

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

November 28, 2005

Informal Opinion 2005-INF-1128-2

Jim Samuel


Dear Mr. Samuel:

In a letter received by the Ohio Ethics Commission on September 7, 2005, you ask several questions concerning the post-employment restrictions that the Ohio Ethics Law and related statutes impose upon you as a former state employee. You state that you were employed at the Department of Taxation (Taxation) from mid-June through September 30, 2005. Prior to being employed at Taxation, you were employed by the Office of the Governor as an Executive Assistant. You were involuntarily separated from that position on June 17, 2005.

Brief Answer

As explained below, for one year from June 17, 2005, the date on which you were involuntarily separated from your position with the Governor's Office, you are prohibited from representing any person, before *any* public agency, on any matter in which you personally participated during your service in that position, regardless of when during your service you participated in the matter.

Further, for one year from September 30, 2005, the date on which you left your position with Taxation, you are prohibited from representing a client or any other person on any matter in which you personally participated as an employee of Taxation regardless of when, during that employment, you personally participated in the matter.

In addition to these restrictions, you are prohibited from disclosing or using, without appropriate authorization, any confidential information that you acquired in the course of your public employment.

Facts

As noted above, you state that you were employed at Taxation from mid-June through September 30, 2005. Prior to being employed at Taxation, you were employed by the Office of the Governor as the Executive Assistant of Business & Industry (Executive Assistant).

During your employment as Executive Assistant, you rendered policy advice to the Governor, the Governor's Chief of Staff, and the Chief Policy Advisors for ten state agencies, including the Bureau of Workers' Compensation (BWC), the Industrial Commission, the Ohio Department of Transportation, and the Public Utilities Commission of Ohio. You state the Chief Policy Advisors reported to the appropriate cabinet member or agency director, and that you were not vested with the authority to direct the actions of the state agencies. You were involuntarily separated from your employment with the Governor's Office on June 17, 2005.

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, prohibits former public officials and employees from representing clients or other persons before public agencies after leaving public service. R.C. 102.03(A)(1) provides:

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 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; (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. 89-009, 91-009, and 92-005.

The term "represent" is defined in R.C. 102.03(A)(5) to include "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." (Emphasis added.) Examples of the types of activities that would fall within the definition of the term "represent" range from appearances in formal proceedings or meetings to informal "lobbying" of agency personnel by telephone or in person. Also included within the definition of "represent" is the preparation of any written communication that is submitted to a public agency, including formal documents, filings, informal letters, notes, and e-mails, regardless of whether the former employee signs the communication. Adv. Ops. No. 86-001, 87-001, 92-005, and 2004-04.

A "person," for purposes of R.C. 102.03(A)(1), has been interpreted by the Ethics Commission to include governmental agencies, individuals, corporations, business trusts, estates, trusts, partnerships, and associations. See R.C. 1.59(C) and Adv. Ops. No. 82-002 and 89-003.

R.C. 102.03(A)(1) prohibits a former public official or employee from “representing” a client, or any other party, on a matter in which he personally participated, before any public agency, and not just before the agency with which he was previously employed. Adv. Ops. No. 86-001, 87-001, and 92-005. R.C. 102.01(C) defines the term “public agency” to include “the general assembly, all courts, any department, division, institution, 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.”

The prohibition in R.C. 102.03(A) applies to any “matter” in which a former public official or employee personally participated. The term “matter” is defined in R.C. 102.03(A)(5) to include “any case, proceeding, application, determination, issue, or question.” However, “matter” has not been interpreted so broadly as to include a general subject matter. The term “matter” includes concrete items such as a specific occurrence or problem requiring discussion, decision, research, or investigation, a legal proceeding, an application, and a settlement of a dispute or question. Adv. Op. No. 99-001. “Matter” also includes such items as a dispute of special or public importance and a controversy submitted for consideration. *Id.* A “matter” can also include a policy decision.

R.C. 102.03(A)(1) defines the term “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 a matter, because 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. Adv. Op. No. 92-005. In the situation you have described, matters on which you rendered policy advice to the Governor, the Governor’s Chief of Staff, or the Chief Policy Advisors for ten state agencies would be matters in which you personally participated.

Application to Specific Questions

You first ask whether the post-employment restrictions of R.C. 102.03(A)(1) apply to you with regard to matters in which you participated as Executive Assistant at the Office of the Governor in light of the fact that you were involuntarily separated from this position. You also ask whether the one-year restriction that is imposed upon you regarding the matters in which you participated as Executive Assistant commences on the date your formal relationship with the agencies ended or on the date you left your employment at Taxation.

These questions must be addressed by examining both the language and intent of R.C. 102.03(A). R.C. Chapter 102., the Ohio Ethics Law, establishes a standard of conduct for all public officers and employees within the State and prohibits them from using their official positions to benefit their private interests or the interests of others with whom they hold certain business or personal relationships. Adv. Op. No. 93-004. See also Adv. Op. No. 89-014.

In State v. Nipps (1979), 66 Ohio App. 2d 17, 20-21, when upholding R.C. 102.03(A)(1) against a constitutional challenge, the Franklin County Court of Appeals addressed the legislative purpose of the revolving door statute, holding: "R.C. 102.03(A), when read in context with the other subdivisions of R.C. 102.03, clearly indicate 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."

