



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

March 6, 1992 Informal Opinion 1992-INF-0306-2

Russell A. Thibaut
[REDACTED]

Dear Mr. Thibaut:

You have asked whether the Ohio Ethics Law and related statutes would prohibit you from being employed by an architect to work on a renovation project that has been undertaken by the State of Ohio, in light of the fact that you worked on that same project while employed by the State.

You have stated by way of history that you were, until recently, employed by the Ohio Department of Administrative Services, Division of Public Works, in the Office of the State Architect, but that you retired, effective February 29, 1992. In your position with the State Architect's Office, you worked with an associate architect on a project to renovate the Ohio Departments Building in Columbus. The project includes art and restoration work, air conditioning, and window replacement. You were the project director and worked with the associate architect to review progress of the project during design development. You also coordinated and communicated between the State Architect's Office and state agencies which are tenants of the building, consulted with in-house architects and construction specialists to resolve problems, and assisted in examining documents for conformance with the Ohio Basic Building Codes.

Upon retirement, you would like to work part-time for the associate architect as a construction administrator on this same project. Your proposed duties with the associate architect will include, but not be limited to: scheduling regular project meetings between the State of Ohio representatives and representatives of the contractors; keeping current updated record schedules of the work, shop drawings, changes in the work and record drawings; observing the work of the contractors on a regular basis and being available to define documents; assisting the State of Ohio's representatives to coordinate temporary relocation of tenants; processing all submittals including shop drawings, product data, and other items required by contract documents; assisting the associate architect in preparation of supplemental drawings and specifications; reviewing proposals from contractors for qualities and costs on labor and material; negotiating with contractors on work proposed to be added, deleted, or modified; and performing building inspections with State of Ohio representatives for conformity of work with contract documents.

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You have also stated that the position will not be full-time and the work schedule will be approximately 25-30 hours per week. Your compensation will be less than your state salary, and you will receive no benefits other than an hourly salary. Your employment will be terminated upon completion of the renovation work, which is scheduled for completion in eighteen months. You have stated that your superior at the State Architect's Office has indicated that it will be to the State's advantage to have you work on this project, since you are familiar with the building.

Division (A) of Section 102.03 of the Revised Code, Ohio's "Revolving Door" Law, 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.

The pertinent elements of this provision are: (1) a present or former public official or employee; (2) is prohibited from representing a new employer, client or any other person (defined in Section 1.59 of the Revised Code to include an individual, corporation, partnership, association, or other similar entity); (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, 87-001, 87-004, 89-009, and 91-009.

R.C. 102.01 (B) and (C) define the term "public official or employee" for purposes of R.C. 102.03 to include any person who is appointed to an office or is an employee of any department or division of the state. You were employed by the State Department of Administrative Services, Division of Public Works, and were, therefore, an employee of a department and division of the State. See R.C. Chapters 123 and 153. Since your retirement from State employment, you are a former "public official or employee" for purposes of R.C. 102.03(A), and subject to its statutory prohibitions.

Accordingly, R.C. 102.03(A) prohibits you, for a period of one year from the date you left your employment with the State of Ohio, from representing a new employer, client, or any other party before any public agency, on any matter in which you personally participated while you were employed by the State.

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R.C. 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." It is apparent that the term "matter" is broadly defined under R.C. 102.03(A) and would include all decisions, determinations, issues, and questions which arose from the award and performance of contracts between the Department of Administrative Services, and the associate architect and other contractors, as well as from the planning and execution of the project.

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 another'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. As project manager of the renovation project on the Ohio Departments Building, you "personally participated" in that project, as evidenced by the examples of your job duties that you have provided. As stated above, you reviewed progress of the project during the design development stages, consulted with others to resolve problems, and examined documents for conformance with building codes. As project manager, it is clear that you substantially exercised administrative discretion in the planning, design, and execution of the project, and supervised and worked with other parties, including the associate architect, in the performance of their work on the project. You "personally participated" through the exercise of administrative discretion in the decisions, determinations, issues and questions arising during the planning and execution of the renovation project for purposes of R.C. 102.03(A). Therefore, you are prohibited by R.C. 102.03(A) from "representing" the associate architect on the renovation project for one year after leaving state service.

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" were described by the Ethics Commission in Advisory Opinion No. 86-001:

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This 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 [former employee] does not sign the documents, letters, or notes, the prohibition would apply if she prepared the communication. If she merely consulted with . . . other personnel who prepared the documents, letters, or notes, the prohibition would not apply.

Therefore, R.C. 102.03(A) prohibits you from having any contact, with any public agency, on behalf of the associate architect or any other party, with respect to the renovation project of the Ohio Departments Building. You may not have personal meetings or consultations with, or make telephone calls, write correspondence, or prepare documents for submission to, any public agency on behalf of the associate architect with respect to the renovation project. R.C. 102.03(A) prohibits you from representing the associate architect on the renovation project before the Department of Administrative Services, as well as before any other public agency. 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."

You have stated that your proposed duties with the associate architect would include working with, and assisting, representatives of the State of Ohio on the renovation project. R.C. 102.03(A) would prohibit you from working with, assisting, or having any other contact with, officials or employees of the State of Ohio on the renovation project. Therefore, you are prohibited by R.C. 102.03(A) from being employed by the associate architect to work on the renovation project where that employment would include contact with any public agency.

Violation of R.C. 102.03(A) is a criminal offense, being a misdemeanor of the first degree. R.C. 102.99(B). Any person who commits a first degree misdemeanor is subject to imprisonment for up to six months and/or being fined up to one thousand dollars. R.C. 2929.21.

You have stated in your letter that your superior at the State Architect's Office has indicated that it will be to the State's advantage to have you work on the project. R.C. 102.03(A) flatly prohibits a former official or employee from representing a party

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on any matter in which he personally participated while in the public service. There ~~is~~ no "balancing" language in R.C. 102.03(A), indicating that the Revolving Door Law will not apply where the benefit to the State of such representation outweighs the harm to the State, or language indicating that the Law will not apply if the State consents to such representation. See generally Dougherty v. Torrence, 2 Ohio St. 3d 69 (1982) (words not used in a statute may not be inserted in construing that statute). Perhaps this is due to a legislative recognition that such "revolving door" situations generally work to the detriment of the public agency, rather than to its benefit. As stated by the court in State v. Nipps:

R.C. 102.03(A), when read in context with the other subdivisions of R.C. 102.03, clearly indicates a legislative purpose to ensure that no public official or employee will engage in a conflict of interest or realize personal gain at public expense from the use of "inside" information. The state does not impose a complete prohibition but seeks to control situations where the General Assembly has determined that the danger of abuse is the greatest.

66 Ohio App. 2d 17, 20-21 (Franklin County 1979).

In this instance, there may be certain advantages to the State to have you work for the associate architect on this project, since you are familiar with the project, the building, and the processes of the Department of Administrative Services. However, any former official who wishes to engage in activity prohibited by the Revolving Door Law would be familiar with the projects and parties he worked with while in the public service, and with the processes and procedures of his former agency. To recognize this type of familiarity as an exception to the Revolving Door Law would render the Law meaningless. Furthermore, situations could clearly arise where the interests of the Department of Administrative Services and the interests of the associate architect may come into conflict or become adversarial during the course of the project. Disputes between the two parties could even result in litigation. If you are, at that point, employed by the associate architect, the knowledge and contacts you gained as an employee of the State working on the project could clearly work to the advantage of the associate architect and to the disadvantage of the State.

If it would be beneficial to the State to have you continue your association with the project, your attention is drawn to the exemption of R.C. 102.03(A), which reads: "Nothing contained in this division shall prohibit, during such [one-year] period, a former public official or employee from being retained or employed

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to represent, assist, or act in a representative capacity for the public agency by which he was employed or on which he served." Therefore, the Revolving Door Law does not prohibit the Department of Administrative Services from retaining you to continue to represent or assist it on the renovation project. However, the Revolving Door Law does prohibit you from being employed by any party other than the Department of Administrative Services to represent it on the renovation project.

There are two other "post-employment" restrictions of which you should be aware.

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 the State. 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 State.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (E) of that section as:

- (1) The purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state or any of its political subdivisions, or any agency or instrumentality of either;
- (2) A contract for the design, construction, alteration, repair, or maintenance of any public property.

Therefore, a contract awarded by the State to an architect for renovation and construction services on State property would constitute a "public contract" for purposes of R.C. 2921.42(A)(3).

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

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No. 87-004, 88-006, and 91-009. See also R.C. 102.03 (D) and (E) (discussed below).

R.C. 2921.42(A)(3) prohibits you from receiving compensation from the associate architect for performing work on the renovation project if you, as an employee of the State Architect's Office, authorized or approved the contract to the associate architect to perform work on the renovation project, unless the contract was competitively bid and was the lowest and best bid. See Advisory Opinions No. 87-004, 88-008, and 89-006. It must be emphasized, however, that even if you can comply with the restrictions of R.C. 2921.42(A)(3), you are still bound by the prohibition of R.C. 102.03(A), as discussed above. See also R.C. 102.03(D) and (E) (discussed below).

The last "post-employment" restriction is R.C. 102.03(B), which prohibits you from disclosing confidential information which you acquired in your position as a State employee 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.

As a final matter, you should also be aware of R.C. 102.03(D) and (E), which apply to you as a state employee, and which restrict your conduct during your public service. These prohibitions 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 associate architect and the compensation which you would receive from such employment would constitute "anything of value"

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for purposes of R.C. 102.03(D) and (E). See Advisory Opinions No. 79-001, 87-009, and 82-012.

The Ethics Commission has held that R.C. 102.03 prohibits a public official or employee, during his public service or employment, from soliciting or accepting employment or compensation therefor from a party that is doing business or seeking to do business with, regulated by, or interested in matters before, the public agency by which he is employed, unless he withdraws as a public employee from all matters affecting the interests of that party and abstains from participating in matters involving that party. See Advisory Opinions No. 82-002, 87-004, and 89-010. R.C. 102.03 (D) prohibits a public official or employee from using his authority or influence to secure employment from such a party. Id. Also, the Commission has held that a public official or employee who is negotiating or who has accepted a position from a party is prohibited by R.C. 102.03(D) from using his official authority or influence to secure anything of value for that party. See Advisory Opinions No. 86-006 and 87-004.

Therefore, you are, as a state employee, prohibited from using your official authority or influence to secure employment from the associate architect. You are also prohibited from seeking or accepting employment, as an employee or independent contractor, from the associate architect unless you have first withdrawn, as a state employee, from any matters which affect the interests of the associate architect and unless you abstain from working with the associate architect. You are prohibited from using your position as a state employee to secure any benefit or any other thing of value for the associate architect if you are negotiating or have accepted employment from the associate architect. In addressing the prohibitions imposed by the Ohio Ethics Law and related statutes in an advisory opinion, the Ethics Commission's function is to set forth the standards and criteria which must be observed in order to avoid a violation of the law, and to apply the law to a given set of circumstances. See Advisory Opinions No. 90-013 and 92-003. In rendering an opinion, the Commission does not act as a fact-finder and cannot determine whether the Ethics Law has been violated; rather, that is a function of the Commission's investigatory process pursuant to Section 102.06 of the Revised Code. See Advisory Opinions No. 75-037 and 90-013. 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 provides the standards which must be met in order to ensure compliance with the Ethics Law.

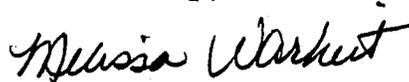
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You should also be aware of the Governor's Executive Order No. 92-61V, which imposes additional restrictions on the activities of former state officials and employees. You may wish to contact the Governor's Office concerning the application of this Executive Order to your circumstances.

The Ethics Commission, at its meeting on March 6, 1992, instructed that this informal advisory opinion be issued. The 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.

If you have any questions, please feel free to contact this office again.

Sincerely,



Melissa A. Warheit
Executive Director