



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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COLUMBUS, OHIO 43215-2940
(614) 466-7090

February 25, 1988

Informal Opinion 1988-INF-0225

Ronald J. O'Brien, City Attorney
City of Columbus

Dear Mr. O'Brien:

You have inquired as to the applicability of the Ohio Ethics Law and related statutes to the following situation. In September, 1987, Robert Howarth was employed by the City of Columbus to serve as the Executive Assistant to the Mayor. His annual salary was approximately \$52,000. Shortly before his employment by the City, Mr. Howarth had been hired as a salaried partner with the law firm of Baker & Hostetler. At the time Mr. Howarth was employed by the City, he disassociated himself from the law firm, and received no compensation from the firm.

You have stated that in November, 1987, the City Council and Civil Service Commission approved splitting the position of Executive Assistant to the Mayor into two positions--Executive Director and Executive Assistant. The compensation of each position would be approximately \$54,000 per year. The Mayor wishes to enter into a personal services or consulting contract with Mr. Howarth for a seven-month period under which Mr. Howarth would perform the duties of the Executive Assistant, including such liaison, consulting, advisory, and other services as are assigned to him by the Mayor. The compensation for such seven-month contract would be \$29,167, which would total \$50,000 on an annual basis. Mr. Howarth anticipates returning to Baker & Hostetler as a salaried partner, where his compensation with the firm would exceed six figures annually. The proceeds of the City contract would be paid by Mr. Howarth to the firm, and Mr. Howarth would receive only his salary from the firm.

It is anticipated that Mr. Howarth would have time to handle other matters for the law firm. However, the City would be his primary client, and Mr. Howarth would devote whatever time is required to adequately fulfill the City contract.

You have asked several questions regarding the propriety of this proposed arrangement. The first issue to be addressed is the applicability of R.C. 2921.43. Division (A) of Section 2921.43 of the Revised Code reads as follows:

- (A) No public servant shall knowingly solicit or accept and no person shall knowingly promise to give to a public servant either of the following:
 - (1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform his official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation;

- (2) Additional or greater fees or costs than are allowed by law to perform his official duties.

A "public servant" is defined for purposes of R.C. 2921.43 in R.C. 2921.01 to include any appointed officer, employee, or agent of the state or any political subdivision thereof, whether in a temporary or permanent capacity, and any person performing ad hoc a governmental function, including an advisor or consultant. The contract between Mr. Howarth and the City would require Mr. Howarth to perform the duties of the newly-created position of Executive Assistant. These duties include external liaison, consulting, and advisory services. All of these duties were performed by Mr. Howarth while he was previously serving as Executive Assistant to the Mayor. Internal liaison and administrative duties previously performed by Mr. Howarth as Executive Assistant to the Mayor have been assigned to the individual serving in the newly-created position of Executive Director.

It is clear that those duties Mr. Howarth would be performing under the contract are all duties he had performed as an officer or employee of the City. See City Code §212.01. Further, Mr. Howarth would be fulfilling the duties of a position which you have stated City Council and the Civil Service Commission have created as an office or position of employment within City government. In Advisory Opinion No. 77-004, the Ethics Commission considered the issue whether the Ohio Ethics Law applied to a professional engineer hired to serve as an independent contractor to the village. The professional engineer had previously worked as the village engineer. Due to a change by the village council, the engineer was engaged on a retainer basis. His duties were the same as they had been when he had served as village engineer. Although the opinion recognized that an independent contractor who is not vested with sovereign authority or who does not share in the exercise of the public trust is not a public official or public employee, and thus, is not subject to the Ohio Ethics Law, the opinion concluded that the engineer was a "public official" for purposes of the Ethics Law, stating:

Whether a person is a public official subject to the Ethics Law depends on the amount and kinds of authority and discretion he exercises, and not on the contractual or other arrangement under which he serves. We conclude that once a person becomes a public official, he exercises the sovereign power of government and is vested with the public trust, and as such he ceases to be an independent contractor. Otherwise, an appointed public official could avoid the Ethics Law simply by executing a contract that declares him to be an independent contractor.

