



OHIO ETHICS COMMISSION

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June 19, 1998

Informal Opinion 1998-INF-0619-2

D. Michael Crites

Dear Mr. Crites:

In a letter to the Ethics Commission dated April 3, 1998, you ask whether the Ohio Ethics Laws and related statutes prohibit you from joining a law firm as a partner. The law firm has a contractual relationship with the school district on whose board you served until December, 1997.

As explained below, because you did not discuss or consider employment with this firm while you were a member of the board of education, R.C. 102.03(D) does not prohibit you from joining the law firm as a partner. R.C. 2921.42(A)(3) also does not preclude you from joining the law firm as a partner, so long as you do not receive any pecuniary gain or benefit from the contract that was entered into between the board of education and the law firm while you were a member. R.C. 102.03(A) prohibits you, for a period of one year from the date you left your position on the board of education, from representing the school district, or any other client or party, before any public agency, on any matter in which you personally participated while you served as a board of education member, regardless of when such personal participation occurred during your public service. R.C. 102.03(B) prohibits you from releasing confidential information that you acquired during your service as a member of the board of education to the law firm, its clients or any other party.

Facts

You state that on December 31, 1997, you concluded four years of service as a board of education member. During your service, the school district contracted with a law firm to represent the district on tax matters. You state that the board reviewed and renewed the contract with the law firm each December. The last time that the board renewed the contract was in December 1997. At that time, you voted to renew the contract.

You state that during your service as a board member, you do not recall meeting any of the law firm's partners. You also state that you neither discussed nor considered career opportunities with the firm during your service. On March 17, 1998, after you left your position on the board of education, you met with the managing partner of the law firm for the first time to discuss career opportunities. You desire to join the law firm as a litigation partner. If you were to accept the position of litigation partner, then you would share in the profits of the firm.

You stress that you would have no professional involvement with the school board that you formerly served for at least one year. However, you state that you would represent other school districts and public entities that are clients of the law firm.

You state that the law firm has existed for more than fifty years and represents many public entities including more than thirty boards of education within Ohio. Finally, you state that the contract authorized by the board of education that you formerly served generated less than 1% of the firm's 1997 gross revenues.

Job Seeking--R.C. 102.03(D) and (E)

In addition to statutes that specifically impose post-employment restrictions, which will be discussed below, the Ethics Commission has held that a public official may not use his authority or influence as a public official to secure a financial advantage for himself, such as employment, even if he will not secure the advantage until after he leaves his public position. Your attention is directed to R.C. 102.03(D) and (E), which read:

- (D) No public official or employee shall use or authorize the use of the authority or influence of 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 the public official or employee with respect to that person's 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 the public official or employee with respect to that person's duties.

A "public official or employee" is defined, for purposes of Chapter 102., to include any person who is elected or appointed to an office of any governmental entity. R.C. 102.01(B) and (C). A member of a board of education is a "public official or employee" as the term has been defined for purposes of R.C. Chapter 102. Ohio Ethics Commission Advisory Opinion No. 80-003.

R.C. 102.03(D) and (E) do not impose prohibitions upon former public officials and employees. R.C. 102.03(D) and (E) prohibit a public official or employee, during his public service, from soliciting, or using his position, formally or informally, to secure, anything of value, if the thing of value is of such a character as to manifest a substantial and improper influence upon him with respect to his official duties. Adv. Ops. No. 80-003 and 88-004.

The Ethics Commission has held that R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting or seeking employment from firms that appear before, do business or seek to do business with, or are regulated by his public agency, unless the public official withdraws from consideration of any matter involving any firm with which he has had contact regarding possible employment. Adv. Op. No. 77-003. Divisions (D) and (E) of Section 102.03 of the Revised Code also prohibit a public official or employee from making recommendations to his

public agency or otherwise using his official position with regard to a firm with which he is seeking or negotiating employment, and from using the authority or influence of his position with his public agency to secure anything of value for a firm with which he has accepted an offer of employment. Adv. Ops. No. 86-006 and 87-004.

In the instant situation, you state that, during your service as a board member, you do not recall meeting any of the law firm's partners and you did not consider career opportunities with the firm. You also state that you met with the managing partner of the law firm for the first time to discuss employment opportunities on March 17, 1998, after you left your position on the board of education. Based upon your representations that you had no contact with the law firm to discuss career opportunities while you were still a member of the board of education, Divisions (D) and (E) of R.C. 102.03 do not prohibit you from joining the law firm as a partner despite the fact that the school district that you formerly served as a member of its board of education contracted with the law firm during your service as a board member.

Post-Employment Restrictions

The Ohio Ethics Law and related statutes impose post-employment restrictions upon former public officials and employees in three areas. These prohibitions limit a former public official or employee, after leaving his public service, from: (1) profiting from public contracts in specified situations; (2) representing parties, on certain matters, before public agencies; and (3) releasing confidential information. This opinion will consider the prohibitions in that order.

