



OHIO ETHICS COMMISSION

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October 8, 1998

Informal Opinion 1998-INF-1008-2

David L. Engler
[REDACTED]

Dear Mr. Engler:

In your letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes prohibit you, as a member of the Board of County Commissioners of Mahoning County, from selling computer software products and related support services to government entities that are not in the county that you serve, and that receive no funding from the county that you serve.

As explained below, the Ohio Ethics Law and related statutes prohibits you from: (1) realizing a financial gain or benefit by selling software and related support services to counties and governmental entities that are interested in matters before, regulated by, or doing or seeking to do business with Mahoning County; (2) using the power and authority inherent in your position of county commissioner in any way to secure business for the company with which you are connected; (3) using public time, facilities, or resources to market the software and related support services, including testing the program and conducting software demonstrations on public equipment within Mahoning County; and (4) having an "interest," as explained below, in the company's public contracts with any governmental entities with which you are connected. The Ohio Ethics Law and related statutes do not prohibit you from selling computer software products and related support services to governmental entities that are not in the county you serve, and that receive no funding from the county you serve, so long as you comply with these limitations.

Facts

You state that you are a member of the Board of County Commissioners of Mahoning County. You also state that you were involved in the concept of developing software for a company called IntelliTech. In your initial request, dated March 16, 1998, you stated that you had "no interest in the company that owns the software." In a further correspondence dated August 28, 1998, you stated that, when the company becomes operational, you will be both an employee and an owner of IntelliTech. In a subsequent telephone conversation, you explained that you own stock in the corporation and that you are also an officer of the corporation.

You have stated that the company desires to market the software to governmental entities. In your initial letter, you stated that the company would donate software to Mahoning County, but that the company wished to sell management services to the County, and that the company planned to bid on other Mahoning County work. In your August letter, you clarified that: "[T]here will be no business transacted with Mahoning County, any political subdivision within Mahoning County, or any entity that receives funding from Mahoning County, directly or

indirectly." You state that Mahoning County does not have any relationship with the other governmental entities with whom IntelliTech will do business involving the purchase or sale of any products or services.

Conflict of Interest Prohibitions—R.C. 102.03(D) and (E)

Whenever a public official or employee is pursuing outside employment, the most applicable provisions of the Ethics Law are the Conflict of Interest provisions, in R.C. 102.03(D) and (E), which provide:

- (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 member of the board of county commissioners is a "public official or employee" and is subject to the prohibitions of R.C. 102.03(D) and (E). Ohio Ethics Commission Advisory Opinion No. 88-003.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 1.03, 102.01(G); Adv. Ops. No. 82-002 and 89-003. The earnings that you would receive from the company for the sale of its software and related support services, either as an employee or an owner, would constitute a thing of value for purposes of R.C. 102.03(D) and (E). Adv. Op. No. 84-013.

General Restrictions Upon Outside Private Business Activity

The Ethics Commission has held that the Ohio Ethics Law does not prohibit a public official or employee from engaging in outside private business activity so long as no actual conflict of interest exists between the official's or employee's public and private positions. Adv. Op. No. 96-004. There are, however, situations where a public official's or employee's private business interests could impair the official's objectivity and independence of judgment with regard to his official decisions and responsibilities. Because the private business interests of an official or employee may impair his independence of judgment, those interests may be of such a character as to manifest an improper influence upon him with respect to his public duties in contravention of R.C. 102.03(D) and (E). In that case, R.C. 102.03(D) and (E) prohibit the public official or employee from engaging in the private outside business activity. Id. See also Adv. Ops. No. 77-006, 84-009 and 86-008.

In 1996, the Ethics Commission issued a comprehensive opinion, detailing the application of the conflict of interest law to outside employment situations. A copy of Advisory Opinion No. 96-004, which more fully explains the outside employment restrictions, is enclosed. This opinion will discuss some aspects of that opinion that are most relevant to your situation.

Prohibitions Imposed By R.C. 102.03 (D)

Division (D) of Section 102.03 of the Revised Code prohibits a public official or employee from using the authority or influence of his position to secure anything of value for himself, family members, business associates, or others where there is a conflict of interest. Adv. Ops. No. 79-002, 80-004, and 89-006. As explained below, Division (D) prohibits any action or inaction by a public official or employee that would result in securing a substantial and improper thing of value.

Generally, the Ethics Commission has held that compensation secured by a public official or employee while engaging in private outside employment or business activity is a thing of value that can be of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to his duties. The Commission has reasoned that the public interest could be adversely affected when a public servant receives compensation for private activities if the compensation is paid as a result of the public servant's use of, or failure to exercise, his official authority, or if the receipt of compensation could impair the performance of public duties and therefore burden public resources entrusted to the public servant in favor of his own personal financial interests.

The Commission has therefore reasoned that a public official, including a county commissioner, is prohibited from (a) using public time, facilities, personnel, or resources in conducting a private business or while engaging in private outside employment, including using public equipment to conduct demonstrations for clients; (b) using his official title or identification on private business cards or other written materials; (c) using his relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding his private interests; (d) discussing, deliberating, or voting on any matter involving his private business; (e) receiving fees for providing services rendered on projects that he has recommended in his official capacity; (f) participating in decisions or recommendations regarding his competitors; and (g) using his public position or authority in any other way to secure a benefit for his outside employer or private business. Adv. Op. No. 84-013. See also Adv. Ops. No. 84-012, 85-013, 85-014, 90-003, and 90-009. In addition, the Commission has reasoned that a public official is prohibited from receiving compensation for private employment from parties that may present a conflict of interest. These restrictions are more fully explained in Advisory Opinion No. 96-004. The three that are most applicable to your situation are more fully discussed below.

Using Official Authority or Influence—R.C. 102.03(D)

A county commissioner develops working relationships by cooperating with other public officials and employees while performing his official duties. R.C. 102.03 (D) would prohibit you from using your position as county commissioner in any way through these working relationships to

secure business opportunities for a company by which you are employed and of which you are an owner. See also R.C. 2921.42(A)(1) (A public official is prohibited from "using the authority or influence of his office" to secure a public contract for himself or a business associate. This includes public contracts with Mahoning County and all other political subdivisions, governmental agencies, and instrumentalities—including those that are not connected with or established by Mahoning County.) Both R.C. 102.03(D) and 2921.42(A)(1) would prohibit you from using your unique position and access to other public officials and employees, as a county commissioner, to benefit yourself or your company. For example, if, by virtue of your service as a county commissioner, you are an officer or board member of any association of public officials, you would be prohibited from using your fiduciary position with the association to secure an endorsement of or recommendation for IntelliTech, its software, or its services.

Participating in Official Decisions—R.C. 102.03(D)

The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official or employee from securing a substantial thing of value that results from his participation in a matter upon which the private interests of the official or employee are dependent or contingent. Adv. Ops. No. 76-005, 79-003, 79-008, and 88-005. A public official or employee who engages in private outside employment or business activity is prohibited from discussing, deliberating, or voting on any matter involving his private business, including recommending his employer's or his own business services to his own public agency. See generally Adv. Op. No. 84-013. You have already stated that IntelliTech will not do business with the County. However, if any other matters come before the county commissioners that directly affect the interests of IntelliTech, you would be prohibited from participating, in any way, in those matters.

Participation In Matters Concerning Competitors—R.C. 102.03(D)

R.C. 102.03 (D) prohibits a public official or employee engaged in private outside business from participating in decisions or making recommendations regarding his competitors. Adv. Ops. No. 86-007 and 90-002. The Ethics Commission has explained that a decision by an official or employee that adversely affects a competitor to his private business could result in financial gain for the official or employee making the decision, due to the narrowing of the market, and could create an automatic challenge that the official's or employee's decision was improperly motivated. Adv. Op. No. 90-002. You would be prohibited, as a county commissioner, from participating in any matters that would have a direct impact on the competitors of IntelliTech.

Prohibitions Imposed By R.C. 102.03 (E)

R.C. 102.03 (E) prohibits a public official from soliciting or accepting anything of value that would have an improper influence upon him with respect to his duties. Unlike R.C. 102.03(D), which prohibits a public official from taking an action to secure a thing of value, R.C. 102.03(E) prohibits a public official from accepting certain things of value even where the official takes no action to secure it.

A public official or employee is prohibited from soliciting "anything of value" if the thing of value could have a substantial and improper influence upon the official or employee. The Commission has determined that outside employment, and the payment received therefor, are "substantial" for purposes of this restriction. Adv. Op. No. 92-015.

