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March 5, 2010

Informal Opinion 2010-INF-0305

Michael A. Dolan
[REDACTED]

Dear Mr. Dolan:

On October 8, 2009, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you are currently employed by the Ohio Lottery Commission (OLC) as a deputy director and had previously served as OLC Executive Director until you resigned from that position on August 24, 2009. You have asked questions regarding the application of the post-employment restrictions of the Ohio Ethics Law and related statutes.

Specifically you have asked whether you are prohibited from being employed by or representing: (1) an OLC vendor, whether the contract is competitively bid and/or approved by the state Controlling Board; (2) a party seeking to do business with OLC; or (3) an OLC licensee. You also asked whether you are prohibited from being employed by a law firm or consulting firm that represents a vendor of OLC.

Brief Answer

As explained below, in seeking possible employment with an OLC vendor or licensee, the Ethics Law requires that you withdraw from matters at OLC involving those parties. For twelve months after leaving the OLC, you are prohibited from communicating, formally or informally, with OLC, or any other state or local public agency, on behalf of any person, on any matter in which you personally participated during your public employment as either executive director or deputy director of the Lottery Commission. These restrictions are not affected by whether the contracts were competitively bid.

In addition, if you participated in authorizing public contracts for OLC, then R.C. 2921.42(A)(3) prohibits you from being compensated by a vendor from the proceeds of the contract or otherwise profiting from the contract, unless the contract was let by competitive bidding to the lowest and best bidder. Further, you are prohibited from participating in the

authorization of any OLC contract to any person or entity with which you are discussing, or plan to discuss, future employment.

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

As a deputy director of the OLC, you are a “public official or employee” subject to R.C. 102.03(D) and (E), which read:

- (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.

See R.C. 102.01(B) and (C); Ohio Ethics Commission Advisory Opinion No. 87-007.

The term “anything of value” has “the same meaning as provided in section 1.03 of the Revised Code.” R.C. 102.01(G). R.C. 1.03 provides that “anything of value” includes: “[a]ny promise of future employment” and “every other thing of value.”

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his position to secure anything of value if the thing of value impairs his objectivity and independence of judgment with regard to his official decisions and responsibilities. Adv. Ops. No. 86-011 and 89-006. By contrast, R.C. 102.03(E) prohibits a public official from merely soliciting or accepting a thing of value that can have a substantial and improper influence on the official or employee, even if he did not use his position to secure it. Adv. Op. No. 86-011.

R.C. 102.03(D) and (E) prohibit a public official or employee from seeking employment with a party doing business or seeking to do business with, interested in matters before or regulated by his public agency, unless he is able to fully withdraw from all decision-making or discretionary matters that involve the party. Adv. Op. No. 82-002. In order to withdraw from these matters, the public employee’s supervisor must be informed of his withdrawal. The supervisor must then either handle the matter or reassign it to another official or employee. Adv. Ops. No. 92-004 and 92-008.

Application of Precedent

Therefore, while serving as an OLC deputy director, you are prohibited from seeking employment with an OLC vendor, licensee, or other person or entity that is seeking to do

business with, interested in matters before, or regulated by OLC. In order to apply for or negotiate future employment with these parties, you would be required to withdraw from matters involving them. If you accept employment with any of these parties, you must continue to withdraw from matters affecting them for the remainder of your time at the OLC. (In a telephone conversation on February 3, 2010, you notified the Commission that your employment with the OLC ended on December 31, 2009.)

Revolving Door Law—R.C. 102.03(A)(1)

You are also subject to R.C. 102.03(A)(1), the Revolving Door Law, which reads:

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.

A “matter” includes “any case, proceeding, application, determination, issue, or question.” R.C. 102.03(A)(5). A “matter” can include concrete items, such 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. Adv. Op. No. 99-001. A “matter” can also include a more abstract item, such as a dispute of special or public importance and a controversy submitted for consideration. *Id.* Please note that a “matter” includes an issue or question, and could be presented as a policy or procedure that the official created, implemented, interpreted, or enforced in his or her public position. This is true even if the official or employee did not personally participate on that issue or question with the specific person, entity, or client who approaches him for representation.

