

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

February 24, 2003

Informal Opinion 2003-INF-0224-2

Geoffrey Stern
Kegler, Brown, Hill & Ritter

Dear Mr. Stern:

The Ohio Ethics Commission received your request for an advisory opinion, submitted on behalf of your client, a consulting company, on December 31, 2002. In your letter, you ask whether the Ohio Ethics Law and related statutes prohibit your client from employing, in a management position, an individual who is a former management employee of a state board. You have explained that your client has a contract with the state board (board) by which the individual was formerly employed, and that the former state employee signed the contract.

At the outset, it should be noted that the Ohio Ethics Law and related statutes do not impose any restrictions, within the facts you have described, on your client. However, the law does impose restrictions on the former employee. This opinion will address those restrictions.

Brief Answer

As set forth more fully below, the Ohio Ethics Law and related statutes prohibit the former state employee from profiting from the contract between the state board and your client's company that he authorized while he was a state employee, but do not prohibit him from accepting employment with the company within the parameters described below. The former state employee is prohibited from profiting from the contract as it was initially awarded and as it was later amended. If the former employee is employed by your client, and does not profit from the contract he authorized, the Ethics Law prohibits the former state employee from representing your client, or any other party, before any public agency, including the state board by which he was formerly employed, on any matter in which he personally participated as an employee of the board.

Facts

You have explained that your client is a company engaged in consulting services, including dispute resolution, litigation support, risk management, project control, and scheduling services. Your client entered into a contract with the board to provide dispute resolution and schedule services and analysis. The contract was competitively solicited. The former employee signed the contract as a management employee for the board. The original amount of the contract was \$35,000. Subsequent to the individual's resignation from the board, the contract was amended to \$135,000. You have explained that \$135,000 is a very small portion of the client's receipts.

Post-Employment Restrictions

The Ohio Ethics Law and related statutes impose post-employment restrictions upon former public officials and employees. Under the facts you have presented, these prohibitions fall into three areas: (1) profiting from public contracts in specified situations; (2) representing parties before public agencies; and (3) releasing confidential information. All three of these prohibitions are applicable in the situation you have posed.

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

R.C. 2921.42(A)(3) provides that no public official shall knowingly:

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 an elected or appointed officer or employee of the state or any political subdivision. R.C. 2921.01(A). As an employee of a state board, the individual your client wishes to employ was a public official, and therefore is subject to the prohibitions of R.C. 2921.42(A)(3) for one year from the date he resigned from his position with the board.

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 the state, any of its political subdivisions, or any agency or instrumentality of either. The contract between your client and the board is a "public contract" for purposes of R.C. 2921.42, since it is a contract for the purchase or acquisition of dispute resolution and schedule services by the use of the board. See Ohio Ethics Commission Advisory Opinion No. 88-001. The fact that the contract was amended after the

former employee resigned from the board does not create a new contract between the board and your client.

For purposes of R.C. 2921.42(A)(3), a public contract will be deemed to have been "authorized" by a public official or board if the contract could not have been awarded without the approval of the official, the position that the official holds, or the board on which the official sits. See Adv. Ops. No. 87-004, 91-009, and 92-005. You have explained that the former state employee signed the contract while he was a management employee for the board. By signing the contract, the former employee "authorized" the contract. Therefore, the restriction in R.C. 2921.42(A)(3) applies, unless the contract was let by competitive bidding and was awarded to the lowest and best bidder. See Adv. Op. No. 91-009. You have said that the contract was competitively solicited, but it is not clear whether it was competitively bid and awarded to the lowest and best bidder. While a request for proposal (RFP) process has some competitive aspects, it is not a competitive bid.

Assuming that the contract was not competitively bid and awarded to the lowest and best bidder, R.C. 2921.42(A)(3) prohibits the former state employee from occupying a position of profit in the performance of the contract between your client and the board for a period of one year after he left his public position. However, R.C. 2921.42(A)(3) does not absolutely prohibit the former employee from accepting employment with your client so long as he does not profit, in any way, from the original or amended contract.

The Ethics Commission has held that the term "profit" as used in R.C. 2921.42(A)(3) connotes a pecuniary or financial gain or benefit. See Adv. Ops. No. 92-013 and 92-017. A "position of profit" must be definite and direct in nature to be prohibited by R.C. 2921.42(A)(3). Id. The Commission has stated that an employee who serves with a company that is awarded a public contract is deemed to profit from that 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 his position with the company is dependent upon the award of the contract; (3) the contract moneys would be used by the company to compensate him or as a basis for his compensation; or (4) he would otherwise profit from the contract. Adv. Op. No. 88-008.