In order to determine whether something of substantial value will also have an improper influence on a public official, the Commission has stated that the question turns on an examination of the source of the thing. Certain sources of things of value are improper depending upon the relationship between the public official or employee and the source of the thing of value. Adv. Ops. No. 86-011 and 92-015. The Commission has held that a public official's or employee's objectivity and independence of judgment with regard to his official actions could be impaired if he were to solicit or accept a thing of substantial value from a party that is interested in matters before, regulated by, or doing or seeking to do business with his own public agency. Adv. Ops. No. 87-006, 87-009, and 89-006. See also Adv. Ops. No. 87-008 and 90-004. The Ethics Commission has held, further, that R.C. 102.03(E) prohibits a public official or employee from engaging in private business activity with parties that are interested in matters before, regulated by, or doing or seeking to do business with his own agency. Adv. Op. No. 96-004.

In the instant situation, the issue is whether the Ohio Ethics Law and related statutes prohibit you from selling software and related support services to political subdivisions other than Mahoning County. In Advisory Opinion No. 84-012, the Ethics Commission held that a service forester employed by the Division of Forestry of the Department of Natural Resources was not, per se, prohibited from operating a private tree service outside his district. In Advisory Opinion No. 90-002, the Commission held that a Department of Agriculture meat inspector was not prohibited by R.C. 102.03(D) and (E) from owning and operating a meat processing plant that was located in an inspection district other than his own despite the fact that his employing state agency would regulate his plant. However, the opinion went on to apply the pertinent restrictions of the Ethics Law upon the business operated by the public employee.

Your official duties pertain to the governance of Mahoning County. Thus, the instant situation is akin to the situations addressed in Advisory Opinions No. 84-012 and 90-002 in which a public employee is charged with performing an official duty within a specified geographical area. Therefore, the same reasoning can be applied to your situation. R.C. 102.03(E) would not, generally, prohibit you from realizing a financial gain or benefit by selling software and related support services to public agencies outside Mahoning County, and for which Mahoning County provides no funding, so long as, similar to the discussion in Advisory Opinions No. 84-012 and 90-002, those agencies are not interested in matters before, regulated by, or doing or seeking to do business with Mahoning County.

For example, a regional transit authority may be created by a county, counties, municipalities, townships, or any combination thereof, and a county may appropriate moneys from its general fund for its portion of the expenses of the authority. R.C. 306.32 and 306.33. If Mahoning County were to belong to a regional transit authority in combination with other political subdivisions, then all of the political subdivisions belonging to the regional transit authority, and the

authority itself, would be interested in matters before Mahoning County. In such an instance, R.C. 102.03(E) would prohibit you from realizing a financial gain or benefit by selling the software program to any of the political subdivisions belonging to the regional transit authority or to the authority itself, even if the local government was located outside Mahoning County.

If you wish to do business with political subdivisions, governmental agencies, and instrumentalities that are regulated by, interested in any matters pending before, or doing or seeking to do business with Mahoning County, you may be able to pursue those business opportunities in some situations. The Ethics Commission has held that in certain situations, a public official or employee may withdraw from consideration of matters that could pose a conflict of interest. Adv. Ops. No. 89-006, 90-002, and 93-015. A public official's or employee's withdrawal from consideration of issues concerning parties who are interested in matters before, regulated by, or doing or seeking to do business with his own public agency may be accomplished only when such a withdrawal: (1) does not interfere with the official's or employee's performance of his assigned duties; and (2) is approved by his employing agency. Adv. Ops. No. 89-006, 89-010, and 90-002. See also Adv. Op. No. 90-010. In your case, if you wished to pursue business opportunities with governmental agencies, you would be required to withdraw from any matters pending before the board of county commissioners that affect the other governmental agencies. You would be required to withdraw completely, from all discussion, deliberation, voting and formal and informal lobbying, with respect to the governmental agencies that are members of the regional transit authority. This may not be possible in all situations, unless the other county commissioners could handle any matters that affect the other governmental agencies that come before the county without your participation.

Therefore, R.C. 102.03 (E) prohibits you from engaging in private outside employment or business activity with parties that are interested in matters before, regulated by, or doing or seeking to do business with the county unless you are capable of withdrawing from consideration of matters that could pose a conflict of interest.

Interest in a Public Contract—R.C. 2921.42(A)(4)

While you have stated that you and IntelliTech do not intend to do any business with Mahoning County, any political subdivision within Mahoning County, or any entity that receives funding, either directly or indirectly, from Mahoning County, it may still be informative to discuss the restrictions of the public contract law.

