



OHIO ETHICS COMMISSION

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June 30, 1997

Informal Opinion 1997-INF-0630-3

Pitambar (Peter) Somani, M.D.

Dear Dr. Somani:

I am writing in response to your letter, received at the Ethics Commission on May 5, 1997, in which you ask several questions regarding restrictions that the Ohio Ethics Law and related statutes may have upon you in your search for employment since your retirement as Director of the Ohio Department of Health (ODH).

As explained below, you are not per se prohibited from pursuing any of the three potential employment situations that you mentioned in your letter. The Ohio Ethics Law does, however, impose significant restrictions on the kinds of activities in which you can engage in all three situations.

Facts

You have explained that you relinquished your position as ODH Director on May 1, 1997. You have further explained that you are considering the following options for future employment:

1. Serving as a member of the Board of Directors of HealthPower, Inc., a health maintenance organization (HMO). You have explained that HealthPower does business in Ohio, including contracts with Ohio's Medicaid program and the Ohio Department of Administrative Services. You have further stated that HMOs are licensed by the Ohio Department of Insurance, and that ODH advises the Department of Insurance on the suitability of all HMOs in Ohio, but does not directly license them;
2. Acting as a consultant to the Cleveland Clinic Foundation (Foundation) on health care policy issues. You have stated that ODH does not license hospitals, but does oversee many aspects of their operation. You stated that, as ODH Director, you made many Certificate of Need decisions involving the Clinic, and there is currently a Certificate of Need decision, which indirectly involves the Clinic, pending before an ODH hearing officer. That Certificate of Need decision will be made by the new ODH Director; and

Pitambar (Peter) Somani, M.D.

June 30, 1997

Page 2

3. Serving as a faculty member at the Ohio State University College of Medicine and Public Health (College of Medicine). You have explained that, as ODH Director, you contracted with the College of Medicine to provide Medical Director services for the ODH Public Health Laboratory. Finally, you stated that a faculty appointment would not be connected with the Public Health Laboratory.

Prohibition In Ohio's "Revolving Door" Restriction-R.C. 102.03 (A)

Ohio's "Revolving Door" law, Division (A) of Section 102.03 of the Revised Code, is directly relevant to your situation. R.C. 102.03 (A)(1) states, in pertinent part:

No present or former public official or employee shall, during 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 the public official or employee 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.

The term "public official or employee" is defined, for purposes of Chapter 102., in R.C. 102.01(B) and (C), to include "any person who is elected or appointed to an office or is an employee" of any department of the state. The director of ODH is a "public official or employee" for purposes of R.C. Chapter 102. See generally Ohio Ethics Commission Advisory Opinion No. 81-007. Since you formerly served as ODH Director, you are a "former public official or employee" for purposes of R.C. 102.03(A). As a former public official or employee, you are prohibited, for a period of one year after you leave state service, from representing a client, new employer, or any other party before any entity of the state or any other public agency, on any matter in which you personally participated as ODH Director, or in any other capacity as a public official or employee.

The term "represent" is defined, in R.C. 102.03(A)(5), to include "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." It is important to note that the Ohio Ethics Law does not limit "representation" to those types of services typically provided by attorneys for their clients. The Ethics Commission has recognized the breadth of the definition of "represent," and described many of the types of activities that fall within the definition of the term "represent" in Advisory Opinion No. 86-001:

[T]his would include activities ranging from an appearance on behalf of a private client in a formal proceeding or meeting to informal "lobbying" of agency personnel by telephone or in person. It also includes written communications ranging from formal documents and filings to informal letters and notes. Even if the [former public official or employee] does not sign the documents, letters, or

notes, the prohibition would apply if she prepared the communication. If she merely consulted with . . . other personnel who prepared the documents, letters, or notes, the prohibition would not apply.

A former public official or employee is prohibited, by R.C. 102.03(A)(1), from representing or acting in a representative capacity for any "person." "Person" is defined in R.C. 1.59, for general purposes under the Revised Code, to include individuals, corporations, business trusts, estates, trusts, partnerships, and associations. R.C. 1.59(C). The Commission has also concluded that the term "person" includes governmental agencies. Adv. Ops. No. 82-002 and 89-003.

R.C. 102.03(A)(1) prohibits a former public official or employee from representing a person before any public agency on a matter in which he personally participated, and not just before the agency with which he previously served. See Adv. Ops. No. 86-001 and 87-001. A "public agency" is defined in R.C. 102.01(C) to include "the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, township, and the five state retirement systems, or any other governmental entity."

R.C. 102.03(A)(5) defines the term "matter," for purposes of the restriction in R.C. 102.03(A)(1), to include "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." (Emphasis added.) The term "matter" is broadly defined under R.C. 102.03(A) and includes any issue or question as well as particular cases, proceedings, applications, and determinations. "Matter" would also include all suits, actions, and other proceedings instituted by ODH, or in which ODH would otherwise participate, pursuant to statutory responsibilities.

