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INFORMATION SHEET: ADVISORY OPINION NO. 2012-04
REVOLVING DOOR LAW EXCEPTION—R.C. 102.03(A)(6)

What is the question in the opinion?

When can a former public employee represent a new employer before a public agency?

What is the revolving door restriction?

The revolving door restriction prohibits a former public employee from representing a client or acting in a representative capacity for any person on any matter if the employee “personally participated” in the matter during his or her public employment. The restriction applies to the former public employee for one year.

Can the former public employer represent his or her former public agency?

Yes. An exception to the restriction, R.C. 102.03(A)(6), enables a former public employee to be retained to “represent, assist, or act in a representative capacity for” his or her former employer on a matter in which he or she personally participated during his or her public employment. The exception in R.C. 102.03(A)(6) is available to a former public employee when he or she is employed or retained by: (a) the agency he or she formerly served; or (b) a third party employer if his or her former public employer has determined that his or her work for the new employer will assist the former public employer.

What prompted this opinion?

The Commission has been asked a number of questions about the application of the R.C. 102.03(A)(6) exception to former public employees.

When did the conclusions in this opinion become effective?

The opinion became effective on Thursday, October 25, 2012.

For More Information, Please Contact:

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ADVISORY OPINION NO. 2012-04 IS ATTACHED.**

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Advisory Opinion
Number 2012-04
October 25, 2012
**Representing or Assisting
Former Public Employer**

Syllabus by the Commission:

- (1) The Revolving Door Law prohibits any former public employee from representing any person before any public agency on a matter in which the employee personally participated.
- (2) The Revolving Door Law was enacted by the General Assembly in Am. Sub. H.B. 55, as part of the original Ethics Law, and became effective January 1, 1974. The law was amended and expanded, and the exception that is discussed in this opinion was enacted, in Am. H.B. 1040, effective August 27, 1976.
- (3) An exception to the revolving door law provides that a former public employee may be retained or employed to represent, assist, or act in a representative capacity for the public agency that he or she formerly served.
- (4) This exception applies when the former public employee is employed or retained by:
 - a) The agency he or she formerly served; or
 - b) Another public agency, private company, non-profit organization, or other third party employer, if the public agency he or she formerly served has determined that his or her work for the new employer will assist the former public employer.

The exception applies whether the former public employee is engaged as an employee, consultant, or independent contractor, and either as an individual or through a private company.

* * *

The Ohio Ethics Commission has been asked whether a former public employee can represent his or her new employer before his or her former public employer.

Revolving Door Law—History

The applicable restriction in the Ethics Law is the revolving door law, R.C. 102.03(A)(1), which applies to all public officials and employees during their public service and for one year thereafter.¹ The General Assembly included the revolving door law as an essential element of the Ethics Law since the law was originally enacted in 1973.² The Law became effective January 1, 1974. The law was amended and expanded, and the exception that is discussed in this opinion was enacted, in Am. H.B. 1040, effective August 27, 1976.

R.C. 102.03(A)(1) is designed to protect the public interest by prohibiting situations from arising in which a former public official or employee “will engage in a conflict of interest or realize personal gain at public expense from the use of ‘inside’ information.”³ In *State v. Nipps*, the Tenth District Court of Appeals held that the Revolving Door prohibition was constitutional. The Court determined: “The state has a substantial and compelling interest to restrict unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government.”⁴

Revolving Door Law—Prohibition

R.C. 102.03(A)(1) provides that no former public employee shall “represent a client or act in a representative capacity for any person on any matter” if the employee “personally participated” in the matter during his or her public employment.

Personal participation includes decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

For one year after a person leaves his or her public position, the former public employee is prohibited from representing any person, including a new employer, on any matter in which he or she personally participated during public employment. Briefly:

- A “matter” is “any case, proceeding, application, determination, issue or question,” and the term “represent” includes “any formal or informal appearance before, or written or oral communication with, any public agency on behalf of any person.”⁵
- “Personal participation” includes “decision, approval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.”⁶
- “Represent” includes “any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person.”⁷
- A “public agency” includes the General Assembly, any state department, board, or commission, any political subdivision, or any other governmental entity in Ohio.⁸

Example of the Restriction

The director of a county program has retired. After she retired, the county entered into a contract with a private company (the Company) to operate the program. The Company would like to hire the former director. Her job would involve interacting with officials and employees of the county. The county has stated that it would like the former director to serve in the position.

