

OHIO ETHICS COMMISSION

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September 7, 2001

Informal Opinion 2001-INF-0907-3

Don Thomas
[REDACTED]

Dear Mr. Thomas:

In a letter received by the Ohio Ethics Commission on July 2, 2001, you have asked several questions regarding the prohibitions that the Ethics Law and related statutes impose upon you as the former Director of the Hamilton County Department of Human Services (Hamilton County DHS). You have indicated that you retired from your position as the Director of Hamilton County DHS on June 30, 2001, and that you plan to join AMS, a for-profit business working with governments in Ohio, and serve as a paid consultant in July 2001.

Opinion Summary

As explained more fully below, the Ethics Law and related statutes place restrictions on public officials and employees who seek other employment or business opportunities after they leave their public positions. R.C. 102.03(D) prohibits a public official or employee, including an official or employee of a county human services department, from making recommendations to his public agency or otherwise using his official position with regard to a company with which he is seeking or negotiating employment, and from using the authority or influence of his position with his public agency to secure anything of value for a company with which he has accepted an offer of employment.

R.C. 102.03(E) prohibits a public official or employee, including an official or employee of a county human services department, from soliciting or accepting employment with a company while performing official duties with respect to that company.

Assuming that you did not, while you were the Director of Hamilton County DHS and seeking employment with AMS, take any actions that are prohibited by R.C. 102.03(D) and (E), as explained in this opinion, you are not prohibited from accepting a paid consulting position with AMS provided that you comply with the post-employment restrictions of the Ethics Law and related statutes as discussed herein. In particular, you are prohibited, within one year from the date you retired from your position with the Hamilton County DHS, from occupying any position of profit in the prosecution of a public contract authorized by you unless the contract was let by competitive bidding to the lowest and best bidder. You are also prohibited, within one

year from the date you retired from your position with the Hamilton County DHS, from representing AMS, or any other person, on any matter in which you personally participated as a public official or employee. Definitions of the terms "represent," "matter," and "personal participation" are set forth in this opinion.

Finally, you are prohibited from disclosing or using, without appropriate authorization, any confidential information that you acquired in the course of your public service.

Facts

In your letter to the Ethics Commission, you state that, on July 2, 2001, you retired from your position as Director of the Hamilton County DHS. You further state that you are planning to join AMS as a paid consultant upon receipt of an advisory opinion from the Ethics Commission.

You explain that AMS is a for-profit business that works with governments in Ohio. You also explain that the Hamilton County DHS selected AMS, through a bid process, to perform some management services for the agency several years ago. You state that the final contract payment to AMS was made in April 2000. You further state that AMS holds several large contracts with the Ohio Department of Job and Family Services (ODJFS), but that you did not participate in the awarding of the ODJFS contracts.

You have asked the Ethics Commission to issue an advisory opinion regarding your potential employment with AMS. In addition to addressing provisions of law which are sometimes referred to as post-employment restrictions of the Ethics Law and related statutes, and which include R.C. 102.03(A)(1), 102.03(B), and 2921.42(A)(3), this advisory opinion will address job-seeking restrictions imposed by R.C. 102.03(D) and (E). While the Commission also has the statutory authority to interpret and help enforce R.C. 2921.43, a supplemental compensation prohibition, the facts that you have presented to the Commission do not implicate R.C. 2921.43.

Job-Seeking Provisions—R.C. 102.03(D) and (E)

Although you have indicated that you have already retired from your position with the Hamilton County DHS, you should be aware of the manner in which the prohibitions of R.C. 102.03(D) and (E) may affect your opportunity, as a former employee of the Hamilton County DHS, to receive compensation from AMS. In particular, R.C. 102.03(D) and (E) provide as follows:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

In your position with the Hamilton County DHS, you were a "public official or employee" and within the class of persons subject to the prohibitions of R.C. 102.03(D) and (E). See R.C. 102.01(B) and (C). See also Ohio Ethics Commission Advisory Opinion No. 89-014.

The term "anything of value" is defined, for purposes of R.C. Chapter 102., to include money, the promise of future employment, and every other thing of value. See R.C. 102.01(G) and R.C. 1.03. The compensation that you would receive from AMS, or any other person, for representing their interests, would fall within the definition of "anything of value" for purposes of R.C. 102.03(D) and (E). See Adv. Ops. No. 86-006, 89-012, and 92-005.