Although Advisory Opinion No. 77-004 was concerned with whether the individual in question was subject to R.C. Chapter 102., the analysis and conclusion of the opinion are instructive in determining whether Mr. Howarth is a "public servant" for purposes of R.C. 2921.43, since both R.C. Chapter 102. and R.C. 2921.43 apply to persons who are appointed to an office or position of employment with political subdivisions. Under the proposed contract, Mr. Howarth would be acting as a consultant and advisor to the Mayor, and would be representing or acting on behalf of the City as an external liaison. Mr. Howarth would be compensated on a salaried basis, and he would be performing work that is part of the regular business of the City, under the direction of the Mayor, with the City providing the resources for the tasks assigned. Mr. Howarth would be performing the duties of a position which has been created as an office or position of employment within City government. Further, the duties are those he previously performed as an appointed officer or employee of the City. In light of the foregoing, it

must be concluded that Mr. Howarth would be exercising the sovereign power of government and would be vested with the public trust. Therefore, he would be an appointed officer or employee of the City, a political subdivision of the state, even though he would serve pursuant to contract. In addition, Mr. Howarth would be charged with various external liaison duties, and could be considered, depending on his authority to perform those duties, an agent of the City. See generally Blackwell v. International Union, 9 Ohio App. 3d 179 (Cuyahoga County 1983); Haluka v. Baker, 66 Ohio App. 308 (Wayne County 1941); Advisory Opinion No. 85-005 (an agent of the state is one to whom the state has delegated the authority to act on its behalf, and who has the authority to bind the state). In sum, Mr. Howarth would be an appointed officer or employee, and in some instances, an agent of the City, and therefore, would be a "public servant" for purposes of the prohibitions of R.C. 2921.43(A).

R.C. 2921.43 would prohibit Mr. Howarth from soliciting or accepting any compensation, other than as allowed by law, as a supplement to his public compensation or for performing his official duties for the City, performing any act or service in his official capacity, or for performing the duties of his City position. Further, no person may promise or give to Mr. Howarth such compensation as described above. The term "person" includes a partnership, see R.C. 1.59(C), and therefore, R.C. 2921.43 would apply to Baker & Hostetler, which you state is a partnership. R.C. 2921.43 requires that Mr. Howarth be paid only by the City for performing his City duties. Mr. Howarth is prohibited by R.C. 2921.43 from accepting compensation from any other source, including Baker & Hostetler, for performing his City duties, and no person other than the City may pay this compensation.

You have indicated that during some weeks, Mr. Howarth would not be required to devote all of his time to his duties under the City contract, and would be able to handle other matters for Baker & Hostetler. However, it has been indicated that there will often be periods of time when he would devote his entire time to his City responsibilities. As discussed above, Mr. Howarth cannot receive compensation from Baker & Hostetler for the time which he spends performing his City duties. Although the position may not be considered to be functionally full-time over the term of the contract, the facts indicate that the majority of Mr. Howarth's time would be spent in the performance of his City duties, and that there would be periods of time when his devotion to his City duties would be on a full-time basis. Baker & Hostetler intends to pay Mr. Howarth a salary which approximates the salary which he was earning while employed by the firm as a salaried partner, and which is commensurate with full-time employment with the firm, even though he would spend only a fraction of his time attending to matters other than as a City officer, employee, or agent. Under these facts, Mr. Howarth would be accepting, and Baker & Hostetler would be giving to him, compensation other than as allowed by law as a supplement to his public compensation or for the performance of his official or City duties, in contravention of R.C. 2921.43(A).

You have also asked about the application of R.C. 102.03(D), (E), and (F). These provisions read:

- (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.
- (F) No person shall promise or give to a public official or employee 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 "public official or employee" is defined for purposes of R.C. 102.03 in R.C. 102.01(B) and (C) to include any person who is appointed to an office or is an employee of a city. As discussed above, Mr. Howarth would be performing the duties of a position which has been specifically created as an office or position of employment by the appropriate authorities within City government and the duties he would be performing are those he previously performed as a City official or employee. Therefore, Mr. Howarth would be considered to be a City officer or employee, and thus, a "public official or employee" for purposes of R.C. 102.03, even though he would serve pursuant to contract. See Advisory Opinion No. 77-004 (discussed above).

The term "anything of value" is defined for purposes of R.C. 102.03 to include money, the promise of future employment, and every other thing of value. See R.C. 1.03 and R.C. 102.01(G). Employment with an agency, including a private law firm, is considered to be "anything of value" for purposes of R.C. 102.03. See Advisory Opinions No. 77-003, 84-009, and 87-006. See also Advisory Opinions No. 77-006, 79-002, and 82-002. Therefore, a public official or employee would be prohibited by R.C. 102.03(D) and (E) from accepting, soliciting, or using his official authority or influence to secure employment with a law firm if such employment is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. Further, a law firm is prohibited by R.C. 102.03(F) from promising or giving employment to a public official or employee if such employment is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

