

OHIO ETHICS COMMISSION

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December 9, 2002 Informal Opinion 2002-INF-1209-2

Gregory L. Mountz
[REDACTED]

Dear Mr. Mountz:

In a letter received by the Ohio Ethics Commission on July 24, 2002, you have asked whether the Ethics Law and related statutes would prohibit you from accepting a position as a Project Manager for the Ohio Department of Administrative Services (DAS). You explain that you would retire from your present position as Chief of the Office of Information Technology for the Ohio Department of Natural Resources (ODNR) if you were to be selected for the position at DAS.

Brief Answer

As explained more fully below, because of an exception to the post-employment provisions of the Ohio Ethics Law, you are not prohibited from accepting a position as Project Manager for the Multi-Agency Radio Communications System (MARCS), if you are offered the position when you leave your position with the Department of Natural Resources.

Facts

In your letter to the Ethics Commission, you explain that you are the Chief of the Office of Information Technology for ODNR. You state that your position is unclassified and that your duties include the management of ODNR's telephone, computer, and radio communications systems. You also state that ODNR is a member of the Multi-Agency Radio Communications System (MARCS). You explain that one of your duties at ODNR is to represent the department as a member of the Program Advisory Committee to MARCS. You further explain that, in this capacity, you have decision-making authority over ODNR issues within the MARCS project and that you can influence decisions that affect ODNR as well as MARCS. You state that DAS has final authority through the Steering Committee and accountability for the MARCS project, but that it is guided by the contract requirements and the needs of the participating agencies.

You explain that you would like to apply for a position as MARCS Project Manager with DAS. In that position, you would support the MARCS project administrator, manage seven staff members, and have significant authority and accountability for moving the project forward. According to the job description for the position that you attached to your request for an advisory opinion on this matter, your job duties with DAS would include using “extensive knowledge of strategic public policy management and high-level, complex computer programming/analysis and design techniques to manage Multi-Agency Radio Communication System (MARCS) program projects (e.g., MARCSNet System, Wireless Voice System, Wireless Data System, GPS/AVL System, Records Management System; Computer Aided Dispatch System, and Message Switch System).” Among other things, you would also be responsible for providing “technical advice and guidance to administrator and staff of MARCS Program Office, Computer Services Division’s Deputy Director and executive-level government officials from all levels of government (e.g., township, city, county, municipal and state) on application of new and emerging information technology hardware and software relating to wireless, computer-based communications.”

You ask whether the Ethics Law prohibits you from applying for the position with DAS. You state that you would not accept an offer to fill the position without a favorable opinion from the Ethics Commission. You also state that you would indicate such at the time you submit your application for the position, and that you would retract your application if you were to be informed that the Ethics Law prohibits you from accepting an offer to fill the position.

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 the ability of former public officials and employees to represent a client or act in a representative capacity for any person after leaving public service. R.C. 102.03(A)(1) provides:

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.

In your position with ODNR, you are a “public official or employee” and within the class of persons subject to the prohibitions of R.C. 102.03(A). See R.C. 102.01(B) and (C).

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." Ohio Ethics Commission Advisory Opinion No. 86-001. Examples of the types of activities that would fall within the definition of the term "represent" range from appearances in formal proceedings or meetings to informal "lobbying" of agency personnel by telephone or in person. Also included within the definition of "represent" is the preparation of any written communication that is submitted to a public agency, including formal documents, filings, informal letters, notes, and e-mails, regardless of whether the former official or employee signs the communication. Adv. Ops. No. 86-001, 87-001, and 92-005.

R.C. 102.03(A) prohibits a former public official or employee from representing a client or acting in a representative capacity for any "person." A "person," for purposes of R.C. 102.03(A)(1), includes governmental agencies, individuals, corporations, business trusts, estates, trusts, partnerships, and associations. See R.C. 1.59(C) and Adv. Ops. No. 82-002 and 89-003. In your situation, this would include DAS and any other agency that is a member of the MARCS cooperative.