Profiting From a Public Contract—R.C. 2921.42(A)(3)

Your attention is directed to Division (A)(3) of Section 2921.42 which reads:

(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.

The term "public official" is defined for purposes of R.C. 2921.42 to include any elected officer of any political subdivision of the state. R.C. 2921.01(A). A member of a board of education is an elected officer of a political subdivision. R.C. 3313.01, 3313.02. Therefore, a member of a board of education is a "public official" for purposes of R.C. 2921.42. Adv. Ops. No. 82-003 and 85-009. A former member of a board of education is subject to the prohibition imposed by R.C. 2921.42(A)(3) for one year after leaving office. Adv. Op. No. 87-008.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (G)(1)(a) 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 a political subdivision of the state. A contract between a board of education and a law firm for the firm's legal services falls within the definition of a "public contract." Adv. Op. No. 88-007.

R.C. 2921.42(A)(3) prohibits a public official, during his public service and for one year after leaving public service, from occupying "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." The Ethics Commission has held that the term "profit" as used in R.C. 2921.42(A)(3) connotes a pecuniary gain or benefit. Adv. Ops. No. 92-013 and 92-017. A "position of profit" that is prohibited under Division (A)(3) must be definite and direct in nature. Adv. Ops. No. 88-008 and 92-008.

Therefore, R.C. 2921.42(A)(3) prohibits you, as a former member of the board of education, from profiting from a public contract entered into with the board for a period of one year after resigning since the board authorized the contract while you were a member thereof and the contract was not let by competitive bidding to the lowest and best bidder. Adv. Op. No. 87-008. The issue becomes whether accepting the proposed position with the law firm would result in your occupying a "position of profit" in the contract.

The Commission has stated that an employee who serves with a company which is awarded a public contract is deemed to profit from that public contract where: (1) the establishment or operation of the company with which he serves is dependent upon receipt of the contract; (2) the creation or continuation of the employee'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 the employee or as a basis for the employee's compensation; or (4) he would otherwise profit from the contract. Adv. Ops. No. 87-004 and 88-008.

As stated above, the law firm has existed for over fifty years and the board of education had contracted with the firm to represent the school on tax matters for at least four years. Therefore, the establishment or operation of the firm is not dependent upon receipt of the contract that was renewed by the board of education while you were a member in December 1997. Also, the fact that the board of education had contracted with the law firm for at least four years strongly suggests that the creation of your contemplated position with the firm is not dependent upon the award of the contract.

As stated above, the revenue generated from the school district contract accounted for less than 1% of the firm's 1997 gross revenues. As also stated above, if you were to accept the position of litigation partner, then you would share in the profits of the firm.

The issue becomes whether your share in the partnership profits of the revenue generated from the December 1997 contract between the school district and the law firm constitutes occupying a position of profit in the contract. In order to address this issue, it is necessary to

more closely examine the definition of the word "profit." In Advisory Opinion No. 92-013, the Commission held:

The word "profit" is defined in The New Lexicon Webster's Dictionary of the English Language as "to obtain financial gain or other benefit."

The Ethics Commission has held that the position of profit that a public official occupies in the prosecution of a public contract, for purposes of Division (A)(3), must be definite and direct. Adv. Ops. No. 92-013 and 93-001. A public official occupies a position of profit in a public contract when he will realize a pecuniary advantage, gain, or benefit which is a definite and direct result of the public contract. Adv. Ops. No. 92-013 and 92-017. The Ethics Commission has held that there is no exception to the application of Section 2921.42 to profits under any certain amount. Adv. Op. No. 90-004. For example, the Ethics Commission has held that a school board member, who has an ownership interest as a minority stockholder in a corporation that is a vendor to the school district, profits from the vendor's sale of goods to the district. Id.

Thus, if you took a distributive share of partnership profits attributable to the December 1997 contract, you would receive a pecuniary gain or benefit from the contract, albeit a very small one, and be considered to "occupy [a] position of profit" in the contract. R.C. 2921.42(A)(3) prohibits you occupying a position of profit in the December, 1997 contract by receiving a distributive share of the earnings from the contract. However, in Advisory Opinion No. 90-004, the Ethics Commission held that in order to "occupy a position of profit," it is necessary for a public official to actually obtain or realize a financial gain or benefit.

Therefore, R.C. 2921.42(A)(3) does not prohibit you from being a partner in a law firm which receives earnings from a contract that was authorized by a board of education while you were a member of the board. However, R.C. 2921.42(A)(3) does prohibit you from receiving a distributive share of any partnership earnings attributable to the contract.

The Revolving Door Prohibition—R.C. 102.03(A)

Division (A) of Section 102.03 of the Revised Code, the "Revolving Door" prohibition of the Ohio Ethics Law, imposes restrictions upon former public officials and employees representing clients or acting in a representative capacity for any persons or entities, after leaving public service. It must be noted that R.C. 102.03(A) does not per se prohibit a former public official or employee from being employed by a party which had entered into a contract with the former official's or employee's public agency while the official or employee was employed with the public agency. See generally Adv. Op. No. 89-009. But see R.C. 2921.42(A)(3) and R.C. 102.03(D) (discussed above). However, as explained below, the former official or employee will face restrictions imposed by R.C. 102.03(A) upon the actions which he may take for his new employer.

