

OHIO ETHICS COMMISSION

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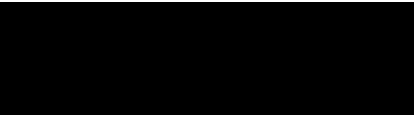


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David E. Freel, *Executive Director*

December 23, 2003 Informal Opinion 2003-INF-1223

Steven T. Nourse



Dear Mr. Nourse:

The Ohio Ethics Commission received your e-mail requesting an advisory opinion on November 26, 2003. In your e-mail, you have explained that you are a Principal Assistant Attorney General, a non-managerial position within the Attorney General's Office. You have explained that you are one of the attorneys who has been assigned to serve as legal counsel for the members and staff of the Public Utilities Commission of Ohio (PUCO). In that role, you have been involved in a small number of matters involving the Office of the Consumers' Counsel that are pending or may remain pertinent in the near future. You have stated that you plan to apply for the position of Consumers' Counsel and have asked whether the Ohio Ethics Law and related statutes prohibit you from holding that position in light of your current job duties.

Brief Answer

As explained more fully below, an Assistant Attorney General (AAG) who represents the PUCO is not prohibited from serving as Consumers' Counsel, as long as the Consumers' Counsel Governing Board makes a determination that it can assign matters in which the AAG personally participated to the Deputy Consumers' Counsel pursuant to R.C. 4911.20. To make that determination, the Consumers' Counsel Governing Board may appropriately consider the specific facts to determine whether the scope of any candidate's previous activity involving the Consumers' Counsel will significantly affect his ability to function effectively during the first year of his service to the Office.

While the AAG is seeking the position of Consumers' Counsel and before he takes the office if he is selected for the position, he will be required to completely withdraw from all matters affecting the Office of Consumers' Counsel.

Facts

As noted above, you have explained that you are an AAG assigned to represent the members and employees of the PUCO and that you are interested in applying for the position of Consumers' Counsel.

The Consumers' Counsel is an officer of the state of Ohio. R.C. 4911.06. The Consumers' Counsel must be an attorney admitted to the practice of law in Ohio, and must have the knowledge and experience to practice in public utility proceedings. R.C. 4911.03 (A). The Consumers' Counsel is appointed by the Consumers' Counsel Governing Board (Governing Board), and holds the office at the pleasure of the Governing Board. R.C. 4911.02 (A). See also R.C. 4911.17. Although the Consumers' Counsel is appointed by the Governing Board, the statutory duties of the Office of Consumers' Counsel reside not in the Governing Board, but in the Office of Consumers' Counsel itself. See, e.g., R.C. 4911.02, 4911.12, 4911.13, 4911.14, and 4911.15.

By way of history, you have stated that you are familiar with the Ohio Ethics Commission's Advisory Opinion No. 93-011, in which the Commission stated that a member or employee of the PUCO may be prohibited from being appointed to the position of Consumers' Counsel. You are also familiar with R.C. 4911.20, enacted in 1994, which created the position of Deputy Consumers' Counsel and empowered the Governing Board to assign, to that person, any of the duties and powers of the Consumers' Counsel. You have asked whether the conclusion in Advisory Opinion No. 93-011 is altered by the enactment of R.C. 4911.20.

Advisory Opinion No. 93-011

In Advisory Opinion No. 93-011, the Commission was asked whether and to what extent the Consumers' Counsel would be subject to the revolving door law, set forth in R.C. 102.03(A), if a person who is a commissioner or employee of the Public Utilities Commission of Ohio applies for and is appointed to the Office. The Commission was also asked whether and to what extent the prohibition of R.C. 102.03(A) would restrict the Office of the Consumers' Counsel itself from representing clients before the PUCO if a former commissioner or employee of the Public Utilities Commission of Ohio was appointed to the position of Consumers' Counsel. The Commission ultimately concluded that R.C. 102.03(A) may preclude a former commissioner or employee of the PUCO from accepting an appointment to the Office of Consumers' Counsel where his duties with the PUCO were such that he would be required to refrain from participating in activities of the Office of the Consumers' Counsel.

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 Commission reviewed the duties of the Consumers' Counsel and concluded that the duties include frequent and extensive contacts with various state and federal courts, the PUCO, and other administrative agencies. As a result, the Commission concluded that R.C. 102.03(A) would prohibit a former PUCO commissioner or employee, if appointed to the position of Consumers' Counsel, from representing any person, including a residential consumer or municipal corporation, before any public agency, including all courts and the PUCO, on any matter, including any application, suit, action, or other Consumers' Counsel proceeding, in which he personally participated while he was a commissioner or employee of the PUCO. The prohibition would remain in effect for one year from the date the PUCO commissioner or employee left his position at the PUCO.

