



OHIO ETHICS COMMISSION

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June 19, 1998

Informal Opinion 1998-INF-0619-1

Patricia E. Snyder, Chief Legal Counsel
Ohio Department of Commerce



Dear Ms. Snyder:

In a letter received by the Commission on March 10, 1998, you asked whether the Ohio Ethics Law and related statutes prohibit Larry McCabe, a former employee of the Department of Commerce (Department), Division of Unclaimed Funds (Division) from being employed by Audit Services, Ltd., a company that wishes to enter into a contract with the Division to perform audits of unclaimed funds holders. As an employee, he would perform audits of unclaimed funds holders for the Division.

As explained below, the Ohio Ethics Laws and related statutes do not prohibit a former Division employee from being employed by a company that wishes to enter into a contract with the Division to perform audits of unclaimed funds holders and, as an employee of the company, performing audits of unclaimed funds holders for the Department and its Division of Unclaimed Funds.

Facts

In a letter received by the Ethics Commission, the Division employee stated that he was employed as an assistant supervisor in the Unclaimed Funds Compliance Section of the Division. He stated, at the time of the letter, that he desired to resign and establish himself in an unclaimed funds audit/compliance business and contract with the Division to assist it in identifying and collecting unclaimed funds accounts. In your correspondence, you state that, instead of contracting with the Division as an individual, the former Division employee desires to become employed by Audit Services, Ltd., a company that will perform audits of unclaimed funds holders.

Post-Employment Restrictions

The Ohio Ethics Law and related statutes impose post-employment restrictions upon former public officials and employees in three areas. These prohibitions limit a former public official or employee, after leaving public service, from: (1) representing parties, on certain matters, before public agencies; (2) profiting from public contracts in specified situations; and (3) releasing confidential information. In addition to the statutes that specifically impose post-employment restrictions, the Ethics Commission has held that a public official may not use his authority or influence as a public official to secure a financial advantage for himself or his business even if he will not secure the advantage until after he leaves his public position.

The Revolving Door Prohibition-- R.C. 102.03(A)

Division (A) of Section 102.03 of the Revised Code, the "Revolving Door" prohibition of the Ohio Ethics Law, imposes restrictions upon the ability of former public officials and employees to represent a client or act in a representative capacity for any person after leaving public service. R.C. 102.03(A)(1) provides, in pertinent part:

No present or former public official or employee shall, during 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 the public official or employee 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.

The language of R.C. 102.03(A) precisely sets forth the prohibitions that it imposes upon former public officials and employees, specifically: (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 (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. Ohio Ethics Commission Advisory Opinions No. 80-008, 86-001, and 92-005. The term "matter" is defined in R.C. 102.03(A)(5) to include "any case, proceeding, application, determination, issue, or question."

R.C. 102.03(A), the "Revolving Door" prohibition of the Ohio Ethics Law, imposes restrictions upon the ability of former public officials and employees to represent a client or act in a representative capacity for any person after leaving public service.

In the instant situation, the former Division employee does not propose to "represent a client or act in a representative capacity for any person." Rather, he desires to become employed by a company, and as an employee of the company, perform audits of unclaimed funds holders for the Department and its Division of Unclaimed Funds.

Because the proposed activity of the former Division employee is not the type of activity that R.C. 102.03(A) prohibits, the prohibition of R.C. 102.03(A) against representing parties before public agencies is inapplicable in the instant situation. However, if the former employee did propose to engage in representation of the Department, R.C. 102.03(A)(6) contains an exception to the prohibitions that it imposes upon former public officials and employees. The exception states that a former public official or employee is not prohibited from being retained or employed to represent, assist, or act in a representative capacity for the public agency with which he served. This exception would apply to allow a former Department employee to be retained, by the Department, to assist the Department after he leaves his public employment, albeit as an employee of a company under contract to the Department.

Therefore, R.C. 102.03(A) does not prohibit the former Division employee from being employed by a company and, as an employee of the company, performing audits of unclaimed funds holders for the Department and its Division of Unclaimed Funds.

Profiting From a Public Contract—R.C. 2921.42(A)(3)

Your attention is also directed to Division (A)(3) of Section 2921.42 which reads:

(A) No public official shall knowingly do any of the following:

....

(3) 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, unless the contract was let by competitive bidding to the lowest and best bidder.

