

OHIO ETHICS COMMISSION

Santiago Feliciano, Jr.
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215

Telephone: (614) 466-7090

Fax: (614) 466-8368

Website: <http://www.ethics.state.oh.us>

November 19, 1999

Informal Opinion 1999-INF-1119-1

Paul L. Wallace

Dear Mr. Wallace:

In your letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes prohibit an Ohio Environmental Protection Agency (EPA) official from acquiring a waste facility, as defined in R.C. 3734.01, immediately after he resigns from the EPA.

The Ethics Law and related statutes do not prohibit the EPA official from acquiring a waste facility immediately after he resigns from the EPA. However, the EPA official is prohibited, for twenty-four months after he leaves the EPA, from representing himself, as the owner or operator of the facility or as an applicant for a permit or license for the facility, before any public agency on any matter in which he personally participated as an EPA official. He is not prohibited from representing himself before a public agency on new matters or matters in which he did not participate as an EPA official, or from performing ministerial functions that are incidental to the operation of the facility, such as the filing of applications for permits and licenses. The term "matter" is further defined in the opinion.

The Commission notes that, although it has determined that the Ohio Ethics law does not prohibit a former EPA official from acquiring a solid or hazardous waste facility, the Commission is troubled about the possible appearance of impropriety, given the highly regulated nature of the waste facility industry, if such a purchase should take place. The Commission also notes that, because of the statutory language, adopted, and previously amended, by the General Assembly, it is constrained to reach this decision in spite of profound concerns expressed by members of the Commission. The Ethics Commission cautions that this opinion does not reach the issue of the appearance or advisability of the proposed purchase.

Facts

You state that the official desires to resign from the EPA and acquire an ownership interest, either as a sole proprietor or sole shareholder, of a waste facility as defined in R.C. 3734.01. You state that the EPA official has personally participated in matters involving the exercise of administrative discretion under R.C. Chapter 3734., but not within the past two years.

Environmental Post-employment Restrictions—R.C. 102.03(A)(3)

R.C. 102.03(A)(3) imposes special post-employment restrictions upon former public officials and employees who have participated in certain environmental matters. R.C. 102.03(A) reads in pertinent part:

For twenty-four months after the conclusion of employment or service, no former public official or employee who personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, the development or adoption of solid waste management plans, investigation, inspection, or other substantial exercise of administrative discretion under Chapter 343. or 3734. of the Revised Code shall represent a person who is the owner or operator of a facility, as defined in section 3734.01 of the Revised Code, or who is an applicant for a permit or license for a facility under that chapter, on any matter in which the public official or employee personally participated as a public official or employee. (Emphasis added.)

R.C. 3734.01(N) defines the term "facility" for purposes of R.C. 102.03(A)(2), and reads:

"Facility" means any site, location, tract of land, installation, or building used for incineration, composting, sanitary landfilling, or other methods of disposal of solid wastes or, if the solid wastes consist of scrap tires, for the collection, storage, or processing of the solid wastes; for the transfer of solid wastes; for the treatment of infectious wastes; or for the storage, treatment, or disposal of hazardous waste.

You have stated that the EPA official exercised administrative discretion under R.C. Chapter 3734., although not for the last two years. The prohibition in R.C. 102.03(A)(3) commences at the "conclusion" of the official's public employment, rather than from when he ended his participation with respect to matters arising under R.C. 3734. Ohio Ethics Commission Advisory Opinion No. 89-003. Accordingly, R.C. 102.03(A)(3) prohibits him, for two years after he leaves his position at the EPA, from representing a person who is the owner or operator of a facility on matters in which he personally participated.

The question becomes whether the prohibition imposed by R.C. 102.03(A)(3) precludes the EPA official from representing himself or a facility of which he is the sole proprietor or sole shareholder during that twenty-four month period.

In Advisory Opinion No. 89-009, the Ethics Commission held that R.C. 102.03(A) does not prohibit a company that employs a former public official or employee from doing business with or seeking to do business with his former public agency. The opinion stated:

The language used in R.C. 102.03(A) clearly applies only to a "present or former public official or employee." See Advisory Opinion No. 88-009. R.C. 102.03(A) does not impose a restriction upon the former public official's or employee's current employer, but rather restricts the actions the former public official or employee may take on behalf of his employer . . . following his public employment. (Emphasis in original.)