R.C. 102.03(A) defines "personal participation" to include "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion." In Advisory Opinion No. 86-001, the Ethics Commission stated that a former public official or employee will be considered to have "personally participated" in a matter if he "exercised supervision or general oversight" over other personnel in their work on that specific matter. Supervision of a public official's or employee's activities on a specific matter will involve decision-making, approval or disapproval, recommendation or advice, and other exercises of administrative discretion by the supervisor. Under these circumstances, even though the supervisor may not be the public official or employee most directly or immediately involved in the matter, he will still be deemed to have "personally participated" in any matter where he performed oversight, supervision, or administrative responsibilities. Adv. Op. No. 91-009. As ODH Director, you supervised other employees at the department in some of their activities. R.C. 102.03(A) prohibits you, therefore, from representing clients before any public

Pitambar (Peter) Somani, M.D.

June 30, 1997

Page 4

agency on any matter where you personally participated, whether you were primarily responsible for the matter, or supervised other ODH officials or employees on that specific matter. Adv. Op. No. 91-009.

The one-year, post-employment prohibition of R.C. 102.03(A) does not commence until after you leave public service. Under the facts you have presented, you are prohibited, for one year from May 1, 1997, from representing your new employer, any of your employer's clients, or any other person, on a matter in which you personally participated while employed as a public official or employee in any position, regardless of when such personal participation occurred. Adv. Op. No. 89-003 and 91-009.

Specifically, you have asked whether you are prohibited from serving on the board of directors of HealthPower, Inc., (HMO), as a consultant to the Cleveland Clinic Foundation (Foundation), or as a faculty member at The Ohio State University College of Medicine (College of Medicine). R.C. 102.03(A)(1) would not absolutely prohibit you from serving in any of these positions. If, however, any of your duties with any of these employers would involve the representation of the employer, any of your employer's clients, or any other person, on matters in which you had personally participated, as the former ODH Director, through oversight, supervision, or administrative responsibilities, then R.C. 102.03(A)(1) would prohibit you from performing those duties. For example, you have stated that one option for you might be a consulting contract with the Foundation. You have explained that, while you were ODH Director, you made "many Certificate of Need (CON) decisions which involved the [Foundation]." If any matter should arise with respect to those decisions, you would be prohibited from representing your consulting client, the Foundation, or any other person, on those matters, before any public agency, until after May 1, 1998. The same restriction would apply in the other possible employment options that you detailed. Please note, however, that R.C. 102.03 (A)(1) does not prohibit you from representing your new employer, any of your employer's clients, or any other person, before any public agency, on legislative matters, matters that have arisen after you left your position with ODH, or matters in which you did not personally participate as a public official or employee. Adv. Op. No. 89-009.

You may also wish to consider the exemption of R.C. 102.03(A)(6) in your search for future employment. R.C. 102.03(A)(6) provides:

Nothing contained in division (A) of this section 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 the public official or employee was employed or on which the public official or employee served.

This section specifically permits you to be retained to represent ODH, even with regard to matters in which you had personally participated while employed. This exemption does not extend to other state departments, divisions, institutions, boards, commissions, authorities, bureaus, or instrumentalities, since those state entities are not the "public agency" by which you were employed. The exemption in R.C. 102.03(A)(6) applies only to the situation where the former state official or employee is retained or employed by the specific office or entity of the state by which he was previously employed, and does not apply to situations where he is retained to represent an entity of the state that he did not serve in his public capacity. A former state official or employee is prohibited from representing a state entity, other than the specific entity or office by which he was previously employed, on any matter in which he personally participated as a state official or employee. See Adv. Ops. No. 91-005 and 91-009. He is also subject to this prohibition with regard to representing other governmental entities. This exemption would not apply, for example, if you accepted a position with the College of Medicine and wished to represent the College of Medicine before any public agency, on any matters in which you participated while you were ODH Director, since the College of Medicine is not the state agency with which you served during your public employment.

You are, therefore, prohibited by R.C. 102.03(A) from representing any state entities, other than ODH, and any other governmental entities, before any public agency, on any matter in which you personally participated while you were the ODH Director. Adv. Op. Nos. 86-001 and 87-001. R.C. 102.03 (A)(1) does not prohibit you from representing your new employer, any of your employer's clients, or any other person, including any state entities, before any public agency, on legislative matters, matters that have arisen after you left your position with ODH, or matters in which you did not personally participate as a public official or employee. Adv. Op. No. 89-009.

Prohibition Imposed by Public Contract Restrictions-R.C. 2921.42 (A)(3)

You should also be aware of the prohibition in R.C. 2921.42(A)(3), which states that:

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

....

(3) 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.

Pitambar (Peter) Somani, M.D.

June 30, 1997

Page 6

A "public official" is defined in R.C. 2921.01(A) to include "any elected or appointed officer, or employee, or agent of the state." A director of the Ohio Department of Health is a "public official" as defined in this section. See generally Adv. Op. No. 88-002. The term "public contract" is defined in R.C. 2921.42(G)(1) to mean the following:

- (a) 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;
- (b) A contract for the design, construction, alteration, repair, or maintenance of any public property.