R.C. 102.03(D) and (E) prohibit a public official or employee, during his public service or employment, from accepting, soliciting, or using his position to secure, a promise of future employment or compensation therefor from a party that is regulated by, doing business or seeking to do business with, or interested in matters before, the public agency with which he serves, unless he withdraws as a public official or employee from matters affecting the interests of that party. See R.C. 2921.42(A)(3); Adv. Ops. No. 91-009 and 92-005. A public official or employee is prohibited from accepting or soliciting employment from a party while performing his official duties with respect to that party, and is prohibited from using his official authority or influence to secure employment. See Adv. Op. No. 92-005. R.C. 102.03(D) also prohibits a public official or employee from making recommendations to his public agency or otherwise using his official position with regard to a company with which he is seeking or negotiating employment, and from using the authority or influence of his position with his public agency to secure anything of value for a company from which he has accepted an offer of employment. Adv. Ops. No. 86-006, 87-004, and 91-009.

In the situation you have described, you would have been prohibited, while you were employed by the Hamilton County DHS, from using your public position to secure employment with AMS. You would have also been prohibited from seeking or accepting employment or compensation from AMS while you were making recommendations affecting AMS, or otherwise performing official duties with respect to AMS.

Post-Employment Restrictions

Assuming that you did not engage in any of the prohibited actions described above, you are also subject to post-employment restrictions that the Ohio Ethics Law and related statutes impose upon all former public officials and employees. These restrictions fall into three areas: (1) profiting from public contracts in specified situations; (2) representing parties before public agencies; and (3) releasing confidential information.

Profiting From a Public Contract—R.C. 2921.42(A)(3)

R.C. 2921.42(A)(3) restricts your ability to profit from contracts that you authorized while you were employed by the Hamilton County DHS. R.C. 2921.42(A)(3) provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

The term "public official" is defined for purposes of R.C. 2921.42 to include any elected or appointed officer, or employee, or agent of the state or any political subdivision. See R.C. 2921.01(A). A county employee is within the class of persons subject to the prohibitions of 2921.42(A)(3). See Adv. Op. No. 91-009.

The term "public contract" is defined, in R.C. 2921.42(G)(1)(a), to include 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. The purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the Hamilton County DHS or ODJFS is a public contract.

For purposes of R.C. 2921.42(A)(3), a public contract will be deemed to have been "authorized" by a public official or board if the contract could not have been awarded without the approval of the official, or the office or position in which the public official serves, or the board on which he sits. See Adv. Ops. No. 88-008, 91-009, and 92-017.

You have stated that you did not participate in the awarding of ODJFS contracts to AMS. Therefore, based on the information you have provided, R.C. 2921.42(A)(3) would not prohibit you from profiting from ODJFS contracts awarded to AMS. See, however, R.C. 102.03(A)(1), discussed above (you are prohibited from representing any person, including AMS, on any matter in which you personally participated as an employee of the Hamilton County DHS).

You have also indicated that the Hamilton County DHS selected AMS to provide management services for the agency several years ago. You have further indicated that the final contract payment to AMS was made in April 2000. You have not indicated whether you participated in the authorization of these contracts, although it is likely that you did as Director of the agency. You should be aware that if you participated in the authorization of these contracts, you would be prohibited from profiting from the contracts within one year of the date that you retired from your position with the Hamilton County DHS. You would profit from a contract awarded to AMS where: (1) the establishment or operation of AMS is dependent upon receipt of the contract; (2) the creation or continuation of your position with AMS is dependent upon the award of the contract; (3) AMS would use funds from the contract to compensate you

or as a basis for your compensation; or (4) you would otherwise profit from the award of the contract to AMS. See Adv. Ops. No. 87-004, 88-008, and 89-006.

The Revolving Door Prohibition—R.C. 102.03(A)

Division (A) of Section 102.03 of the Revised Code, the "Revolving Door" prohibition of the Ohio Ethics Law, imposes restrictions upon the ability of former public officials and employees to represent a client or act in a representative capacity for any person after leaving public service. R.C. 102.03(A)(1) provides:

No present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

The pertinent elements of this provision are: (1) a present or former public official or employee; (2) during government service and for one year thereafter; (3) is prohibited from representing a client or acting in a representative capacity for any person; (4) before any public agency; (5) on any matter in which he personally participated as a public official or employee. See Adv. Ops. No. 86-001, 89-009, 91-009, and 92-005. The Franklin County Court of Appeals upheld the "Revolving Door" prohibition as constitutional in State v. Nipps, 66 Ohio App. 2d 17 (1979).