However, “matter” is not so broadly applied as to include a general subject matter. *Id.* R.C. 102.03(A)(1) also does not prohibit a former public official or employee from representing an employer or client on wholly new matters or matters in which he had not participated as a public official or employee. Adv. Op. No. 84-005.

“Personal participation” includes decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion, including supervision or general oversight over other personnel in their work on a matter. R.C. 102.03(A); Adv. Ops. No. 86-001 and 91-009. A former public official or employee who reviewed and wrote agency policies and procedures, reviewed and evaluated requests from constituents, or represented the agency in legal matters, has “personally participated” in all of these matters. A public official or employee who exercises supervision or general oversight over subordinate personnel is considered to have personally participated in any matter that the personnel participated in for purposes of the prohibition. Adv. Op. No. 86-001.

The term “represent” is defined to include “any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person.” R.C. 102.03(A)(5); 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.

It is important to note that R.C. 102.03(A)(1) prohibits the former official or employee from representing clients or others not only before the public agency he formerly served, but before any public agency. This would include the governor’s office, the general assembly, the courts, all state departments, boards, and commissions, and any other public agency at the state or local level.

The one-year period of the restriction dates from the day the official or employee leaves public service, not from the day he participated in the matter. Adv. Op. No. 89-009. Even if the official or employee personally participated in a specific matter five years before leaving his public position, he is prohibited from representing any person on that matter within one year of leaving public service.

Application of Precedent

R.C. 102.03(A)(1) does not prohibit you from being employed with any entity, but rather prohibits the actions you may take on behalf of your new employer or clients. Therefore, during your current employment and for twelve months after leaving the OLC, you are prohibited from communicating, formally or informally, with OLC, or any other state or local public agency, on behalf of any person, on any matter in which you personally participated during your public employment with the Lottery Commission. Adv. Op. No. 99-001 and 2004-04. The term “person” would include, but not be limited to: (1) a vendor; (2) a party seeking to do business with; or (3) a licensee of the OLC.

This restriction would apply to “matters” in which you “personally participated” while serving as either OLC executive director or deputy director. *Please note that a “matter” includes an issue or question, such as a policy or procedure you created, implemented, interpreted, or enforced as OLC Executive Director or Deputy Director.* Even if you did not personally participate on that issue or question with the specific person, entity, or client who approaches you for representation, R.C. 102.03(A)(1) prohibits you from representing the person, entity, or client on the underlying “matter.”

Where your role, as either Executive Director or Deputy Director, was to implement the policies and decisions of the OLC, in any specific matter, your activities would involve the substantial exercise of administrative discretion and would be “personal participation” in that matter. In addition, in those specific matters where you exercised supervision or general oversight over OLC personnel, you are considered to have personally participated in those matters through supervision.

The twelve-month period of the restriction dates from the day you leave public employment at OLC, not from the day you participated in the matter or from the date you stepped down as executive director. Note that, even if you personally participated in a specific matter early in your service as the OLC executive director, you are prohibited from representing any person on that specific matter within one year of leaving public service as a deputy director at OLC.

Representation includes engaging in activities such as attending meetings with any public officials or employees, preparing or sending, letters, documents, or e-mails to any public officials or employees, and having informal discussions with any public officials and employees. This prohibition applies to you acting as: (1) an attorney representing a client; (2) a consultant in a non-legal matter, or (3) an employee of a company or law firm representing your employer.

Because you served as both the executive director and a deputy director of OLC, if you seek to be employed by, or provide consulting services to, an OLC vendor or licensee, it is likely that you have personally participated in many matters involving these parties. Therefore, the revolving door restriction would significantly impair your ability to represent parties before any public agencies in Ohio until a year after you leave your position with OLC.

R.C. 102.03(A)(1) does not prohibit you from representing an employer or client on wholly new matters or matters in which you had not participated as a public official or employee. In addition, R.C. 102.03(A)(1) does not prohibit you from representing a new employer or client on matters before a private organization or before any public entity located outside of the state of Ohio. If you were to accept employment with an OLC vendor, someone seeking to do business with OLC, or any licensee of OLC, please consult with the Ohio Ethics Commission with further questions about the application of the law to specific activities.

