



OHIO ETHICS COMMISSION

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Advisory Opinion Number 89-010
October 18, 1989

Syllabus by the Commission:

- (1) Division (B) of Section 102.04 of the Revised Code prohibits an employee of the Department of Agriculture from selling or agreeing to sell tool sharpening services to the Department of Rehabilitation and Correction except through competitive bidding unless the provisions of Divisions (D) and (E) of Section 102.04 of the Revised Code are met;
- (2) Divisions (D) and (E) of Section 102.04 of the Revised Code allow for an exception to the competitive bidding requirement of Division (B) of Section 102.04 for an employee of the Department of Agriculture who wishes to sell tool sharpening services to the Department of Rehabilitation and Correction provided that the employee files the required statements describing his interest in the unbid contract and stating that he will disqualify himself for two years from any participation as an employee of the Department of Agriculture in any matter involving any public official or employee of the Department of Rehabilitation and Correction;
- (3) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a Department of Agriculture employee from accepting, soliciting, or using the authority or influence of his public employment to secure employment as an independent contractor at an institution where he performs regulatory responsibilities for the Department of Agriculture, regardless of the fact that the service performed for the institution as an independent contractor is unrelated to his duties as a Department of Agriculture employee, and regardless of the fact that he has complied with the requirements of Divisions (D) and (E) of Section 102.04 of the Revised Code.

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In your letter to the Ethics Commission, you ask whether Division (E) of Section 102.04 of the Revised Code requires an employee of the Department of Agriculture (Department) with duties to oversee animal slaughtering and meat processing operations at the London Correctional Institution (Institution) to disqualify himself from working at the Institution in light of the fact that he provides tool sharpening services as an independent contractor for the Institution's carpentry shop.

You state, by way of history, that a meat inspector employed by the Department is assigned for six months each year to the London Correctional Institution to conduct ante- and postmortem inspection of animals slaughtered there for evidence of disease and to insure that the equipment, facilities, and personnel of the Institution comply with the Department's sanitary

requirements. You have submitted a position description which provides a detailed list of a meat inspector's job duties. You state that the meat inspector has the authority to suspend operations and condemn meat products when, in his judgment, compliance with the Department of Agriculture's requirements is not being met. You also state that the meat inspector holds a contract with the Ohio Department of Rehabilitation and Correction to sharpen woodworking tools used in the carpentry shops at the London Correctional Institution. The contract was not awarded pursuant to a competitive bidding process.

Division (B) of Section 102.04 provides:

Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall sell or agree to sell, except through competitive bidding, any goods or services to the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

R.C. 102.04(B) prohibits a person employed by a state department from selling, or agreeing to sell, any goods or services, except through competitive bidding, to the general assembly or any state department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts. See Ohio Ethics Commission Advisory Opinion No. 77-006. The Ohio Department of Agriculture is a statutorily created administrative department of the state, see R.C. 121.02(E), R.C. Chapter 901., and an employee of the Department of Agriculture is subject to the prohibitions of Section 102.04(B) of the Revised Code. The Department of Rehabilitation and Correction is a statutorily created administrative department of the state, see R.C. 121.02(Q), R.C. Chapter 5120., which operates and maintains the London Correctional Institution for the custody, training, and rehabilitation of persons convicted of crimes and sentenced to a penal institution. See R.C. 5120.05. Therefore, an employee of the Department of Agriculture is prohibited from selling, or agreeing to sell, any goods or services, except through competitive bidding, to a correctional institution operated and maintained by the Department of Rehabilitation and Correction.

An exception to the competitive bidding requirement of Division (B) is provided by Division (D) of Section 102.04 of the Revised Code, which reads:

(D) A public official who is appointed to a non-elective office or a public employee shall be exempted from division (A), (B), or (C) of this section if both of the following apply:

(1) The agency to which the official or employee wants to sell the goods or services, or before which the matter that involves the rendering of his services is pending, is an agency other than the one with which he serves;

(2) Prior to rendering the personal services or selling or agreeing to sell the goods or services, he files a statement with the appropriate ethics commission, with the public agency with which he serves, and with the public agency before which the matter is pending or that is purchasing or has agreed to purchase goods or services. The required

statement shall contain the officials or employee's name and home address, the name and mailing address of the public agencies with which he serves and before which the matter is pending or that is purchasing or has agreed to purchase goods or services, and a brief description of the pending matter and of the personal services to be rendered or a brief description of the goods or services to be purchased. The statement shall also contain the public officials or employee's declaration that he disqualifies himself for a period of two years from any participation as such public official or employee in any matter involving any public official or employee of the agency before which the present matter is pending or to which goods or services are to be sold. The two-year period shall run from the date of the most recently filed statement regarding the agency before which the matter was pending or to which the goods or services were to be sold No person shall be required to file statements under this division with the same public agency regarding a particular matter more than once in a calendar year. (Emphasis added.)

