



OHIO ETHICS COMMISSION

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Advisory Opinion Number 92-005
March 6, 1992

Syllabus by the Commission:

- (1) Division (A) of Section 102.03 of the Revised Code does not prohibit a former assistant city law director from being retained by a port authority to serve as its legal counsel, even though, as part of his duties, as assistant law director he provided legal services to the port authority under a contract between the city and the port authority;
- (2) Division (A) of Section 102.03 of the Revised Code prohibits a former assistant city law director, who has been retained by a port authority to serve as its legal counsel, from representing the port authority for a period of one year after leaving his employment with the city on any matter in which he personally participated during his public employment;
- (3) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a former assistant city law director, for a period of one year after leaving his employment with the city, from receiving compensation from a port authority to act as its legal counsel if the legal services which he would provide to the port authority arise from, or are related to, contracts which he authorized or approved while serving with the law director's office as advisor to the port authority unless the contracts were competitively bid and were the lowest and best bid;
- (4) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a former assistant city law director, for a period of one year after leaving his employment with the city, from providing, as a private attorney, legal services to the port authority and accepting compensation therefor, if he authorized his employment by the port authority while he was employed by the law director's office as advisor to the port authority;
- (5) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a former assistant city law director from being retained by the port authority as its legal counsel if, during his employment with the law director's office, he used the authority or influence of his official position in any way, to secure for himself employment, as a private attorney, to provide legal services to the port authority.

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You have asked whether the Ohio Ethics Law and related statutes prohibit you from being retained by a port authority to serve as its legal counsel in light of the fact that, while you were employed as a part-time civil assistant in a city law director's office, you assisted the law director in providing legal services for the port authority.

You state that from 1989 until recently, the port authority contracted with the city to have the city law director's office serve as the port authority's legal counsel. Under the terms of the contract, the port authority paid a monthly retainer and hourly fees to the city's general fund for legal services provided by the city law director's office. However, over the past three years, the port authority has retained other legal counsel to supplement the legal services provided by the city law director's office. For the last year and a half the services provided by the city law director's office were limited to having a staff member from the city law director's office attend port authority meetings. The port authority no longer uses the city law director's office as its legal counsel; currently the port authority is without legal counsel.

You state that for the past seven years you were employed as a civil assistant in the city law director's office; you were employed part-time and also were engaged in the private practice of law. While you were employed with the city law director's office you attended port authority meetings and advised the port authority's board of directors. You left your employment with the city law director's office on January 1, 1992. The port authority has asked you to serve as its legal counsel; in consideration, you will be paid a monthly retainer and an hourly fee. You have declared that if you are retained by the port authority you would not represent the port authority in any matters on which you may have advised the authority while serving as a civil assistant with the city law director's office.

Division (A) of Revised Code Section 102.03 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. (Emphasis added.)

The pertinent elements of this provision are: (1) a present or former public official or employee; (2) is prohibited from representing a client or acting in a representative capacity for any person (including a public entity, see Advisory Opinion No. 82-002); (3) before any public agency; (4) on any matter in which he personally participated as a public official or employee; (5) during government service and for one year thereafter. See Ohio Ethics Commission Advisory Opinions No. 80-008, 81-002, 82-002, 84-005, 86-001, 87-004, 89-009, and 91-009.

R.C. 102.01 (B) and (C) define the term "public official or employee" to include any person who is elected or appointed to an office or is an employee of any department of a city. As a former civil assistant in the city law director's office, you are a former "public official or employee" for purposes of R.C. 102.03 (A) and subject to its statutory prohibitions. See generally Advisory Opinions No. 83-005 and 91-011.

Accordingly, R.C. 102.03 (A) prohibits you, for a period of one year from the date you left your employment with the city law director's office, from representing a client, new employer, or any other party before any public agency, on any matter in which you personally participated while you were a civil assistant with the city law director's office.

The term "represent" is defined in R.C. 102.03 (A) to include "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." Examples of the types of activities which would fall within the term "represent," for purposes of this section, were described by the Ethics Commission in Advisory Opinion No. 86-001:

[T]his would include activities ranging from an appearance on behalf of a private client in a formal proceeding or meeting to informal "lobbying" of agency personnel by telephone or in person. It also includes written communications ranging from formal documents and filings to informal letters and notes. Even if the attorney or consultant does not sign the documents, letters, or notes, the prohibition would apply if she prepared the communication. If she merely consulted with the attorneys or other personnel who prepared the documents, letters, or notes, the prohibition would not apply.