R.C. 2921.42(A)(3) prohibits a public official, during his public service and for one year after leaving public service, from occupying "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, unless the contract was let by competitive bidding to the lowest and best bidder."

R.C. 2921.42(A)(3) prohibits the former Division employee from profiting from a public contract entered into with the Division for a period of one year after resigning if he authorized the contract and the contract was not awarded to the lowest and best bidder in a competitive bid. An employee of a corporation is considered to occupy a position of profit in a contract if: (1) the establishment or operation of his employer is dependent upon receipt of the contract; (2) the creation or continuation of his employment with his employer is dependent upon the award of the contract; (3) the contract moneys would be used by his employer to compensate him or as a basis for his compensation; or (4) he were to otherwise profit from the contract. Adv. Ops. No. 87-004 and 88-008.

You have stated that the former Division employee was not involved in the Department's decision to enter into contracts with outside auditing firms. Because the former Division employee did not "authorize" the decision to enter into contracts with outside auditing firms or the contracts themselves, the prohibition of R.C. 2921.42(A)(3), against occupying a position of profit in the prosecution of a public contract authorized by him unless the contract was let by competitive bidding to the lowest and best bidder, is inapplicable in the instant situation and need not be addressed further. Therefore, R.C. 2921.42(A)(3) does not prohibit the former Division employee from being employed by a company and, as an employee of the company, performing audits of unclaimed funds holders for the Department and its Division of Unclaimed Funds.

Disclosure of Confidential Information—R.C. 102.03(B)

The final post-employment restriction is Division (B) of Section 102.03 of the Revised Code, which reads as follows:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that 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.

R.C. 102.03 (B) prohibits the former employee from using or disclosing confidential information to any party, without appropriate authorization. No time limit exists for the prohibition of R.C. 102.03(B). Adv. Op. No. 88-009.

Because the proposed activity of the former Division employee is not the type of activity that would implicate the prohibition imposed by R.C. 102.03(B), as discussed above, the release of confidential information, the prohibition of R.C. 102.03(B) need not be addressed. Therefore, R.C. 102.03(B) does not prohibit the former Division employee from being employed by a company and, as an employee of the company, performing audits of unclaimed funds holders for the Department and its Division of Unclaimed Funds.

Securing Improper Things of Value—R.C. 102.03(D)

Your attention is directed to R.C. 102.03(D), which reads:

No public official or employee shall use or authorize the use of the authority or influence of 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 the public official or employee with respect to that person's duties.

R.C. 102.03(D) prohibits a public official or employee from using his position, formally or informally, to secure, anything of value, if the thing of value is of such a character as to manifest a substantial and improper influence upon him with respect to his official duties. Adv. Ops. No. 80-003 and 88-004. However, R.C. 102.03(D) does not impose prohibitions upon former public officials and employees.

Therefore, R.C. 102.03(D) does not prohibit the former Division employee from being employed by the company and, as an employee of the company, performing audits of unclaimed funds holders for the Department and its Division of Unclaimed Funds.

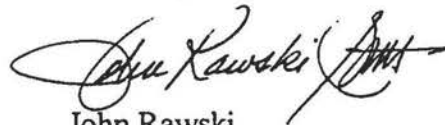
Conclusion

As explained above, the Ohio Ethics Laws and related statutes do not prohibit a former Division employee from being employed by a company that wishes to enter into a contract with the Division to perform audits of unclaimed funds holders and, as an employee of the company, performing audits of unclaimed funds holders for the Department and its Division of Unclaimed Funds.

Your attention is also directed to Executive Order 93-39V, which imposes revolving door restrictions on certain former state officials and employees. The Ohio Ethics Commission's jurisdiction is limited to issues arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code and does not include restrictions imposed by Executive Order. If you believe that the former employee may be affected by this Executive Order, then you should contact the Governor's Office for more information.

This informal advisory opinion was approved by the Ethics Commission at its meeting on June 19, 1998. This opinion considers facts presented by the Department that deal with Larry McCabe, a former Department employee, and the conclusions in the opinion apply to Mr. McCabe. The opinion represents the views of the undersigned, based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. If you have any further questions or desire additional information, please feel free to contact this Office again.

Sincerely,

A handwritten signature in cursive script, appearing to read "John Rawski". The signature is written in black ink and is positioned above the typed name.

John Rawski
Staff Attorney