



OHIO ETHICS COMMISSION

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Advisory Opinion No. 77-006

October 6, 1977

Syllabus by the Ohio Ethics Commission:

- 1) Division (A) of Section 102.04 of the Revised Code does not prohibit an employee of an administrative department of the state from receiving or agreeing to receive compensation from another state agency, directly or indirectly, for services rendered or to be rendered by him personally, either as an employee or an independent contractor.
- 2) Division (B) of Section 102.04 of the Revised Code does not prohibit an employee of an administrative department of the state from receiving or agreeing to receive compensation from another state agency, directly or indirectly, for services rendered or to be rendered by him personally, either as an employee or an independent contractor.
- 3) Division (D) of Section 102.03 of the Revised Code prohibits an employee of an administrative department of the state from using or attempting to use his official position to secure anything of value for himself, including a position with another state agency, that would not ordinarily accrue to him in the performance of his official duties, and that is of such character as to manifest a substantial and improper influence upon him with respect to his duties.

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In your request for an Ohio Ethics Commission Advisory Opinion, you asked whether the Ohio Ethics Law, particularly Section 102.04 of the Revised Code., prohibits an attorney who is an employee of an administrative department of the state from serving as a consultant for another state agency under an independent contract.

You state, by way of history, that you are an attorney employed as legal counsel for an administrative department of the state. You have been asked to serve as a consultant on a special project to be undertaken by a state commission under an agreement by which you would be designated an independent contractor. You would be compensated by the commission, and would perform your work at times other than those required by your primary employer. You ask whether, by virtue of your position with the department by which you are employed, you would be in violation of the Ohio Ethics Law, particularly Section 102.04 of the Revised Code, if you accepted the position as a consultant.

The prohibitions of Section 102.04 of the Revised Code apply to any "person elected or appointed to an office of or employed by the . . . state. . . (or) . . . a county, township, municipal corporation, or any other governmental entity, excluding the courts." (emphasis added) As an

employee of an administrative department of the state, you are "employed by the . . . state," and therefore within the jurisdiction of the Ohio Ethics Law.

Division (A) of Section 102.04 of the Revised Code provides:

"Except as provided in division (D) of this section no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts." (emphasis added)

Division (A) of Section 102.04 of the Revised Code prohibits a person employed' by the General Assembly or a state department or agency from receiving or agreeing to receive compensation, directly or indirectly, other than from the agency with which he serves, for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter before the General Assembly or any state department or agency, except the courts. However, in Advisory Opinion No. 75-010, the Ohio Ethics Commission.- in considering whether a public official or employee may receive compensation for services rendered as an employee or independent contractor for more than one agency of the state determined that:

"Compensation received 'from the agency with which he serves' is not prohibited compensation. The term agency, in the phrase 'other than from the agency with which he serves' can be read in the . . . plural, by virtue of Section 1.43 of the Revised Code which states that 'the singular includes the plural and the plural includes the singular.' Thus, 'agency' means agencies as well. Therefore, Section 102.04 of the Revised Code does not prohibit receipt of compensation from more than one agency of a governmental entity." (emphasis in original)

In Advisory Opinion No. 76-004, the Ohio Ethics Commission, in considering a fact situation similar to the instant case, concluded that "it is not a violation of Section 102.04 (A) of the Revised Code, for a member of the Board of Tax Appeals to receive compensation as an attorney engaged by another agency of the state as counsel, either as an independent contractor for that agency, or an employee of the agency." However, the distinctions between employees and independent contractors (See: Advisory Opinion 75-012) are inapposite here, since the construction of the term "agency" permits elected or appointed officials and employees to receive compensation from more than one agency of a governmental entity, regardless of the capacity in which the person serves.

Therefore, we conclude that Division (A) of Section 102.04 of the Revised Code does not prohibit an employee of a state department from receiving or agreeing to receive compensation from another state agency, directly or indirectly, for services rendered or to be rendered by him personally, either as an employee or an independent contractor.