R.C. 102.03(A)(1) defines "personal participation" to include "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion." "Personal participation" 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 Adv. Op. No. 91-009.

Generally, R.C. 102.03(A) does not prohibit a former public official or employee from taking a new position, whether in the public or private sector. However, the Commission noted the considerable interactions between the PUCO and the Office of the Consumers' Counsel and the frequency with which both offices may be involved in particular matters, and the unique statutory authority of the Consumers' Counsel, and concluded:

The Consumers' Counsel cannot be insulated from the activities of his own office. The Consumers' Counsel appoints, and is the ultimate supervisor of, all of the employees of his office. The Consumers' Counsel is empowered to hire employees to assist him in carrying out the "duties and exercise the powers conferred by law upon him." R.C. 4911.12. All of the expenses of the Office of the Consumers' Counsel, including employees, are paid from funds appropriated for the use of the Consumers' Counsel, "after being approved by the consumers' counsel." Id. Therefore, even if employees of the Office that the Consumers' Counsel hires, supervises, and compensates would perform work on a matter, the Consumers' Counsel is required by statute to be involved in all matters before his office. See generally Advisory Op. No. 89-015 and 92-009. The Consumers' Counsel is ultimately responsible for all work performed by his office, and is unable to withdraw from this responsibility. See Advisory Op. No. 92-004.

Neither is the Consumers' Counsel comparable to an executive director or secretary of a state board or commission, who is employed to assist in performing the duties statutorily imposed upon the board or commission. See generally Advisory Op. No. 92-009. Although the Consumers' Counsel is appointed by and serves at the pleasure of the Governing Board, and "shall at all times remain responsible to the governing board," the Consumers' Counsel is not engaged to carry out the duties of the Governing Board. R.C. 4911.02 (A) and 4911.17. All of the powers and duties of the Office of the Consumers' Counsel, including the powers to sue and be sued, and to bring actions on behalf of consumers and others, are the powers of the Consumers' Counsel himself. See, e.g., R.C. 4911.02, 4911.12, 4911.13, 4911.14, and 4911.15. Therefore, the Consumers' Counsel cannot withdraw and have the employees of his office report directly to the Governing Board. Id.

Adv. Op. No. 93-011.

Therefore as the law existed in 1993, prior to the enactment of R.C. 4911.20, the Consumers' Counsel was unable to remove himself from the duties of the Office of the Consumers' Counsel with regard to matters in which he had personally participated while he was an employee of the PUCO. If a former PUCO commissioner or employee were to be appointed to the position of Consumers' Counsel, and he would be required to refrain from representing persons on matters in which he personally participated, the prohibition of R.C. 102.03(A) would effectively prohibit the Office of the Consumers' Counsel itself from representing clients on matters in which the Consumers' Counsel had personally participated while he was an commissioner or employee of the PUCO.

Application to Specific Facts

As an AAG assigned to represent the PUCO, you have personally participated in a small number of matters that involve the Office of the Consumers' Counsel that are pending or may remain pertinent in the near future. If you were to be appointed to the position of Consumers' Counsel, you would be prohibited, by R.C. 102.03(A)(1), from representing any person, including a residential consumer or municipal corporation, before any public agency, including all courts and the PUCO, on those matters in which you had personally participated. Further, you would be prohibited from supervising employees of the Office of the Consumers' Counsel with respect to those matters in which you personally participated. If the authority of the Office had not changed since 1994, you would be effectively prohibited from holding the Office of the Consumers' Counsel because of the application of R.C. 102.03(A)(1).

However, as you have noted, the General Assembly changed the authority of the Office with the enactment of R.C. 4911.20, effective June 1, 1994.

Enactment of R.C. 4911.20

R.C. 4911.20 provides:

If the consumers' counsel governing board determines that the appointment of a deputy consumers' counsel is necessary to ensure the full and proper performance of the powers and duties of the consumers' counsel, the board may appoint a deputy consumers' counsel. The board may assign the deputy consumers' counsel any of the duties and powers of the consumers' counsel, and the deputy shall perform the assigned duties and powers. The deputy consumers' counsel shall report to the board on all matters assigned to him by the board, and shall serve at the pleasure of the board. The board may appoint an employee of the office of the consumers' counsel as deputy consumers' counsel. The board shall determine the salary of the deputy consumers' counsel.

If a deputy consumers' counsel is appointed, the consumers' counsel shall not perform the duties and powers that are assigned by the governing board to the deputy.

