



OHIO ETHICS COMMISSION

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December 18, 1995

Informal Opinion 1995-INF-1218

James A. Philomena
Mahoning County Prosecuting Attorney

Dear Mr. Philomena:

You have asked whether the Ohio Ethics Law and related statutes prohibit Michael Antonoff, a member of the Board of Trustees of Austintown Township (Township), from being employed as the township administrator. As explained below, the Ohio Ethics Law and related statutes prohibit Mr. Antonoff from being employed as township administrator.

On September 5, 1995, the Ohio Ethics Commission received your request for an advisory opinion regarding Mr. Antonoff's desire to be employed as township administrator. Your Office provided supplemental information regarding this question in correspondence received on October 30, 1995. This correspondence was provided in response to a request for additional information made by the Ethics Commission's Executive Director.

On November 13, 1995, personal counsel to Mr. Antonoff, Attorney Robert Kerpsack, submitted what he titled as a "Memorandum of Law" to this Office on Mr. Antonoff's behalf. In the Memorandum, Mr. Kerpsack proffers a legal analysis of several provisions of the Ohio Ethics Law and related statutes, specifically R.C. 2921.42 (A)(3), R.C. 2921.42 (C), and R.C. 102.03 (A). Mr. Kerpsack's Memorandum of Law contends that these provisions do not prohibit Mr. Antonoff from being employed as township administrator.

This advisory opinion addresses the question in light of all of the facts presented. The Ethics Commission issues advisory opinions in response to either a hypothetical or prospective question. See Advisory Op. No. 75-037. These opinions provide guidance to public officials concerning their future conduct. The Commission has explained that the rendering of advisory opinions is not a fact-finding process and that the Commission cannot, in rendering an advisory opinion, determine whether a public official or employee has violated a law. Id. Rather, an advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes and sets forth the standards and criteria that a public official or employee must observe to avoid violating the law in a given set of circumstances. See Advisory Ops. No. 75-037, 90-013, and 92-015. In contrast, the purpose of the confidential investigative authority of the Commission is to examine and decide facts that have already occurred to determine whether those facts indicate that an individual has violated the Ethics Law, and whether to refer the individual to the appropriate prosecutor with a recommendation of criminal prosecution. See Advisory Op. No. 92-003.

FACTS

Mr. Antonoff is a current member of the Board of Trustees of Austintown Township in Mahoning County. However, we have been advised by counsel that he was an unsuccessful incumbent candidate in the November 7, 1995 election. As a result, Mr. Antonoff will hold office until the end of his term.

On January 10, 1995, Mr. Ditzler, another member of the board of trustees, made a motion to approve expenditures for advertising the position of township administrator. Mr. Antonoff, as a trustee, voted to approve the motion. The board of trustees determined that the salary of a new township administrator would be paid from the general fund.

You state that Mr. Antonoff was not involved in creating the job description or in developing the basis for evaluating candidates for the position. Early in the process of seeking applicants for the township administrator position, however, Mr. Antonoff asked the other trustees if they would consider him as an applicant for the position. The other trustees told Mr. Antonoff that they would treat his application like any other application.

The first step in the trustee's selection process was to examine applications. During the examination, the board of trustees, including Mr. Antonoff acting as a trustee, reviewed each application and voted whether to give each candidate further consideration. A vote of two or more trustees was required to keep a candidate in the selection process. The board of trustees, including Mr. Antonoff, selected thirty of the applicants. The second step in the process involved the remaining two trustees, other than Mr. Antonoff selecting and interviewing fifteen of the thirty applicants. These two trustees selected six of the fifteen applicants to be interviewed by township department heads. Mr. Antonoff observed the interviews with the department heads. You have stated that since all of the candidates knew that Mr. Antonoff was an applicant, they realized that the other two trustees would conduct the interviews and select the township administrator.