Division (E) of R.C. 102.04 emphasizes the disqualification requirement of Division (D), as follows:

(E) No public official or employee who files a statement or is required to file a statement under division (D) of this section shall knowingly fail to disqualify himself from any participation as a public official or employee of the agency with which he serves in any matter involving any official or employee of an agency before which a matter for which he rendered personal services was pending or of a public agency that purchased or agreed to purchase goods or services. (Emphasis added.)

In the instant situation, the meat inspector is an employee of the Department of Agriculture and is selling services to a state department other than his own. The meat inspector has filed the statements required by R.C. 102.04(D) with the Ohio Ethics Commission, the agency with which he serves, the Department of Agriculture, and the agency that is purchasing his services, the Department of Rehabilitation and Correction. The meat inspector has, in his 102.04(D) statement, described his interest in the unbid contract with the Department of Rehabilitation and Correction to provide tool sharpening services at the carpentry shop of the London Correctional Institution and has stated that he will disqualify himself for a period of two years from any participation as an employee of the Department of Agriculture in any matter involving any public official or employee of the Department of Rehabilitation and Correction.

The position description which you have submitted states that twenty-five percent of the meat inspector's duties include "[i]nspection of all equipment, facilities and plant personnel to assure daily maintenance of acceptable sanitary levels." (Emphasis added.) The provisions of R.C. 102.04(D) and (E) require that the meat inspector disqualify himself for a period of two years from the date of the filing of his most recent statement from participating as a Department of Agriculture employee in inspections of public officials and employees of the Department of Rehabilitation and Correction. This would include the inspection of plant personnel at the London Correctional Institution, who are officials or employees of the Department of Rehabilitation and Correction, for compliance with the Department of Agriculture's sanitary requirements. A matter involving any public official or employee for purposes of R.C. 102.04(D) and (E) does not include matters which involve the inspection, monitoring, or review of matters

not involving the personnel of the Department of Rehabilitation and Correction, such as the inspection of animals, equipment, or facilities, or the condemnation and disposal of meat products. Therefore, R.C. 102.04(D) and (E) do not require a meat inspector with the Department of Agriculture to disqualify himself from all matters involving animal slaughtering and meat inspection at the London Correctional Institution on the basis that he provides saw sharpening services as an independent contractor to the Institution, but only that he disqualify himself from matters involving officials and employees of the Department of Rehabilitation and Correction.

However, the instant situation involves facts and circumstances which implicate other provisions of the Ohio Ethics Law, even though all of the criteria of Divisions (D) and (E) of R.C. 102.04 may be met.

Divisions (D) and (E) of Section 102.03 of the Revised Code provide:

(D) 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.

(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 him with respect to his duties.

R.C. 102.01(B) defines a "public official or employee" for purposes of Chapter 102. to include any person who is an employee of any public agency. R.C. 102.01(C) defines "public agency" to include any department of the state. Therefore, a meat inspector employed by the Department of Agriculture is a "public official or employee" within the above statutory definition and is subject to the prohibitions set forth in R.C. 102.03(D) and (E). See generally Advisory Opinion No. 75-023.

R.C. 1.03 defines "anything of value" for purposes of R.C. 102.03 to include money and every other thing of value. See R.C. 102.01(G). A definite pecuniary benefit is considered to be a thing of value under R.C. 102.03(D) and (E). See Advisory Opinions No. 79-008, 85-006, 85-011 and 86-007. Therefore, the compensation which the meat inspector receives from the Department of Rehabilitation and Correction for performing tool sharpening services as an independent contractor would fall under the definition of "anything of value." The issue becomes whether the compensation received by a Department of Agriculture employee for providing tool sharpening services as an independent contractor to the London Correctional Institution would be of such character as to manifest a substantial and improper influence upon him with respect to his duties as a Department of Agriculture employee to oversee animal slaughtering and meat inspection at the same correctional institution.