R.C. 102.03(A) provides, in pertinent part:

- (1) 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.

....

- (5) As used in divisions (A)(1), (2), and (3), "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.
- (6) 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 he was employed or on which he served.
- (7) Division (A) of this section 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.

The language of R.C. 102.03(A) precisely sets forth the prohibitions that it imposes upon former public officials and employees, specifically: (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 any 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. Adv. Ops. No. 80-008, 86-001, and 92-005. However, R.C. 102.03(A) does not prohibit a former public official or employee from: (1) being retained or employed by the agency with which he served; and (2) performing ministerial functions, such as preparing tax returns and filing applications for permits or licenses.

Accordingly, R.C. 102.03(A) prohibits you, for a period of one year from the date you left your position as a member of the board of education, from representing a client of the law firm, or any other party, before any public agency, on any matter in which you personally participated while you were a member of the board of education.

The term "represent" is defined in R.C. 102.03(A) to include "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." Examples of the types of activities which would fall within the term "represent," for purposes of this section, were described by the Ethics Commission 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 attorney or consultant does not sign the documents, letters, or notes, the prohibition would apply if she prepared the communication. If she merely consulted with the attorneys or other personnel who prepared the documents, letters, or notes, the prohibition would not apply.

It must be noted that R.C. 102.03(A) prohibits a former public official or employee from "representing" a client, new employer, or any other party, on a matter in which he personally participated, before any public agency and not only before the agency with which he was previously employed. 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."

Revised Code Section 102.03(A) defines the term "matter" 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." 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.

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. 91-009, the Ethics Commission held that "personal participation" in a matter also includes the exercise of "supervision or general oversight" over other personnel in their work on that matter since supervision of a public official's or employee's activities involves decision-making, approval or disapproval, recommendation or advice, and other exercises of administrative discretion, by the supervisor, regarding that matter. See also Adv. Op. No. 86-001.

The one-year, post-employment prohibition of R.C. 102.03(A) commenced the date you left your public service. Adv. Ops. No. 81-002, 86-001, and 89-003. Therefore, R.C. 102.03(A) prohibits you, for a period of one year from the date you left your position on the board of education, from representing the school district, or any other client or party, before any public agency, on any matter in which you personally participated while you served as a board of education member, regardless of when such personal participation occurred during your public service. Adv. Ops. No. 89-003 and 91-009.

You have stated that you would have no professional involvement with the school board that you formerly served for at least one year. However, you state that you contemplate representing other school districts and public entities that are clients of the law firm. It must be stressed that you are prohibited from representing the other school districts and public entities before any public agency, on any matter in which you personally participated while you were a member of the board of education. You are not prohibited from representing the school district that you formerly served as a member of the board of education before a public agency on new matters, or matters in which you did not personally participate as a member of the board of education. However, by having no professional involvement with the school district that you formerly served, you would aid in avoiding an appearance of impropriety.

Disclosure of Confidential Information-- R.C. 102.03(B)

You should also be aware of Division (B) of Section 102.03 of the Revised Code, which reads as follows:

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.

Division (B) of Section 102.03 prohibits a present or former public official from disclosing or using, without appropriate authorization, any confidential information acquired by him in the course of his official duties. No time limitation exists for this prohibition, and it is effective while a person serves in a public position and after he leaves public service. Adv. Op. No. 88-009. R.C. 102.03(B) prohibits you from releasing confidential information that you acquired during your service as a member of the board of education to the law firm, its clients or any other party.

Conclusion

As explained above, because you did not discuss or consider employment with this firm while you were a member of the board of education, R.C. 102.03(D) does not prohibit you from joining the law firm as a partner. R.C. 2921.42(A)(3) also does not preclude you from joining the law firm as a partner, so long as you do not receive any pecuniary gain or benefit from the contract that was entered into between the board of education and the law firm while you were a member. R.C. 102.03(A) prohibits you, for a period of one year from the date you left your position on the board of education, from representing the school district, or any other client or party, before any public agency, on any matter in which you personally participated while you served as a board of education member, regardless of when such personal participation occurred during your public service. R.C. 102.03(B) prohibits you from releasing confidential information that you acquired during your service as a member of the board of education to the law firm, its clients or any other party.

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Your question may also raise issues concerning the professional conduct of attorneys under the Code of Professional Responsibility. See D.R. 9-101. These issues are not within the jurisdiction of the Ohio Ethics Commission, but should be referred to the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court.

This informal advisory opinion was approved by the Ethics Commission at its meeting on June 19, 1998. It represents the views of the undersigned, based on the facts presented. It 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,

A handwritten signature in cursive script that reads "John Rawski".

John Rawski
Staff Attorney