R.C. 4911.20 was enacted specifically to provide a method for the Office of the Consumers' Counsel to "ensure the full and proper performance of the powers and duties of the [C]onsumers' [C]ounsel," so that the Office can function effectively in the event that the Consumers' Counsel is faced with a conflict of interest.

R.C. 4911.20 would apply to the situation you have described. If you were to be selected to serve as Consumers' Counsel, and a matter in which you personally participated were to be before the Office of the Consumers' Counsel, the Governing Board could make a determination that it would appoint a Deputy Consumers' Counsel and assign to that person both the duties and powers of the Consumers' Counsel with respect to that matter. In such a situation, the Deputy Consumers' Counsel would report to the Governing Board, rather than to you. If it were necessary for the Governing Board to appoint a Deputy Consumers' Counsel, you would be statutorily barred from performing those specific duties that the Governing Board assigns to the Deputy Consumers' Counsel.

In order to comply with R.C. 102.03(A)(1) and to ensure that the safeguards contained in R.C. 4911.20 allow for the full functioning of the Consumers' Counsel Office, you would have to be diligent to identify those matters in which you personally participated such that a conflict of interest could arise.¹ The best method of ensuring smooth operation of the Office would be for you to list those matters that will or are likely to arise before the Office in order for the Governing Board to proactively assign the matters to a Deputy Consumers' Counsel.

¹ For purposes of R.C. 102.03(A)(1), a "matter" is any case, proceeding, application, determination, issue, or question. "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. Adv. Op. No. 99-001.

From your description of your job duties as an AAG, it does not appear that you would be required to withdraw, as the Consumers' Counsel, from a significant number of matters. However, as you note in your letter, the Consumers' Counsel Governing Board may appropriately consider whether the scope of any candidate's previous activities involving the Consumers' Counsel will affect that person's ability to function effectively as Consumers' Counsel. In some situations, a candidate's previous activities may be so extensive that he or she would be compelled to withdraw from a significant number of the Consumers' Counsel's activities and the Office of the Consumers' Counsel would be hobbled in its functions as a result.

Seeking Employment with the Consumers' Counsel—R.C. 102.03(D) and (E)

You should also be aware of the restrictions set forth in R.C. 102.03(D) and (E) regarding job-seeking activity by a public official or employee. R.C. 102.03(D) and (E) prohibit a public official from soliciting or using his position to secure employment 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. Adv. Op. No. 96-004. A person is "seeking employment" if he is responding to a specific job advertisement or posting or sending resumes and inquiring about a position. There is an exception if the official can and does withdraw completely from any matter involving the party from whom he is seeking or has accepted employment. Adv. Ops. No. 91-009 and 92-005.

If the official is normally required to participate in a matter affecting the party, the public agency must approve his withdrawal. Adv. Op. No. 96-004. An official cannot effectively withdraw from a matter by simply refusing to perform his job duties. It must also be clear that the withdrawal will not impede the official's ability to perform his assigned duties.

Therefore, in order for you to seek employment with the Office of the Consumers' Counsel, you must fully withdraw from the matters that you have described involving the Consumers' Counsel. In order to withdraw from these matters, you must inform your supervisor of your withdrawal. Your supervisor must then either handle the matter or reassign it 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. *Id.* If you are offered, and accept, employment as the Consumers' Counsel, you will be prohibited from participating in any matters affecting the Office of the Consumers' Counsel during your remaining service to the AG's Office. Adv. Op. No. 91-009.

Code of Professional Responsibility

In addition to the restrictions discussed above, you should contact the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court. The Board of Commissioners can advise you about the post-employment restrictions discussed in the Code of Professional Responsibility, particularly Disciplinary Rule 9-101(B), as they apply to you.

Conclusion

As explained more fully above, an Assistant Attorney General (AAG) who represents the PUCO is not prohibited from serving as Consumers' Counsel, as long as the Consumers' Counsel Governing Board makes a determination that it can assign matters in which the AAG personally participated to the Deputy Consumers' Counsel pursuant to R.C. 4911.20. To make that determination, the Consumers' Counsel Governing Board may appropriately consider the specific facts to determine whether the scope of any candidate's previous activity involving the Consumers' Counsel will significantly affect his ability to function effectively during the first year of his service to the Office.

Finally, while the AAG is seeking the position of Consumers' Counsel and before he takes the office if he is selected for the position, he will be required to completely withdraw from all matters affecting the Office of Consumers' Counsel.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on December 17, 2003. The Commission commends you for requesting guidance before any actions that could be prohibited by the Ethics Law were taken.

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 contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney