

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

January 23, 2007

Informal Opinion 2007-INF-0123-1

Pamela J. Vest
Chief Legal Counsel
Office of the Auditor of State

Dear Ms. Vest:

In a letter received by the Ethics Commission on December 28, 2006, you asked the Ethics Commission two questions pertaining to the application of the Ohio Ethics Law and related statutes upon the new Auditor of State (Auditor). The first question pertains to the Auditor's former employment with an accounting firm that does business with the Office of the Auditor of State (Office) and other public agencies. The question is whether the law prohibits the Auditor from participating in matters in which her former private employer has an interest or prohibits her former private employer from continuing to do business with the Office during her term.

The second question pertains to the Auditor's husband's ownership of a construction management firm that does business with public agencies. The second question will be addressed in another advisory opinion.

Brief Answer

As set forth below, under the facts that you have described, the Auditor is not prohibited from participating in matters, including reviewing and approving contracts, in which her former private employer has an interest. The accounting firm is not prohibited from continuing to do business with the Office during the term of the Auditor because she ceased to serve as an employee of the firm before she became Auditor.

Facts

You state that the Auditor was associated with the Independent Public Accountant (IPA) firm of Bober, Markey, Fedorovich & Company from October 1994 until December 2006. The Auditor was not a partner of the firm. The Auditor resigned from her position with the firm on December 11, 2006. The Auditor's only continuing connection with the firm is her 401(k) retirement plan that was established while she was an employee of the firm. However, that plan is not invested in the firm's stock and the Auditor controls her plan's investments.

The firm does business with public entities and bids on IPA contracts let by the Office. The IPA contracts are three-party contracts to do audits of public agencies, and are entered into between the Office, the IPA, and the public entity. State statutes and administrative rules mandate the procedure for the Office's selection of IPA firms. Currently, the firm is the IPA on three public audit contracts. The Auditor has neither been compensated by the firm nor shared in its profits with regard to these three public audit contracts.

Conflict of Interest Restrictions—R.C. 102.03(D) and (E)

R.C. 102.03(D) and (E) read as follows:

- (D) 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.
- (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 the public official or employee with respect to that person's duties.

The Auditor is a "public official or employee" for purposes of R.C. 102.03(D) and (E). See R.C. 102.01(B) and (C); Ohio Ethics Commission Advisory Opinion No. 82-002. The term "anything of value" includes money and every other thing of value. R.C. 1.03; 102.03(G). A definite and direct pecuniary benefit, or the avoidance of a detriment, is a thing of value under R.C. 102.03(D) and (E). Adv. Ops. No. 88-004 and 92-019. A public contract and the payment received under the contract are within the definition of anything of value.

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of her public position, formally or informally, in any matter that would render a definite and direct financial benefit or detriment for her private employer. Adv. Ops. No. 88-005 and 89-008. R.C. 102.03(E) prohibits a public official or employee from soliciting a particular and definite benefit for her private employer, including a public contract and the payment received under the contract. Id.

However, R.C. 102.03(D) and (E) do not prohibit a public official or employee from participating in matters that affect the financial interests of her former private employer, as long as there is no continuing connection between the public official and her former employer. Adv. Op. No. 2003-02. See also Adv. Ops. No. 90-011 and 92-004. If, for example, a public official's or employee's former private employer owes her commissions or other payments related to work she completed, the public official or employee would have a continuing financial relationship with her former employer and would be prohibited from participating in matters that affect the former employer. Adv. Op. No. 2003-02.

In Advisory Opinion No. 2003-02, the Ethics Commission determined that a continuing connection between a public official or employee and her former employer exists if a public official or employee has: (1) retained a 401(k) plan established while she was employed at that firm; (2) the fund in which the 401(k) is invested owns the firm's stock; and (3) the firm controls the 401(k). In the instant situation, the Auditor has retained a 401(k) plan that was established while she was an employee of the firm. However, you explained that the plan is not invested in the firm's stock, the Auditor controls her plan's investments, and the performance of the plan is independent of the firm that established it.