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

You are subject to R.C. 2921.42(A)(3), which states that, for one year after leaving public service, no former public official shall knowingly:

[O]ccupy any position of profit in the prosecution of a public contract authorized by the public official or by a legislative body, commission, or board of which the public official was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

The prohibition of R.C. 2921.42(A)(3) is pertinent whenever a former public official seeks employment with a party that has contracts with his former public agency. Adv. Op. No. 95-004.

The term “public contract” is defined 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. R.C. 2921.42(I)(1)(a). A public official is considered to have authorized a public contract 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. Adv. Ops. No. 88-008 and 91-009.

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. A “position of profit” that is prohibited under Division (A)(3) must be definite and direct in nature. Adv. Ops. No. 88-008 and 92-008. The Ethics Commission has held that a public official will be deemed to profit from a public contract if any of the following apply: (1) the establishment or operation of the company with which the official is employed is dependent upon receipt of the contract; (2) the creation or continuation of the official’s position with the company is dependent upon the award of the contract; (3) the contract moneys would be used by the company to compensate the official or as a basis for the official’s compensation; or (4) the official would otherwise profit from the contract. Adv. Ops. No. 87-004 and 88-008.

Application of Precedent

If you were involved in the authorization of OLC contracts, as either executive director or deputy director, then R.C. 2921.42(A)(3) will apply to you regarding any contract unless the “contract was let by competitive bidding to the lowest and best bidding.” For example, R.C. 2921.42(A)(3) would prohibit you from being compensated by a vendor from the proceeds of an OLC contract, or otherwise profiting from the contract in the manners described above, if you participated in the authorization of the contract either as OLC Executive Director or Deputy Director.

While the application of this restriction depends on whether the contract was competitively bid, many contracts reviewed by the Controlling Board are not competitively bid.

Confidentiality—R.C. 102.03(B)

R.C. 102.03(B) prohibits you from disclosing or using, without appropriate authorization, any confidential information that you acquired in the course of your official duties with OLC. For example, if you are privy to confidential information about projects that OLC intends to pursue or vendors with which it will contract, you are prohibited from using that information in your search for private employment. There is no time limitation associated with this prohibition; you are also prohibited from using or disclosing confidential information acquired while employed at OLC after you leave your public employment. Adv. Op. No. 88-009.

Other Issues

Because you are an attorney, your questions may also raise issues under the Ohio Rules of Professional Conduct. See, e.g., Rule 1.11. For guidance concerning these Rules, you should contact the Board of Commissioners on Grievances and Discipline for the Supreme Court of Ohio.

You have asked to what extent the recent injunction issued by the Federal District Court in Cincinnati limits or suspends the Revolving Door Law. The injunction enjoined enforcement of R.C. 102.03(A)(4), which prohibits lobbying activities by former members of the Ohio General Assembly for one year after leaving office, pending a final decision of the Court. Neither R.C. 102.03(A)(4), nor the injunction specifically regarding the application of R.C. 102.03(A)(4), applies to your questions because you are not a current or former member of the Ohio General Assembly.

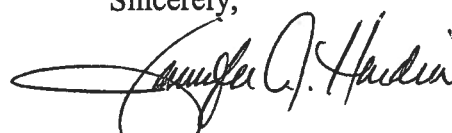
Conclusion

As explained above, in seeking possible employment with an OLC vendor or licensee, the Ethics Law requires that you withdraw from matters at OLC involving those parties. For twelve months after leaving the OLC, you are prohibited from communicating, formally or informally, with OLC, or any other state or local public agency, on behalf of any person, on any matter in which you personally participated during your public employment as either executive director or deputy director of the Lottery Commission. These restrictions are not affected by whether the contracts were competitively bid.

In addition, if you participated in authorizing public contracts for OLC, then R.C. 2921.42(A)(3) prohibits you from being compensated by a vendor from the proceeds of the contract or otherwise profiting from the contract, unless the contract was let by competitive bidding to the lowest and best bidder. Further, you are prohibited from participating in the authorization of any OLC contract to any person or entity with which you are discussing, or plan to discuss, future employment.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on February 2, 2010. 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