



OHIO ETHICS COMMISSION

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Advisory Opinion Number 87-004
June 18, 1987

Syllabus by the Commission:

(1) Division (A) of Section 102.03 of the Revised Code prohibits the former director of the Department of Development, for twelve months after leaving public service, from representing his new employer before the Department of Development or other public agency on any matter in which he personally participated while director of the Department, including a grant which he had previously recommended be awarded to the firm by which he was later employed.

(2) Division (D) of Section 102.03 of the Revised Code prohibits the director of the Department of Development from seeking employment with any firm that has an application for a grant pending before the Department, unless he is able to withdraw from consideration of the application, and from acting upon, or otherwise using his official position with regard to any application for assistance from a firm with which he is seeking or negotiating employment.

(3) Division (D) of Section 102.03 of the Revised Code prohibits the director of the Department of Development from using the authority or influence of his position to secure anything of value for a firm from which he has accepted an offer of employment.

(4) Division (A)(3) of Section 2921.42 of the Revised Code prohibits the former director of the Department of Development, for a period of one year after leaving state service, from receiving compensation for serving in a position which would not have been created but for the award of a grant authorized by him.

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You asked whether the Ohio Ethics Laws and related statutes prohibit the former director of the Department of Development from serving as president and chief executive officer of an enterprise which received a grant from the Department of Development during the director's tenure.

You stated, by way of history, that you are currently the director of the Department of Development (hereinafter Department), but that you will soon resign to accept a position with a private organization. During your tenure as the director of the Department, the Industrial Technology and Enterprise Advisory Board (hereinafter ITEAB) reviewed and recommended that a grant be awarded to this organization, and a grant was subsequently awarded from the Department.

Division (A) of Section 102.03 of the Revised Code 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 used in this division, "matter" includes 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. As used in this division, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person. Nothing contained in this division shall prohibit, during such period, a former public official or employee from being retained or employed to represent, assist, or act in a representative capacity for the public agency by which he was employed or on which he served. This division shall not be construed to prohibit the performance of ministerial functions, including, but not limited to, the filing or amendment of tax returns, applications for permits and licenses, incorporation papers and other similar documents.

As summarized in Ohio Ethics Commission Advisory Opinion No. 87-001, Division (A) "does not prohibit a former public official or employee from seeking or accepting employment in the private sector. It prohibits a present or former public official or employee from representing private clients, including a new employer, before his former agency or any other public agency, on any matter in which he personally participated, during government service and for a period of one year thereafter."

A "public official or employee" is defined for purposes of Chapter 102. of the Revised Code to include any person who is appointed to an office or is an employee of any department of the state. See R.C. 102.01 (B) and (C). The director of the Department of Development is appointed by the Governor, with the advice and consent of the Senate, see R.C. 121.03 (A)(10), to administer the Department of Development, which is an administrative department created within state government, see R.C. 121.02(O). Thus, the director of the Department of Development is a "public official or employee" for purposes of Chapter 102. of the Revised Code, and is subject to the prohibition of Division (A) of Section 102.03.

Pursuant to R.C. Section 122.33(C), the director of the Department is charged with administering the Thomas Alva Edison grant program. The enterprise by which the director will be employed received the grant in question under this program. Section 122.30 of the Revised Code sets out in greater detail the procedure by which grants are awarded, providing that the director shall receive applications for assistance under Sections 122.28 to 122.36 of the Revised Code, and forward them with necessary supporting information to the ITEAB, which has been created pursuant to Section 122.29 of the Revised Code. The ITEAB shall make recommendations to the director as to such applications for assistance. The director shall receive the ITEAB's recommendation, and make a final determination whether to approve an application. He must then transmit any determination to approve assistance to the Controlling Board for its

review and decision as to whether to approve the assistance. A grant made under the Thomas Alva Edison program must be in conjunction with a contribution made by a cooperating enterprise or by an educational institution or related entity. R.C. 122.33 (C)(3). No grant shall exceed the contribution made by the cooperating enterprise, educational institution, or related entity. Id.

It is apparent from the foregoing that the director of the Department personally participates in the awarding of grants under the Thomas Alva Edison grant program through decision, approval, disapproval, recommendation, the rendering of advice, investigation, and other substantial exercise of administrative discretion. It is the understanding of the Commission that the director, in fact, did so participate in the awarding of the grant to the enterprise by which he will be employed. Thus, Division (A) of Section 102.03 of the Revised Code prohibits him for a period of one year after leaving the Department from representing his employer or any other person before the Department or other public agency on the grant awarded by the Department to his employer or on any other matter in which he personally participated as director. However, it does not prohibit the director from representing his new employer on matters in which he did not participate or on any matters arising after his resignation. See Advisory Opinions No. 86-006 and 87-001.

Division (D) of Section 102.03 of the Revised Code reads:

No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his duties.

