



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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February 23, 1989

Informal Opinion 1989-INF-0223-2

John D. Borrows



Dear Mr. Borrows:

You have asked whether the Ohio Ethics Law and related statutes prohibit you from serving as a part-time employee with the National Regulatory Research Institute (NRRI) at the Ohio State University. You are the Director of the Utilities Department of the Public Utilities Commission of Ohio (PUCO), where you advise the PUCO and develop and execute policy as to utility regulatory issues and questions. The PUCO enters into contracts with NRRI whereby NRRI agrees to provide research services to the PUCO. You have indicated that you would not perform any work under the contracts as an employee of NRRI and that you do not participate in any way in the consideration of the NRRI contracts or work performed thereunder as an employee of the PUCO.

Division (A)(4) of Section 2921.42 of the Revised Code reads as follows:

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

...

(4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

The term "public official" is defined for purposes of R.C. 2921.42 in R.C. 2921.01(A) to include any elected officer or employee of the state. The PUCO is a statutorily created commission within state government. See R.C. 4901.02. As an employee of the PUCO, you are, therefore, a "public official" who is subject to the prohibitions of R.C. 2921.42. See generally R.C. 4901.19.

Division (E)(1) of Section 2921.42 defines a "public contract" for purposes 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." In this instance, the contracts between the PUCO and NRRI for research services are "public contracts" for purposes of R.C. 2921.42.

R.C. 2921.42(A)(4) would prohibit you from having an "interest" in a public contract entered into by any department or division of the PUCO. See Ohio Ethics Commission Advisory Opinion No. 84-008. An interest which is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. See Advisory Opinion No. 81-008. The issue is, therefore, whether you would have an "interest" in the PUCO's contracts with NRRI by virtue of your employment with NRRI.

The Ethics Commission has held that an employee of an agency does not necessarily have an "interest" in a public contract entered into by his employer. See Advisory Opinion No. 78-006. However, an employee who has an ownership in, or who is a director, trustee, or officer of his employing agency is deemed to have an interest in his employer's contracts. See Advisory Opinions No. 78-006, 81-001, and 85-005. Furthermore, an employee is considered to have an interest in his employer's contracts if the employee takes part in the contract negotiations, if his salary is based on the proceeds of the contract, if he receives a share of the contract's proceeds in the form of a commission or fee, or if his employment responsibilities include participation in the administration or execution of the contract. See Advisory Opinions No. 78-006, 82-003, and 85-005. Also, an employee may be deemed to have an interest in a contract of his employer where the employee's tenure is dependent upon his employer receiving the award of such contract.

In this instance, it is my understanding that you did not negotiate the current contracts between the PUCO and NRRI or participate in the decision to enter the contracts, that you would perform no work for NRRI under the contracts, that your tenure or compensation with NRRI is not based or dependent upon the contracts and that you receive no financial benefit under the contracts. Therefore, you would not, as an employee of NRRI, have an "interest" in NRRI's contracts with the PUCO, and R.C. 2921.42(A)(4) would not prohibit you from being employed by NRRI.

You are, however, also subject to the prohibitions of Division (A)(1) of Section 2921.42, which provides:

- (A) No public official shall knowingly do any of the following:
 - (1) 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.

A public official's employer is considered to be his "business associate" for purposes of R.C. 2921.42(A)(1). See Advisory Opinions No. 78-006 and 81-001. You would be prohibited by R.C. 2921.42 from authorizing the PUCO's contracts with NRRI, and from discussing, deliberating, or otherwise using your authority or influence as a PUCO official, either formally or informally, to secure for OSU or NRRI any contracts with the PUCO. You are prohibited from participating in any manner as an official of the PUCO in current or prospective contracts between the PUCO and NRRI so long as you are employed by NRRI. It has been indicated that employees under your supervision participate in assessing whether the PUCO should engage NRRI for specific research projects. R.C. 2921.42(A)(1) would prohibit you from participating as a PUCO official in any manner in the decision to contract with NRRI if you are employed by NRRI, and to the extent that your subordinates are involved in this process, they must report directly to the commissioners of the PUCO. See Advisory Opinion No. 85-002.

Divisions (D) and (E) of Section 102.03 of the Revised Code read as follows:

- (D) No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his 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 him with respect to his duties.

The term "public official or employee" is defined for purposes of R.C. 102.03 in R.C. 102.01(B) and (C) to include any person who is appointed to an office or is an employee of any commission of the state. You are, therefore, subject to the prohibitions of R.C. 102.03. See Advisory Opinion No. 77-003.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money, the promise of future employment, and every other thing of value. See R.C. 102.03(G). Employment with an agency and the compensation attendant thereto, fall within the definition of "anything of value." See Advisory Opinions No. 77-003, 77-006, 82-002, 87-006, and 88-002.

