



OHIO ETHICS COMMISSION

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Advisory Opinion Number 89-009
August 30, 1989

Syllabus by the Commission:

- (1) Division (A) of Section 102.03 of the Revised Code does not prohibit a company which employs the former manager of a regional transit authority from bidding upon or entering into a contract to supply liability insurance to the transit authority;
- (2) Division (A) of Section 102.03 of the Revised Code does not prohibit an official or employee of a regional transit authority from being retained or employed to represent or assist the transit authority during the twelve-month period following his resignation from the transit authority;
- (3) For purposes of Division (A) of Section 102.03 of the Revised Code, the twelve-month period of post-employment restrictions commences when a public official or employee resigns from his office or employment and this period is not extended if the public official or employee is retained as an independent contractor or consultant to represent or assist his former public agency during the twelve-month period.

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In your letter to the Ethics Commission, you have asked several questions regarding the application of Division (A) of Section 102.03 of the Revised Code, the "Revolving Door" prohibition of the Ohio Ethics Law, to a former general manager of the Metro Regional Transit Authority (transit authority) who is currently employed by an insurance company which supplies liability insurance to the transit authority.

You state that the former general manager of the transit authority resigned from his position with the transit authority in September, 1988 and served the transit authority as a consultant for six months before becoming employed as a customer service representative by the insurance company which currently provides liability insurance to the transit authority. You also state that the transit authority conducts competitive bidding for its liability insurance every three years and that the present insurance contract will expire in December, 1989. You state that the present insurance contract was in place prior to the general manager leaving employment with the transit authority. You further state that the former general manager had been involved in reviewing the bid specifications for the insurance contract, and in administering claims and handling other problems with the insurance company. You have asked whether the former general manager's current employer would be prohibited from bidding on the new contract to commence in January 1, 1990. If the insurance company is not prohibited from bidding, you wish to know whether the former general manager is prohibited from serving the transit authority's account under the new contract, or otherwise participating in the new contract. You

have also asked whether he may act as a customer service representative on the transit authority's current account.

All public officials and employees within the state of Ohio are subject to the postemployment restrictions of the "Revolving Door" prohibition of the Ohio Ethics Law, Division (A) of Section 102.03 of the Revised Code. R.C. 102.01(B) defines "public official or employee" for purposes of R.C. Chapter 102. as any person who is an employee of any public agency. R.C. 102.01(C) defines "public agency" to include any governmental entity. A regional transit authority is statutorily defined as a political subdivision of the state. See R.C. 306.31. Therefore, officials and employees of a regional transit authority are "public officials and employees" for purposes of the Ohio Ethics Law. See Ohio Ethics Commission Advisory Opinion No. 75-021.

Division (A) of Section 102.03 of the Revised Code 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 through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion As used in this division, "matter" includes 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. As used in this division, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person. Nothing contained in this division shall prohibit, during such period, a former public official or employee from being retained or employed to represent, assist, or act in a representative capacity for the public agency by which he was employed or on which he served. This division shall not be construed to prohibit the performance of ministerial functions, including, but not limited to, the filing or amendment of tax returns, applications for permits and licenses, incorporation papers, and other similar documents. (Emphasis added.)

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 (defined in Section 1.59 of the Revised Code to include an individual, corporation, partnership, association, or other similar entity); 3) before his former agency or any other 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 Advisory Opinions No. 80-008, 81-002, 82-002, 84-005, 86-001, and 87-001.

You have asked whether the insurance company is disqualified from the bidding process since it employs the former manager of the transit authority. R.C. 102.03(A) prohibits a former public official or employee for a period of twelve months after leaving public service from representing any person, including a new employer, before his former agency or any other public agency on any matter in which he had personally participated during his government service. See Advisory Opinion No. 87-001. R.C. 102.03(A) does not prohibit a former public official or employee from being employed by a company that is doing business or seeking to do business

with his former agency. Id. (But see discussion of R.C. 2921.42(A)(3), below.) Furthermore, R.C. 102.03(A) does not prohibit a company from doing business or seeking to do business with a public agency which had previously employed one of the company's employees. The language used in R.C. 102.03(A) clearly applies only to a "present or former public official or employee." See Advisory Opinion No. 88-009. R.C. 102.03(A) does not impose a restriction upon the former public officials or employee's current employer, but rather restricts the actions the former public official or employee may take on behalf of his employer during the twelve-month period following his public employment. Therefore, R.C. 102.03(A) does not prohibit the insurance company from participating in the bidding process in light of the fact that the company employs the former general manager of the transit authority.