Generally, the Ethics Law prohibits a public official from having an interest in a contract for the sale of goods or services to a public agency with which he is connected. R.C. 2921.42(A)(4). A county commissioner is a public official subject to this prohibition. Adv. Ops. No. 87-002 and 88-003. As an employee and owner of IntelliTech, you would be considered to have an interest in all of the contracts of the company. An employee who also has an ownership interest in, or who is a director, trustee, or officer of, his employer is considered to have an interest in his employer's contracts. Adv. Ops. No. 78-006, 81-008, and 86-005. Once again, you have listed a number of public agencies with which the company does not intend to do

business. You have also expressed your belief that it would not be in the best interest of the county, the company, or yourself, to have any relationships that could be questioned. To assist you in upholding this conviction, this opinion will focus briefly on a description of the agencies with which you would be prohibited from contracting.

R.C. 2921.42(A)(4) prohibits you, as an employee and owner of IntelliTech, from having an interest in the sale of computer software or services to any political subdivision or governmental agency with which you are connected, as a county commissioner. The Ethics Commission has held that to be "connected with" something is to be related to or associated with that entity. Adv. Op. No. 87-002 and 95-004. In Advisory Opinion No. 89-004, the Commission held: "It is apparent that the purpose of R.C. 2921.42 is best served if the statute is interpreted as prohibiting a public official from doing business with all political subdivisions, governmental agencies, and instrumentalities with which he is connected." (Emphasis added.)

A county may join or contract with other political subdivisions in order to provide public services. To list a few examples, counties may become members of joint solid waste management districts, R.C. 343.01(B), regional councils of government, R.C. Chapter 167., regional planning commissions, R.C. 713.21, regional transit authorities, R.C. 306.32, regional water and sewer districts, R.C. Chapter 6116., and may contract with one another, R.C. 307.14-19. You would be deemed to be "connected with" any county or political subdivision which had joined with or contracted with Mahoning County. Adv. Op. No. 89-004 (R.C. 2921.42(A)(4) prohibits a county commissioner who is a partner in an insurance agency from having an interest in a contract for insurance services with a regional transit authority that is coextensive with the county).

Therefore, R.C. 2921.42(A)(4) prohibits you from having an interest in the company's contracts with Mahoning County, and any other political subdivisions, governmental agencies, and instrumentalities with which you are connected, unless you can meet the exception provided by Division (C) of R.C. 2921.42. This activity would also be prohibited by R.C. 102.03(E), as described above. Since you have already expressed your conviction to avoid doing business with these kind of entities, it is unnecessary to discuss the application of the exception in R.C. 2921.42(C). The Commission supports your decision to avoid doing business where the transactions could be questioned. You should take extreme care, when examining the political subdivisions with which the company will do business, to determine that the political subdivision to which you desire to sell the software and related support services is not "connected with" Mahoning County and that "connections" between the political subdivision and Mahoning County are unlikely to arise.

Conclusion

As explained above, the Ohio Ethics Law and related statutes prohibits you from: (1) realizing a financial gain or benefit by selling software and related support services to counties and governmental entities that are interested in matters before, regulated by, or doing or seeking to do business with Mahoning County; (2) using the power and authority inherent in your position of county commissioner in any way to secure business for the company with which you are connected;

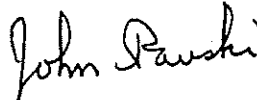
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(3) using public time, facilities, or resources to market the software and related support services, including testing the program and conducting software demonstrations on public equipment within Mahoning County; and (4) having an "interest," as explained below, in the company's public contracts with any governmental entities with which you are connected. The Ohio Ethics Law and related statutes do not prohibit you from selling computer software products and related support services to governmental entities that are not in the county you serve, and that receive no funding from the county you serve, so long as you comply with these limitations.

As a final note, if IntelliTech desires to pursue business opportunities with Mahoning County, or any other political subdivisions or governmental agencies with which you are connected as a county commissioner, at any time in the future, you should contact the Commission for more information about those transactions. You would be subject to other provisions of the law, which not discussed above, if the company were to sell goods or services to any of these parties. Please do not hesitate to contact this Office in this instance for more information.

This informal advisory opinion was approved by the Ethics Commission at its meeting on September 25, 1998. 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

Enclosure: Advisory Opinion No. 96-004