

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

September 29, 2006 Informal Opinion 2006-INF-0929-3

Gordon Proctor
[REDACTED]

Dear Mr. Proctor:

In a letter received by the Ohio Ethics Commission on August 29, 2006, you have explained that you are the Director of the Ohio Department of Transportation (ODOT). An executive recruiter for the Mid-Ohio Regional Planning Commission (MORPC) has asked you to become a candidate for the position of its Executive Director. You have asked whether the Ohio Ethics Law and related statutes prohibit you from seeking or accepting the position.

Brief Answer

As explained below, because you approved public contracts from ODOT to MORPC during your service as ODOT Director, and because the position of MORPC Executive Director would involve substantial activities that are closely related to your existing authority as ODOT Director, the Ohio Ethics Law and related statutes prohibit you from seeking or accepting the position of Executive Director of MORPC during your public service and for one year thereafter.

Facts

You explain that MORPC is a non-profit organization comprised of local governments in Central Ohio that plans transportation and development programs. Local governments pay dues and provide volunteer appointees to MORPC who serve rotating terms on its governing board. You state that ODOT passes federal transportation planning funds to MORPC. In addition, ODOT and the Federal Highway Administration (FHA) audit the performance of MORPC to ensure that these funds are properly spent.

You also state that, as the ODOT Director, you chair the Transportation Review Advisory Council (TRAC). TRAC is a nine-member body that governs the process used by ODOT to select major transportation capacity projects. You have recommended that TRAC fund statewide projects, including projects in the MORPC region. As the chairman of TRAC, you have also voted on the status of projects in the MORPC region.

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 in R.C. 2921.01(A) to include any appointed officer, or employee, or agent of the state. As the ODOT Director, you are subject to the prohibitions imposed by R.C. 2921.42(A)(3) for twelve months after you leave your public position.

A “public contract” is defined for purposes of R.C. 2921.42(G)(1)(a) to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for a political subdivision of the state. The federal transportation planning funds that ODOT passes to MORPC and the funds for projects provided through TRAC fall within the definition of a “public contract.” See Ohio Ethics Commission Advisory Opinion No. 92-014 (a grant from ODOT to MORPC that is funded through federal moneys, to be used to encourage commuter ridesharing, is a public contract). For purposes of R.C. 2921.42(A)(3), a public official or board “authorizes” a contract in any situation where the contract could not have been awarded without the approval of the official, or the office or position in which the public official serves, or the board on which he serves. Adv. Ops. No. 88-008, 91-009, and 92-017.

As set forth above, you state that ODOT passes federal transportation planning funds to MORPC and that, as the chairman of TRAC, you have recommended that TRAC fund projects in the MORPC region. Because you participated in the authorization of grants to MORPC, either as the Director of ODOT or as the chairman of TRAC, you are prohibited from profiting from the award of these grants within one year of the date you leave your position with ODOT.

The Ethics Commission has held that the term “profit” as used in R.C. 2921.42(A)(3) connotes a pecuniary gain or benefit. Adv. Ops. No. 92-013 and 92-017. In the instant situation, if you were to become the Executive Director of MORPC, you would profit from grants awarded to MORPC where: (1) the establishment or operation of MORPC is dependent upon receipt of the grants; (2) the creation or continuation of your position with MORPC is dependent upon the award of the grants; (3) MORPC would use funds from the grants to compensate you or as a basis for your compensation; or (4) you would otherwise profit from the award of the grants to MORPC. See Adv. Ops. No. 87-004, 88-008, and 89-006.

As the Executive Director of MORPC, you would be in a position where you would perform services pertaining to pending transportation projects that would not have been possible but for, or are currently dependent upon, the receipt of the grants made by MORPC or TRAC. Thus, R.C. 2921.42(A)(3) bars you from accepting the position of Executive Director of MORPC during the first twelve months after you leave your position as Director of ODOT.

The Revolving Door Prohibition—R.C. 102.03(A)(1)

R.C. 102.03(A)(1), the “Revolving Door” prohibition of the Ohio Ethics Law, 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)(1) 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, 21 (1979). Referring to the revolving door law, the Court in State v. Nipps held: “The state has a substantial and compelling interest to restrict unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government.”