The prohibition in R.C. 102.03(A) applies to any "matter" in which the official or employee personally participated. The term "matter" includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, or investigation, a lawsuit or legal proceedings, an oral or written application, and a settlement of a dispute or question. Adv. Op. No. 99-001. "Matter" also includes such abstract items as a dispute of special or public importance and a controversy submitted for consideration. Id. In your situation, for example, the term matter would include such things as issues, questions, or determinations with respect to the MARCS project.

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. 92-005. Based on the descriptions of your job duties, you have personally participated, through a "substantial exercise of administrative discretion," in matters involving the MARCS project.

Therefore, unless there is an applicable exception, R.C. 102.03(A) prohibits you from representing any person before any public agency on matters related to MARCS in which you personally participated. See Adv. Op. No. 91-009. If you were to accept employment with DAS as a project manager for the MARCS office, you would be prohibited from representing DAS before any other public agency, including the members of the cooperative and local public agencies, on matters in which you personally participated as an ODNR employee.

Exception—R.C. 102.03(A)(6)

There is an exception to this prohibition, set forth in R.C. 102.03(A)(6), which may apply to your situation. R.C. 102.03(A)(6) provides:

Nothing contained in this 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 exception normally would allow ODNR, after an official or employee leaves a position with that department, to retain the former official or employee as a representative or assistant.

In Advisory Opinion No. 91-009, the Commission stated that the exception provided in R.C. 102.03(A)(6) extended to the particular agency by which a former public employee was employed. In its discussion of the exception in Advisory Opinion No. 91-009, the Commission stated:

A former public official or employee has presumably developed an expertise and familiarity regarding the functioning and mandate of the specific public agency by which he was employed and may be able to serve the needs of that public agency more efficiently and capably than someone who does not have the same expertise. The policy underlying the exemption within R.C. 102.03 (A) is that it may serve the overall public good for a public agency to be able to avail itself of this expertise developed by a former employee or official during his employment or service with that particular public agency. (Citations omitted.) The policy imperative, however, extends only to the public agency by which the individual was employed, or with which he served.

In direct response to your specific facts, the Commission has not examined the application of R.C. 102.03(A)(6) where, as a part of his job duties for one public agency, a public employee is assigned to work in a cooperative of which his agency and other public agencies are members.

Unique to your situation, ODNR is a member of the MARCS cooperative along with DAS and nine other state agencies. According to DAS materials, the General Assembly created a MARCS steering committee, composed of the Directors of DAS, ODNR, Public Safety, Transportation, the Office of Budget and Management, and the Adjutant General, to expedite construction of MARCS and develop policies for its ongoing operation. The DAS MARCS office guides the agencies in the cooperative. Teams composed of participants from member agencies work together on system design issues to provide the MARCS office with the user perspective for the system. This is the work in which you were engaged as an ODNR employee.

Through your service as a member of the Program Advisory Committee to MARCS, you have developed expertise on the MARCS project. As discussed in Advisory Opinion No. 91-009, you have developed an expertise and familiarity regarding the functioning and mandate of the specific public agencies with which you worked. You may be able to serve the needs of the cooperative, and of DAS, which administers the cooperative, more efficiently and capably than someone who does not have the same expertise. Unlike the situation discussed in Advisory Opinion No. 91-009, your expertise would serve not only the public agency by which you were directly employed (ODNR) but also the cooperative with which you worked and its member agencies.

The exception in R.C. 102.03(A)(6) allows a former public employee to be retained by the "public agency by which [he] was employed or on which [he] served." In this instance, and based on these specific facts, it is clear that, while you were employed by ODNR, you served on the Program Advisory Committee for MARCS and with the MARCS cooperative. Therefore, the exception in R.C. 102.03(A)(6) applies, and would allow you to be retained by the office at DAS responsible for administering the MARCS project for its member agencies. You are not prohibited, if you are engaged as the project manager, from representing the interests of the MARCS cooperative, before any public agency, with respect to any matters, including those matters in which you personally participated as an ODNR employee.

Conclusion

As explained above, because of an exception to the post-employment provisions of the Ohio Ethics Law, you are not prohibited from accepting a position as Project Manager for the Multi-Agency Radio Communications System (MARCS), if you are offered the position when you leave your position with the Department of Natural Resources.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on December 9, 2002. The Commission commends you for seeking advisory guidance before taking any action that could be prohibited by law.

The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney