

# OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

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April 14, 2004      Informal Opinion 2004-INF-0414-1

William D. Hayes, Ph.D.



Dear Mr. Hayes:

In a letter received by the Ohio Ethics Commission on December 31, 2003, you asked whether the Ethics Law and related statutes prohibit you, after you leave your position with the Ohio Department of Job and Family Services (ODJFS) and begin employment with the Health Policy Institute of Ohio (HPIO), from being involved in matters that may affect or be of concern to your former public employer.

### **Brief Answer**

As explained below, the Ohio Ethics Law and related statutes condition your ability to act in a representative capacity for HPIO or any other person after leaving ODJFS. In addition, the Ethics Law prohibits you from disclosing or using, without appropriate authorization, confidential information that you acquired in the course of your public service.

### **Facts—Your Position at ODJFS**

You state that, until January 16, 2004, you were an Assistant Deputy Director in the Office of Ohio Health Plans (OHP) within ODJFS. You state that OHP manages Ohio's Medicaid and Disability Medical Assistance Programs. You state that your duties at OHP involved supervising the bureau chiefs that manage five of OHP's seven bureaus: Health Plan Policy, Managed Health Care, Consumer and Program Support, Long Term Care Facilities, and Plan Operations. You also state that you were a member of OHP's executive committee and were involved in OHP's planning and policy activities.

### **Facts—The Health Policy Institute of Ohio**

You state that, on January 14, 2004, you became President of HPIO. You have explained that HPIO is a newly created non-profit organization that is designed to provide objective, well-developed, non-partisan information on health care issues. You state that HPIO is neither a lobbying nor a consumer advocacy organization. HPIO will not represent parties, such as providers, that have a direct material interest in policy issues.

You state that in order to achieve its purpose, HPIO will convene conferences, workshops, and forums on health care. In addition, HPIO will analyze legislation, draft reports, and organize advisory committees. HPIO staff will establish relationships with interested parties to determine HPIO's best role and activities to meet its goals.

You state that various Ohio foundations that are interested in creating a good source of information on health care issues have funded HPIO. You also state that, for the next few years, HPIO will not seek any financial relations with OHP, ODJFS, or any other government agency of the state.

### **Job Seeking and Post-Employment Law**

The Ohio Ethics Law limits the manner in which public officials and employees seek new employment opportunities. Ohio Ethics Commission Advisory Opinion No. 82-002. These limitations would have applied to you as an employee of ODJFS. However, at the time you sought an advisory opinion from the Commission, you had already accepted employment with HPIO. Therefore, this opinion will not consider that aspect of the Ethics Law.

Assuming that you obtained the position with HPIO in a legal and proper manner, the statutes under the Ethics Commission's authority that impose post-employment restrictions will limit the activities that you may perform for HPIO as its president now that you have left your public position. These restrictions fall into three areas: (1) representing parties before public agencies; (2) releasing confidential information; and (3) profiting from public contracts in specified situations.

### **Revolving Door—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 persons 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 term "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is an employee of any public agency. See R.C. 102.01(B) and (C). As a former employee of ODJFS, you are a former "public official or employee," subject to the prohibitions of R.C. 102.03(A)(1).

Accordingly, R.C. 102.03(A)(1) prohibits you, for one year from the date you left your employment with ODJFS, from representing any person on any matter in which you personally participated while you were employed by ODJFS. Adv. Ops. No. 91-009 and 92-005.

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." Examples of the types of activities that would fall within the definition of the term "represent," for purposes of this section, were described by the Ethics Commission in Advisory Opinion No. 86-001 as:

[A]ctivities ranging from an appearance on behalf of a private client in a formal proceeding or meeting to informal "lobbying" of agency personnel by telephone or in person. It also includes written communications ranging from formal documents and filings to informal letters and notes. Even if the attorney or consultant does not sign the documents, letters, or notes, the prohibition would apply if she prepared the communication. If she merely consulted with the attorneys or other personnel who prepared the documents, letters, or notes, the prohibition would not apply.

The Ethics Commission has determined that the term "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); Adv. Ops. No. 82-002 and 89-003. In your situation, this would include HPIO, any of its clients, and any other person.

R.C. 102.03(A) prohibits a former public official or employee from "representing" a new employer, client, or any other party before any public agency on a matter in which he personally participated, and not just before the agency with which he was previously employed. 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."