Also, in Advisory Opinion No. 91-009, the Commission held that because the prohibition imposed by R.C. 102.03(A) is a personal prohibition placed upon the former official or employee, a law firm that employs a former chief deputy administrator for a board of county commissioners is not prohibited from representing clients before the county on matters in which the former chief deputy administrator personally participated.

The instant situation differs from Advisory Opinions No. 89-009 and 91-009 in that the former public official or employee is neither employed by a party that does business with, nor is retained to represent clients, before his former public agency. Rather, the former public employee would own, either as a sole proprietor or sole shareholder, a facility that his former public agency regulates. Your question is whether the prohibition against representation, set forth in R.C. 102.03(A)(3), prohibits the EPA official, after he resigns, from owning a regulated facility.

Representation

The statutory language of R.C. 102.03(A)(3) clearly describes the action it prohibits—representing a person who owns or operates a facility or who has applied for a permit or license for a facility. For purposes of R.C. 102.03(A), the term person includes government agencies, individuals, corporations, partnerships, associations, or other similar entities. See R.C. 1.59 and Adv. Ops. No. 82-002, 89-003, and 96-001. In this instance, the former EPA official, and the facility that he would acquire, are "persons" for purposes of R.C. 102.03(A).

The Ethics Commission has consistently adhered to the well-established rule of statutory interpretation that it is to be assumed that the legislature has used the language contained in a statute advisedly and intelligently and expressed its intent by the use of the words found in the statute. Adv. Ops. No. 74-001, 89-003, and 92-007. Furthermore, words not used in a statute may not be inserted in construing that statute. Dougherty v. Torrence, 2 Ohio St. 3d 69 (1982). In interpreting a statute, reference is made to the fact that if the legislature intended a particular meaning, it could easily have found apt words or phrases to express its meaning. Shafer v. Streicher, 105 Ohio St. 528 (1922).

In the instant situation, it is obvious from the language of R.C. 102.03(A)(3) that the legislature has expressed, in clear and unambiguous terms, its intent to prohibit the specified former officials and employees from representing a person who owns or operates a facility or who has applied for a permit or license for a facility on matters in which the official or employee personally participated. The term "represent" is defined, in R.C. 102.03(A)(5), to include any formal or informal appearance before, or written or oral communication with, any public agency,

on behalf of any person. However, the clear language in R.C. 102.03(A)(3), which prohibits representation, cannot be interpreted to prohibit a public official or employee from entering the class of individuals who are regulated by his public agency. The Franklin County Court of Appeals considered the Revolving Door Law in State v. Nipps, 66 Ohio App. 2d 17 (1979). In that case, the Court stated:

The [Revolving Door] statute does not impose a complete prohibition but seeks to control situations where the General Assembly has determined that the danger of abuse is the greatest. . . . Under this ethics law, a public official or employee may enter private employment in an area related to his public employment or service, but, must conform his conduct to the restrictive language utilized in the statute.

State v. Nipps, 66 Ohio App. 2d 17, 21 (1979).

In the specific case that you have presented, the language of the statute cannot be interpreted to prohibit a former EPA official from owning or operating a facility that will be regulated by the EPA, although it does limit the activities of the individual with respect to matters in which he personally participated.

If the former official or employee owns or operates the facility or is an applicant for a permit or license, then he may not represent either himself or his facility on matters in which he personally participated as an EPA official within twenty-four months after leaving public service. It would contravene the intent of the Revolving Door Prohibition to hold that R.C. 102.03(A)(3) applies to a former official or employee who is employed or retained by a facility owner but does not apply to a former official or employee who is a facility owner.