Division (D) of Section 102.03 would prohibit you from using your authority or influence as a PUCO official to secure employment with NRRI in light of the contractual relationship between the PUCO and NRRI. See generally Advisory Opinions No. 77-003, 77-006, 82-002, and 87-008. Furthermore, Division (E) would prohibit you from soliciting or accepting anything of value that is of such character as to manifest a substantial and improper influence upon you with respect to your duties at the PUCO. Division (E) of Section 102.03 has been interpreted as generally prohibiting a public official from soliciting or accepting anything of value, including employment, from a party that is regulated by, interested in matters before, or doing or seeking to do business with, the agency with which the official or employee serves. See Advisory Opinions No. 86-011, 87-006, and 88-002. Also, a public official is prohibited by R.C. 102.03 from accepting employment where such employment would subject the public official to divided loyalties, or impair his objectivity or independence of judgment as a public official. See Advisory Opinions No. 87-006, 87-008, and 88-002.

The application of the prohibitions of R.C. 102.03(D) and (E) is dependent upon the facts and circumstances of each individual case. See Advisory Opinions No. 77-003, 77-006, and 87-008. You have stated that you have no official responsibilities as a PUCO employee with regard to any matter involving OSU or NRRI, the contracts between the PUCO and NRRI, or the work performed thereunder. Further, you would not, as an employee of NRRI, perform any work under the contracts between NRRI and the PUCO. You would not, therefore, have an inherent conflict of interest between your duties as a PUCO official and an employee of NRRI, such that you would be prohibited from serving as an employee of NRRI. Although NRRI and the PUCO do business, there is no indication in this instance that the acceptance of employment with NRRI would be of such character as to manifest a substantial and improper influence upon you with respect to your duties at the PUCO.

Although you are not prohibited by Division (E) of Section 102.03 from accepting employment with NRRI, Division (D) does condition or restrict your conduct. As noted above, you are prohibited by R.C. 102.03(D) from using your authority or influence as a PUCO official to secure employment with NRRI or OSU, and you are prohibited from using your official position with the PUCO to secure anything of value for NRRI or OSU. See Advisory Opinions No. 82-002, 87-004, and 88-005. Furthermore, you are prohibited from: (1) using PUCO time, facilities, or resources to perform work for NRRI; (2) receiving compensation for services rendered on projects you have recommended in your official capacity with the PUCO; (3) rendering services for compensation that are

your duty to provide as an employee with the PUCO; (4) refraining from rendering any service or otherwise performing your duties with the PUCO in order to secure the position with NRRI; (5) receiving compensation for services rendered by NRRI to the PUCO; and (6) recommending NRRI's services to the PUCO. See Advisory Opinions No. 84-012 and 84-013. See also R.C. 2921.43 (prohibiting a public servant from soliciting or accepting any compensation or supplement to perform his official duties).

Your attention is also drawn to Divisions (A) and (B) of Section 102.04, which read:

- (A) Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.
- (B) Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall sell or agree to sell, except through competitive bidding, any goods or services to the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

Division (B) of Section 102.04 prohibits you from selling, except through competitive bidding, any services to any instrumentality of the state, which would include OSU. Division (A) prohibits you from receiving compensation from OSU for personally rendering any service in any case, proceeding, application, or other matter that is before the PUCO or any other department, agency, or entity of the state. Division (D) of Section 102.04 provides an exception to the prohibitions of Division (A) and (B) and is available to nonelected officials and public employees. Both of the following criteria must be met before the exception will apply:

- (D) A public official who is appointed to a nonelective office or a public employee shall be exempted from division (A), (B), or (C) of this section if both of the following apply:
 - (1) The agency to which the official or employee wants to sell the goods or services, or before which the matter that involves the rendering of his services is pending, is an agency other than the one with which he serves;
 - (2) Prior to rendering the personal services or selling or agreeing to sell the goods or services, he files a statement with the appropriate ethics commission, with the public agency with which he serves, and with the public agency before which the matter is pending or that is purchasing or has agreed to purchase goods or services.

Division (D) specifies the information which must be contained in the statement filed pursuant to that provision, including a declaration that the official or employee disqualifies himself for two years from participating in any matter involving any public official or employee of the agency before which the matter is pending or to which goods or services are to be sold. Division (E) emphasizes this disqualification, as follows:

- (E) No public official or employee who files a statement or is required to file a statement under division (D) of this section shall knowingly fail to disqualify himself from any participation as a public official or employee of the agency with which he serves in any matter involving any official or employee of an agency before which a matter for which he rendered personal services was pending or of a public agency that purchased or agreed to purchase goods or services.

You are also subject to Divisions (A) and (B) of Section 102.03. Division (A) prohibits a public official or employee from representing any person, including his employer, before any public agency on any matter in which he personally participated as a public official or employee. This prohibition remains in effect while the official is in public service and for one year after he leaves public service. You are, therefore, prohibited by R.C. 102.03(A) from representing OSU, NRRI, or any other person before the PUCO or any other public agency on any matter in which you personally participated as an employee of the PUCO.

Division (B) of Section 102.03 reads:

No present or former public official or employee 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.

You are prohibited from disclosing confidential PUCO information to OSU, NRRI, or any other party, or using such confidential information, without appropriate authorization. No time limitation exists for this prohibition, and it is effective during your service and after you leave the PUCO.

This informal staff opinion was approved by the participating members of the Ohio Ethics Commission at its meeting on February 23, 1989. This 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, and does not purport to interpret other laws or rules. If you have any questions, please contact me.

Sincerely,



Melissa A. Warheit
Executive Director