The prohibition in R.C. 102.03(A) applies to any "matter" in which the public official or employee "personally participated" through "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion." The term "matter" is defined, for purposes of R.C. 102.03(A)(1) and (3), to include "any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments." R.C. 102.03(A)(5). The term "matter" is broadly defined under R.C. 102.03(A)

and includes any issue or question, as well as particular cases, proceedings, applications, and determinations. Adv. Ops. No. 91-009 and 92-005. In Advisory Opinion No. 99-001, the Ethics Commission further defined "matter" as follows:

"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. "Matter" also includes such abstract items as a dispute of special or public importance and a controversy submitted for consideration. It is also apparent, however, that the term "matter" cannot be interpreted so broadly as to include a general subject matter.

In your situation, the term "matter" would include any specific occurrence or problem in which you were involved while performing your duties at ODJFS concerning OHP's planning and policy activities and supervision of the bureau chiefs that manage OHP's seven bureaus.

You have stated that HPIO is neither a lobbying nor a consumer advocacy organization and that it will not represent parties, such as providers, that have a direct material interest in policy issues. However, the prohibition imposed by R.C. 102.03(A)(1) extends beyond making formal or informal appearances before a public agency. Representation also includes written or oral communication, including letters, notes, e-mails, telephone calls, and informal conversations with any public agency, on behalf of the HPIO, its members, or any other person. Adv. Op. No. 86-001.

Therefore, R.C. 102.03(A) prohibits you, for a period of one year after leaving state employment, from representing HPIO, its officers and employees, or any other person before any public agency on any specific occurrence or problem in which you personally participated while you were employed by ODJFS, except the proposal, consideration, or enactment of rules. This prohibition extends for one year after you leave your public employment. You are not prohibited from making any representation on behalf of HPIO on a matter that was outside your purview, or a new matter that arose after you left ODJFS.

If it were to be necessary for someone to represent HPIO before public agencies on matters in which you personally participated as an ODJFS Assistant Deputy Director, the representation would have to be performed by another person. You are not prohibited from consulting with that person regarding the representation; however, for one year, you are prohibited from engaging in the representation yourself. Adv. Op. No. 86-001. Considering that OHP and HPIO may have common interests, concerns, and goals related to health care issues, you must exercise diligence to assure that you comply with the prohibitions of R.C. 102.03(A).

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

Division (B) of Section 102.03 of the Revised Code reads as follows:

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 this section, you are prohibited from disclosing or using, without appropriate authorization, any confidential information that you acquired in the course of your official duties as Assistant Deputy Director of ODJFS. No time limitation exists for this prohibition. Adv. Op. No. 88-009. It is effective while you serve in the public position and after you leave public employment. Id.

**Having a Position of Profit in a Public Contract—R.C. 2921.42(A)(3)**

Division (A)(3) of Section 2921.42 of the Revised Code 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 any employee of the state. R.C. 2921.01(A). As a former employee of ODJFS, you were a "public official" for purposes of R.C. 2921.42(A)(3) and are subject to its prohibitions for one year after you left your public position.

R.C. 2921.42(A)(3) would prohibit you from profiting from any contract awarded by ODJFS if you, or a body on which you served as a member, "authorized" the contract. A grant awarded by a public agency to a non-profit corporation is a public contract for purposes of R.C. 2921.42. Adv. Op. No. 84-001.

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In your letter to the Ethics Commission, you state that various Ohio foundations are funding HPIO and that, for the next few years, HPIO will not seek any financial relations with ODJFS or any other agency of state government. Based on the facts that you have provided in your letter, it appears that the prohibition in R.C. 2921.42(A)(3) does not apply to your situation and need not be addressed. If HPIO did receive any grant or contract from ODJFS while you were employed at ODJFS, and you participated in the authorization of the grant or contract, please contact this Office for further guidance.

### **Conclusion**

As explained above, the Ohio Ethics Law and related statutes condition your ability to act in a representative capacity for HPIO or any other person after leaving ODJFS. In addition, the Ethics Law prohibits you from disclosing or using, without appropriate authorization, confidential information that you acquired in the course of your public service.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 7, 2004. The opinion is based on the facts presented. It 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,

A handwritten signature in cursive script that reads "John Rawski".

John Rawski  
Staff Attorney