



OHIO ETHICS COMMISSION

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COLUMBUS 43215

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Advisory Opinion No. 75-014

July 1, 1975

Syllabus by the Ohio Ethics Commission:

1) A former deputy administrator of the Bureau of Employment Services is prohibited, for twelve months, from representing a client on a matter before the Bureau, if while serving as deputy administrator of the Bureau, he was directly concerned and personally participated by a substantial and material exercise of administrative discretion with regard to the matter.

2) A former deputy administrator of the Bureau of Employment Services is not prohibited from representing a client on a matter before the Unemployment Compensation Board of Review or the courts.

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Your request for an advisory opinion asks whether a former deputy administrator of the Bureau of Employment Services can represent a client before the Bureau of Employment Services, the Unemployment Compensation Board of Review or the courts on an unemployment compensation matter.

You state by way of history, that you served as deputy administrator of the Bureau of Employment Services from December 20, 1971 through January 10, 1975, and that as deputy administrator you were responsible for the overall supervision of the Unemployment Compensation Division of the Bureau.

You state you are presently engaged in the practice of law and ask if you are prohibited by Section 102.03 (A) of the Revised Code from representing clients 1) before the Administrator of the Bureau of Employment Services, 2) before the Unemployment Compensation Board of Review, and 3) in cases appealed from the Board of Review to the courts.

Section 102.03 (A) of the Revised Code states:

"No state official or employee shall represent a client before the public agency by which he is or within the preceding twelve months was employed or on which he serves or within the preceding twelve months had served on any matter with which the person is or was directly concerned and in which he personally participated during his employment or service by a substantial and material exercise of administrative discretion. As used in this division, "matter" does not include the proposal, consideration, or enactment of statutes, rules, regulations, ordinances, resolutions, or charter or constitutional amendments."

Section 102.03 (A) of the Revised Code restricts the representation of clients before only the public agency with which the employee or official was employed or served.

A deputy administrator of the Bureau of Employment Services is an employee of the Bureau. However, the issue with regard to representation of clients before the Board of Review turns on whether the Board is part of the public agency with which the deputy administrator was employed or served.

The Board of Review is established by Section 4141.06 of the Revised Code which states:

"There is hereby created an unemployment compensation board of review consisting of three full-time members appointed by the governor, with the advice and consent of the senate. Terms of office shall be for six years, . . . The chairman of the board and each member shall be paid a salary fixed pursuant to section 124.14 of the Revised Code from the unemployment compensation administration fund. The governor may, at any time, remove any member for cause in the manner provided in section 4141.02 of the Revised Code for the removal of the administrator of the bureau of employment services. . . .

No board member shall participate in the disposition of any appeal in which he has an interest in the controversy. Challenges to such interest of any board member may be made by any interested party defined in division (I) of section 4141.01 of the Revised Code and shall be in writing. All challenges shall be decided by the chairman of the advisory council who in case he decides the challenge to be well taken shall advise the governor who shall in such case or at any time it is determined by the governor that a member of the board is incapacitated to serve appoint a member of the advisory council representing the same affiliations to act and receive the same compensation from the unemployment fund for serving in place of such member.

The board may appoint a secretary to hold office at its pleasure. Such secretary shall have such powers and shall perform such duties as the board prescribes and shall receive a salary fixed pursuant to section 124.14 of the Revised Code. Notwithstanding sections 124.01 to 124.64 of the Revised Code, each member of the board may appoint a private secretary to hold office at the pleasure of such member. . . .

The board shall hear appeals arising from claims for compensation and adopt, amend, or rescind such rules of procedure, undertake such investigations, and take such action required for the hearing and disposition of appeals as it deems necessary and consistent with sections 4141.01 to 4141.46 of the Revised Code. Such rules of procedure shall be effective as the board prescribes and shall not be inconsistent with such sections.

The board, subject to sections 124.01 to 124.64 of the Revised Code, and the approval of the governor, shall appoint such referees as are necessary. . . . The board may grant power to take testimony in any appeals coming before the board. The board and its referees shall, in the performance of their duties, exercise all powers provided by section 4141.17 of the Revised Code.

The board, subject to section 124.01 to 124.64 of the Revised Code, may employ such reporters, stenographers, clerical aid, and other employees as are requisite to the discharge of the duties of the board and the salaries of such employees are fixed pursuant to section 124.14 of the Revised Code. The board shall further provide itself and its employees with such offices, equipment, and supplies as are necessary, using those already provided for the central office of the bureau or its branch offices wherever possible.

The board shall have access to all the records of the bureau of employment services needed in the performance of its official duties. The board shall have the right to request of the administrator necessary information from the research and statistics department, the legal department, the department of public information, the fiscal department, or any other department from which pertinent information is necessary.

The board shall prepare and submit a budget covering the necessary administrative costs of the board, and such budget shall be approved by the administrator without change and shall be included in the budget as a part thereof."

Thus, the Board of Review may appoint a Secretary to the Board, appoint referees, hire employees, prepare and submit a budget, and control such other administrative functions as necessary to hear appeals arising from claims for unemployment compensation. These functions indicate autonomy and establish the Board as a separate, distinct public agency from the Bureau of Employment Services.