However, there exists the possibility that, under certain circumstances, persons appointed, employed, or engaged by more than one department or agency of the state may be involved in actual conflicts of interest. For example, an employee of a state agency with review authority over another agency could use his position to secure a position, either as an employee or an independent contractor, with the agency that is subject to review, and perhaps affect the decisions of that agency, to his personal benefit but to the detriment of one or both agencies. Although this would not be a violation of Division (A) of Section 102.04 of the Revised Code, as previously interpreted, it may constitute an actual conflict of interest in violation of another provision of the Ohio Ethics Law, such as Division (D) of Section 102.03 of the Revised Code, which 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."

This provision prohibits a public official or employee from using or attempting to use his position to secure anything of value for himself: 1) that would not ordinarily accrue to him in the performance of his duties; and 2) that is of such character as to manifest a substantial and improper influence upon him with respect to his duties. If, in the instant case or the example outlined above., an employee of a state department or agency used or attempted to use his position to secure employment with another state agency ("anything of value" is defined in Section 1.03 (H) of the Revised Code to include "any promise of future employment") and if the position sought would not ordinarily accrue to him in his primary position ' and-would be of such character as to manifest a substantial and improper influence upon him with respect to his duties with his primary employer, he would be in violation of Division (D) of Section 102.03 of the Revised Code. There may be other situations in which conduct that is not in violation of Division (A) of Section 102.04 of the Revised Code because of the construction of the term "agency," discussed supra, may constitute a violation of other provisions of the Ethics Law, particularly Sections 102.03 and 102.04 (B) of the Revised Code. We conclude, therefore, that Division (D) of Section 102.03 of the Revised Code prohibits an employee of an administrative department of the state from using or attempting to use his official position to secure anything of value for himself, including a position with another agency of the state, that would not ordinarily accrue to him in the performance of his official duties, and that is of such character as to manifest a substantial and improper influence upon him with respect to his duties.

Your attention is directed to Divisions (D), (E), and (F) of Section 102.04 of the Revised Code., which provide:

"A public official who is appointed to a nonelective office or a public employee shall be exempted from division (A), (B), or (C) of this section if both of the following apply:

(1) the agency to which the official or employee wants to sell the goods or services, or before which the matter that involves the rendering of his services is pending, -is an agency other than the one with which he serves;

(2) prior to rendering the personal services or selling or agreeing to sell the goods or services, he files a statement with the public agency with which he serves and with the public agency before which the matter is pending or which is purchasing or has agreed to purchase goods or services.

The required statement shall contain the official's or employee's name and home address, the name and mailing address of the public agencies with which he serves and before which the matter is pending or which is purchasing or has agreed to purchase goods or services, and a brief description of the pending matter and of the personal services to be rendered or a brief description of the goods or services to be purchased. The statement shall also contain the public official's or employee's declaration that he disqualifies himself for a period of two years from any participation as such public official or employee in any matter involving any public official or employee of the agency before which the present matter is pending or to which goods or services are to be sold. The two-year period shall run from the date of the most recently filed statement regarding the agency before which the matter was pending or to which the goods or services were to be sold. No person shall be required to file statements under this division with the same public agency regarding a particular matter more than once in a calendar year.

(E) No public official or employee who files a statement or is required to file a statement under division (D) of this section shall knowingly fail to disqualify himself from any participation as a public official or employee of the agency with which he serves in any matter involving any official or employee of an agency before which a matter for which he rendered personal services was pending or of a public agency which purchased or agreed to purchase goods or services.

(F) This section shall not be construed to prohibit the performance of ministerial functions including, but not limited to, the filing, or amendment of tax returns, applications for permits and licenses, incorporation papers, and other documents." (emphasis added)

Even though the facts presented do not indicate that you would violate Division (A) of Section 102.04 of the Revised Code by accepting the position as a consultant with another state agency, you may wish to file a statement, under Division (D) of Section 102.04 of the Revised Code, with the state department by which you are employed and the state agency with which you intend to serve as a consultant, in order to avoid even the appearance of impropriety.

