

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

June 13, 2003

Informal Opinion 2003-INF-0613-1

Thomas M. Zaino, Tax Commissioner
Department of Taxation



Dear Commissioner Zaino:

In a letter received by the Ohio Ethics Commission on May 1, 2003, you ask whether the Ethics Law and related statutes prohibit the Administrator of the Excise Tax Division (Division) in the Department of Taxation (Department) from seeking employment with the International Fuel Tax Association (Association) while he is an employee of the Department. The Administrator is retiring on December 31, 2003, and would begin his position with the Association after his retirement.

Brief Answer

As explained below, the Administrator is not prohibited from being employed by the Association after he retires from his position at the Department. However, the Ohio Ethics Law and related statutes prohibit him from seeking the employment while he is an employee of the Department, unless he withdraws from all matters pending before the Division that directly affect the Association's interests. In order to comply with this requirement, the Administrator must resign from his position as an Association Board member. The Administrator's withdrawal must be reviewed by the Department to determine whether it will create a hardship for the Department.

If the Administrator accepts employment with the Association, he is prohibited, for a period of one year after leaving employment with the Department, from representing the Association, its member jurisdictions, and any other "person" before any Ohio public agency on any matter in which he personally participated in the course of the performance of his public duties, regardless of when, during his employment, the personal participation occurred.

Facts

In your letter to the Ethics Commission, you state that the Division collects the Ohio Fuel Use Tax (Tax) through the International Fuel Tax Agreement (Agreement). Owners of vehicles with three or more axles that purchase fuel outside of Ohio but consume it while driving on Ohio highways are required to pay the Tax. Ohio is a member, along with forty-seven other states and ten Canadian provinces, in the Agreement. Under the Agreement, a party required to pay the Tax files only one tax return with, and submits payment to, its base jurisdiction based upon travel in all jurisdictions. The base jurisdiction processes the tax return and transfers the appropriate amount of revenue to the proper jurisdictions.

The Agreement is administered by the Fuel Tax Association, which is a nonprofit corporation based in Arizona. The Association is governed by a nine-member board of trustees (Board). The Administrator is one of the Association's nine Board members. The Board's primary goal is to develop a strategic plan for the Association that promotes the purpose of the Agreement and the wishes of its membership. The Association must approve by majority vote: (1) the appointment of individuals to membership on the Association's Board; (2) the Association's budget; (3) any changes to the Agreement, and (4) matters affecting the jurisdictions that are Association members.

The Association, its Board, and its employees have no contact with the persons who are required to pay the Tax and are not involved with the transfer of revenue among jurisdictions. The Association conducts compliance reviews of the jurisdictions that comprise its membership to determine whether the jurisdictions are complying with the Agreement. The Association conducts the reviews on a rotating basis so that each jurisdiction is reviewed once every four years. The review determines whether the jurisdiction is following the proper procedure for the administration, collection, and auditing of fuel use taxes. You state that the Association conducted a compliance review of Ohio in 2002, for the period 1998 through 2001. Ohio is scheduled for another review in 2006.

You state that, at the Board's meeting in April 2003, the Executive Director discussed the possibility of creating a part-time position to lead a three-person team to conduct the compliance reviews. The Board voted to create and fund this part-time team-leader position. You state that the Administrator told the Executive Director that he would be interested in applying for the team-leader position. Because of his desire to become an employee of the Association, the Administrator did not participate in the Board's decision to create and fund the part-time position. You explain that, if the Administrator were to be employed by the Association, the Association will prohibit him from participating in the Association's next compliance review of Ohio.

Job Seeking—R.C. 102.03(D) and (E)

Your attention is directed to R.C. 102.03(D) and (E), which read:

- (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.

A "public official or employee" is defined, for purposes of R.C. Chapter 102., to include any person who is employed by any department of the state. R.C. 102.01(B) and (C). An employee of the Department of Taxation is a "public official or employee" subject to the prohibitions of R.C. 102.03.

The term "anything of value" is defined in R.C. 1.03 to include "the promise of future employment" and "every other thing of value." R.C. 1.03(H). The compensation that the Association will provide to the team leader is a thing of value for purposes of R.C. 102.03(D) and (E).