The courts are a separate public agency, independent and distinct from the General Assembly, departments, division, institutions, instrumentalities, boards, commissions or bureaus of the state, counties or municipalities. The distinct nature of the courts is indicated in Section 102.01 of the Revised Code, the definition of "public agency," which specifically includes the courts as a separate, distinct public entity.

Thus, the prohibitions of Section 102.03 (A) of the Revised Code apply to the former deputy administrator only with respect to the representation of clients before the Bureau and not the Board of Review or the courts since he was an employee only of the Bureau. He was not employed by either the Board of Review or the courts and thus the prohibitions do not apply to his representation before these agencies.

Section 102.03 (A) of the Revised Code prohibits only the representation of clients in certain matters.

The interpretation of the word "matter" is subject to limitations by an exception included within Section 102.03 (A) of the Revised Code:

"As used in this division, 'matter' does not include the proposal, consideration, or enactment of statutes, rules, regulations, ordinances, resolutions, or charter or constitutional amendments."

This sentence is clearly an exception to the application of the section. The general rule of construction is that an exception in a statute is an affirmation of the application of its provisions to all cases not excepted, and excludes all other exceptions. This well established theory of construction was restated in Hill v. Harris et al, 39 Ohio Op. 267 (1948), at page 271:

"Where an exception is grafted upon the general terms of a statute, that exception should be strictly construed and must be governed by the familiar rule that the exclusion clearly made in the exception only emphasizes the inclusion of all other things relative to the statute which are not so excluded."

Thus, representing a client before the administrator of the Bureau of Employment Services is not the kind of activity contemplated by the exclusionary language of Section 102.03 (A) of the Revised Code and is, therefore, the representation of a client on a "matter" as used in Section 102.03 (A) of the Revised Code.

An additional condition of Section 102.03 (A) of the Revised Code is that the state employee or official must have been "directly concerned with" and personally participated" by a "substantial and material exercise of administrative discretion" in the matter as those terms are used in Section 102.03 (A) of the Revised Code:

". . . on any matter (1) with which the person is or was directly concerned and (2) in which he personally participated - during his employment or service by a substantial and material exercise of administrative discretion." (Emphasis, numerals and parentheses added)

The phrases, emphasized above, are crucial in establishing the intention of the section and test the proximity of a person to a "matter."

The phrases "directly concerned," "personally participate" and "substantial and material exercise of administrative discretion" are not terms of art in legal parlance. Some of the terms within these phrases may individually be technical, such as "material," however, the phrases as a whole are not. The Revised Code offers no watershed of usage of the phrases through which comparisons can be drawn or precedents discerned.

Consider the use of the term "discretion" as illustrated in the analogous area of "abuse of discretion" at 3 O. Jur. 2d, Appellate Review, Section 746, which states "it is difficult to define exactly what is meant by 'abuse of discretion,' and practically impossible to lay down any general rule as to what it consists of, since it depends upon the facts in each particular case." It is reasonable to conclude that a similar statement would apply to the phrase "substantial and material use of administrative discretion," or for that matter the phrases "personally participate" and "directly concerned" as they are used in Division (A) of Section 102.03 of the Revised Code. None of these terms have developed a precise, technical definition through their use in the law. Therefore, Section 1.42 of the Revised Code requires a "common usage" interpretation:

"Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or

particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."

Thus, the following general common usage definitions of the terms are offered:

- a) directly - in a direct way, without a person or thing coming between; immediately
- b) concerned - involved or interested
- c) personally - without the help of others; in person
- d) participate - to have or take a part or share in
- e) substantial - of or having substance, real, actual, true; not imaginary; of considerable worth or value; important
- f) material - important, essential, or pertinent; important enough to affect the outcome of a case, going to the merits, having to do with matter, as distinguished from form
- g) exercise - active use or operation; employment, performance of duties, functions
- h) administrative - of or connected with the management of governmental or institutional affairs by managing, conducting, directing or superintending, the execution, application, or conduct of persons or things
- i) discretion - the freedom or authority to make decisions and choices; the power to judge or act

The Ohio Ethics Commission must examine each case on its facts, applying Section 102.03 (A) of the Revised Code and the common usage definitions of the terms therein.

It must determine in the case at hand whether a person is representing a client before the state agency by which he was employed or served, within the preceding twelve months, on a matter with which he was directly concerned and in which he personally participated during his employment or service by a substantial and material exercise of administrative discretion.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised that a former deputy administrator of the Bureau of Employment Services is prohibited for twelve months after leaving the Bureau, from representing a client on a matter before the Bureau, if while serving as deputy administrator of the Bureau, he was directly concerned and personally participated by a substantial and material exercise of administrative discretion with regard to the matter.

A former deputy administrator of the Bureau of Employment Services is not prohibited from representing a client on a matter before the Unemployment Compensation Board of Review or the courts.



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by (Mrs) Barbara H. Rawson, Chairman

