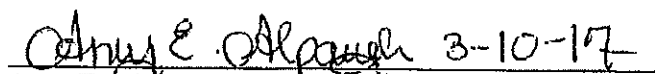
It is also worth specifying that the fact that the "staff fee rate" is a benefit of *employment* with an Oregon public university—*independent of Board membership*—is key in the application of this exception. In the stated facts, persons are not OSU employees as a result of serving on its Board of Trustees, so Board members are not eligible for the "staff fee rate" as a result of Board service. If, on the other hand, this were a question of expanding the "staff fee rate" policy to include members of the Board of Trustees as recipients of the benefit, or if the Board of Trustees had its own tuition or fee rate discount policy, a different analysis may apply. This is because prior Government Ethics Commission opinions have concluded application of the exception limited to situations where the conflicted public official is determined to be a member of a class *distinct* from the official position (see OGEC Op. 14S-002). In other words, the Commission has never identified a governing body itself to constitute a class for the purposes of ORS 244.020(13)(b), and as it is not a question here, declines to do so in this opinion.

THIS OPINION IS ISSUED BY THE OREGON GOVERNMENT ETHICS COMMISSION PURSUANT TO ORS 244.280. A PUBLIC OFFICIAL OR BUSINESS WITH WHICH A PUBLIC OFFICIAL IS ASSOCIATED SHALL NOT BE LIABLE UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS LIMITED TO THE FACTS SET FORTH HEREIN.

Issued by Order of the Oregon Government Ethics Commission at Salem, Oregon on the 10th day of March 2017.



Daniel T. Golden, Chairperson



Amy E. Alpaugh, Assistant Attorney General

ADDENDUM

RELEVANT STATUTES: The following Oregon Revised Statutes (ORS) are applicable to the issues addressed in this opinion:

244.020 Definitions. As used in this chapter, unless the context requires otherwise:

(1) "Actual conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (13) of this section.

(13) "Potential conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated, unless the pecuniary benefit or detriment arises out of the following:

(a) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.

(b) Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person's relative or business with which the person or the person's relative is associated, is a member or is engaged.

(15) "Public official" means the First Partner and any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body as defined in ORS 174.109 as an elected official, appointed official, employee or agent, irrespective of whether the person is compensated for the services.

(16) "Relative" means:

(a) The spouse, parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law of the public official or candidate;

- (b) The parent, stepparent, child, sibling, stepsibling, son-in-law or daughter-in-law of the spouse of the public official or candidate;
- (c) Any individual for whom the public official or candidate has a legal support obligation;
- (d) Any individual for whom the public official provides benefits arising from the public official's public employment or from whom the public official receives benefits arising from that individual's employment; or
- (e) Any individual from whom the candidate receives benefits arising from that individual's employment.

244.120 Methods of handling conflicts. (2) An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:

- (a) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or
- (b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:
 - (A) Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.
 - (B) If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.
- (3) Nothing in subsection (1) or (2) of this section requires any public official to announce a conflict of interest more than once on the occasion which the matter out of which the conflict arises is discussed or debated.
- (4) Nothing in this section authorizes a public official to vote if the official is otherwise prohibited from doing so.