The program is a “matter” in which the former director “personally participated.” Therefore, for one year from the date she left her county job, R.C. 102.03(A)(1) prohibits the former director from representing the Company before her former county employer and any other public agency on the program.

Exception—R.C. 102.03(A)(6)

There are four exceptions to the revolving door law that may apply to a former public employee during the first year after he or she leaves the public position. The relevant exception in this situation, R.C. 102.03(A)(6), enables a former public employee to be retained to “represent, assist, or act in a representative capacity for” his or her former employer on a matter in which he or she personally participated during his or her public employment.⁹

The exception in R.C. 102.03(A)(6) is available to a former public employee only if he or she is representing, assisting, or acting for the former public employer.¹⁰ This exception recognizes that there is no conflict of interest or potential personal gain at public expense in situations when a former employee represents, assists, or acts in a representative capacity for the public agency he or she formerly served.

R.C. 102.03(A)(6) allows a former public employee to accept employment with his or her former public employer. However, R.C. 102.03(A)(6) does not require that, in order to represent, assist, or act in a representative capacity for his or her former public agency, a former public employee must be retained or employed by his or her former public agency.

In limited circumstances, the exception can also apply when the former public employee is engaged by a third party provided that he or she can demonstrate that his or her work for the third party will assist the former employer. The governing board, legal counsel, or other administrative or managerial officials at the public agency by which he or she was formerly employed must review the proposed employment and make a determination that the former public employee’s services would serve the agency’s interests.¹¹ In that case, the interests of the former public employer are served and the former public employee has no conflict of interest or realization of personal gain at public expense.

The exception applies only when the work the former public employee is doing for his or her new employer assists his or her former public employer. The former public employee is prohibited from representing his or her new employer before any other public agency, on matters in which he or she personally participated as a public employee, if the former employer’s interests are adverse to the position he or she is advocating for the new employer. If such a

situation arises during the first year after he or she leaves the public job, then his or her new employer must have someone other than the former public employee handle the matter on its behalf.

Example of the Exception

The former director of the county program described above can accept employment with the Company. Further, provided that the county commissioners, county prosecutor, or county administrator have determined that her work with the Company will assist the county, the exception in R.C. 102.03(A)(6) applies to the former director. As a result, the former director is not prohibited from representing the Company on matters in which she participated in her county position. For example, the former director would not be prohibited from:

- Calling, sending letters, notes and e-mails, or meeting or interacting with, county personnel in order to ensure the continuity and success of the program;
- Preparing and delivering to county personnel informational reports about the program and the relationship between the county and the Company;
- Interacting with county officials and employees who participate in the program as county residents in order to address their needs and problems as customers; or
- Working with formal or informal groups that include representatives of the county and other public agencies to discuss, mediate, and resolve operational matters regarding the program, if the interests of the county and the Company are aligned.

The exception applies only when the work the former county employee is doing for the Company assists the county. The former county employee cannot represent the Company on matters in which she personally participated if the Company has taken a position that opposes the county's position. For example, if the Company and the county are discussing funding for the program or labor relations matters that affect the program, and the interests of the two parties are not aligned, the former county employee cannot represent the Company in those discussions.

Other Restrictions

Whenever a person accepts another job after leaving his or her public position, there are two other restrictions that apply to that person. All public officials or employees who are leaving a public position to take another job should be aware of these restrictions. The other relevant restrictions are:

- (1) R.C. 2921.42(A)(3), which prohibits a former public official or employee from profiting from a public contract he or she authorized during his or her public service unless the contract was competitively bid. If the former county program director had approved the county's contract with the private Company, this prohibition would apply to her. The restriction is fully discussed in Advisory Opinions No. 2011-03 and 91-009.