R.C. 102.03 (A) prohibits a former public official or employee from "representing" a client, new employer, or any other party before any public agency on a matter in which he personally participated, and not just before the agency with which he was previously employed. See Advisory Opinions No. 86-001 and 87-001. A "public agency" is defined in R.C. 102.01 (C) to include "the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, township, and the five state retirement systems, or any other governmental entity."

Revised Code Section 102.03 (A) defines the term "matter" to include "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." The term "matter" is broadly defined under R.C. 102.03 (A) and includes any issue or question, as well as particular cases, proceedings, applications, and determinations. See Advisory Opinion No. 91-009.

R.C. 102.03 (A) defines "personal participation" to include "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion." In Advisory Opinion No. 91-009, the Ethics Commission held that "personal participation" in a matter also includes the exercise of "supervision or general oversight" over other personnel in their work on that matter, since supervision of a public official's or employee's activities involves decision-making, approval or disapproval, recommendation or advice, and other exercises of administrative discretion, by the supervisor, regarding that matter. See also Advisory Opinion No. 86-001.

The one-year, post-employment prohibition of R.C. 102.03 (A) commences upon the date of your leaving public service. See Advisory Opinions No. 81-002, 86-001, 86-006, 87-001, 87-004, and 89-003. Therefore, R.C. 102.03 (A) prohibits you, for a period of one year from the date you left your employment with the city law director's office, from representing the port authority, or any other client or party, before any public agency, on any matter in which you personally participated while you were employed as a civil assistant with the city law director's office, regardless of when such personal participation occurred during your public service. See Advisory Opinions No. 89-003 and 91-009. You are not prohibited from representing the port

authority before a public agency on new matters, legislative matters, or matters in which you did not personally participate as a public official or employee. See Advisory Opinions No. 89-009 and 91-009.

It must be noted that R.C. 102.03 (A) does not per se prohibit a former public official or employee from being employed by a party which had entered into a contract with the former official's or employee's public agency while he was employed with the public agency. See generally Advisory Opinion No. 89-009. But see R.C. 2921.42 (A)(3) and R.C. 102.03 (D) and (E) (discussed below). However, the former official or employee will face restrictions imposed by R.C. 102.03 (A) upon the actions which he may take for his new employer. In the instant situation, R.C. 102.03 (A) does not prohibit you from being retained by the port authority to serve as its legal counsel; however, as described above, R.C. 102.03 (A) imposes restrictions upon the actions which you may take on behalf of the port authority for twelve months from the date you left your employment as a civil assistant with the city law director's office.

R.C. 102.03 (A) does state that "[n]othing contained in this division shall prohibit . . . 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." Thus, R.C. 102.03 (A) provides an exemption from its prohibitions for instances where the former official or employee is employed or retained by the public agency which formerly employed him or on which he served. In Advisory Opinion No. 91-005, the Ethics Commission held that this exemption "allows a former official or employee to be employed by all of the public agencies by which he was employed or on which he served." (Syllabus, paragraph one). However, this exemption would not apply to you in your new employment with the port authority. The public agency by which you were previously employed was the city law director's office, not the port authority. Furthermore, it cannot be said that you served on the port authority. See R.C. 4582.03 (providing for the creation of a board of directors of a port authority). During your public employment, the port authority contracted with the law director's office for legal services, and the port authority paid for such legal services to the city's general fund. You advised the port authority as part of your official duties with the law director's office. However, you were employed and compensated solely by the law director. Therefore, the exemption would not apply in this instance with regard to your proposed employment with the port authority.

As stated above, you have declared that you would not represent the port authority in any matters on which you may have advised the port authority as a civil assistant with the city law director's office. In making this statement you placed no time limit on this disqualification. As explained above, R.C. 102.03 (A) imposes a disqualification on you for a period of twelve months after you leave public employment; however, disqualifying yourself from participation in such matters beyond the twelve-month period imposed by R.C. 102.03 (A) would help to avoid an appearance of impropriety.