The Ethics Commission has consistently held that a public official or employee of an administrative department of the state is not prohibited by the Ohio Ethics Law from holding outside employment for another state agency, so long as no actual conflict of interest exists between the two positions. See Advisory Opinions No. 77-006 and 88-002. However, a public

official or employee is prohibited by R.C. 102.03(D) and (E) from accepting, soliciting, or using his position to secure anything of value, including outside employment, that would directly benefit his personal or private pecuniary interests, where the thing of value could impair his objectivity and independence of judgment with regard to his official decisions and responsibilities. See Advisory Opinions No. 77-006, 85-006, 87-006, and 88-002. The Ethics Commission has also held that Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his office or employment to secure anything of value, including outside employment, from a party that is interested in matters before, regulated by, or doing or seeking to do business with the agency with which he serves. See Advisory Opinions No. 79-002, 79-006, 80-004, 84-009, 84-010, 86-011, 87-006, 87-009, and 88-002. The Ethics Commission addressed the issue of a state official or employee being prohibited by Section 102.03 from engaging in outside employment with another state agency in Advisory Opinion No. 77-006, holding that:

[T]here exists the possibility that, under certain circumstances, persons appointed, employed, or engaged by more than one department or agency of the state may be involved in actual conflicts of interest. For example, an employee of a state agency with review authority over another agency could use his position to secure a position, either as an employee or an independent contractor, with the agency that is subject to review, and perhaps affect the decisions of that agency, to his personal benefit but to the detriment of one or both agencies.

The Department of Agriculture is statutorily required to inspect all processing operations at establishments where animals are slaughtered and prepared for food purposes. See generally R.C. Chapter 918. Also, the Department of Agriculture is statutorily required to cooperate with the Department of Rehabilitation and Correction in making tests which are necessary "to determine the quality, strength, and purity of supplies, the value and use of farm lands, or conditions and needs of mechanical equipment." See R.C. 5120.20.

A meat inspector employed by the Department of Agriculture has the responsibility to provide services which fulfill the statutorily mandated and defined duties of the Department of Agriculture in an objective and impartial manner with respect to establishments which slaughter and prepare animals for food purposes. You have stated that the principal duties of the employee in question involve inspecting animals slaughtered at the London Correctional Institution for evidence of disease, inspecting the equipment, facilities, and personnel to assure compliance with sanitary requirements, and monitoring the disposition of meat determined to be diseased. This responsibility to the public agency which employs him must not be hindered by any improper influence. It is apparent that the Department of Agriculture exercises regulatory authority over the Department of Rehabilitation and Correction's meat processing establishment at the London Correctional Institution, and that the two agencies could, therefore, often stand in adversarial positions. A meat inspector with the Department of Agriculture who performs those regulative responsibilities at a correctional institution and who has contracted with the correctional institution to provide personal services would have an inherent conflict of interest or divided loyalties such that his independence and objectivity of judgment with regard to carrying out the decisions and responsibilities of the Department of Agriculture could be impaired. For example, certain circumstances could arise in which the meat inspector is required, as part of his

official duties, to suspend the institution's meat processing operations or condemn its meat products. The meat inspector could be favorably disposed towards the institution due to his holding outside employment there as an independent contractor. On the other hand, if a controversy arises over the services which he has provided as an independent contractor, it could present an improper motivation for the suspension of operations or the condemnation of the meat products. The impairment of the meat inspector's objectivity and independence of judgment exists regardless of the fact that the service he performs for the institution as an independent contractor is unrelated to his duties as a public employee with the Department of Agriculture.

Division (D) of Section 102.03 would, therefore, prohibit a meat inspector who is assigned to a correctional institution from using his official position to secure a contract for tool sharpening services with the institution. Division (E) of Section 102.03 would prohibit a meat inspector who is assigned to a correctional institution from accepting or soliciting a contract for tool sharpening services with the institution.