As noted above, and in accordance with R.C. 102.01(B) and (C), you are a "former public employee" for purposes of R.C. 102.03(A). As a former public employee, you are subject to the statutory revolving door prohibitions. Accordingly, R.C. 102.03(A) prohibits you, for a period of one year from the date that you left your employment with the Hamilton County DHS, from representing AMS, or any other party, before any public agency, including the Hamilton County DHS, on any matter in which you personally participated while you were employed with the Hamilton County DHS. Adv. Ops. No. 91-009 and 92-005.

The term "represent" is defined in R.C. 102.03(A)(5) to include "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." Examples of the types of activities that would fall within the definition of the term "represent," for purposes of this section, were described by the Ethics Commission in Advisory Opinion No. 86-001:

[T]his would include activities ranging from an appearance on behalf of a private client in a formal proceeding or meeting to informal "lobbying" of agency personnel by telephone or in person. It also includes written communications ranging from formal documents and filings to informal letters and notes. Even if the attorney or consultant does not sign the documents, letters, or notes, the prohibition would apply if she prepared the communication. If she merely

consulted with the attorneys or other personnel who prepared the documents, letters, or notes, the prohibition would not apply.

R.C. 102.03(A) prohibits a former public official or employee from "representing" a client, new employer, or any other party, on a matter in which he personally participated, before any public agency, and not just before the agency with which he was previously employed. See Adv. Ops. No. 86-001, 87-001, and 92-005.

A "person," for purposes of R.C. 102.03(A)(1), has been interpreted by the Commission to include governmental agencies, individuals, corporations, business trusts, estates, trusts, partnerships, and associations. See R.C. 1.59(C) and Adv. Ops. No. 82-002 and 89-003. In your situation, this would include AMS and any other person. The prohibition in R.C. 102.03(A) applies to any "matter" in which the official or employee personally participated. The term "matter" is defined, for purposes of R.C. 102.03(A)(1), to include "any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments." R.C. 102.03(A)(5). The term "matter" is broadly defined under R.C. 102.03(A) and includes any issue or question, as well as particular cases, proceedings, applications, and determinations. See Adv. Ops. No. 91-009 and 92-005. In Advisory Opinion No. 99-001, the Ethics Commission further defined "matter" as follows:

"Matter" includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, or investigation, a lawsuit or legal proceedings, an oral or written application, and a settlement of a dispute or question. "Matter" also includes such abstract items as a dispute of special or public importance and a controversy submitted for consideration. It is also apparent, however, that the term "matter" cannot be interpreted so broadly as to include a general subject matter.

In your situation, for example, the term matter would include such things as issues, questions, or determinations with respect to AMS' provision of services to the Hamilton County DHS.

R.C. 102.03(A) defines "personal participation" to include "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion." In Advisory Opinion No. 91-009, the Ethics Commission held that "personal participation" in a matter also includes the exercise of "supervision or general oversight" over other personnel in their work on that matter, since supervision of a public official's or employee's activities involves decision-making, approval or disapproval, recommendation or advice, and other exercises of administrative discretion, by the supervisor, regarding that matter. See also Adv. Op. No. 92-005.

Therefore, R.C. 102.03(A) prohibits you from representing any person before any public agency on any matter in which you personally participated, whether you were primarily responsible for the matter, or supervised other officials or employees, as the Director of the County DHS, on the matter. See Adv. Op. No. 91-009. You would not be prohibited, however,

from representing any party before any public agency on new matters or matters in which you did not personally participate as a public official or employee. See Adv. Op. No. 92-005.

In your letter to the Commission, you explain that the Hamilton County DHS selected AMS to perform some management services for the agency several years ago. You should be aware that R.C. 102.03(A)(1) would prohibit you, within one year of the date that you retired from your position with the Hamilton County DHS, from representing AMS before any public agency on a matter related to these AMS contracts, or any other matter, if you personally participated in the matter while you were employed by the Hamilton County DHS. Further, if you participated in other matters involving AMS' ongoing relationship with ODJFS, you would be prohibited from representing AMS or other parties on those matters for one year from the date you left your public position.

Disclosure of Confidential Information—R.C. 102.03(B)

You are also subject to Division (B) of Section 102.03 of the Revised Code, which provides the following:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

Pursuant to this section, you are prohibited from disclosing or using, without appropriate authorization, any confidential information that you acquired in the course of your official duties. No time limitation exists for this prohibition. Adv. Op. No. 88-009. It is effective while you serve in a public position and after you leave public service. Id.