In your letter, you have specifically stated that neither the establishment and operation of your client's consulting firm, nor the creation or continuation of the former employee's position, are dependent upon the contract. You have stated that, if your client employs the former employee, he would receive a salary plus financial incentives. None of the incentives would be related to the contract between your client and the board. Further, you have stated that, for at least one year from the date he resigned from his position with the board, the former employee's job duties would not be related to the contract between your client and the board. Finally, you state that there is no anticipation that the former employee would profit in any way from the consulting contract in question.

As noted above, R.C. 2921.42(A)(3) prohibits the former employee from profiting, in any way, from the contract (as amended) between the board and your client. Based on the information you have provided, and as long as the former employee does not receive any other kind of pecuniary benefit from the contract between your client and the board he formerly served, the former employee is not precluded from accepting general employment with your client's company.

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.

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 just before the agency with which he was previously employed. See Adv. Ops. No. 86-001, 87-001, and 92-005. 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." A "person," for purposes of R.C. 102.03(A)(1), has been interpreted by the Commission to include governmental agencies, individuals, corporations, business trusts, estates, trusts, partnerships, and associations, and would include, but is not limited to, the former state board by which the subject of your request was employed. See R.C. 1.59(C) and Adv. Ops. No. 82-002 and 89-003.

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." Adv. Op. 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 employee signs the communication. Adv. Ops. No. 86-001, 87-001, and 92-005.

The prohibition in R.C. 102.03(A) applies to any "matter" in which the official or employee personally participated. The term "matter" is defined in R.C. 102.03(A)(5) to include "any case, proceeding, application, determination, issue, or question." Therefore, 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 items as a dispute of special or public importance and a controversy submitted for consideration. Id. Any cases, decisions, investigations, projects, occurrences, problems, controversies, or other matters in which the former employee personally participated as a management employee of the board, regardless of the parties, are "matters" for purposes of R.C. 102.03(A)(1).

R.C. 102.03(A)(1) 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. As a management employee of the state board, who had the authority to sign contracts, the former employee is likely to have personally participated in a number of matters including, but not limited to, the contract between the state board and your client.

The one-year, post-employment restriction set forth in R.C. 102.03(A)(1) commences the date the former employee resigned from his position with the board. Adv. Ops. No. 81-002, 86-001, and 89-003. Therefore, R.C. 102.03(A)(1) prohibits the former employee, for a period of one year from the date he resigned from his position with the board, from representing your client, or other party, before any state or local agency, including the board by which he was employed, on any matter in which he personally participated while he was employed by the board. See Adv. Ops. No. 89-003, 91-009, and 92-005. You have stated that, for at least one year from the date he resigned from his position with the board, the former employee's job duties would not be related to the contract between your client and the board. R.C. 102.03(A)(1) would prohibit the former employee from representing your client with respect to matters involving the contract, but also applies to all matters in which the former employee participated, regardless of when such personal participation occurred during his public service. Adv. Op. No. 89-003. The former employee is not prohibited from representing your client or any other person, before any public agency on matters that arose after he left his position with the state agency or matters in which he did not personally participate as a management employee of the board.

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

Finally, the former employee should be aware of the restriction imposed by R.C. 102.03(B):

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that 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.

Pursuant to R.C. 102.03(B), the former employee is prohibited from disclosing or using, without appropriate authorization, any confidential information that he acquired in the course of his official duties as a management employee of the state board. No time limitation exists for this prohibition. Adv. Op. No. 88-009.

Conclusion

As set forth more fully above, the Ohio Ethics Law and related statutes prohibit the former state employee from profiting from the contract between the state board and your client's company that he authorized while he was a state employee, but do not prohibit him from accepting employment with the company within the parameters described below. The former state employee is prohibited from profiting from the contract as it was initially awarded and as it was later amended. If the former employee is employed by your client, and does not profit from the contract he authorized, the Ethics Law prohibits the former state employee from representing your client, or any other party, before any public agency, including the state board by which he was formerly employed, on any matter in which he personally participated as an employee of the board.

On a final note, depending upon the former employee and company involved in your question, and their interactions while he was an employee of the board, other provisions of the Ethics Law, particularly the conflict of interest provisions in R.C. 102.03(D), (E), and (F), may apply to your question. Those provisions could bar employment under specific circumstances. However, this opinion cannot consider or attempt to construe the application of those restrictions because you have not provided information about the interactions between your client and the former state employee before he resigned from his employment with the board.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on February 21, 2003. The Commission commends your client for requesting guidance before any actions were taken that could be prohibited by law.

Geoffrey Stern
February 24, 2003
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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,

A handwritten signature in cursive script, appearing to read "Jennifer A. Hardin".

Jennifer A. Hardin
Chief Advisory Attorney