You have stated that the former general manager resigned from his position with the transit authority in September, 1988 and then served the transit authority as a consultant for six months. You have asked whether the former general manager may participate in a new contract between the insurance company and the transit authority which would be rebid in November, 1989 and take effect in January, 1990. Your question raises the issue of when the twelve-month period imposed by R.C. 102.03(A) commences.

R.C. 102.03(A) states that "no present or former public official or employee shall, during his public employment or service or for twelve months thereafter" represent a person in violation of the provisions thereof. The prohibitions of R.C. 102.03(A) apply during a public officials or employee's employment or service and for twelve months after his public employment or service ends. In reading the above-quoted phrase as a whole, it is obvious that the term "employment" refers to a public employee's tenure with his agency, and the term "service" applies to a 'public officials tenure with his agency. There is nothing in R.C. 102.03(A) to indicate that the term "service is meant to include the time during which an independent contractor is retained by a public agency, or, indeed, to refer to the service of anyone other than a public official. Indeed, it is instructive to note that R.C. 102.03(A) specifically states that it does not prohibit a former public official or employee "from being retained or employed to represent, assist, or act in a representative capacity for the public agency by which he was employed or on which he served" without reference to any time limit on their action. R.C. 102.03(A) does not restrict a former official or employee from being retained by his former agency, and there is no indication that the twelve-month period of restriction is extended by the time during which the former official or employee acts as an independent contractor or consultant for his former agency.

The Commission has consistently held that an independent contractor who provides services to a public agency is not generally within the class of persons who are subject to Chapter 102. of the Revised Code. See Advisory Opinion No. 89-003. The rationale is that employees of a public entity share in the responsibilities of the public trust exercised by their elected and appointed superiors, but that an individual who provides services as an independent contractor does not generally exercise the public trust and is not subject to the restrictions of the Ohio Ethics Law. See Advisory Opinions No. 75-012, 77-004, and 89-003. It would not be consistent with this interpretation of the scope of the Ethics Law to hold that the period of post-employment restrictions imposed by R.C. 102.03 is extended by the time during which a former public official or employee serves with his former agency as an independent contractor, unless, as discussed below, he exercises the sovereign powers of government.

It is apparent, therefore, that the twelve-month period imposed by R.C. 102.03(A) commences when the public official or employee resigns from his public employment or office. See Advisory Opinion No. 86-001. If, during the twelve-month period, the former official or employee is retained to represent or assist his former public agency as an independent contractor, the time during which he is employed as an independent contractor is not considered to be a continuation of his public employment or service for purposes of extending the twelve-month period of restriction.

Thus, in the instant situation, the twelve-month period during which the restrictions of R.C. 102.03(A) apply commenced when the former general manager resigned from his position with the transit authority in September, 1988 and not from the conclusion of the following six-month period during which he served as a consultant to the transit authority. The twelve-month period of post-employment restrictions imposed by R.C. 102.03(A) will therefore end in September, 1989, on the first anniversary of his resignation date. If the regional transit authority rebids the insurance contract in November, 1989 for coverage to commence on January 1, 1990, then R.C. 102.03(A) will not prohibit the former general manager from participating in any matter regarding the insurance contract after the twelve-month period of restriction ends in September, 1989.

It should be noted, however, that the Ethics Commission has held that the determination as to whether an individual who serves as an "independent contractor" or a "public official or employee" for purposes of the Ethics Law depends upon the amount and kinds of authority and discretion he exercises, and that one who exercises the sovereign powers of government is vested with public trust and ceases to be an independent contractor. See Advisory Opinions No. 77-004 and 89-003. Otherwise, the Ethics Law could be avoided by execution of a contract that declares one to be an independent contractor regardless of the duties performed. See Advisory Opinion No. 77-004. A public official or employee may not circumvent the twelve-month period of post-employment restrictions imposed by R.C. 102.03(A) by the execution of a contract which classifies him as an independent contractor if he has the authority and discretion to exercise the sovereign power of government. Therefore, if the former general manager's duties as a consultant to the transit authority during the six months after his resignation as general manager included the authority and discretion to exercise the sovereign powers of government, he would not be considered to have been an independent contractor and would be subject to the provisions of the Ohio Ethics Law during that time period, regardless of the contractual nature of his employment. The time during which he acted in this capacity would be considered public service or public employment for purposes of computing the twelve-month period of post-employment restrictions.

