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Angelita Cruz Bridges
Betty Davis
Diana Swoope

David E. Freel,
Executive Director



OHIO ETHICS COMMISSION
William Green Building
30 West Spring Street, L3
Columbus, Ohio 43215-2256
Telephone: (614) 466-7090
Fax: (614) 466-8368

www.ethics.ohio.gov

March 10, 2010

Informal Opinion 2010-INF-0310-2

Terry J. Collins
[REDACTED]

Dear Mr. Collins:

On January 4, 2010, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that your retirement as the Director of the Ohio Department of Rehabilitation and Corrections (ODRC) would be effective after January 31, 2010. You asked if the Ethics Law and related statutes prohibit you from providing expert consultation services on a case involving a county jail's classification process after your retirement.

Brief Answer

As explained below, the Ethics Law and related statutes prohibit you, for twelve months after leaving ODRC, from representing any person before any state or local public agency, on any matter in which you personally participated during your public employment.

Because your role as the ODRC Director involved the development and promulgation of mandatory standards for the operation of Ohio's jails and the supervision of ODRC staff that audited the jails' operations based on these standards, you would be prohibited from communicating, formally or informally, with ODRC, any county entity, including the sheriff and jail, the courts or any other public agency regarding operational standards for Ohio detention facilities. This will prohibit you from serving as an expert consultant on a case involving the adequacy of a county jail's classification process for one year after your retirement.

Facts

In your letter, you explained that on Friday, December 18, 2009, you announced your plans to retire. After you made this announcement, you were contacted by an attorney who asked you to be an expert consultant on a case involving the adequacy of the security classification process for a county jail after you leave state service. You stated that, in this capacity, you would be required to evaluate and provide your opinion on the adequacy of the county jail's procedures for classifying inmates based on their security risks.

You explained that, as the Director of ODRC, you are responsible for the development and promulgation of mandatory standards for the operation of Ohio's adult detention facilities, including all of the full service jails. Also, employees of ODRC conduct audits of the jail operation as measured against these standards. You noted, however, that ODRC's standards do not specifically prescribe the details of a required security classification procedure and that ODRC auditors are not compensated by the counties for the audits they perform.

You explained that the attorney who contacted you was appointed as special counsel by the Attorney General to represent ODRC in a lawsuit against ODRC and the Ohio State Penitentiary regarding prison classification issues. The lawsuit was terminated by the court on March 12, 2008. You stated that the attorney's assignment was renewed by the Attorney General in the current fiscal year but he has not performed any work since the case has been concluded. ODRC paid the invoices for the attorney's work. The last payment was made in February 2009.

Revolving Door Law—R.C. 102.03(A)(1)

As the former Director of the ODRC, you are subject to R.C. 102.03(A)(1), the Revolving Door Law, which provides that no former public official, for twelve months after leaving public service, shall:

[R]epresent 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.

R.C. 102.03(A)(1) is designed to protect the public interest by prohibiting situations from arising where 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." *State v. Nipps* (1979), 66 Ohio App.2d 17, 21 (1979). The Court in *Nipps* held that the Revolving Door prohibition was constitutional, and 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."¹

¹ The Commission notes that, in a recent decision from the Southern District Court of Ohio, the court found that R.C. 102.03(A)(4) is unconstitutional. *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

A “matter” includes “any case, proceeding, application, determination, issue, or question.” R.C. 102.03(A)(5). A “matter” can include concrete 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. Adv. Op. No. 99-001. A “matter” can also include a more abstract item, such as a dispute of special or public importance and a controversy submitted for consideration. Id. *Please note that a “matter” includes an issue or question, and could be presented as a policy or procedure that the official created, implemented, interpreted, or enforced in his public position.* This is true even if the official or employee did not personally participate on that issue or question with the specific person, entity, or client who approaches him for representation.

However, “matter” is not so broadly applied as to include a general subject matter. Id. R.C. 102.03(A)(1) also does not prohibit a former public official or employee from representing an employer or client on wholly new matters or matters in which he had not participated as a public official or employee. Adv. Op. No. 84-005.

“Personal participation” includes decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion, including supervision or general oversight over other personnel in their work on a matter. R.C. 102.03(A); Adv. Ops. No. 86-001 and 91-009. A former public official or employee who reviewed and wrote agency policies and procedures, reviewed and evaluated requests from constituents, or was a named party in the agency’s legal matters, has “personally participated” in all of these matters. A public official or employee who exercises supervision or general oversight over subordinate personnel is considered to have personally participated in any matter that the personnel participated in for purposes of the prohibition. Adv. Op. No. 86-001.

The term “represent” is defined to include “any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person.” R.C. 102.03(A)(5); Adv. Op. No. 86-001. Examples of the types of activities that would fall within the definition of the term “represent” range from appearances in formal proceedings or meetings to informal “lobbying” of agency personnel by telephone or in person. See *State v. Nipps* (1979), 66 Ohio App.2d 17, 25 (1979) (The jury appropriately decided that a former public official who appeared as an expert witness for a company at a meeting with agency personnel was engaged in representation.). Also included within the definition of “represent” is the preparation of any written communication that is submitted to a public agency, including formal documents, filings, informal letters, notes, and e-mails, regardless of whether the former employee signs the communication. Adv. Ops. No. 86-001, 87-001, and 92-005.

personally participated while in office and on which they had the opportunity to gain inside information, was not narrowly tailored. Similar to the version of the statute considered in *Nipps*, R.C. 102.03(A)(1), the statute considered here and over which the Ethics Commission has jurisdiction, requires that the public official or employee has personally participated in the matter.