- (2) R.C. 102.03(B), which prohibits a former public official or employee from disclosing or using, without appropriate authorization, any confidential information that he or she acquired during public service.¹² The former county program director is prohibited from disclosing or using any information she acquired in that role without appropriate authorization. She cannot share that information with her new employer. There is no time limit for this prohibition.¹³

Also, all private companies are subject to R.C. 102.03(F) and 2921.43(A), which prohibit them from offering or giving substantial things of value, or supplemental compensation, to any officials or employees of the public agencies to which they provide services.¹⁴ Anyone seeking more information about these restrictions may contact the Ethics Commission for advice or guidance.

Conclusion

Therefore, it is the opinion of the Ohio Ethics Commission, and the Commission advises that: The Revolving Door Law prohibits any former public employee from representing any person before any public agency on a matter in which the employee personally participated. The Revolving Door Law was enacted by the General Assembly in Am. Sub. H.B. 55, as part of the original Ethics Law, and became effective January 1, 1974. The law was amended and expanded, and the exception that is discussed in this opinion was enacted, in Am. H.B. 1040, effective August 27, 1976. An exception to the revolving door law provides that a former public employee may be retained or employed to represent, assist, or act in a representative capacity for the public agency that he or she formerly served. This exception applies when the former public employee is employed or retained by: (a) The agency he or she formerly served; or (b) Another public agency, private company, non-profit organization, or other third party employer, if the public agency he or she formerly served has determined that his or her work for the new employer will assist the former public employer. The exception applies whether the former public employee is engaged as an employee, consultant, or independent contractor, and either as an individual or through a private company.



Merom Brachman, Chairman
Ohio Ethics Commission

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's Web site: www.ethics.ohio.gov

¹ R.C. 102.01(B) and (C). The restrictions discussed in this opinion apply to public officials and employees. For ease of reading, this opinion will use the term "public employee," but the prohibitions discussed also apply to public officials.

² Am. Sub. H.B. 55 (eff. Jan. 1, 1974).

³ *State v. Nipps* (1979), 66 Ohio App.2d 17, 21.

4 See also *Brinkman v. Budish* (S.D. Ohio Feb. 17, 2010), Case No. 1:09-cv-326. R.C. 102.03(A)(4) prohibits a former employee or member of the general assembly, for one year after the conclusion of his or her service with the general assembly, from representing any person on any matter before the general assembly, a committee of the general assembly, or the controlling board. The *Brinkman* court, considering the *Nipps* precedent, recognized that the stated purpose of the version of the statute considered in *Nipps* was closely tied to its narrow restriction against advocacy on matters on which the official had personally participated. The court decided that the current version of R.C. 102.03(A)(4), which prohibits former general assembly members from representing clients on any matter before the general assembly, regardless of whether it is a matter in which they personally participated while in office and on which they had the opportunity to gain inside information, was not narrowly tailored. R.C. 102.03(A)(1), the statute considered here and over which the Ethics Commission has jurisdiction, is similar to the statute considered in the *Nipps* case in that it limits a former public official or employee from representing anyone in a matter in which he has personally participated.

⁵ R.C. 102.03(A)(5).

⁶ R.C. 102.03(A)(1); Ohio Ethics Commission Advisory Opinion No. 91-009.

⁷ R.C. 102.03(A)(5); Adv. Op. No. 86-001.

⁸ R.C. 102.01(C).

⁹ The other exceptions are: (a) R.C. 102.03(A)(7), which allows a former public employee to perform ministerial functions on behalf of a client or employer; (b) R.C. 102.03(A)(8), which allows a former employee of one state agency to represent a new state employer on most matters in which he or she personally participated; and (c) R.C. 102.03(A)(9), which allows a former employee of a division of a local agency to represent another division of the agency on matters in which he or she personally participated. Advisory Opinion No. 2012-03 fully discusses the exceptions in R.C. 102.03(A)(8) and (9).

¹⁰ Adv. Ops. No. 91-005 and 91-009.

¹¹ The former public employer can also engage an outside advisor to assist it in this review.

¹² Adv. Op. No. 88-009.

¹³ Id.

¹⁴ Adv. Op. No. 90-001.