

OHIO ETHICS COMMISSION

Sarah M. Brown, *Chairman*
Robert Browning, *Vice Chairman*



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.ohio.gov

David E. Freel, *Executive Director*

June 27, 2007

Informal Opinion 2007-INF-0627

The Honorable Robin N. Piper
Butler County Prosecuting Attorney
Butler County Government Services

Dear Prosecutor Piper:

On May 29, 2007, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you asked whether the Ethics Law and related statutes prohibit a former member of the Board of Commissioners of Butler County (county), Michael A. Fox, from soliciting and accepting employment as the Executive Director of the county Department of Jobs and Family Services (DJFS).

In your request for an advisory opinion, you included your analysis of the question. Based on your application of the facts to the relevant provisions of law, you have determined that the former county commissioner is not prohibited from seeking and accepting employment as the Executive Director of the county DJFS.

At the outset, the Ethics Commission cannot interpret or enforce provisions of the Ohio Revised Code other than the Ethics Law and related statutes (Chapter 102. and R.C. 2921.42 and 2921.43). Therefore, this opinion considers the application of those laws to your question. While the citizens in Butler County are interested in a fair and open process in the selection of the Executive Director for the DJFS, this opinion can only address the question of whether the former commissioner can be a candidate for or, if he were chosen by the county commissioners to do so, serve as the person official carrying out these important responsibilities.

Brief Answer

As explained below, based on the facts and circumstances you have presented, the Commission agrees with your analysis and concludes that the former county commissioner is not prohibited from seeking employment as the Executive Director of the county DJFS. The county commissioners and others required to be involved must independently determine whether the former county commissioner is a viable candidate and whether to select him from among the candidates for the position in order for the former county commissioner to serve as the Butler County DJFS Executive Director.

Facts

R.C. 5153.02 requires that each county establish a public children services agency. The statute sets forth three alternate methods for the operation of the agency: (1) a county children services board; (2) a county department of jobs and family services; or (3) a private or government agency designated under R.C. 307.981. In each county, the commissioners designate the method for the operation of the county children services agency. R.C. 307.981(C).

On September 18, 2006, the county commissioners passed a resolution to appoint an independent citizen task force to advise it on the best of the three methods for the operation of the county children services agency. At the time of the resolution, the county Children Services Board (CSB) was designated as the county children services agency. You stated that the former county commissioner, in his official role, voted in favor of this resolution.

The task force recommended that the county CSB no longer be designated as the county children services agency. On March 12, 2007, as required by law, the county commissioners passed a resolution to notify the county CSB that it was considering re-designating the method for the operation of the county children services agency. See R.C. 307.981(H). You stated that the former county commissioner voted in favor of this resolution.

On May 9, 2007, the former county commissioner announced at a news conference that, prior to the commissioners' meeting scheduled for May 14, he would resign from his position as county commissioner. He stated that the purpose of his resignation was to enable him to seek employment as the Executive Director of the county DJFS if the county commissioners passed a resolution at its meeting to re-designate the children services agency from a CSB to a DJFS. On May 14, 2007, prior to the meeting of the county commissioners, the former county commissioner submitted an e-mail stating that he was resigning from his elected position.

At its meeting on May 14, 2007, the county commissioners passed a resolution re-designating the county children services agency from a CSB to a DJFS and providing for the hire of an Executive Director to operate the county DJFS. You have concluded that, because the former county commissioner had resigned from his position prior to the meeting, he did not participate in the enactment of this resolution.

The Revolving Door Law—R.C. 102.03(A)

The Revolving Door Law, set forth in 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 former county commissioner is a "former public official" subject to R.C. 102.03(A)(1) for one year from the date he resigned (May 14, 2007). R.C. 102.01(B) and (C).

For twelve months after the former county commissioner left his public position, R.C. 102.03(A)(1) prohibits him from representing any person on any matters in which he "personally participated." As a county commissioner, he would have personally participated in numerous matters involving the CSB. Therefore, if the former county commissioner's employment as Executive Director of the DJFS were to be employment with a *separate* public agency, R.C. 102.03(A)(1) would significantly compromise his ability to perform the duties of that position. For example, he would be prohibited from representing the DJFS before the county commissioners, the General Assembly, or any other public agency, on any matters in which he personally participated as a commissioner. However, there is an exception to the prohibition:

Nothing contained in division (A) of this section [R.C. 102.03] shall prohibit, during such period [one year after leaving public office] 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 he was employed or on which he served. (Emphasis added).

R.C. 102.03(A)(6). The exception of R.C. 102.03(A)(6) is available to a former public official or employee only where the official or employee is representing, assisting, or acting in a representative capacity for his former public agency. Ohio Ethics Commission Advisory Opinions No. 91-005 and 91-009.

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 (1979), 66 Ohio App.2d 17, 21 (1979). 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 official or former official is retained to represent or assist the public agency by which he had been employed. But see R.C. 102.03(D) and (E) (discussed below) and Adv. Op. No. 87-008 (a member of a governing board of a public agency is prohibited from accepting employment with the public agency, even after he leaves the board position, if he used his position while on the board to secure the employment).

A county commissioner serves all boards, divisions, departments, and offices of the county. See Adv. Op. No. 91-005 (the exception in R.C. 102.03(A)(6) applies to a former county commissioner seeking employment with a joint solid waste district in which the county is a participant). The designation of the DJFS as the county children's services agency and the duties and responsibilities of the Executive Director have been the subject of much public discussion. The exception of R.C. 102.03(A)(6) enables the former county commissioner to be considered for and possibly employed as the Executive Director of the county DJFS unless the employment is prohibited by another provision of the Ethics Law and related statutes.