PROHIBITIONS IMPOSED BY R.C. 102.03 (D) AND (E)

Your attention is directed to Divisions (D) and (E) of Section 102.03 of the Revised Code, which 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 to include any person who is elected or appointed to an office of a political subdivision. A member of a township board of trustees is a "public official or employee" for purposes of R.C. 102.03 (D) and (E), and is subject to its statutory prohibitions. Advisory Op. No. 92-008.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include the promise of future employment, money, and every other thing of value. R.C. 1.03, 102.01 (G); Advisory Ops. No. 82-002, 87-008, and 89-003. A promise of future employment as a township administrator and its accompanying salary are both things of value for purposes of R.C. 102.03 (D) and (E). Advisory Op. No. 82-002.

Generally, R.C. 102.03 (D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his office or employment to secure anything of value, or the promise or offer of anything of value, which could manifest a substantial and improper influence upon him with respect to his duties. The Ethics Commission has consistently held that R.C. 102.03 (D) prohibits a public official or employee from using his official position to benefit his personal or private financial interests.

Precedent Established by Advisory Opinion No. 87-008

In Advisory Opinion No. 87-008, the Ethics Commission was asked whether the Ohio Ethics Law and related statutes prohibited a school board member from being appointed as either the treasurer or assistant treasurer of the school district. The position of treasurer was a pre-existing position. See R.C. 3313.22 (in most school districts, the board of education is required by statute to appoint a treasurer). The position of assistant treasurer was not a pre-existing position. The school board member planned to apply for employment in either the pre-existing treasurer position, or in the newly-created assistant treasurer position, while serving on the board of education. The board member stated that he would resign from the board if he was successful in securing employment with the board.

In Advisory Opinion No. 87-008, the Ethics Commission held that R.C. 102.03 (D) and (E) prohibit a current member of a board of education from soliciting or using the authority or influence of his office to secure employment with that board. The Commission also held that R.C. 102.03 (D) prohibits a member of a board of education from voting, deliberating, participating in discussions, or otherwise using the authority or influence of his office to create a position with the school district, or set the compensation for such position, where he is considering, or being considering for, employment in that position.

In Advisory Opinion No. 87-008, the Commission held:

This is not to say that a former board member may never be hired as an employee of the board with which he once served. For example, a former board member may properly accept employment where the board considers him for a position, without his knowledge, and approaches him with an offer of employment. A former board member may seek employment where a sufficient amount of time has passed since his tenure on the board to indicate that he did not use his authority or influence while on the board to secure a position for himself. R.C. 102.03 (D) and (E) do, however, prohibit a member of a board of education from taking action, formally or informally, to solicit or secure employment with the school district. He may not solicit, vote, deliberate, participate in discussions, or otherwise use or attempt to use the authority or influence of his office to secure, a position. (Emphasis added.)

According to the precedent established by Advisory Opinion No. 87-008, R.C. 102.03 (D) and (E) require that a public official who is interested in seeking employment with his board, and is a member of the authority considering the employment, must first resign from his board before tendering an application for employment, and he must not have not used his authority or influence while on the board to secure his employment. It must be noted that the application of R.C. 102.03 (D) and (E) is dependent upon the facts and circumstances of each individual situation. Advisory Opinion No. 87-008.

Application of R.C. 102.03 (D) and (E) to Trustee

It remains to apply the R.C. 102.03 (D) and (E) prohibition, and the holding of Advisory Opinion No. 87-008, to the instant situation.

R.C. 505.031 reads in part:

The board of township trustees may appoint a township administrator, who shall be the administrative head of the township under the direction and supervision of the board and who shall hold office at the pleasure of the board.

...

The board shall fix the salary of the township administrator and cause the same to be paid.

The facts presented indicate that Mr. Antonoff solicited his board for employment as township administrator while serving as a member of the board of township trustees. Despite the fact that Mr. Antonoff requested that he be treated the same as all other applicants, he did not distance himself from his authority as a member of the board of township trustees. He participated in the board's decision to advertise for the position and the board's initial screening of the applications. A public official or employee who screens applicants for a position where he is a competing applicant would be faced with an inherent impairment of his objectivity and independence of judgment based upon his own financial interests. In addition, competing applicants, as well as the public, are left to question whether it is the trustee's financial interests or his legitimate qualifications that objectively qualifies him for consideration. Even if Mr. Antonoff desired to be hired after the end of his term of office, because he solicited employment while on the board and competed with the applicants that he initially screened, he would not fall within any exception to the R.C. 102.03 (D) and (E) precedent established by Advisory Opinion No. 87-008, set forth above.