Prior to the enactment of Am. Sub. H.B. 300, 116th Gen. A. (1986) (eff. September 17, 1986, Division (D) of Section 102-03 prohibited a public official or employee from using his official position to secure anything of value for himself if the thing of value were of such character as to manifest a substantial and improper influence upon him with respect to his duties. Am. Sub. H.B. 300 amended Division (D), however, to delete the requirement that the thing of value be for the public official or employee himself.

Division (D) of Section 102.03 of the Revised Code has been interpreted as prohibiting a public official or employee from seeking employment with firms that appear before, or are regulated by, his agency unless he withdraws from consideration of any matter involving the firm with which he has had contact regarding possible employment. See Advisory Opinions No. 77-003, 82-002, and 87-001. Thus, the director would be prohibited from seeking employment with any firm that had an application for assistance pending before the Department, unless he were able to withdraw from consideration of the application.

Similarly, the Commission concluded in Advisory Opinion No. 86-006 that Division (D) of Section 102.03 of the Revised Code prohibits a public official or employee from making recommendations to his public agency or otherwise using his official position with regard to any company with which he is seeking or negotiating employment. Therefore, the director would be prohibited from acting upon, or otherwise using his official position with regard to, any

application for assistance from a firm with which he is seeking or negotiating employment. Further, although the director has already secured employment outside of the Department, anything of value or benefit to his future employer is of such character as to manifest a substantial and improper influence upon him with respect to his duties. Therefore, Division (A) of Section 102.03 of the Revised Code prohibits him from using the authority or influence of his position with the Department from securing anything of value for the enterprise with which he has accepted an offer of employment.

Division (A)(3) of Section 2921.42 of the Revised Code provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid.

"Public official" is defined for purposes of Chapter 2921. in Division (A) of Section 2921.01 of the Revised Code to include any appointed officer or employee of the state. Therefore, the director of the Department of Development is subject to the prohibitions of Division (A)(3) of Section 2921.42 of the Revised Code. As used in Section 2921.42, a "public contract" is defined in Division (E) of that section to include the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state. The Commission has consistently concluded that grants awarded by governmental agencies are "public contracts," as defined in Division (E) of Section 2921.42 of the Revised Code, since a grant is the purchase or acquisition of services by or for the use of the governmental agency. See Advisory Opinions No. 82-004, 85-002, and 87-003. See also Sections 122.30 and 122.33 of the Revised Code. Thus, the Director is prohibited during his term of public service, and for one year after leaving public service, from occupying a position of profit in the prosecution of a grant or other public contract which was authorized by him and which was not let by competitive bidding, or, where let by competitive bidding, was not the lowest and best bid. In this instance, the grant was not let by competitive bidding. Further, as set forth above, Section 122.30 provides that both the director of the Department and the Controlling Board must approve an application for assistance before a grant may be awarded under that section and Section 122.33. In this instance, the grant could not have been awarded to the enterprise without the director's approval. The director is, therefore, deemed to have "authorized" the grant for purposes of R.C. 2921.42 (A)(3), and is prohibited under that section from occupying a position of profit in the prosecution of the grant for a period of one year after leaving public service.

You have indicated that the enterprise has stated that none of the moneys awarded under the grant would be used by the enterprise for payment of the individuals compensation. Rather, such compensation would be paid from private funds contributed to the enterprise. See R.C. 122.33 (C)(3). The enterprise has also stated that the funds received and used to compensate the individual during his first twelve months of employment would not be utilized by the enterprise for purposes of matching the grant moneys under R.C. 122.33 (C)(3). However, the facts presented indicate that the establishment and operation of the enterprise in question were

dependent upon the receipt of the grant which was authorized by the director. The position of president and chief executive officer of the enterprise would not have been created but for the award of the grant moneys. Therefore, the director is prohibited by R.C. 2921.42 (A)(3) from receiving any compensation or other profit for serving in such position with the enterprise, regardless of whether such compensation would be paid from funds other than grant or matching funds. This prohibition is in effect for a period of one year after the director leaves state service.

This advisory opinion is based on the facts presented, and 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 the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (A) of Section 102.03 of the Revised Code prohibits the former director of the Department of Development, for twelve months after leaving public service, from representing his new employer before the Department of Development or other public agency on any matter in which he personally participated while director of the Department, including a grant which he had previously recommended be awarded to the firm by which he was later employed; (2) Division (D) of Section 102.03 of the Revised Code prohibits the director of the Department of Development from seeking employment with any firm that has an application for a grant pending before the Department, unless he is able to withdraw from consideration of the application, and from acting upon, or otherwise using his official position with regard to any application for assistance from a firm with which he is seeking or negotiating employment; (3) Division (D) of Section 102.03 of the Revised Code prohibits the director of the Department of Development from using the authority or influence of his position to secure anything of value for a firm from which he has accepted an offer of employment; and (4) Division (A)(3) of Section 2921.42 of the Revised Code prohibits the former director of the Department of Development, for a period of one year after leaving state service, from receiving compensation for serving in a position which would not have been created but for the award of a grant authorized by him.


Merom Brachman, Chairman
Ohio Ethics Commission