Soliciting or Accepting Anything of Value—R.C. 102.03(D) and (E)

R.C. 102.03(D) and (E) read as follows:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.
- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

A county commissioner is subject to R.C. 102.03(D) and (E). R.C. 102.01(B) and (C); Adv. Op. No. 88-003. The term "anything of value" includes the promise of future employment, money, and every other thing of value, including employment with a public agency and the compensation derived therefrom. R.C. 1.03 and R.C. 102.01(G); Adv. Op. No. 88-002.

R.C. 102.03(D) and (E) prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his position to secure anything of value from any party, private or public, that is regulated by, interested in matters before, or doing or seeking to do business with, the agency he serves, or where the receipt of such a thing of value could otherwise impair his objectivity and independence of judgment with regard to his official decisions and responsibilities. Adv. Ops. No. 86-011 and 89-006. While R.C. 102.03(D) prohibits a public official from using his authority or influence to secure an improper thing of value, R.C. 102.03(E) prohibits merely soliciting an improper thing of value. Adv. Op. No. 86-011.

In Advisory Opinion No. 87-008, the Commission considered whether the Ethics Law prohibits an elected official from seeking employment with the public agency he serves. In that opinion, the Commission stated:

Division (D) of Section 102.03 . . . prohibits a school board member from voting, deliberating, discussing, or otherwise using or attempting to use his official authority or influence to secure for himself employment with the school district. (Citations omitted). Division (E) of Section 102.03 prohibits a board member from merely soliciting employment with the board. He may not seek such employment from other board members, board employees, or other persons of authority or influence. . . .

R.C. 102.03(D) and (E) . . . prohibit a member of a board of education from taking action, formally or informally, to solicit or secure employment with the school district. He may not solicit, vote, deliberate, participate in discussions, or otherwise use or attempt to use the authority or influence of his office to secure, a position.

However, the Commission also concluded that a former public official was not prohibited from soliciting employment from his former public agency after he resigned from his public position. Adv. Op. No. 87-008.

Prior to his resignation on May 14, 2007, the former county commissioner was subject to the prohibitions imposed by R.C. 102.03(D) and (E) and the precedent established by the Ethics Commission in Advisory Opinion No. 87-008. While he served as a county commissioner, he was prohibited from using the authority or influence of his position, formally or informally, to solicit or secure employment with the county DJFS.

Even though the former county commissioner made his interest in securing the position publicly known at a news conference on May 9, 2007, it must be noted that, at the time of this announcement, the Executive Director position did not exist. In your letter, you write:

Mr. Fox has publicly stated, in essence, that he is aware of these statutory restrictions on his conduct as a county commissioner and that he refrained from in any way using the influence of his office to attempt to influence the other members of the board concerning his desire to be appointed to this position. We are unaware of any evidence to the contrary.

The advisory guidance provided by the Ethics Commission to any requester, such as the former county commissioner, is based on the facts disclosed, and provides protection under the law only to the extent those facts are true and complete. Based upon the representation that the former county commissioner has not used his former position to secure the job, R.C. 102.03(D) and (E) do not prohibit the former county commissioner from submitting a resume and competing for the position of Executive Director of the county DJFS. If the county commissioners independently conclude that the former county commissioner should be hired to serve as Executive Director of the county DJFS, the Ethics Law does not prohibit him from accepting the position.

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.

A county commissioner is subject to the prohibitions of R.C. 2921.42. Adv. Op. No. 91-005.

The employment of an individual by a public agency is a “public contract”. Adv. Op. No. 90-010. The salary that a public employee receives under his public contract for employment is a “position of profit” under the contract because the word “profit” connotes a pecuniary or financial gain or benefit. A public official who serves on a legislative body, commission, or board is subject to the prohibition of R.C. 2921.42(A)(3) regardless of whether he participates in

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discussions or votes on the public contract as a member of the legislative body, commission, or board. Adv. Ops. No. 88-006, 88-008, and 91-005.

In Advisory Opinion No. 87-008, the Ethics Commission determined that R.C. 2921.42 (A)(3) prohibits, for a period of one year, a member of a board of education from being employed by the board if the board of education authorized his employment while he was still a member thereof. Advisory Opinion No. 87-008 further explains that R.C. 2921.42(A)(3) prohibits a board member from accepting employment by the school district and subsequently resigning from his position of board member to serve the board as an employee.

In this instance, however, the former county commissioner had resigned from his position as a commissioner prior to the meeting of the county commissioners that established the county DJFS as the designated county children services agency and created the position of Executive Director. Because he was not a member of the board of county commissioners when the decision was made, R.C. 2921.42(A)(3) does not prohibit the former county commissioner from being employed as the Executive Director of the county DJFS if the county commissioners conclude that the former county commissioner should be hired for the position.

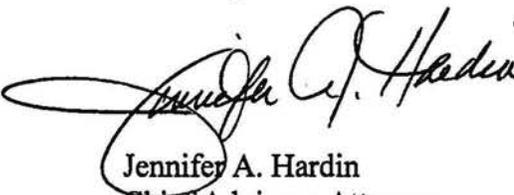
Conclusion

As explained above, based on the facts and circumstances you have presented, the Commission agrees with your analysis and concludes that the former county commissioner is not prohibited from seeking employment as the Executive Director of the county DJFS. The county commissioners and others required to be involved must independently determine whether the former county commissioner is a viable candidate and whether to select him from among the candidates for the position in order for the former county commissioner to serve as the Butler County DJFS Executive Director.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on June 22, 2007. The Commission commends the county and former commissioner for requesting guidance before any actions that are prohibited by law were taken.

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,



Jennifer A. Hardin
Chief Advisory Attorney