Involuntary Separation

The General Assembly intended, based on the language used in R.C. 102.03(A)(1), that the one-year Revolving Door restrictions apply to a "former public official or employee." The manner in which an individual may become a "former public official or employee," whether by retirement, voluntary resignation, or involuntary separation is not pertinent, in that R.C. 102.03(A)(1) does not distinguish any manner by which a public official or employee becomes a member of the class of individuals who are subject to its one-year post-employment restriction. The basis of separation does not affect the potential influence resulting from the representation by the former official. Bernardini v. Bd. of Educ. (1969), 58 Ohio St.2d 1, 5 (it is well established that words not used in a statute may not be inserted in construing that statute).

Therefore, the one-year post-employment restriction of R.C. 102.03(A)(1) applies to a former public official or employee, regardless of whether he left his public position of his own accord or was involuntary separated from the position.

Commencement of the One-year Time Period

R.C. 102.03(A)(1) states, in plain language, that the restrictions it imposes are effective "during public employment or service or for twelve months thereafter." In past advisory opinions, the Commission has considered the application of this restriction when a public official or employee leaves one public position to take a position with another public agency. The Commission has concluded that R.C. 102.03(A)(1) prohibits the official or employee, for the first year after leaving one public position to take another, from representing any person, including his new public employer, on any matters in which the official or employee personally participated in his former public position. See Adv. Op. No. 82-002 (R.C. 102.03(A) prohibits a former state examiner, who is employed by a city, from representing the city on any matters in which he personally participated as state examiner. The prohibition is in effect for one year after the former state examiner left his position with the auditor's office.)

If the Commission were to construe the words "during public employment or service or for twelve months thereafter" such that the one-year post-employment restriction commenced only after all successive public service ended, a person who left one public position to accept another would be barred, during the whole of his public service, from representing a new public employer before a former public employer or any other public agency on matters in which he personally participated during the entirety of his preceding public employment. This would not give effect to the intent of the General Assembly, which was to impose a specific and defined

one-year time limit on post-employment activity. See Ohio State University v. Kinkaid, 48 Ohio St. 3d 78, 80 (1990) (the object of interpreting a statute is to ascertain and give effect to the intent of the General Assembly).

In the situation you have set forth, the one-year time period for the post-employment restriction, as it applies to you regarding your service with the Governor's Office, began when you left that position, on June 17, 2005, even though you were employed by another public agency after that date. Therefore, you are prohibited, for one year from June 17, 2005, from representing a client or any other person before any public agency on any matter in which you personally participated as an employee of the Governor's Office, regardless of when, during that employment, you personally participated in the matter. Adv. Op. No. 89-003 and 89-009. You should note, even though you state that you stopped participating in matters affecting the Bureau of Workers' Compensation and Industrial Commission on May 27, 2005, the one-year period for all matters in which you personally participated as an employee at the Governor's Office begins on the date you left that position, not on the date in which you participated in a particular matter.

The one-year time period for the post-employment restriction, as it applies to you regarding your service with the Department of Taxation, began when you ended your public employment with Taxation on September 30, 2005. You are prohibited for one year from September 30, 2005, from representing a client or any other person before any public agency on any matter in which you personally participated while an employee of Taxation, regardless of when you personally participated in the matter. Adv. Op. No. 89-003 and 89-009.

Pursuant to the statute, you are not prohibited from representing a client or any other person before any public agency, including Taxation, the Office of the Governor, and the ten state agencies to which you rendered policy advice, on new matters or matters in which you did not personally participate. Adv. Ops. No. 92-005 and 99-001.

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

Division (B) of Section 102.03 of the Revised Code 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.

Pursuant to this section, you are prohibited from disclosing or using, without appropriate authorization, any confidential information that you acquired in the course of your public employment. No time limitation exists for this prohibition. Adv. Op. No. 88-009.

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

The prohibition of R.C. 2921.42(A)(3) is pertinent whenever a former public official who had authorized public contracts seeks employment or business opportunities with a party that has done business with his former public agency. If, in either of your former public positions, you had any authority related to public contracts, R.C. 2921.42(A)(3) would apply to you. You have not provided any facts about authorization of public contracts. If you did have any authority related to contracts, please contact this Office for further guidance.

Conclusion

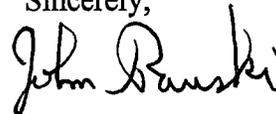
As explained above, for one year from June 17, 2005, the date on which you were involuntarily separated from your position with the Governor's Office, you are prohibited from representing any person, before *any* public agency, on any matter in which you personally participated during your service in that position, regardless of when during your service you participated in the matter.

Further, for one year from September 30, 2005, the date on which you left your position with Taxation, you are prohibited from representing a client or any other person on any matter in which you personally participated as an employee of Taxation regardless of when, during that employment, you personally participated in the matter.

In addition to these restrictions, you are prohibited from disclosing or using, without appropriate authorization, any confidential information that you acquired in the course of your public employment.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on November 28, 2005. The 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. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



John Rawski
Staff Attorney