

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

INFORMATION SHEET: ADVISORY OPINION NO. 2003-02 **401(k) PLAN WITH FORMER EMPLOYER**

What is the question addressed in the opinion?

Do the Ethics Law and related statutes prohibit a state employee from participating in matters affecting a private company by which he was formerly employed if the employee has retained a 401(k) plan that was established when he was employed by that company?

What is the answer in the opinion?

No. The Ethics Law and related statutes do not prohibit a state employee from participating in matters affecting a private company by which he was formerly employed if the only remaining connection between the employee and the company is a 401(k) plan that was established when he was employed by the company, the fund in which the 401(k) is invested does not own the company's stock, and the company has no control over the 401(k) plan.

To whom does this opinion apply?

This opinion applies to any public official or employee who was formerly employed in the private sector, has retained a 401(k) plan established while in his private employment, and may be expected to participate in matters affecting his former employer.

When will the conclusions of the opinion become effective?

The opinion will become effective upon acceptance by the Commission.

For More Information, Please Contact:

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IT IS NOT AN ETHICS COMMISSION ADVISORY OPINION.
ADVISORY OPINION NO. 2003-02 IS ATTACHED.**

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Advisory Opinion
Number 2003-02
October 17, 2003

Syllabus by the Commission:

- (1) Divisions (D) and (E) of Section 102.03 of the Revised Code do not prohibit a state employee from participating in matters that affect a company by which he was formerly employed where he has no other connection with the company except that he has retained a 401(k) plan established while he was employed at that company, as long as the fund in which the 401(k) is invested does not own the company's stock and the company has no control over the 401(k);
- (2) Division (A)(1) of Section 2921.42 of the Revised Code does not prohibit a state employee from participating in the authorization of contracts to a company by which he was formerly employed if he has retained a 401(k) plan established while he was employed at that company, as long as there is no other connection between the employee and company.

* * *

You have asked whether the Ohio Ethics Law and related statutes prohibit you from participating in matters affecting a company by which you were formerly employed given the fact that you have retained a 401(k) plan that was established when you were employed by that company.

Brief Answer

As explained more fully below, the Ohio Ethics Law and related statutes do not prohibit you from participating in matters affecting a company by which you were formerly employed if the only remaining connection between you and the company is a 401(k) plan that was established when you were employed by the company, the fund in which the 401(k) is invested does not own any stock in the company, and the company has no control over the 401(k) plan.

Facts

By way of history, you have explained that you are an employee of the State Architect's Office. Your current position may involve participation in the Office's review and approval of contracts.

Before your employment with the Architect's Office, you were employed in the private sector. While you were employed by a private company, you participated in a 401(k) retirement plan. The original investment in the plan was from profit sharing. You stated that you left that company three years ago, and that there have been no additional investments in the plan since that time.

A 401(k) plan is a type of deferred compensation plan established pursuant to the Internal Revenue Code Section 401(k). According to information provided by the Internal Revenue Service, an employee can elect to have his employer contribute a portion of his wages to a 401(k) plan on a pre-tax basis. The deferred wages are not subject to income tax withholding at the time of deferral, but are included as wages subject to social security, Medicare, and federal unemployment taxes.

Distributions from a 401(k) plan may qualify for optional "rollover." A rollover occurs when an employee withdraws assets from an employer 401(k) and contributes all or part of the assets to another qualified retirement plan or Individual Retirement Account within 60 days of the withdrawal. If an employee rolls the contribution over, the transaction is not taxable.

Conflict of Interest Restrictions—R.C. 102.03(D) and (E)

R.C. 102.03(D) and (E) applies to the question you have raised:

- (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 state employee is a "public official or employee" for purposes of R.C. 102.03(D) and (E). See R.C. 102.01(B) and (C); Ohio Ethics Commission Advisory Opinion No. 87-007. The term "anything of value" includes money and every other thing of value. R.C. 1.03; 102.03(G). A definite and direct pecuniary benefit, or the avoidance of a detriment, is considered to be a thing of value under R.C. 102.03(D) and (E). Adv. Ops. No. 88-004 and 92-019. A decision regarding the award of a public contract is within the definition of anything of value.

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his public position, formally or informally, in any matter that would render a definite and direct financial benefit or detriment for a person with whom the official has a close business relationship, such as an employer. Adv. Ops. No. 88-005 and 89-008. R.C. 102.03(E) prohibits a public official or employee from soliciting a particular and definite benefit for a person with whom the official has a close business relationship. The application of the Ethics Law is dependent upon the facts and circumstances of the individual situation. Adv. Op. No. 89-006.