You have asked whether the contract for the insurance to be bid in November, 1989 is considered to be a new matter arising after the resignation of the former general manager for purposes of R.C. 102.03(A). If the former general manager had not exercised the sovereign powers of government while serving as consultant to the transit authority, then the issue does not need to be addressed in light of the fact that the twelve-month period of post-employment restrictions imposed upon the general manager by R.C. 102.03(A), as discussed above, will no longer be in effect in November, 1989. If the former general manager had exercised the sovereign powers of government while serving as a consultant, then the twelve-month period of post-employment restriction, as described above, would be in effect during the bidding in November, 1989. As a result, whether the contract to be bid in November is a new matter would

depend, as discussed below, upon whether the former general manager had personally participated through the exercise of administrative discretion with regard to the contract for the insurance to be bid in November.

You have also asked whether the former general manager is prohibited from working as a customer service representative on the transit authority's account during the remainder of the present contract. R.C. 102.03(A) prohibits the former general manager for twelve months after his resignation from the transit authority from representing his new employer, or any other person, before the transit authority or any other public agency on any matter in which he had personally participated as an official or employee of the transit authority through decision, approval, disapproval, recommendation, rendering of advice, investigation, or other exercise of administrative discretion.

As used in Section 102.03(A), the term "matter" includes "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." The term "matter" is construed very broadly under R.C. 102.03(A), and includes any issue or question, as well as particular cases, proceedings, applications, and determinations. You have stated that the former general manager, while employed by the transit authority, had reviewed bid specifications and administered claims and handled other problems with the insurance company with regard to the current contract. It is apparent that he personally participated through the exercise of administrative discretion with regard to the current contract while serving with the transit authority. See generally Advisory Opinion No. 86-001. He is prohibited, therefore, from representing the insurance company before the transit authority or any other public agency with regard to the current insurance contract. "Representation" includes any formal or informal appearance before, or any written or oral communication with, the transit authority or other agency. This prohibition is in effect until the first anniversary date of his resignation in September, 1989.

Your final question is whether there are any other ethical considerations which are raised by this situation. The former general manager is also subject to Division (A)(3) of Section 2921.42 of the Revised Code, which provides that no public official shall 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.

A "public official" is defined in R.C. 2921.01(A) for purposes of R.C. 2921.42 to include any officer, employee, or agent of the state. The former general manager is, therefore, prohibited by R.C. 2921.42(A)(3) for one year after resigning from his position from occupying a position of profit in the prosecution of a public contract which was authorized by him as general manager of the transit authority or by any board of which he was a member (regardless of whether he voted to approve such contract) if the contract was not let by competitive bidding, or where let by competitive bidding, was not the lowest and best bid. The term "public contract" is defined for purposes of R.C. 2921.42 in Division (E) of that section to include 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 political subdivision and has been held to include the purchase of insurance by

a regional transit authority. See Advisory Opinion No. 89-004. R.C. 2921.42(A)(3) would prohibit the former general manager from accepting employment with the insurance company for a period of one year after leaving the transit authority if he or a board of which he was a member, authorized a public contract with the insurance company which was not competitively bid or was not the lowest and best bid, and if: (1) the establishment or operation of the insurance company is dependent upon receipt of the contract; (2) the creation or continuation of the former general manager's position with the company is dependent upon the award of the contract; (3) the contract moneys would be used by the company to compensate him or as a basis for his compensation; or (4) he were to otherwise profit from the contract. See Advisory Opinion No. 88-008.

Division (B) of Section 102.03 of the Revised Code provides as follows:

No present or former public official shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such 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 general manager from using or disclosing to his employer or any other party, without proper authorization, any information acquired in the course of his official duties. It is important to note that no time limitation exists for this prohibition. See Advisory Opinion No. 88-009.

This advisory 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, that: Therefore, it is the opinion of the Ethics Commission, and you are so advised, (1) Division (A) of Section 102.03 of the Revised Code does not prohibit a company which employs the former manager of a regional transit authority from bidding upon or entering into a contract to supply liability insurance. to the transit authority; (2) Division (A) of Section 102.03 of the Revised Code does not prohibit an official or employee of a regional transit authority from being retained or employed to represent or assist the transit authority during the twelve-month period following his resignation from the transit authority; (3) For purposes of Division (A) of Section 102.03 of the Revised Code, the twelve-month period of post-employment restrictions commences when a public official or employee resigns from his office or employment and this period is not extended if the public official or employee is retained as an independent contractor or consultant to represent or assist his former public agency during the twelve-month period.


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