The Ethics Commission has held that a public official or employee is prohibited from accepting, soliciting, or using his official authority or influence to secure anything of value from parties that are regulated by, doing business or seeking to do business with, or interested in matters before, the agency with which he serves. See Advisory Opinions No. 79-002, 84-009, and 86-011. See also Advisory Opinions No. 79-006 and 86-008. Furthermore, Division (F) of Section 102.03 prohibits parties who are interested in matters before, regulated by, or doing or seeking to do business with a public agency from promising or giving anything of value to an official or employee of that agency. See Advisory Opinions No. 87-005 and 87-007. In this instance, two members of the firm of Baker & Hostetler have contracted with the City to provide legal services in connection with the City Airport, and thus, the firm is doing business with the City. You have stated that the Mayor played no role in entering or awarding the contract. However, the Mayor is the chief executive officer of the City, see City Charter §58, and he and his office staff could very well be required to be involved, or become involved, in various policy, administrative, and operational matters involving the Airport. See City Charter §§60, 62, 63; City Code §§221.01-.03; §1703.01. Therefore, because the firm is doing business with the City, R.C. 102.03(D) and (E) prohibit Mr. Howarth from accepting, soliciting, or using his official authority or influence to secure employment with Baker & Hostetler. The firm is prohibited by R.C. 102.03(F) from promising or giving employment to Mr. Howarth.

You have asked about the liability of the Mayor under R.C. 102.03. Under the facts presented, the provisions of R.C. 102.03 do not apply to the conduct of the Mayor in contracting with Mr. Howarth.

If Mr. Howarth were simultaneously to serve as Executive Assistant and as a salaried partner with Baker & Hostetler, the provisions of R.C. 2921.42 would also be implicated. Division (A)(4) of this section reads as follows:

- (A) No public official shall knowingly do any of the following:
 - (4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

As an appointed officer or employee of the City, Mr. Howarth would be a "public official" for purposes of R.C. 2921.42. See R.C. 2921.01(A). Therefore, he would be prohibited from having an interest in any public contract entered into by or for the use of any officer, board, agency, or department of the City. See Advisory Opinion No. 87-002. The term "public contract" is defined 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 city, see R.C. 2921.42(E), and would include the contract between the City and the attorneys from Baker & Hostetler who are providing legal services in connection with the Airport.

You have stated that Mr. Howarth would be a salaried partner at the firm, and would receive no percentage or distributive share of the firm's profits. However, he may have an interest in the contract with the City for purposes of R.C. 2921.42(A)(4) if he is in a management position with the firm, if he takes part in the contract negotiations, receives a direct share of the contract's proceeds in the form of a commission or fee, or if his employment responsibilities include participation in the administration of the contract. See Advisory Opinions No. 78-006, 82-003, and 85-005. See also Advisory Opinions No. 78-006, 81-001, and 85-008. Further, an employee may be deemed to have an interest in a contract of his employer where the employee's tenure is dependent upon his employer receiving the award of such contract. If Mr. Howarth would have an interest in the contract between the City and Baker & Hostetler for legal services involving the Airport, he would be prohibited by R.C. 2921.42(A)(4) from simultaneously serving as an employee or officer with the City. R.C. 2921.42(C) does provide an exception to this prohibition. See Advisory Opinions No. 82-007 and 84-006 (explaining Division (C)(2)). If the exception were established, so that Mr. Howarth could serve with both the City and Baker & Hostetler, Division (A)(1) of Section 2921.42 would prohibit him from authorizing, or using the authority or influence of his office to secure authorization of, any contracts between the City and the law firm.

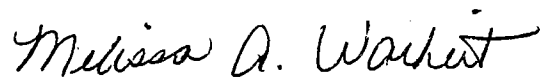
In conclusion, Mr. Howarth would be, under the facts presented, an appointed officer or employee of the City for purposes of Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code, even though he would serve pursuant to contract. Division (A) of Section 2921.43 would prohibit Mr. Howarth from receiving from Baker & Hostetler compensation which is commensurate with full-time employment with the firm since he would be spending only a small portion of his time on matters other than as a City officer, employee, or agent. Section 2921.43 would also prohibit Baker & Hostetler from paying Mr. Howarth this compensation. R.C. 102.03(D) and (E) would prohibit Mr. Howarth from accepting, soliciting, or using his official authority or influence to secure

Ronald J. O'Brien
February 25, 1988
Page 6

employment with Baker & Hostetler since the firm is doing business with the City. The firm is prohibited by R.C. 102.03(F) from promising or giving employment to Mr. Howarth. Mr. Howarth is also prohibited by R.C. 2921.42 from serving concurrently with the City and the law firm if he has an "interest" in the contract for legal services concerning the Airport between the City and the firm.

This informal advisory opinion has been approved by the Ethics Commission, 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. If you have any questions, please contact me.

Sincerely,



Melissa A. Warheit
Executive Director

MW/pg