A public official or employer is prohibited from participating in the matters that definitely and directly affects the interests of a current employer. However, a public employee's former employer is generally not a person with whom the person has a close business relationship, such that he would be prohibited from participating in matters affecting the employer, as long as it is clear that there is no ongoing connection between the public employee and his former employer. See, generally, Adv. Op. No. 90-011. If, for example, a public employee's former employer owes him commissions or other payments related to work he completed, the public employee would have a continuing relationship with the former employer such that he would be prohibited from participating in matters that affect that party.

Further, there may be situations where the unique facts limit a public official's or employee's ability to participate in matters affecting his former private employer. For example, if a person who has been newly employed by a public agency is asked to participate in matters affecting his former private employer for which he was significantly responsible in his former job, the official or employee may be prohibited from participating those matters. Adv. Op. No. 88-009 (a board member of a joint-county community mental health district is prohibited from taking any action regarding a contract between the mental health board and a private, non-profit agency he formerly served as director, where he signed the contract in his capacity as director of the agency.)

In the situation you have described, you have opted to leave the 401(k) plan you began while in your former employment in place rather than roll it over into another plan. The performance of the plan is independent of the company that established it. The fund in which the 401(k) is invested owns no stock in the company by which you were formerly employed. You pay an advisory fee to the plan manager, which is a private investment corporation. You have stated that, as far as you can ascertain, the only role your former employer plays regarding the 401(k) is the determination of the plan manager.

This connection between you and your former employer, under the circumstances you have described, is not so close that the relationship between you and your former employer would impair your ability to review and approve contracts in which your former employer has an interest. Under these circumstances, the firm by which you were formerly employed is not in a position to make decisions that could definitely and directly affect your interests. Therefore, you are not prohibited from participating in matters, including reviewing and approving contracts, in which a company by which you were formerly employed has an interest, as long as you have no other connection with the company.

Public Contract Restrictions—R.C. 2921.42

The other applicable statute is R.C. 2921.42(A)(1), which provides that no public official shall knowingly:

Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

A state employee is a “public official” for purposes of R.C. 2921.42(A)(1). See R.C. 2921.01(A); Adv. Op. No. 89-006. A “public contract” is any purchase or acquisition of property or services by or for the use of the state agency. R.C. 2921.42(G). Any contract entered into by the State Architect’s Office under which the Office acquires real or personal property or services is a “public contract” for purposes of R.C. 2921.42(A)(1). Adv. Ops. No. 87-002, 88-003, and 91-001.

R.C. 2921.42(A)(1) prohibits a public official from participating in the approval of a public contract if any of his business associates has an interest in the contract. A “business associate” includes any person or entity with which the official is pursuing an ongoing business enterprise. Adv. Ops. No. 86-002 and 87-003. A public official’s employer is his business associate for purposes of R.C. 2921.42(A)(1). Adv. Op. No. 89-008.

Therefore, you would be prohibited from participating in the review and approval of the Office’s contracts if your current employer had an interest in the contract. However, a former employer is not your business associate unless, as discussed above, you have some kind of continuing business relationship with the former employer. The retention of a 401(k) investment of the kind you describe is not sufficient to constitute a business association.

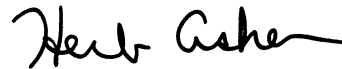
Accordingly, R.C. 2921.42(A)(1) does not prohibit you from participating in the Office’s review or approval of contracts in which your former employer has an interest, as long as you have no connection with that company other than retention of a 401(k) investment that was begun while you were employed at the company.

Conclusion

As explained more fully above, the Ohio Ethics Law and related statutes do not prohibit you from participating in matters affecting a company by which you were formerly employed if the only remaining connection between you and the company is a 401(k) plan that was established when you were employed by the company, the fund in which the 401(k) is invested does not own any stock in the company, and the company has no control over the 401(k) plan.

Finally, while this Advisory Opinion specifically involves a state employee, the conclusions in the opinion apply to all public officials and employees, at every level of government, who are subject to the Ohio Ethics Law and related statutes.

This advisory 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. Therefore, it is opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Divisions (D) and (E) of Section 102.03 of the Revised Code do not prohibit a state employee from participating in matters that affect a company by which he was formerly employed where he has no other connection with the company except that he has retained a 401(k) plan established while he was employed at that company, as long as the fund in which the 401(k) is invested does not own the company's stock and the company has no control over the 401(k); and (2) Division (A)(1) of Section 2921.42 of the Revised Code does not prohibit a state employee from participating in the authorization of contracts to a company by which he was formerly employed if he has retained a 401(k) plan established while he was employed at that company, as long as there is no other connection between the employee and company.



Dr. Herb Asher, Chairman
Ohio Ethics Commission