This section prohibits the EPA official from advocating the interests of his facility before the EPA, or any other public agency, with respect to matters in which he personally participated at any time during his service as an EPA official. The term "matter" is defined as any case, proceeding, application, determination, issue, or question. Adv. Op. No. 99-001. A "matter" includes, but is not limited to, a specific occurrence or problem requiring discussion, decision, research, or investigation, a lawsuit or legal proceedings, an oral or written application, a settlement of a dispute or question, a dispute of special or public importance, and a controversy submitted for consideration. Id. This restriction applies to the EPA official during the remainder of his public employment, and for two years after he leaves the EPA.

Therefore, R.C. 102.03(A)(3) does not prohibit an EPA official from acquiring a solid waste facility, as defined in R.C. 3734.01, provided that he adheres to the additional restrictions described below, immediately after he resigns from the EPA. However, R.C. 102.03(A)(3) restricts his personal conduct in the operation of the facility for twenty-four months after he leaves the EPA. Specifically, he is prohibited from representing himself, either as the owner or operator of the facility or as an applicant for a permit or license for the facility, before any public agency on any matter in which he personally participated as an EPA official. He is not prohibited from representing himself before a public agency on new matters or matters in which he did not participate as an EPA official.

Your attention is also directed to R.C. 102.03(A)(7), which reads in pertinent part:

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. (Emphasis added.)

The EPA official is not prohibited from performing ministerial functions incidental to the operation of the facility such as the filing or amendment of tax returns, applications for permits and licenses, incorporation papers, and other similar documents.

Other Issues

You state that you have carefully reviewed the Ohio Ethics Commission's advisory opinions and have limited your question to whether the prohibition imposed by R.C. 102.03(A)(3) precludes the former EPA official from acquiring an ownership interest of a facility, either as a sole proprietor or sole shareholder. A memorandum explaining the post-employment restrictions of the Ohio Ethics Law has been enclosed for your reference to guide you in applying the prohibition of R.C. 102.03(A)(3) and other post-employment restrictions to the EPA official. Also enclosed is Advisory Opinion No. 96-004, which deals with outside employment for public officials and employees.

Of particular note in the opinion and memorandum are the restrictions imposed by R.C. 102.03(D) and (E). These sections generally prohibit a public official or employee from seeking private business opportunities from parties that are regulated by the public agency he serves, unless he is able to fully withdraw from the regulation of that party. Adv. Op. No. 96-004. The official's withdrawal must not interfere with his ability to perform his job duties, and must be approved by his public employer. Id.

You have stated that your client is currently employed by the EPA, which regulates the waste facility industry. Your client is prohibited from participating in any matters, as an EPA employee, that affect the interests of any of the parties involved in the purchase of the facility, including the facility's current owners and the facility itself. Your client will also be prohibited, during his service to EPA, from participating in any matters that affect other individuals or entities which may also be interested in purchasing this waste facility. See generally Adv. Op. No. 90-002. While you have not raised these issues in your request letter, it is important that you advise your client about these limitations. Please do not hesitate to contact this office if you have any additional questions about the restrictions imposed by R.C. 102.03(D) and (E) or other provisions of the Ethics law.

Conclusion

As explained above, the EPA official is not prohibited from acquiring a solid waste facility, as defined in R.C. 3734.01, immediately after he resigns from the EPA. He is prohibited, for twenty-four months after he leaves the EPA, from representing himself, as the

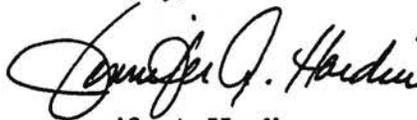
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owner or operator of the facility or as an applicant for a permit or license for the facility, before any public agency on any matter in which he personally participated as an EPA official. He is not prohibited from representing himself before a public agency on new matters or matters in which he did not participate as an EPA official, or from performing ministerial functions that are incidental to the operation of the facility, such as the filing of applications for permits and licenses.

It should be noted that, although the law does not absolutely prohibit the former EPA official from purchasing a solid or hazardous waste facility, so long as he does not participate in representing the facility on matters in which he personally participated as an EPA official, the purchase may create the appearance of impropriety. In rendering this opinion, the Ethics Commission is not opining as to the appearance or advisability of the proposed purchase.

This informal advisory opinion was approved by the Ethics Commission at its meeting on November 19, 1999. 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.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

Enclosure: Post-employment Memorandum