It is important to note that R.C. 102.03(A)(1) prohibits the former official or employee from representing clients or others not only before the public agency he formerly served, but before any public agency. This would include the courts, all state departments, boards, and commissions, and any other public agency at the state or local level.

The one-year period of the restriction dates from the day the official or employee leaves public service, not from the day he participated in the matter. Adv. Op. No. 89-009. Even if the official or employee personally participated in a specific matter years before leaving his public position, he is prohibited from representing any person on that matter within one year of leaving public service.

Application of Precedent

For twelve months after leaving ODRC, R.C. 102.03(A)(1) prohibits you from communicating, formally or informally, with ODRC, the courts, any county entity, including the sheriff and jail, or any other state or local public agency, on behalf of any person, on any matter in which you personally participated during your public employment with the ODRC. Adv. Ops. No. 99-001 and 2004-04. The term "person" would include, but not be limited to: (1) an attorney; (2) a law firm; or (3) a party to a lawsuit.

This restriction would include "matters" in which you "personally participated" at anytime during your tenure with ODRC. *A "matter" includes an issue, question, or investigation, such as a policy, standard, or procedure you created, implemented, interpreted, or enforced as the ODRC Director or an audit performed by ODRC staff members that you supervised. In your letter, you noted that an auditor is not compensated by the county for the regulatory function ODRC performs. This fact is not relevant to the application of the revolving door law restriction.* Even if you did not personally participate on that issue or question with the specific person, entity, or client who approaches you for representation, R.C. 102.03(A)(1) prohibits you from representing the person, entity, or client on the underlying "matter."

R.C. 5120.01 states:

The director of rehabilitation and correction is the executive head of the department of rehabilitation and correction. All duties conferred on the various divisions and institutions of the department by law or by order of the director shall be performed under the rules and regulations that the director prescribes and shall be under the director's control. Inmates committed to the department of rehabilitation and correction shall be under the legal custody of the director or the director's designee, and the director or the director's designee shall have the power to control transfers of inmates between the several state institutions included under section 5120.05 of the Revised Code.

R.C. 5120.10(A)(1) requires the Director of Rehabilitation and Correction to promulgate minimum standards for jails in Ohio. In accordance with this mandate, ODRC has adopted and promulgated Ohio Administrative Code sections 5120:1-8-02 and 5120:1-8-03 which set forth minimum standards in regards to classification and security for full service jails. R.C. 5120.10(D) authorizes ODRC to investigate and supervise county and municipal jails and other corrections institutions based on the rules promulgated under R.C. 5120.10(A)(1).

Where your role, as the Director, was to implement the policies and decisions of the ODRC, in any specific matter, your activities would involve the substantial exercise of administrative discretion and would be "personal participation" in that matter. For example, your development and promulgation of mandatory operational standards for Ohio adult detention facilities, including all full-service jails, involves the substantial exercise of administrative discretion and would be personal participation in those matters. In addition, in those specific matters where you exercised general oversight over ODRC personnel, such as authority over ODRC employees conducting audits of jail operations measured against ODRC criteria and standards, you are considered to have personally participated in those matters through supervision.

You have stated that the state's standards do not specifically prescribe details of a required security classification procedure. The fact that specific details are not included is not a determining factor in assessing your personal participation. The rules set general standards, and you were involved in or supervised staff involved in writing, reinforcing, or making decisions about the classification and security in all jails in the state based on the rules. Therefore, you have personally participated in these matters.

The twelve-month period of the restriction dates from the day you leave public employment at ODRC, not from the day you participated in the matter. Note that, even if you personally participated in a specific matter early in your career with ODRC, you are prohibited from representing any person on that specific matter within one year of leaving public service ODRC.

Representation includes engaging in activities such as attending meetings with any public officials or employees, testifying or preparing documents to be filed in court, preparing or sending letters, documents, or e-mails to any public officials or employees, or having informal discussions with any public officials and employees.

Because you served as the Director of ODRC, if you seek to provide consulting services on matters that relate to the classifying procedures of an Ohio jail, it is likely that you have personally participated in many matters involving the underlying issues of the case. Therefore, the revolving door restriction would significantly impair your ability to represent parties before any public agencies in Ohio on matters related to the Ohio's adult detention facilities until a year after you leave your position with ODRC.

Confidentiality—R.C. 102.03(B)

R.C. 102.03(B) prohibits you from disclosing or using, without appropriate authorization, any confidential information that you acquired in the course of your official duties with ODRC. There is no time limitation associated with this prohibition; you are also prohibited from using or disclosing confidential information acquired while employed at ODRC **after** you leave your public employment. Adv. Op. No. 88-009.

Conclusion

As explained above, the Ethics Law and related statutes prohibit you, for twelve months after leaving ODRC, from representing any person before any state or local public agency, on any matter in which you personally participated during your public employment.

Because your role as the ODRC Director involved the development and promulgation of mandatory standards for the operation of Ohio's jails and the supervision of ODRC staff that audited the jails' operations based on these standards, you would be prohibited from communicating, formally or informally, with ODRC, any county entity, including the sheriff and jail, the courts or any other public agency regarding operational standards for Ohio detention facilities. This will prohibit you from serving as an expert consultant on a case involving the adequacy of a county jail's classification process for one year after your retirement.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on March 9, 2010. 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,

A handwritten signature in cursive script that reads "Jennifer A. Hardin". The signature is written in black ink and is positioned above the printed name and title.

Jennifer A. Hardin
Chief Advisory Attorney