Also, it is important to note that R.C. 102.03 (A) imposes greater restrictions on any former public official or employee who exercised administrative discretion under R.C. Chapter 343 or R.C. Chapter 3734 while in public service. R.C. Chapter 343 deals generally with the establishment of county, joint-county, and regional solid waste management districts, and R.C. Chapter 3734 regulates the handling, storage, transportation, and disposal of solid, hazardous,

and infectious wastes. A former public official or employee who participated in matters under R.C. Chapter 343 or R.C. Chapter 3734 while in public service is prohibited for a period of two years following departure from public service from representing, before any public agency, an owner or operator of a waste facility, or an applicant for a permit or license for a facility, on any matter in which the former official or employee personally participated while in public service. See Advisory Opinions No. 91-003 and 91-005.

Other statutes under the Ethics Commission's jurisdiction may impose additional restrictions upon you depending upon the facts and circumstances which have transpired.

R.C. 2921.42 (A)(3) states that a public official may not 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. (Emphasis added.)

The term "public official" is defined in R.C. 2921.01 (A) for purposes of R.C. 2921.42 to include an officer or employee of any political subdivision of the state. An attorney employed by a city law director is a "public official" as defined in this section. See generally Advisory Opinion No. 89-015. Therefore, you are subject to the prohibition of R.C. 2921.42 (A)(3) for a period of one year after you leave employment with the law director's office.

The term "public contract" is defined for purposes of R.C. 2921.42 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 a political subdivision. See Advisory Opinions No. 83-002, 86-004, 88-007, and 89-015.

A public contract will be deemed to have been "authorized" by a public official if the contract could not have been awarded without the public official's approval. See Advisory Opinions No. 87-004, 88-006, and 91-009. R.C. 2921.42 (A)(3) prohibits you, for a period of one year after leaving public service, from receiving a monthly retainer and hourly fees from the port authority to act as its legal counsel if the legal services which you would provide to the port authority arise from, or are related to, public contracts which you authorized or approved while serving with the law director's office and as legal counsel to the port authority, unless the contracts were competitively bid and were the lowest and best bid. See Advisory Opinion No. 91-009. See also R.C. 102.03 (A); R.C. 102.03 (D) and (E) (discussed below). Also, by receiving a monthly retainer and hourly fees from the port authority to act as its legal counsel, you would be occupying a position of profit in a public contract between yourself, as a private attorney, and the port authority. You are prohibited from receiving compensation for providing, as a private attorney, legal services to the port authority, if you authorized or approved such employment as legal counsel to the port authority while you were employed by the law director's office as advisor to the port authority. See Advisory Opinion No. 87-008. See generally Advisory Opinions No. 87-004, 88-008, 89-008, and 91-009. See also R.C. 102.03 (D) and (E).

Although you have already left public employment, it should be noted that other statutes under the jurisdiction of the Ethics Commission, which apply to public officials and employees during their public service, are also relevant in the instant situation. Divisions (D) and (E) of Section 102.03 of the Revised Code, read as follows:

(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.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money, the promise of future employment, and every other thing of value. See R.C. 1.03, 102.01 (G); Advisory Opinions No. 82-002 and 89-003. Employment by the port authority and the monthly retainer and hourly fees which you would receive from the port authority to act as its legal counsel would be things of value for purposes of R.C. 102.03 (D) and (E). See Advisory Opinions No. 79-001, 87-009, and 89-012.

The Ethics Commission has held that R.C. 102.03 (D) and (E) prohibit a public official or employee, during his public service or employment, from accepting, soliciting, or using his position to secure, a promise of future employment or compensation therefor from a party that is regulated by, doing business or seeking to do business with, or interested in matters before, the public agency with which he serves, unless he withdraws as a public official or employee from matters affecting the interests of that party. See Advisory Opinions No. 82-002, 87-004, and 89-010. A public official or employee is prohibited from accepting or soliciting employment from a party while performing his official duties with respect to that party, and is prohibited from using his official authority or influence to secure employment. Id. See also R.C. 2921.42 (A)(3) (described above). The Commission has also held that R.C. 102.03 (D) prohibits a public official or employee who is engaged in a private outside business from performing his official duties in a manner which would provide his private business or financial interests with an economic advantage upon his leaving public service. See generally Advisory Opinions No. 84-012, 84-013, and 85-013. See also 2921.42 (A)(3) (described above). Furthermore, R.C. 102.03 (D) and (E) prohibit a public official or employee from participating in a matter upon which his private interests are dependent or contingent. See Advisory Opinions No. 76-005, 79-003, 79-008, 88-005, and 89-012.

