



## OHIO ETHICS COMMISSION

150 EAST BROAD STREET

COLUMBUS 43215

(614) 466-7090

Advisory Opinion No. 77-003

February 18, 1977

Syllabus by the Ohio Ethics Commission:

- 1) A public utilities commissioner is a "public official or employee" as that term is defined in Section 102.01 (B) of the Revised Code.
- 2) Section 102.03(D) of the Revised Code prohibits a public utilities commissioner from seeking employment by sending resumes to law firms that practice before the Public Utilities Commission, prior to the expiration of his term of office, unless the commissioner withdraws himself from consideration of any matter involving any firm with which he has had contact regarding possible employment.

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In your request for an Ohio Ethics Commission Advisory Opinion, you asked whether Section 102.03(D) of the Revised Code prohibits a public utilities commissioner from seeking employment by sending resumes to law firms that practice before the Public Utilities Commission, prior to the expiration of his term of office, if he withdraws himself from consideration of any matter involving any firm with which he has had contact regarding possible employment.

The prohibitions of Section 102.03(D) of the Revised Code apply to any "public official or employee," defined in Section 102.01(B) of the Revised Code as "any person who is elected or appointed to an office or is an employee of any public agency. . ." (emphasis added) It should be noted that Am. H.B. 1040 of the 111th General Assembly amended the definition of "public official or employee" in Section 102.01(B) of the Revised Code to include "any person elected or appointed to an office," rather than "any person elected or appointed to an elective office," as in prior law, but retained the distinction between a person "elected or appointed to an office," and a person who is "an employee of any public agency." Therefore, it is necessary to determine whether a public utilities commissioner is "appointed to an office," for purposes of Section 102.01(B) of the Revised Code.

Section 4901.02 of the Revised Code provides, in part:

"There is hereby created a public utilities commission of Ohio . . . which . . . shall consist of three public utilities commissioners appointed by the governor with the advice and consent of the senate. . ."

Thus, it is clear that a public utilities commissioner is "appointed." In addition, the Ohio Ethics Commission has formally recognized the Public Utilities Commission as an agency that

exercises sovereign power and that is therefore subject to the provisions of Sections 102.03 and 102.04 of the Revised Code, based on an examination of Chapter 4901. of the Revised Code, case law, and other pertinent information. Thus, the position of public utilities commissioner is an "office" for purposes of Section 102.01(B) of the Revised Code. We conclude, therefore, that a public utilities commissioner is "appointed to an office" for purposes of Section 102.01(B) of the Revised Code, and is therefore a "public official" under the Ohio Ethics Law.

Section 102.03(D) of the Revised Code provides:

"No public official or employee shall use or attempt to use his official position to secure anything of value for himself that would not ordinarily accrue to him in the performance of his official duties, which thing is of such character as to manifest a substantial and improper influence upon him with respect to his duties."

The issue with respect to this provision is whether Section 102.03(D) of the Revised Code prohibits a public utilities commissioner from seeking employment by sending resumes to law firms that practice before the Public Utilities Commission, prior to the expiration of his term of office.

Section 102.03(D) prohibits any public official from using his official position to secure for himself "anything of value," which is defined in Section 1.03 of the Revised Code to include "any promise of future employment." In addition, the thing of value must be: (1) secured "for himself;" (2) something "that would not ordinarily accrue to him in the performance of his official duties;" and (3) "of such character as to manifest the substantial and improper influence upon him with respect to his duties." Applying the criteria established by the Ohio Ethics Commission in Advisory Opinion No. 76-005, it may be determined that:

- (1) The promise of future employment is a "thing of value;"
- (2) The position in a law firm, if accepted, would accrue to the public utilities commissioner "for himself;"
- (3) A position in a private law firm is a "thing of value" that would not ordinarily accrue to a public utilities commissioner in performance of his official duties, since the commissioner receives a salary as a member of the Public Utilities Commission.

To determine whether the possibility of future employment would be "of such character as to manifest a substantial and improper influence upon" the public utilities commissioner, the "reasonably prudent public official" test, also established in Advisory Opinion No. 76-005, must be applied.

For the reasonably prudent public official to be subject to a substantial and improper influence:

- (1) He must be susceptible to being influenced -- here, the reasonably prudent public utilities commissioner might be susceptible to influence in any case in which a ruling

required of the Commission involved any law firm with which the commissioner had sought or accepted employment;

(2) There must be an opportunity to exert influence on the reasonably prudent public official -- here, the public utilities commissioner would be subject to influence in any case involving any law firm with which he had sought or accepted employment;

(3) The result of the influence must have either a calculated or unconscious effect upon the reasonably prudent public official, resulting in the apparent destruction of his unbiased discretion with respect to the performance of his official duties -- here the result of the influence, a position with a law firm, would appear to have either a calculated or unconscious effect upon the public utilities commissioner in any determination requiring the commissioner's vote in which the law firm with which he had sought or accepted employment was involved.

We conclude, therefore, that the possibility of a position in a private law practice would appear to be "of such character as to manifest a substantial and improper influence upon him with respect to his duties." However, it should be noted that such a determination is a question of fact to be determined in light of the facts and circumstances of a particular case.

In addition, you should be aware that Section 4901.24 of the Revised Code provides, in pertinent part:

"No public utilities commissioner. . . shall accept any gift, gratuity, emolument or employment from any public utility or railroad . . . or solicit, suggest, request, or recommend, directly or indirectly, to any person, corporation, or public utility subject to the supervision of the commission, to any officer, attorney, agent, or employee thereof, the employment of any person to any office, place, position, or employment. . ."

You should also note that Section 102.03(A) prohibits a former public official from representing a client before the agency on which he had served within the preceding twelve months, on any matter with which the person was directly concerned or in which he personally participated during his service by a substantial and material exercise of administrative discretion.

The Ohio Ethics Commission cautions that its Advisory Opinions may be relied upon only with respect to violations of Chapter 102. of the Revised Code and not possible violations of other laws and rules.

In your request for an advisory opinion, you indicated that you would "withdraw (your)self from consideration of all matters with which those firms were concerned." Such actions indicate that you have made an effort to avoid the use of your official position to obtain something of value that would not ordinarily accrue to you.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that Section 102.03(D) of the Revised Code prohibits a 'Public Utilities Commissioner from seeking employment by sending resumes to law firms that practice before the Public Utilities

Commission, prior to the expiration of his term of office, unless the commissioner withdraws himself from consideration of any matter involving any firm with which he has had contact regarding employment.

  
OHIO ETHICS COMMISSION  
Lindsey Cowen - Chairman