Therefore, in the instant situation, R.C. 102.03 (D) and (E) prohibit Mr. Antonoff from serving as the Township administrator.

PROHIBITION IMPOSED BY R.C. 2921.42 (A)(3)

Despite the fact that R.C. 102.03 (D) and (E) prohibit Mr. Antonoff from becoming employed as township administrator, R.C. 2921.42 (A)(3) needs to be addressed because of questions raised regarding its potential application and discussion in Advisory Opinion 87-008.

R.C. 2921.42 (A)(3) 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, unless the contract was let by competitive bidding to the lowest and best bidder. (Emphasis added.)

The term "public official" is defined in R.C. 2921.01 (A) for purposes of R.C. 2921.42 (A)(3) to include any elected or appointed officer of any political subdivision of the state. A member of a board of township trustees falls within this definition, and is subject to the prohibitions of R.C. 2921.42. Advisory Op. No. 92-008.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (G)(1)(a) of that Section to mean:

The purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either. (Emphasis added.)

Division (G)(1)(a) of R.C. 2921.42 does not limit the definition of the term "public contract" to a specific manner or means by which an individual is employed by the state or a political subdivision. See Advisory Op. No. 90-010. Accordingly, contracts for full-time, part-time, temporary, or permanent employment are all "public contracts" for purposes of R.C. 2921.42.

For purposes of R.C. 2921.42 (A)(3) the word "profit" connotes a pecuniary or financial gain or benefit. Advisory Op. No. 92-013. See also Advisory Ops. No. 88-003, 88-006, and 92-008. The Commission has held that a public official will be deemed to profit from a public contract whenever the official receives a fee or compensation, paid from or dependent upon the contract, or the official receives some other profit or benefit from the contract. Advisory Ops. No. 88-008 and 92-008.

The Ethics Commission has held that a legislative body, commission, or board will be deemed to have authorized a public contract for purposes of R.C. 2921.42 (A)(3) where the contract could not have been awarded without the official's or board's approval. In Advisory Opinion No. 87-008, the Ethics Commission held that R.C. 2921.42 (A)(3) prohibits, for a period of one year, a member of a board of education from being employed by the board if the board of education authorized his employment while he was still a member thereof. The Commission further held:

[T]he board member is bound by the prohibition regardless of the fact that he did not deliberate, vote upon, or otherwise authorize, his own employment.

Advisory Opinion No. 87-008 concludes that R.C. 2921.42 (A)(3) prohibits a board member from accepting employment by the school district and subsequently resigning from his position of board member to serve the board as an employee. Under the facts contained in Advisory Opinion 87-008, the prohibition imposed by R.C. 2921.42 (A)(3) applied to both the pre-existing position of treasurer and the newly-created position of assistant treasurer. Accordingly, the Ethics Commission held that a public official who serves on a legislative body, commission, or board is subject to the prohibition of R.C. 2921.42 (A)(3) regardless of whether he participates in discussions or votes on the public contract as a member of the legislative body, commission, or board. See Advisory Ops. No. 87-008, 88-006, 88-008, and 91-005.

Application of R.C. 2921.42 (A)(3) to Trustee

Employment as township administrator is a "public contract" as that term is defined in R.C. 2921.42 (G)(1)(a) because the board of township trustees is employing an individual to perform services for the township. The salary that the township administrator receives under the public contract is a "position of profit" under the contract for purposes of R.C. 2921.42 (A)(3), since the word "profit" connotes a pecuniary or financial gain or benefit.

The board of trustees, of which Mr. Antonoff is a member, must authorize the appointment of an individual to serve as the township administrator. If the board were to appoint Mr. Antonoff to the position of township administrator, then he would occupy a position of profit in a public contract that was authorized by his board while he was still a member thereof. Accordingly, R.C. 2921.42 (A)(3) prohibits Mr. Antonoff from accepting employment with the Township and then resigning from his position of board member to serve the board as an employee. He is bound by the prohibition imposed by R.C. 2921.42 (A)(3), regardless of the fact that he did not deliberate, vote upon, or otherwise authorize his own employment.