R.C. 102.03(D) and (E) prohibit a public official or employee, during his public service or employment, from using the authority or influence of his public office or employment to secure a financial benefit for himself, such as the compensation associated with private employment, even if he will not secure the benefit until after he leaves his public position. Ohio Ethics Commission Advisory Opinion No. 87-008. R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting or seeking employment from parties that are interested in matters before, doing or seeking to do business with, or are regulated by his public agency, unless the public official withdraws from consideration of any matter involving any firm with which he has had contact regarding possible employment. Adv. Ops. No. 77-003 and 88-002.

As explained above, the Association, its Board, or its employees are not involved with persons who are required to pay the Tax or the transfer of revenue amongst jurisdictions. Therefore, the Association is not doing or seeking to do business with, or regulated by, the Department. However, it is apparent that the Association functions to expedite and administer the collection of the Tax by the Department's Division. Therefore, the Association is a party that is interested in matters—the collection of the Tax and administration of the Agreement—before the Department.

Accordingly, in the instant situation, in order for the Administrator to solicit an offer of future employment from the Association, he must withdraw from consideration of any matter involving the Association. R.C. 102.03(D) and (E) prohibits the Administrator from making recommendations to the Department, or otherwise using his position, with regard to issues that could affect the Association. R.C. 102.03(D) and (E) also prohibit the Administrator from using the authority or influence of his position to secure anything of value for the Association. Any matter before the Division that could affect the Association must be handled by a Department official or employee who either serves in, or reports to a person who serves in, a position that is at, or above, the Administrator's level of supervision.

R.C. 102.03(D) and (E) prohibit a public official or employee from using the authority or influence of his position with his public agency to secure anything of value for a party from which he is seeking or negotiating employment and with which he has accepted a position of employment. Adv. Ops. No. 86-006 and 87-004. Therefore, as discussed above, the Administrator must be able to withdraw from participating in matters affecting the Association both while he is seeking employment from the Association and after he has accepted employment with the Association.

Continued Service on the Board of the Association

R.C. 102.03(D) prohibits a public official or employee from engaging in the use of the authority or influence of his office or employment to secure a thing of value that could have an improper influence upon him with respect to the performance of his "duties." The Administrator is prohibited from using the authority or influence of his office to secure anything of value that could have an improper influence upon him with respect to any of his duties as Administrator. One of the Administrator's job duties is to serve on the Association Board. Therefore, when the Administrator is performing his duties as a Board member, he is also performing his duties as Administrator.

The words "authority or influence" are not defined for purposes of R.C. 102.03(D). A primary tenet of statutory construction is that undefined words used in a statute must be construed according to rules of grammar and common usage. See R.C. 1.42. The word "authority" is defined as "power or influence resulting from knowledge, prestige, etc." *Webster's New World Dictionary of the American Language* 94 (2d College ed. 1970). The word "influence" is defined as "the power of persons . . . to affect others, seen only in its effects" and "the ability of a person . . . to produce effects indirectly by means of power based on . . . high position." *Id.* at 722.

You state that Ohio is one of the top five member jurisdictions with respect to persons subject to the Tax, registered vehicles, audits required, and revenue collected. As long as he continues to serve on the Board, the Administrator is in a position of influence with respect to the Association's other Board members and its Executive Director. His position on the Board could

influence them regarding their selection of a person to fill the position of team leader, even if he does not actively participate in Board actions on those matters.

You stated that, because of the Administrator's desire to become an employee of the Association, he did not participate in the Board's decision to create and fund the part-time position. The Administrator's decision to refrain from participation in this matter was laudable. However, in order to prevent any influence upon the other Association Board members and the Association's Executive Director with respect to their selection of a person to fill the position of team leader, the Administrator is required to resign from his position as an Association Board member if he desires to continue pursuing employment with the Association.

Review and Approval of Withdrawal

The Ethics Commission has noted that the withdrawal of a public official from matters that affect his outside employer may be detrimental to the functioning of his public agency. Adv. Op. No. 99-002. Because of this potential detrimental result, the Ethics Commission has held that the withdrawal of a public official from matters that affect a future employer must be approved by the public agency. Adv. Op. No. 99-002. In this case, as discussed above, the Administrator will be required to withdraw from all matters before the Department that affect the Association and step down from his position on the Association's Board.