As the ODOT Director, you are subject to the revolving door prohibition for twelve months after you leave your public position. R.C. 102.01(B) and (C). A “person,” for purposes of R.C. 102.03(A)(1), includes a non-profit corporation and would include MORPC, and the local governments that participate in its operation. 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.” (Emphasis added.) Adv. Op. No. 86-001. The prohibition in R.C. 102.03(A)(1) applies to any “matter” in which you personally participated. The term “matter” is defined in R.C. 102.03(A)(5) to include “any case, proceeding, application, determination, issue, or question,” and can be concrete, such as a specific problem, or abstract, such as a policy determination. Adv. Op. No. 99-001.

R.C. 102.03(A) prohibits a public official or employee, during or for one year after public employment, from representing any person on a matter in which he personally participated, before any public agency, and not just before the agency with which he was previously employed. Adv. Ops. No. 86-001, 87-001, and 92-005. This would include ODOT, and any other public agency at the state or local level.

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 explained that "personal participation" in a matter 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. Ops. No. 86-001 and 99-001.

R.C. 102.03(A)(1) prohibits you from representing MORPC before any public agency, including, but not limited to, ODOT, on any transportation related matters in which you personally participated as the ODOT Director, either through actions taken by yourself or through supervision of ODOT staff, including transportation capacity projects undertaken by TRAC in which you participated as the Chairman of TRAC.

Because the position of Executive Director of MORPC would involve substantial activities that are closely related to your existing authority as the Director of ODOT, the Ethics Commission concludes that R.C. 102.03(A)(1), in addition to R.C. 2921.42(A)(3), bars you from accepting the position of Executive Director of MORPC during the first twelve months after you leave your position as Director of ODOT.

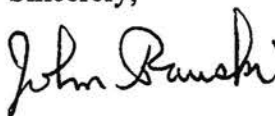
Conclusion

As explained above, because you approved public contracts from ODOT to MORPC during your service as ODOT Director, and because the position of MORPC Executive Director would involve substantial activities that are closely related to your existing authority as ODOT Director, the Ohio Ethics Law and related statutes prohibit you from seeking or accepting the position of Executive Director of MORPC during your public service and for one year thereafter.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 29, 2006. The Commission commends you for requesting guidance before taking any actions that could be prohibited by law.

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,



John Rawski
Advisory Staff Attorney

August 28, 2006

Mr. David E. Freel
Executive Director
Ohio Ethics Commission
8 East Long St., 10th Floor
Columbus, Ohio 43215

OHIO ETHICS COMMISSION
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Dear Mr. Freel,

Thank you for the time you provided me on the telephone today. I appreciate your effort to direct me to pertinent past advisory opinions.

My question pertains to the appropriateness of I being a candidate for the executive director of the Mid-Ohio Regional Planning Commission. MORPC is a non-profit organization comprising local governments in Franklin, Delaware and Ross Counties. It conducts planning for transportation, air quality, water quality and housing programs. It is collectively overseen by its 42 local governments who provide dues and volunteer appointees to serve rotating terms on its decision-making board.

MORPC and ODOT interact frequently. ODOT passes through federal transportation planning funds to MORPC. ODOT and the Federal Highway Administration audit MORPC's performance and practices to ensure that it spends federal funds in accordance with statutes. MORPC also seeks projects from the Transportation Review Advisory Council, a nine-member body which governs ODOT's process for selecting major transportation capacity projects. As director of ODOT, I chair the TRAC.

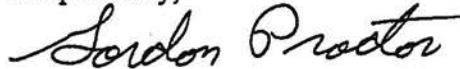
Personally, I have had no direct involvement in auditing MORPC or otherwise approving its activities. I have, however, made recommendations to the TRAC as to which projects to fund statewide, including those in the MORPC region. As a TRAC member I also vote on those projects' status.

My interaction with MORPC has been no more or no less involved that my interaction with any of other 15 metropolitan planning organizations in Ohio and I have had no detailed conversations with MORPC about this position. MORPC's executive recruiter

Mr. David Freel
Ohio Ethics Commission
August 28, 2006

has contacted me to determine if I would like to be a candidate. I am concerned about complying with the letter and spirit of the state's ethics statutes so I would appreciate your guidance on this matter.

Respectfully,

A handwritten signature in cursive script that reads "Gordon Proctor".

Gordon Proctor
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