Advisory Opinions 75-010 and 76-004, discussed previously, were adopted prior to the enactment of Am. H. B. 1040 of the 111th General Assembly, which was effective August 27, 1976. The Act expands the prohibitions of Section 102.04 of the Revised Code by adding a new Division (B), infra, but permits any nonelective public official or public employee to exempt himself from the prohibitions of Divisions (A), (B), and (C), by filing a statement under a new Division (D), supra, with the agency with which he serves and the agency before which he wishes to render services or to which he wishes to sell goods. Thus, the issue is whether Division (B) of Section 102.04 of the Revised Code prohibits an employee of a state department from serving as a consultant for another agency as an independent contractor.

Division (B) of Section 102.04 of the Revised Code provides:

"Except as provided in division (D) of this section, no person who is elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall sell or agree to sell, except through competitive bidding, any goods or services to the general assembly or any department, division, institution, instrumentality, board, commission or bureau of the state, excluding the courts." (emphasis added)

This provision prohibits a person employed by the General Assembly or a state department or agency, except the courts, from selling or agreeing to sell any goods or services, except through competitive bidding, to the General Assembly or any state department or agency, except the courts. It may be argued that an employee of a state department who agrees to serve as a consultant for another agency is selling services to the state, and that such an arrangement is prohibited by Division (B) of Section 102.04 of the Revised Code, except through competitive bidding. However, if Division (B) of Section 102.04 were interpreted to prohibit a public employee from providing services for compensation to an agency of the state other than the one by which he is employed, Divisions (A) and (B) of Section 102.04 would be inconsistent and overlapping. In addition, it does not appear that the services of an attorney are the types of services contemplated by Division (B) of Section 102.04 of the Revised Code, since: 1) Division (A) deals with services rendered personally for or on behalf of an agency, while Division (B) deals with the sale of services, by bid, to an agency; and 2) professional persons, such as attorneys, do not ordinarily sell their services through competitive bidding. Maintenance and food service contracts are some examples of the types of services contemplated by Division (B) of Section 102.04 of the Revised Code.

It appears that the legislature intended to draw a distinction between services provided or rendered personally for or on behalf of another agency, and goods or services, other than personal services, sold to another agency. Although there exists no formal legislative history in Ohio, Legislative Service Commission analyses of bills provide evidence of legislative intent. The analysis of Am. H.B. 1040 of the 111th General Assembly, states:

"The bill would add a prohibition against state officers and employees selling goods and services to state governmental agencies except by competitive bidding, but provide a means by which any nonelective state or local officer or employee could be exempted from either the personal services ban or the sale of goods or services ban, as long as the goods were sold to an agency other than his own, or the services were to be rendered before an agency other than his own." (emphasis in original deleted; emphasis added)

In addition, Division (D) (2) of Section 102.04 recognizes this distinction by requiring that the statement to exempt an official or employee from Division (A), (B), and (C) of that section be filed "prior to rendering the personal services or selling or agreeing to sell goods or services . . ."

Therefore, the prohibitions of Division (B) of Section 102.04 of the Revised Code do not apply to the fact situation in the instant case. We conclude that Division (B) of Section 102-04 of

the Revised Code does not prohibit an attorney employed by a state department from receiving or agreeing to receive compensation for serving as a consultant for a state commission, either as an employee or an independent contractor.

The Ohio Ethics Commission cautions that its advisory opinions may be relied upon only with respect to questions arising under Chapter 102. and Section 2921.42 of the Revised Code and do not address possible violations of other laws or rules.

Therefore, on the basis of the facts presented, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: 1) Division (A) of Section 102-04 of the Revised Code does not prohibit an employee of an administrative department of the state from receiving or agreeing to receive compensation, directly or indirectly, from another state agency for services rendered or to be rendered by him personally, either as an employee or an independent contractor; 2) Division (B) of Section 102.04 of the Revised Code does not prohibit an employee of an administrative department of the state from receiving or agreeing to receive compensation from another state agency, directly or indirectly, for services rendered or to be rendered personally, either as an employee or an independent contractor; and 3) Division (D) of Section 102.03 of the Revised Code prohibits an employee of an administrative department of the state from using or attempting to use his official position to secure anything of value for himself, including a position with another state agency, that would not ordinarily accrue to him in the performance of his official duties, and that is of such character as to manifest a substantial and improper influence upon him with respect to his duties.



Lindsey Cowen, Chairman
The Ohio Ethics Commission