A public contract will be deemed to have been "authorized" by a public official, board, or commission if the contract could not have been awarded without the public official's or entity's approval. Adv. Op. Nos. 87-004 and 88-006.

If there are any public contracts that you authorized or approved, between ODH and any of the parties with whom you are considering future employment, you would be subject to the restriction in R.C. 2921.42(A)(3). You are prohibited, by R.C. 2921.42(A)(3), from occupying a position of profit in the performance of those contracts if they were not let by competitive bidding and were not awarded to the lowest and best bidders. Adv. Op. No. 87-008. You would be deemed to profit from a public contract held by an entity or individual that has employed you where: (1) the contract money will be used by the entity or individual to compensate you; (2) you would be representing the entity or individual, for compensation, with respect to the contract you authorized (see also R.C. 102.03(A)); (3) you would receive, or your salary would be based upon, a share of fees paid to a person within the entity from the contract proceeds or earned by the person for representing the entity with respect to the contract; or (4) you would otherwise profit from the contract. Adv. Op. Nos. 87-004, 88-008, and 89-008.

For example, you have explained that, while you were the ODH Director, you signed a contract with the College of Medicine for the College to provide Medical Director services to the ODH Public Health Laboratory. The purchase of Medical Director services by the ODH from the College of Medicine is a public contract as defined above. Your signature on the contract, as the ODH Director, would constitute "authorization" of the contract for purposes of R.C. 2921.42(A)(3). See generally Adv. Op. No. 91-001. You have also explained that one of the positions that you may be offered is a faculty position with the College of Medicine. You would be prohibited, by R.C. 2921.42(A)(3), from profiting from the performance of the contract between the ODH and the College of Medicine, that you authorized, in any of the ways described above, unless the contract had been competitively bid and was awarded to the lowest and best bidder.

Pitambar (Peter) Somani, M.D.

June 30, 1997

Page 7

You have stated that the position you may be offered would not be connected with the ODH Public Health Laboratory. It appears, therefore, that you would not be absolutely prohibited from accepting a faculty position with the College of Medicine, unless you would, in some way, profit from the contract between the ODH and the College of Medicine as a result of accepting the position.

Prohibition on Misuse of Confidential Information-R.C. 102.03 (B)

Another relevant section of the Ohio Ethics Law, R.C. 102.03(B), states:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that 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.

Pursuant to this section, you are prohibited from disclosing, to future employers, clients, or any other party, confidential information that you acquired in your position as a public official or employee. You are also prohibited from using such information without proper authorization. Advisory Op. No. 89-006. This prohibition has no time limit, and is applicable during public service and after. Id.

Summary and Conclusion

As explained above, you are not per se prohibited from pursuing any of the three potential employment situations that you mentioned in your letter. The Ohio Ethics Law does, however, impose certain restrictions on the kinds of activities in which you can engage in all three situations.

In sum, Division (A) of Section 102.03 of the Revised Code prohibits you, as a former director of ODH, for twelve months after leaving your public position, from representing a client or acting in a representative capacity for any person on any matter in which you personally participated as a the director of ODH. The exemption in Division (A)(6) of Section 102.03 of the Revised Code permits you, as a former director of ODH, to be retained or employed to represent, assist, or act in a representative capacity for ODH, the state agency by which you were formerly employed. Division (A)(3) of Section 2921.42 of the Revised Code prohibits you, as a former director of ODH, for one year after leaving your public position, from occupying any position of profit in the prosecution of a public contract authorized by you or by a legislative

Pitambar (Peter) Somani, M.D.
June 30, 1997
Page 8

body, commission, or board of which you were a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder. Finally, Division (B) of Section 102.03 of the Revised Code prohibits you, as a former director of a state agency, from disclosing or using, without appropriate authorization, any information acquired by you in the course of your official duties that is confidential because of statutory provisions, or that has been clearly designated to you as confidential.

Finally, it is important to note that Governor's Executive Order 93-39V, which imposes additional Revolving Door restrictions on certain former state officials and employees, may be relevant to you as the former ODH Director. The Ohio Ethics Commission's jurisdiction is limited to issues arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and the Commission does not have the authority to interpret Executive Orders. For more information on the Executive Order, contact Maria Armstrong, Chief Legal Counsel, Office of the Governor.

This informal advisory opinion was approved by the Ohio Ethics Commission at its meeting on June 30, 1997. The Ethics Commission requests that you notify this Office in the event that you are employed by The Ohio State University College of Medicine and Public Health, because the college is a state agency whose employees are generally subject to the jurisdiction of the Ohio Ethics Law and related statutes. This Office will then forward a copy of this informal advisory opinion, or you may provide a copy, to the college so that all interested parties will be aware of the application of the Ethics Law.

This informal advisory 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. It does not purport to interpret other laws or rules. If you have any additional questions, please contact this Office again.

Sincerely,

A handwritten signature in cursive script that reads "Sharon A. Mull". The signature is written in dark ink and is positioned above the typed name.

Sharon A. Mull
Staff Attorney