Accordingly, a public official or employee who, while in public service or employment, advocates or recommends that his public agency, or any other party, proceed with a matter is prohibited by R.C. 102.03 (D) from receiving compensation, employment, consulting fees, or anything else of value on that same matter, regardless of whether he resigns or retains his public position. See Advisory Opinions No. 84-012, 84-013, and 85-013. See also 79-003, 79-008, and 80-007. A public official or employee who is engaged in a private occupation or business is prohibited from discussing, deliberating, or participating in any matter involving his private

interests, and is prohibited from advocating or recommending that the public agency which he advises purchase his services. See generally Advisory Opinion No. 84-013.

In the instant situation, due to the prohibitions of R.C. 102.03 (D) and (E), in order to be retained by the port authority as its legal counsel, you must not, while you were employed by the law director's office, have advocated or recommended that the port authority retain you as its legal counsel instead of renewing its contract with the city or otherwise have used the authority or influence of your employment with the city law director's office to secure a future contract for legal services for yourself as a private attorney.

In Advisory Opinion No. 89-012, the Ethics Commission recognized that "the likelihood of conflict is high" when a city law director represents both his city and a port authority created by his city. If while providing legal advice for the port authority's board of directors you recommended that it would be advantageous for the port authority to retain private legal counsel instead of contracting with the city, then R.C. 102.03 (D) and (E) would prohibit you from providing the legal services to the port authority. Also, if in your capacity as a civil assistant with the city law director's office you recommended that the city not renew its contract with the port authority, then R.C. 102.03 (D) and (E) would prohibit you from providing the legal services to the port authority.

Division (B) of R.C. 102.03 reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

Pursuant to this section, you are prohibited from disclosing confidential information which you acquired in your position as a civil assistant and from using such information, without appropriate authorization. See Advisory Opinion No. 89-006. This prohibition has no time limit, and is applicable during your public service, and after. Id.

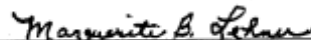
In addressing the requirements imposed by the Ohio Ethics Law and related statutes it must be noted that the Ethics Commission's function in rendering advisory opinions is not a fact-finding process. See Advisory Opinions No. 75-037 and 90-013. An advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes and sets forth the standards and criteria which must be observed in order to avoid a violation of the law. See Advisory Opinion No. 90-013. An advisory opinion cannot determine whether certain facts exist, but must rely on the accuracy and completeness of the facts presented in the request for an opinion. However, an advisory opinion can explain the application of the Ethics Law and related statutes to a given set of circumstances. Id. Therefore, this opinion cannot determine whether the requirements of the Ethics Law and related statutes have been established, factually and as a matter of law in this

instance, but will provide the standards which must be met in order for you to be retained by the port authority as their legal counsel.

Your situation may also raise issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. These issues are not within the jurisdiction of the Ethics Commission, but should be referred to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court and perhaps your local bar association.

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 the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (A) of Section 102.03 of the Revised Code does not prohibit a former assistant city law director from being retained by a port authority to serve as its legal counsel, even though, as part of his duties, as assistant law director he provided legal services to the port authority under a contract between the city and the port authority; (2) Division (A) of Section 102.03 of the Revised Code prohibits a former assistant city law director, who has been retained by a port authority to serve as its legal counsel, from representing the port authority for a period of one year after leaving his employment with the city on any matter in which he personally participated during his public employment; (3) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a former assistant city law director, for a period of one year after leaving his employment with the city, from receiving compensation from a port authority to act as its legal counsel if the legal services which he would provide to the port authority arise from, or are related to, contracts which he authorized or approved while serving with the law director's office as advisor to the port authority unless the contracts were competitively bid and were the lowest and best bid; (4) Division (A)(3) of Section 2921.42 of the Revised Code prohibits a former assistant city law director, for a period of one year after leaving his employment with the city, from providing, as a private attorney, legal services to the port authority and accepting compensation therefor, if he authorized his employment by the port authority while he was employed by the law director's office as advisor to the port authority; and (5) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a former assistant city law director from being retained by the port authority as its legal counsel if, during his employment with the law director's office, he used the authority or influence of his official position in any way, to secure for himself employment, as a private attorney, to provide legal services to the port authority.


Marguerite B. Lehner, Chair
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