You, as Tax Commissioner, must determine whether the Administrator's withdrawal could create a hardship upon the Department before his planned retirement at the end of this year. See Adv. Ops. No. 90-002 and 96-004. If you determine that the Administrator's withdrawal will not create a hardship for the Department, the Administrator can proceed to withdraw from these matters and seek employment with the Association. If you determine that the Administrator's withdrawal from issues involving the Association will create a hardship for the Department, the Administrator must either: (1) cease any attempt to seek employment from the Association in order to continue to perform his duties for the state; or (2) retire now in order to seek employment from the Association.

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

R.C. 102.03(A), the "Revolving Door" prohibition of the Ohio Ethics Law, also applies to your question. R.C. 102.03(A) provides, in pertinent part:

No present or former public official or employee shall, during his 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 he 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.

As noted above, the Administrator is a "public official or employee" for purposes of the restriction in R.C. 102.03. Therefore, the Administrator is subject to R.C. 102.03(A).

The term "represent" is defined, in R.C. 102.03(A) to include "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." Representation can include formal or informal communications with a public agency including letters, notes, e-mails, and telephone calls, on behalf of any person.

A "public agency" is defined in R.C. 102.01(C) to include "the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, township, and the five state retirement systems, or any other governmental entity." In the situation you have described, this includes the Department of Taxation, but it also includes any other governmental agency within the state of Ohio. Adv. Ops. No. 86-001 and 87-001.

R.C. Section 102.03(A) defines the term "matter" 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." "Matter" is broadly defined and includes both concrete matters items, such 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. However, "matter" cannot be so broadly defined as to include general subject matter. In the situation you have presented, matter includes any decisions made by the Administrator involving the Ohio Fuel Use Tax, includes any decisions related to the state's policies and controversies related to Fuel Use Tax. It would include matters that arose before the Administrator while he was a Board member of the Association.

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, advice, and other exercises of administrative discretion, by the supervisor, regarding that matter. See also Adv. Op. No. 86-001.

Therefore, R.C. 102.03(A) prohibits the Administrator, for a period of one year after leaving his employment with the Department, from representing the Association, its member jurisdictions, and any other "person" before any public agency on any matter in which he personally participated in the course of the performance of his public duties, regardless of when, during his employment, the participation occurred. The Administrator is not prohibited from performing the duties you have described as team leader, unless those duties would involve

representation of the Association, before any public agency in Ohio, in matters in which he personally participated as Administrator, including matters in which he participated as a Board member of the Association.

In your letter to the Ethics Commission, you explain that the Association will prohibit the Administrator from participating in the Association's compliance review of Ohio that is scheduled for 2006. This prohibition will help limit any appearance of impropriety that may be presented by the hire, because the 2006 compliance review will include the period when he was the Administrator of the Excise Tax Division in Ohio.

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

You should also be aware of Division (B) of Section 102.03 of the Revised Code, which reads as follows:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such 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.

Division (B) of Section 102.03 prohibits a present or former public official from disclosing or using, without appropriate authorization, any confidential information acquired by him in the course of his official duties. No time limitation exists for this prohibition, and it is effective while a person serves in a public position and after he leaves public service. Adv. Op. No. 88-009. R.C. 102.03(B) prohibits the Administrator from releasing confidential information that he acquired during his state service to the Association or any other party.

Conclusion

As explained above, the Administrator is not prohibited from being employed by the Association after he retires from his position at the Department. However, the Ohio Ethics Law and related statutes prohibit him from seeking the employment while he is an employee of the Department, unless he withdraws from all matters pending before the Division that directly affect the Association's interests. In order to comply with this requirement, the Administrator must resign from his position as an Association Board member. The Administrator's withdrawal must be reviewed by the Department to determine whether it will create a hardship for the Department.

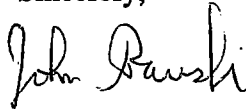
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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on June 13, 2003. The Commission commends you for requesting guidance on behalf of the Administrator before any actions were taken that could be prohibited by law.

The 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. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



John Rawski
Staff Attorney