Responses to Your Specific Questions

In your letter to the Ethics Commission, you pose the following questions:

- (1) Is there any prohibition for me doing paid work for AMS in Ohio or other parts of the country provided that I stay out of Hamilton County?
- (2) What limitations are placed on me in working for AMS in Hamilton County such as meeting with the County Commissioners, County Administrator, or top managers in the Department of Human Services?
- (3) Are there any other things that I need to be aware of so that I do not compromise myself or AMS in the next year?

In response to your first and second questions, you should note that the restrictions explained above are not tied to the geographical area in which you would provide services to AMS. Rather, the restrictions are based on your actions as the former Director of the Hamilton County DHS, and, further, whether you would be representing AMS on a matter in which you personally participated as the former Director of the Hamilton County DHS or whether you would be profiting from a contract that you authorized. However, if you were to work for AMS in Hamilton County, it would be more likely that your consulting activity with AMS would involve matters in which you personally participated as the Director of the Hamilton County DHS, or would otherwise implicate provisions of the Ethics Law that are explained above. Further, if you were to work for AMS in Hamilton County, there may be the appearance that you used your former position with the Hamilton County DHS to secure the work for AMS and yourself, regardless of whether the performance of the work, and the compensation and profit received thereby, would otherwise be prohibited by the Ethics Law and related statutes.

In response to your third question, the Ethics Commission has the authority to interpret provisions of law in R.C. Chapter 102. and R.C. 2921.42 and 2921.43. An advisory opinion issued by the Ethics Commission applies these provisions of law to the facts provided by the requester of an opinion in his or her letter to the Commission. When the Ethics Commission renders an advisory opinion relating to the facts provided by the requester of such an opinion, the person to whom the opinion is directed, and any person who is similarly situated, may reasonably rely upon the opinion and is immune from criminal prosecutions, civil suits, or actions for removal from his or her office or position of employment for a violation of Chapter 102. or section 2921.42 or 2921.43 of the Revised Code based on the facts and circumstances covered by the opinion, if the opinion states there is no violation of Chapter 102. or section 2921.42 or 2921.43 of the Revised Code. See R.C. 102.08. Therefore, this opinion is limited to addressing whether provisions in Chapter 102. or section 2921.42 or 2921.43 of the Revised Code would be violated under the facts you have provided. The Ethics Commission does not have the authority to address whether other provisions of law would restrict you from seeking employment with AMS. While this advisory opinion provides a full examination of the various provisions of the Ethics Law and related statutes that may apply to the facts that you have provided to the Ethics Commission, you may wish to seek advice from private legal counsel as to whether provisions of law outside of the Ethics Law may place restrictions on your ability to provide services to AMS.

Conclusion

As explained above, the Ethics Law and related statutes place restrictions on public officials and employees who seek other employment or business opportunities after they leave their public positions. R.C. 102.03(D) prohibits a public official or employee, including an official or employee of a county human services department, from making recommendations to his public agency or otherwise using his official position with regard to a company with which he is seeking or negotiating employment, and from using the authority or influence of his position with his public agency to secure anything of value for a company with which he has accepted an offer of employment.

R.C. 102.03(E) prohibits you from accepting compensation for providing services to AMS if you used your public position to secure employment with AMS. This prohibition would be in place until it is clear, based on the passage of time, that your employment or receipt of compensation did not result from your use of your position to obtain employment or other business opportunities with AMS.

Assuming that you did not, while you were the Director of Hamilton County DHS and seeking employment with AMS, take any actions that are prohibited by R.C. 102.03(D) and (E), as explained in this opinion, you are not prohibited from accepting a paid consulting position with AMS provided that you comply with the post-employment restrictions of the Ethics Law and related statutes as discussed herein. In particular, R.C. 102.03(A)(1) prohibits you, within one year from the date you retired from your position with the Hamilton County DHS, from representing AMS, or any other person, on any matter in which you personally participated as a public official or employee. Definitions of the terms "represent," "matter," and "personal participation" are set forth in this opinion.

You are also prohibited, within one year from the date you retired from your position with the Hamilton County DHS, from occupying any position of profit in the prosecution of a public contract authorized by you unless the contract was let by competitive bidding to the lowest and best bidder.

Finally, the Ethics Law prohibits you from disclosing or using, without appropriate authorization, any confidential information that you acquired in the course of your public service.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 7, 2001. The Commission commends you for requesting guidance before taking any actions that could be prohibited by the Ethics Law.

The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please contact this Office again.

Sincerely,



Timothy L. Gates
Staff Attorney