You have also explained that the firm is the IPA on three public audit contracts. It is important to the Ethics Commission's review to note that the Auditor has neither been compensated by the firm nor shared in its profits with regard to these past audits. Therefore, as long as there is no financial contribution from the company to the 401(k) account after January 8, 2007, the Auditor does not have a continuing connection with her former employer that would limit or prohibit her from participating in future matters affecting the firm. In the instant situation, the existence of a 401(k) plan and three public audit contracts, as you have described them, does not prohibit the Auditor from participating in matters that affect the financial interests of her former private employer.

R.C. 102.03(D) and (E) also prohibit a public official or employee from participating in any matters affecting her former private employer if she was significantly responsible for those matters in her former position. See Adv. Op. No. 88-009 (a board member of a joint-county community mental health district is prohibited from acting in a matter regarding a contract between the board and a private agency he formerly served as director, where he signed the contract in his capacity as the agency's director). Finally, the law prohibits the official from participating in matters affecting her former employer if there is any agreement that she can renew her employment with her former private employer in the future. Adv. Op. No. 90-011.

Because she does not have a continuing financial connection with her former private employer, the Auditor is not prohibited from participating in matters, including reviewing and approving contracts, in which her former private employer has an interest, as long as she had no significant role as an employee of the firm in those matters and does not have any agreement with the firm that she can return to her employment in the future.

Public Contract Restrictions—R.C. 2921.42

The other statute that is applicable to your question is R.C. 2921.42(A)(1), which provides that no public official shall knowingly:

Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

The Auditor is a “public official” for purposes of R.C. 2921.42(A)(1). See R.C. 2921.01(A). A “public contract” is any purchase or acquisition of property or services by or for the use of a public agency. R.C. 2921.42(G). Any contract entered into by the Auditor of State’s Office under which the Office acquires services is a “public contract” for purposes of R.C. 2921.42(A)(1). Adv. Ops. No. 87-002, 88-003, and 91-001.

R.C. 2921.42(A)(1) prohibits a public official from participating in the approval of a public contract if any of her business associates has an interest in the contract. A “business associate” includes any person or entity with which the official is pursuing an ongoing business enterprise. Adv. Ops. No. 86-002 and 87-003. A public official’s employer is her business associate for purposes of R.C. 2921.42(A)(1). Adv. Op. No. 89-008.

The Ethics Commission has explained that a public official’s former employer is not her business associate unless, as discussed above, the official has an ongoing business relationship with the former employer. Adv. Op. No. 2003-02. As explained above, the retention of a 401(k) investment, as it has been described, is insufficient to constitute a “business association” for purposes of R.C. 2921.42 (A)(1).

In addition, the Commission has explained that, although the Ethics Law and related statutes includes post-employment restrictions that apply to public officials or employees after they leave public office or employment, the Ethics Law and related statutes do not prohibit a newly elected or appointed public official from doing business with a private entity for any period of time after the official has ceased to have an interest in the entity’s contracts. Adv. Op. No. 92-004. Cf. Advisory Opinion No. 90-011 (R.C. 102.03(D) does not generally prohibit a public official from participating in a matter presented to his agency by a former client of his law firm or law partner).

Accordingly, R.C. 2921.42(A)(1) does not prohibit the Auditor from participating in the Office’s review or approval of contracts in which her former employer has an interest, as long as she has no continuing connection with the firm other than the retention of a 401(k) plan that was established while she was an employee of the firm. The firm is not prohibited from doing business with the Office during the term of the Auditor because she ceased to serve as an employee of the firm before she assumed the position of Auditor.

Conclusion

As set forth above, under the facts that you have described, the Auditor is not prohibited from participating in matters, including reviewing and approving contracts, in which her former private employer has an interest. The accounting firm is not prohibited from continuing to do business with the Office during the term of the Auditor because she ceased to serve as an employee of the firm before she became Auditor.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 17, 2007. 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,

A handwritten signature in black ink that reads "John Rawski". The signature is written in a cursive style with a large initial "J" and "R".

John Rawski
Advisory Staff Attorney