In his Memorandum of Law, Mr. Kerpsack contends that the board of township trustee's process of screening and interviewing applicants for the position of township administrator is a competitive bidding process. In Advisory Opinion No. 87-008, the Ethics Commission held that the employment of individuals by a public body is not a competitive bidding process. Mr. Kerpsack also contends that Mr. Antonoff possesses the best qualifications for the position due to his experience as a township trustee. The Ethics Commission has held that R.C. 2921.42 (A)(3) prohibits a public official from being employed by his own board despite the fact that he may possess the best qualifications for the position.

In Advisory Opinion No. 87-008, the Ethics Commission held:

Because employees are not hired pursuant to competitive bidding, the board member would be prohibited from being employed by the board, even though he may possess the best qualifications for the position. (Emphasis added.)

See also Advisory Ops. No. 87-004, 88-006, 91-009, and 92-005.

Application of R.C. 2921.42(C) to Trustee

Mr. Kerpsack also contends that Mr. Antonoff meets the exception provided by R.C. 2921.42 (C). In Advisory Opinion No. 92-002, the Ethics Commission held that the exception of R.C. 2921.42 (C) does not provide an exception to the prohibition against a public official occupying a position of profit in a public contract that was authorized by his board. Advisory Opinion No. 92-002 explains that R.C. 2921.42 (C) provides an exception only to the R.C. 2921.42 (A)(4) prohibition against a public official having an interest in a contract with his own political

subdivision. See also Advisory Ops. No. 92-008 (explaining the difference between an "interest" and a "position of profit") and 90-005 (the prohibition of (A)(3) is not affected by Division (B) nor any other provision of R.C. 2921.42).

Because the exception provided by R.C. 2921.42 (C) is inapplicable to the prohibition imposed by R.C. 2921.42 (A)(3), it is unnecessary to examine Mr. Kerpsack's assertion that Mr. Antonoff meets all of the four criterion necessary to avail himself of the exception. However, it should be noted that the facts also do not demonstrate that Mr. Antonoff acted at "arm's length" with regard to the potential public contract because, after he solicited his board of township trustees for employment as township administrator, he did not distance himself from the board's initial screening of the applications.

Application of R.C. 102.03 (A) to Trustees

Mr. Kerpsack asserts that a provision of R.C. 102.03 (A), the Revolving Door Law, enables Mr. Antonoff to be employed as township administrator. The contention that R.C. 102.03 (A) applies to Mr. Antonoff, under the facts described, is incorrect.

R.C. 102.03 (A) (6) reads:

Nothing contained in division (A) of this section [R.C. 102.03] shall prohibit, during such period [one year after leaving public office] 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. (Emphasis added).

Thus, the language of R.C. 102.03 (A)(6) clearly states that the provision, which enables a former public official to be employed by his former political subdivision, applies only to the prohibitions of Division (A) of R.C. 102.03.

In Advisory Opinion No. 91-005, the Ethics Commission held that other statutes under the Ethics Commission's jurisdiction are not affected by the exception provided by R.C. 102.03 (A)(6). In fact, R.C. 102.03(A)(6) supports the hiring of a former official or employee who has, pursuant to the prior discussion, properly observed the restrictions of R.C 102.03 (D) and (E) and removed himself entirely from the process. Therefore, in order for the exception of R.C. 102.03 (A)(6) to apply and enable Mr. Antonoff to be employed as township administrator, such employment must not be prohibited by any other provision of the Ethics Law and related statutes. As explained above, R.C. 102.03 (D) and (E) and R.C. 2921.42 (A)(3) prohibit Mr. Antonoff from being employed as township administrator.

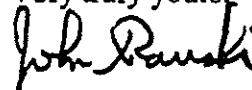
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CONCLUSION

As explained above, the Ohio Ethics Law and related statutes prohibit Mr. Antonoff from being employed as township administrator.

This informal advisory opinion was approved by the Ethics Commission at its meeting on December 18, 1995. The opinion is based on the facts presented and is limited to questions arising under Chapter 102, and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any further questions, please feel free to contact this Office again.

Very truly yours,



John Rawski
Staff Attorney