In Advisory Opinion No. 89-006, the Ethics Commission addressed the issue of whether an employee of the Ohio Department of Mental Health (ODMH) could contract to provide training and teaching services to a college or university that received a grant from ODMH. The Commission held that R.C. 102.03(E) prohibits an official or employee of ODMH from accepting a teaching or training position at a college or university that has received a grant from ODMH if his duties at ODMH include reviewing or approving the grants and he is unable to withdraw from consideration of the grant or grant application of his prospective employer. The Commission held that such a withdrawal may not: (1) interfere with the ODMH officials or employee's performance of his duties at ODMH or ODMH's operations; and (2) must be approved by the appropriate officials at ODMH. See Advisory Opinion No. 89-006.

In the situation addressed in Advisory Opinion No. 89-006, the withdrawal of an ODMH employee from consideration of one grant or grant application would have a relatively minor impact on the overall performance of the employee's responsibilities. In this instance, the Department of Agriculture employee is assigned to the Institution for three to five days a week for six months of each year. It is apparent that the meat inspector's withdrawal from his duties at the London Correctional Institution would substantially interfere with the performance of his assigned duties.

An employee of an administrative department of the state owes his responsibility to the exercise of the public trust by performing the tasks assigned to him by his employing agency. This duty must not be impaired by a public employee's concern for his own personal interests. In the instant situation, the Department of Agriculture employee has the responsibility to perform the duties of a meat inspector, as described above, at the locations to which he has been assigned by his superiors. There may be instances where a state agency is willing to accommodate the personal interests of its employees and excuse or reassign an employee with outside interests in order to avoid inherent conflicts of interests where the agency determines that such special consideration would not interfere with the agency's operations or work hardship upon other employees. The state agency's determination whether such action is possible or desirable is a matter within the discretion of the affected agency. If in the instant situation, the Department of Agriculture determines it is unable, or does not desire to make special arrangements to

accommodate the employee's outside interests, it is under no obligation to do so, and Divisions (D) and (E) of Section 102.03 would prohibit the employee from accepting, soliciting, or using the authority or influence of his employment to secure a contract to provide tool sharpening services to the London Correctional Institution. All employees must accept necessary restrictions to avoid any possible interference with the responsibilities of their public service.

It should be noted that in this instance the prohibitions of Section 102.04 and Section 102.03 work different results. See Advisory Opinion No. 77-006. See also Advisory Opinion No. 83-001. R.C. 102.04(D) and (E) do not prohibit an official or employee of a state agency from selling goods and services to a state agency other than his own as an independent contractor, provided he files the necessary statements and disqualifies himself from matters involving any public official or employee of the agency to which the goods or services are to be sold. However, R.C. 102.03(D) and (E) prohibit a public official or employee from accepting, soliciting, or using his position to secure outside employment from a state agency which is subject to regulation by his own state agency, and where his outside employment could detract from his objectivity in performing his official duties. See Advisory Opinions No. 77-006 and 88-002. In the instant situation, the meat inspector is prohibited by R.C. 102.03(D) and (E) from accepting, soliciting, or using the authority or influence of his employment to secure compensation for performing services as an independent contractor for the Department of Rehabilitation and Correction.

This advisory opinion is based on the facts presented, and is rendered only with regard to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission and you are so advised, that: (1) Division (B) of Section 102.04 of the Revised Code prohibits an employee of the Department of Agriculture from selling or agreeing to sell tool sharpening services to the Department of Rehabilitation and Correction except through competitive bidding unless the provisions of Divisions (D) and (E) of Section 102.04 of the Revised Code are met; (2) Divisions (D) and (E) of Section 102.04 of the Revised Code allow for an exception to the competitive bidding requirement of Division (B) of Section 102.04 for an employee of the Department of Agriculture who wishes to sell tool sharpening services to the Department of Rehabilitation and Correction, provided that the employee files the required statements describing his interest in the unbid contract and stating that he will disqualify himself for two years from any participation as an employee of the Department of Agriculture in any matter involving any public official or employee of the Department of Rehabilitation and Correction; (3) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a Department of Agriculture employee from accepting, soliciting, or using the authority or influence of his public employment to secure employment as an independent contractor at an institution where he performs regulatory responsibilities for the Department of Agriculture, regardless of the fact that the service performed for the institution as an independent contractor is unrelated to his duties as a Department of Agriculture employee, and regardless of the fact that he has complied with the requirements of Divisions (D) and (E) of Section 102.04 of the Revised Code.



Richard D. Jackson, Chairman
Ohio Ethics Commission