



OHIO ETHICS COMMISSION

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Advisory Opinion No. 77-008

November 18, 1977

Syllabus by the Commission:

Section 102.03 (A) of the Revised Code does not prohibit an attorney, who served as a hearing examiner for the State Personnel Board of Review under an independent contract, from representing private clients before the Board within twelve months of the termination of his contract with the Board.

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In your request for an Ohio Ethics Commission Advisory Opinion, you asked whether Section 102.03 (A) of the Revised Code prohibits an attorney, who served as a hearing examiner for the State Personnel Board of Review under a personal service contract, from representing a private client before the Board within twelve months of the termination of his contract with the Board.

You state, by way of history, that the State Personnel Board of Review utilized the services of attorneys engaged in the private practice of law as hearing examiners on a part-time basis during the past eighteen months. The hearing examiners, who served under personal service contracts, heard cases, decided facts, and made reports and recommendations on cases assigned to them by the Board. Recently, the Board hired three full-time hearing examiners, and will no longer utilize the services of these private attorneys to any significant degree. Section 102.03 (A) of the Revised Code provides:

"No public official or employee shall represent a client or act in a representative capacity for any person before the public agency by which he is or within the preceding twelve months was employed or on which he serves or within the preceding twelve months had served on any matter with which the person is or was directly concerned and in which he personally participated during his employment or service by a substantial and material exercise of administrative discretion. As used in this division, 'matter' does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments. Nothing contained in this division shall prohibit during such period, 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)

The Ohio Ethics Commission has determined that independent contractors of public agencies are not within the class of persons described by the phrase "employed by" for purposes of the Ohio Ethics Law. The rationale is that the employees of a public entity share in the responsibilities of the public trust exercised principally by their elected and appointed superiors,

but independent contractors, who do not exercise the public trust, are not within the purview of the Ohio Ethics Law. (Ohio Ethics Commission Advisory Opinion No. 75-012)

The traditional tests used to distinguish employees from independent contractors are set forth in Gillum v. The Industrial Commission, 25 Ohio Op. 531 (1943), at page 34:

- "(a) The extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in that locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in a particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by time or by job;
- (h) whether or not the work is a part of the regular business of the employer; and
- (i) whether or not the parties believe they are creating a relationship of master and servant."

Among the tests listed above, the primary test for purposes of the Ohio Ethics Law is (b), whether the one employed is engaged in a distinct occupation or business.

The pertinent provisions of the personal service contract are as follows:

- (1) The hearing examiner hears appeals of state service employees as assigned by the Board., and provides a written report setting forth findings of fact, conclusions of law, and recommendations of action to be taken by the Board;
- (2) the hearing examiner is required to use his own facilities, supplies, and clerical personnel;
- (3) the hearing examiner is responsible for all work performed under the contract;
- (4) the term of the contract is six months;
- (5) the hearing examiner is compensated on a case-by-case basis, with fees established for individual and group hearings. The hearing examiner is required to submit an

itemized statement twice each month. The maximum amount paid during the term of the contract is \$6,000;

(6) the contract includes a provision that "it is mutually understood and agreed that the Hearing Examiner is an independent contractor and will receive no fringe benefits, and that there will be no money withheld from. . . (his) compensation for income taxes or retirement, or for any other purpose."

It is necessary to examine the contractual relationship between the State Personnel Board of Review and the hearing examiner and apply the tests outlined above to determine whether the person is an independent contractor or an employee.

(a) Extent of control. Although the Executive Secretary and the Board assign cases and have general authority to supervise the work of the hearing examiner, neither control the hours or method of work, nor do they exercise control over the actual performance of tasks by the hearing examiner, who is responsible for all work to be performed under the contract.

(b) Distinct occupation or business. The hearing examiner is an attorney with a distinct occupation, the practice of law.

(c) The kind of occupation, with reference to supervision. Generally, attorneys work without supervision.

(d) Skill required. The hearing examiner is engaged in the performance of a specific set of tasks for which the particular skills of an attorney are required.

(e) Supplies, instrumentalities, tools, and place of employment. The hearing examiner is required to use his own facilities, supplies, and clerical personnel.

(f) Length of time for which the person is employed. The term of the personal service contract is six months; however, the hearing examiner is engaged only to hear particular cases during the term of the contract. Recently, the contracts with private attorneys were terminated because the Board had employed three full-time hearing examiners.

(g) Method of payment. The hearing examiner is paid at a specified rate per hearing; there is no salary or wage.

(h) Whether the work is part of the regular business of the employer. The work of the hearing examiner is part of the regular business of the State Personnel Board of Review, since the Board is required under Section 143.012 of the Revised Code to hear appeals of state employees. In addition the Board has employed three full-time hearing officers to take the place of private practitioners previously employed under personal service contracts.

(i) Whether the parties believe they are creating a relationship of master and servant. The contract outlined above specifies that an employer-independent contractor relationship is the intention of the parties.

Since the employment relationship meets eight of the nine criteria outlined above, including the primary criterion, a distinct occupation or business, we conclude, on balance, that the hearing examiner is an independent contractor and not an employee. Therefore, a private practicing attorney who heard cases as a hearing examiner before the State Personnel Board of Review under a personal service contract did so as an independent contractor, and was not and is not under the purview of the Ohio Ethics Law, including Section 102.03 (A) of the Revised Code.

In answer to your specific question, the Ohio Ethics Law does not prohibit a contract attorney from appearing before the State Personnel Board of Review immediately upon termination of his contract with the Board. However, such a private attorney may be in violation of some other laws or rules, including the Code of Professional Responsibility, if he appears before the State Personnel Board of Review in a case in which he was involved while under contract with the Board.

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

The conclusions of this advisory opinion are based upon an examination of the facts and circumstances of the instant case as you have presented them.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that Section 102.03 (A) of the Revised Code does not prohibit a private attorney, who served as a hearing examiner for the State Personnel Board of Review under an independent contract, from representing private clients before the Board within twelve months of the termination of his contract with the Board.



Lindsey Cowen, Chairman
The Ohio Ethics Commission