



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 88-009
December 16, 1988

Syllabus by the Commission:

(1) Division (A) of Section 102.03 of the Revised Code does not prohibit the former director of a private, non-profit agency which has entered into a contract with a joint-county community mental health board from serving as a board member of the mental health district even though he signed the existing contract between the agency and the mental health board in his capacity as director of the contract agency;

(2) Division (D) of Section 102.03 of the Revised Code prohibits a board member of a joint-county community mental health district from voting upon, or discussing, deliberating or taking any action regarding a contract existing between the mental health board and a private, non-profit agency he formerly served as director, where he signed the contract in his capacity as director of the agency;

(3) Division (B) of Section 102.03 of the Revised Code prohibits a board member of a joint-county community mental health district from disclosing or using, without appropriate authorization, confidential information acquired in his official capacity as a board member for the joint-county community mental health district.

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You have asked whether the Ohio Ethics Law and related statutes prohibit the former director of a private non-profit agency which provides contract services to a joint-county community mental health district from serving on the board of that district.

You state, by way of history, that the joint-county community mental health district (hereinafter District) receives funds from federal, state, and local sources and uses those moneys to contract with other agencies for the supply of mental health services. You state that recently the director of a private non-profit agency which provides, pursuant to contract, drug abuse services to the District resigned from the nonprofit agency to accept other employment, and was then appointed to the board of the mental health district (hereinafter Board) by the county commissioners. You also state that the Board member, while serving as director of the private contract agency, signed the current contract between his agency and the District, and that the contract will remain in effect until June 30, 1989. You also state that, as a Board member, the former director has the power to vote upon and approve contracts, payments under those contracts, and act in other matters in which the agency he formerly served as director is interested. You further state that the Board member will abstain from voting on issues relating to his previous employer until the current contract expires.

Your request for an advisory opinion specifically asks for an application of R.C. Section 102.03(A), the "Revolving Door" provision, to the instant situation.

Division (A) of Section 102.03 of the Revised Code provides, in pertinent part:

No present or former public official or employee shall, during his 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 he 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.....

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. This division 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 similar documents. (Emphasis added.)

R.C. 102.01(B) defines a "public official or employee" for purposes of R.C. 102.03 as any person who is appointed to an office of any public agency. R. C. 102.01(C) defines the term "public agency" to include any governmental entity. A joint-county community mental health service district is a statutorily created, multi-county district responsible for providing community services for mentally ill and emotionally disturbed persons. See R.C. 340.01. The governing board of the district is created pursuant to R.C. 340.02, and the members of the board are appointed under this section. The board is charged with serving as the community mental health planning agency for the counties under its jurisdiction, see R.C. 340.03. A joint-county board has the authority to levy taxes, see R.C. 5705.01, 5705.03, and to enter into contracts with public and private agencies for the provision of mental health services and facilities, see R.C. 340.03(G). The board of a joint-county community mental health service district is a governmental entity and, as an appointed officer of a governmental entity, a member of the board is a "public official or employee" who is subject to the prohibitions of Section 102.03 of the Revised Code. Division (A) of Section 102.03 prohibits a board member while he serves on the board and for one year after leaving his public position from representing any person before the joint-county community mental health board, or any other public agency, on any matter in which he personally participated through the exercise of administrative discretion while a board member.

The language used in R.C. 102.03(A) clearly applies only to a "present or former public official or employee," and is designed to prevent a present or former public official or employee from using inside knowledge or exerting undue influence upon public agencies on matters in which he had personally participated while in public service. See generally, State v. Nipps, 66 Ohio App. 2d 49 (Franklin County 1979). Division (A) of Section 102.03 does not prohibit individuals who have done business with, appeared before, or otherwise been involved with, a public agency from later serving with that agency. See Ohio Ethics Commission Advisory Opinion No. 78-002. Therefore, the former director of a private non-profit contract agency is not prohibited by R.C. 102.03(A) from serving as a Board member of the joint-county community

mental health district, even though he signed the present contract between the agency and the District in his capacity as director. The former director would not be a public official or employee and would not be affected by the prohibitions of R.C. 102.03(A) until he assumes the position as a Board member. See Advisory Opinion No. 78-002.

Your attention is also directed to Division (D) of Section 102.03 which reads as follows:

No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his duties.

R.C. 102.03 defines "anything of value" for the purposes of R.C. 102.03 to include money and every other thing of value. See R.C. 102.01(G). A definite pecuniary benefit is considered to be a thing of value under R.C. 102.03(D). See Advisory Opinions No. 79-008, 80-003, 85-006, 85-011, and 86-007. Therefore, payments made by the mental health board to a private contract agency for the provision of drug abuse services, or other board action that would benefit the private contract agency, would fall within the definition of "anything of value."

The issue is whether contract payments or other benefits authorized by the Board to a private contract agency with which a Board member formerly served as director, would be of such character as to manifest a substantial and improper influence upon the Board member with respect to his duties. The Ethics Commission has consistently held that Division (D) of Section 102.03 of the Revised Code prohibits a public official or employee from acting in any situation where the public official or employee would have an inherent conflict of interest such that his independence and objectivity of judgment with regard to his official decisions and responsibilities could be impaired. See Advisory Opinions No. 84-009 and 85-006.

In previous advisory opinions, the Ethics Commission has held that R.C. 102.03(D) prohibits a public official from reviewing, in his official capacity, work he has performed in his private capacity. See Advisory Opinions No. 78-004, 79-007, 82-001, 83-001, and 84-004. The rationale of these opinions is that the public officials personal pecuniary interest in fees earned in his private capacity could impair his independence of judgment when reviewing work he has prepared. See Advisory Opinions No. 82-001 and 83-001. See also Advisory Opinion No. 84-013.

When these opinions were rendered, R.C. 102.03(D) prohibited a public official or employee from using his official position to secure anything of value "for himself" if the thing of value were of such character as to manifest a substantial and improper influence upon him with respect to his duties. Am. Sub. H.B. 300, 116th Gen. A. (1986) (eff. September 17, 1986) deleted the requirement that the thing of value be for the public official or employee himself thereby broadening the scope of the prohibition. See Advisory Opinions No. 87-004 and 88-004. Therefore, the fact that contract payments or other benefits would be for a contract agency that the Board member had formerly served as director rather than for the Board member himself, does not necessarily indicate that R.C. 102.03(D) would be inapplicable. See Advisory Opinion No. 88-004.

In the instant situation, the Board member, while serving as director of the private contract agency, signed the current contract with the joint-county community mental health district on behalf of the contract agency. The Board member now holds a public position in which he has the capacity to review and act upon work which he had undertaken in his private capacity. It is apparent that the objectivity and independence of judgment of the Board member could be impaired if he were to review or take other action with regard to a contract he signed or other work he performed while with the private contract agency. This situation is analogous to the above-mentioned opinions which prohibit a public official from reviewing work he performed in his private capacity. Because there is no longer a requirement that the benefit accrue to the public official or employee himself, it is immaterial that the contract agency, rather than the Board member, would benefit from the Board member's actions with regard to his own work. Therefore, the Board member is prohibited by R.C. 102.03(D) from reviewing or acting upon the current contract which he signed as director of the contract agency, since the Board member would have an inherent conflict of interest such that his independence and objectivity of judgment with regard to his official decisions and responsibilities could be impaired. The Board member is prohibited by Division (D) of R.C. 102.03 from voting upon, or discussing, deliberating, or taking any action regarding the current contract or other work he performed while director of the private agency.

The Board member is not, however, prohibited by R.C. 102.03(D) from participating in the discussions or vote to enter into a new contract with his former agency when the current contract expires in June, 1989. It is apparent that a Board member would have an inherent conflict of interest in reviewing or otherwise acting upon a contract which he had prepared or signed while director of the contract agency. The possibility that a Board member would have a conflict of interest as to new matters affecting his former agency, which arose after he left the agency is much more remote. Therefore, the Board member is not prohibited by R.C. 102.03(D) from participating in matters affecting his former agency where those matters arose after he resigned from the agency. This conclusion is conditioned on the assumption that there is no on-going relationship between the agency and the Board member, and there is no understanding that the Board member will, at some time in the future, rejoin the agency.

Also, Division (B) of Section 102.03 of the Revised Code provides as follows:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

Therefore, the Board member is prohibited by R.C. 102.03(B) from using or disclosing to his former agency, without appropriate authorization, confidential information acquired in his official capacity as a Board member. It is important to note that no time limit exists for this prohibition and it is effective while the Board member serves and after he leaves office. See Advisory Opinions No. 81-002 and 88-003.

As a final matter, you state that the Board member now holds a position with a school system. If a contract exists between the Board member's employing school board and the mental health district, R.C. 2921.42, which prohibits a public official or employee from having an interest in the contracts of the public agency with which he is connected, would be implicated. Also, R.C. 340.02 prohibits a member of a community mental health board from being an employee of any agency with which the community mental health board has entered into a contract for the provision of services or facilities. See Attorney General Opinion No. 81-101 (holding that pursuant to R.C. 340.02 a school principal may not serve on a community mental health board when his employing school board has contracted with the mental health board). The Ethics Commission has no authority to render advisory opinions interpreting R.C. 340.02, and the Board's legal counsel should be consulted regarding R.C. 340.02, as well as for a determination whether the positions of Board member and school district employee are "compatible."

This advisory opinion is based on the facts presented, and 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.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (A) of Section 102.03 of the Revised Code does not prohibit the former director of a private, non-profit agency which has entered into a contract with a joint-county community mental health board from serving as a board member of the mental health district even though he signed the existing contract between the agency and the mental health board in his capacity as director of the contract agency; (2) Division (D) of Section 102.03 of the Revised Code prohibits a board member of a joint-county community mental health district from voting upon, or discussing, deliberating or taking any action regarding a contract existing between the mental health board and a private, nonprofit agency he formerly served as director, where he signed the contract in his capacity as director of the agency; and (3) Division (B) of Section 102.03 of the Revised Code prohibits a board member of a joint-county community mental health district from disclosing or using, without appropriate authorization, confidential information acquired in his official capacity as a board member for the joint-county community mental health district.



Paul F. Ward, Chairman
Ohio Ethics Commission