

OHIO ETHICS COMMISSION

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January 17, 2003

Informal Opinion 2003-INF-0117-3

Matthew G. McLaughlin
[REDACTED]

Dear Mr. McLaughlin:

In a letter that the Ethics Commission received on December 31, 2002, you ask whether the Ohio Ethics Laws and related statutes prohibit you, after you experience an involuntary layoff from your position with the Department of Administrative Services (DAS), from assisting DAS with the development of the Multi-Agency Radio Communication Service (MARCS) as an employee of a consultant engaged by DAS.

Brief Answer

As explained below, under the facts presented, you are not prohibited, after you experience an involuntary layoff from your position with DAS, from assisting DAS with the development of the MARCS as an employee of a consultant engaged by DAS pursuant to the exception to the Revolving Door Prohibition set forth in R.C. 102.03(A)(6).

Facts

You state that, on January 10, 2003, DAS involuntarily terminated your employment with DAS as a Telecommunications Network Monitor 2. You state that, as a DAS employee, you monitored the operation of the MARCS voice and data network, received reports from users, and helped resolve problems. You state that you did not negotiate or sign contracts for any parties involved in the MARCS project.

You also state that a firm engaged by DAS as a consultant on the MARCS project has offered you employment to begin after you are laid off by DAS. You state that, as an employee of the consultant, you would assist DAS with the continuing development of MARCS by working on portions of the MARCS project that have not passed performance testing. DAS requested that you seek the guidance of the Commission. In a conversation with Commission staff, Darryl Anderson, MARCS Program Manager, stated that DAS would best be served by allowing you to work as an employee of the consultant, on the continuing development of MARCS.

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.

The Franklin County Court of Appeals upheld the “Revolving Door” prohibition as constitutional. State v. Nipps, 66 Ohio App.2d 17 (1979).

R.C. 102.01(B) and (C) define the term "public official or employee" to include any person who is elected or appointed to an office or is an employee of any bureau or other instrumentality of the state. As a DAS employee, you are subject to the statutory prohibitions of R.C. 102.03(A).

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, the firm engaged by DAS as a consultant on the MARCS project is a person for purposes of R.C. 102.03(A)(1).

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 legal proceeding, an 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 the instant situation, because of the scope of the duties you have described, the MARCS project is a "matter" for purpose of R.C. 102.03(A).

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 description you have provided 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, for one year after you leave your employment with DAS, from representing a new employer or client before DAS or any public agency on any matter in which you participated as a DAS employee through decision, recommendation, investigation, or other substantial exercise of administrative discretion. See Adv. Op. No. 91-009.

Exemption to the Revolving Door Prohibition—R.C. 102.03(A)(6)

R.C. 102.03(A)(6) provides an exception to the prohibition described above, reading as follows:

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. (Emphasis added).

The Ethics Commission has explained that the exemption of R.C. 102.03(A)(6) is available to a former public official or employee only with respect to the official's or employee's former public agency. Adv. Ops. No. 91-005 and 91-009. As explained above, DAS has engaged a consultant to assist with the development of MARCS. The issue is whether the assistance that you would provide to DAS for the development of MARCS as an employee of a consultant engaged by DAS falls within the exception provided by R.C. 102.03(A)(6).

It must be emphasized that the exception of R.C. 102.03(A)(6) does not require that a former public employee be retained or employed only by his former public agency in order to represent, assist, or act in a representative capacity for his former public agency. A basic principle of statutory construction is that words not used in a statute may not be inserted in construing that statute. See 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 would

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have found apt words or phrases to express that meaning, especially where it has used such words or phrases in another connection. See Shafer v. Streicher, 105 Ohio St. 528 (1922); Swetland v. Miles, 101 Ohio St. 501 (1920). Thus, if the legislature had intended that the only manner that a former employee could represent, assist, or act in a representative capacity for his former public agency was by being retained or employed by his former public agency, then it would have specifically so indicated.

Furthermore, statutes "must be construed in light of the mischief they are designed to combat." City of Mentor v. Giordano, 9 Ohio St. 2d 140, 144 (1967). It is clear that R.C. 102.03(A) is designed to protect the public interest by prohibiting situations from arising where a former public official or employee "will engage in a conflict of interest or realize personal gain at public expense from the use of 'inside' information." State v. Nipps, 66 Ohio App.2d 17, 17 (1979). It is also clear that the exception of R.C. 102.03(A)(6) recognizes an absence of a conflict of interest or the realization of personal gain at public expense provided that the former official or employee represents, assists, or acts in a representative capacity for the public agency by which he was employed.

Under the facts presented, the interests of DAS are served and there is no conflict of interest or realization of personal gain at public expense if the former DAS employee represents, assists, or acts in a representative capacity for DAS either as a contract employee of DAS or as an employee of a firm currently engaged under contract by DAS. But see R.C. 2921.42(A)(3), below. In the instant situation, the ability for DAS to retain the expertise of a former employee in the continuation of the MARCS project, without incurring additional expense, would provide a benefit to the DAS. See R.C. 1.47 (in enacting a statute, it is presumed that a just and reasonable result is intended) and R.C. 1.49 (in interpreting a statute, the consequences of a particular construction may be considered.)

Other Considerations

Even if you can meet the exception in R.C. 102.03(A)(6), your ability to take this employment opportunity is dependent on two other considerations. First, if a public official or employee was responsible for authorizing a contract with a consultant, he is prohibited from benefiting from that contract as an employee of the consultant even if he can meet the exception in R.C. 102.03(A)(6). R.C. 2921.42(A)(3) prohibits a former public official, for one year after leaving employment or service, from profiting from the prosecution of a public contract that he authorized while he was a public official. If a public official profits within a year after leaving employment or service from a public contract that he authorized, then the exception of R.C. 102.03(A)(6) would not apply and he would clearly have engaged in a conflict of interest and realize personal gain at public expense. As set forth above, you state that you did not negotiate or sign contracts for any parties involved in the MARCS project. Therefore, R.C. 2921.42(A)(3) does not apply to the situation you have set forth.

Further, R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting or using his position to secure anything of value that is of such a character as to have a substantial

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and improper influence upon the official or employee with respect to the performance of his public duties. R.C. 102.03(D) and (E) would prohibit a public official or employee from being employed by a consultant to his public agency if the official or employee had used his public position to secure the job opportunity, even if he could meet the exception in R.C. 102.03(A)(6). From the information you have provided, it does not appear that you solicited employment with the consultant and that, but for the fact that you have been laid off by the state, you would be continuing in your employment with DAS. Therefore, R.C. 102.03(D) and (E) do not apply in the situation you have described.

Therefore, so long as you did not authorize the contract between DAS and the consultant, and did not use your public position to secure a job with the consultant, the exception in R.C. 102.03(A)(6) applies to the situation you have described. Because of the exception, you are not prohibited, after you are laid off by DAS, from assisting DAS with the development of MARCS as an employee of a consultant engaged by DAS.

Conclusion

As explained above, under the facts presented, you are not prohibited, after you experience an involuntary layoff from your position with DAS, from assisting DAS with the development of the MARCS as an employee of a consultant engaged by DAS pursuant to the exception to the Revolving Door Prohibition set forth in R.C. 102.03(A)(6).

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 17, 2003. The Commission commends you for requesting guidance before any actions were taken that could be prohibited by law.

This 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 contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

cc: Darryl Anderson, MARCS Program Manager
Department of Administrative Services

Deborah Archie, Chief Legal Counsel
Department of Administrative Services