



OHIO ETHICS COMMISSION
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Advisory Opinion No. 91-003
August 21, 1991

Syllabus of the Commission:

(1) Division (A) of Section 102.03 of the Revised Code prohibits a former public official or employee who personally participated as a public official or employee through the exercise of administrative discretion under R.C. Chapter 343. or 3734. from representing an owner or operator of a facility as defined in R.C. 3734.01 (N) or an applicant for a permit or license for a facility under that chapter, before any public agency, for twenty-four months after the conclusion of her employment or service on any matter in which she personally participated as a public official or employee. (Advisory Opinion No. 89-003 overruled in part due to legislative amendment.)

(2) A former public official or employee who participated as a public official or employee through the exercise of administrative discretion under R.C. Chapter 343. or 3734., on or after June 24, 1988, and who left public service before January 1, 1991, is bound by the former prohibition of R.C. 102.03 (A) as enacted by Am. Sub. H.B. 592 for twenty-four months from the date she left public office or until January 1, 1991, whichever is earlier.

(3) A former public official or employee who participated as a public official or employee through the exercise of administrative discretion under R.C. Chapter 343. or 3734., on or after June 24, 1988, and who left public service before January 1, 1991, is bound by the present prohibition of R.C. 102.03 (A), as enacted by Am. Sub. S.B. 382, from January 1, 1991, until such time as she has been gone from public service for two years.

* * * * *

You have asked if an employee of your company who is a former city employee is prohibited, by the Ohio Ethics Law and related statutes, from preparing documents which will be submitted to the Ohio Environmental Protection Agency (EPA) and the city board of health.

You have explained, by way of history, that your company operates a solid waste facility in Ohio. You have explained that you hired a research chemist in July of 1990. As a part of her job duties, the chemist is responsible for performing testing and analysis, and preparing reports and other documents for submission to the EPA and the city board of health. Until July of 1990, the chemist had been employed by the city board of health working in the area of solid waste regulation in the city where your facility is located. See R.C. 3734.01 and 3734.07.

Your question concerns the amendment to R.C. 102.03(A) which was enacted as part of Am. Sub. S.B. 382, 118th Gen. A. (1990) (eff. Jan. 1, 1991). This amendment revised the restriction of Ohio's "Revolving Door" law which applies to any former public official or employee who participated through the exercise of administrative discretion under Revised Code Chapter 343. or Chapter 3734. while in public service. Chapter 343. of the Revised Code deals generally with the establishment of county, joint-county, and regional solid waste management districts, and R.C. Chapter 3734. regulates the handling, storage, transportation, and disposal of solid, hazardous and infectious wastes. In order to fully address your question, it is helpful to first review the general provisions of R.C. 102.03(A) which remain unaffected by the S.B. 382 amendment.

All public officials and employees within the state of Ohio are subject to the general post-employment restrictions of the "Revolving Door" prohibition of the Ohio Ethics Law, Section 102.03(A) of the Revised Code. The general provision of Section 102.03(A) prohibits a present or former public official or employee, during government service and for one year thereafter, from representing a client or other person, including a corporation, an individual, or a new employer, before any public agency on any matter in which he personally participated as a public official or employee. For purposes of R.C. 102.03 (A), 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." The Ethics Commission has determined that "representation" includes appearing on a client's behalf at a formal proceeding or meeting, informal lobbying over the telephone or in person, and preparing written documents including filings, letters, notes and memos, reports and documentary evidence. See Advisory Opinions No. 77-001, 81-002, and 86-001. The term "matter" is defined in R.C. 102.03 (A) to include "any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments." See R.C. 102.03 (A). The term "personally participated" is described in R.C. 102.03 (A) to include "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion." See R.C. 102.03 (A). Therefore, the general provision of the Revolving Door Law prohibits any former public official or employee from appearing formally or informally before, or communicating, in writing or orally, with any public agency, on behalf of any client or any other person or entity, on a matter in which the former public official or employee personally participated while a public servant. See generally Advisory Opinions No. 86-001 and 87-001 (discussing the general provision of R.C. 102.03 (A)).

Former public officials and employees who have participated in the exercise of administrative discretion under R.C. Chapter 343. or 3734. while in public service are, however, also subject to a special provision of R.C. 102.03 (A), which is stricter than the general Revolving Door prohibition. The individual who is employed by your firm falls within this category of employees, because she performed inspections of solid waste facilities under R.C. Chapter 3734. while employed by the city. See R.C. 3734.01 and 3734.07. The special provision of R.C. 102.03 (A) which bound the former employee after she left city employment in July 1990 was enacted by the 117th General Assembly in Am. Sub. H.B. 592, effective June 24, 1988. That provision stated:

For twenty-four months after the conclusion of his service, no former public official or employee who participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, the development or adoption of solid waste management plans, investigation, inspection, or other substantial exercise of administrative discretion under Chapter 343. or 3734. of the Revised Code shall represent a person who is the owner or operator of a facility, as defined in Section 3734.01 of the Revised Code, or who is an applicant for a permit or license for a facility under that chapter, or shall act in a representative capacity on behalf of any such person before any board, commission, or agency of the state or a political subdivision.

The pertinent elements of the H.B. 592 amendment to R.C. 102.03(A) were: (1) a former public official or employee who participated while in public service through decision, approval, recommendation, the rendering of advice, the development or adoption of solid waste management plans, investigation, inspection, or other substantial exercise of administrative discretion under Chapters 343. or 3734. of the Revised Code; (2) is prohibited for twenty-four months after leaving public service; (3) from representing or acting in a representative capacity for a person who is the owner or applicant for a permit or license for such a facility; (4) before any board, commission, or agency of the state or a political subdivision. See Advisory Opinion No. 89-003. Former officials or employees who were subject to the H.B. 592 amendment were prohibited from representing a facility owner, operator, or applicant before a public agency on any matter; H.B. 592 did not limit the prohibition against a former official's representation to matters involving the regulation of solid, hazardous, or infectious wastes. Id. The H.B. 592 prohibition was distinguished from the general Revolving Door Law in that it was limited to representation of facility owners or operators, or applicants for facility permits or licenses. Further, "the criterion of personal participation in a matter [was] not an element of the post-employment restrictions imposed upon affected former officials with regard to representing facility owners," so that an affected former official or employee was prohibited from representing a facility owner, operator, or applicant on any matter, and not just those matters in which he personally participated while in public service. Advisory Opinion No. 89-003. Finally, the restriction imposed by H.B. 592 extended for two years, rather than the one year restriction contained in the general Revolving Door prohibition.

The restriction passed by H.B. 592 governed the post-employment activity of public officials and employees who acted under Chapter 343. or 3734., on or after June 24, 1988, the effective date of H.B. 592. See Advisory Opinion No. 89-003. The prohibition contained in the H.B. 592 amendment was effective from June 24, 1988 through December 31, 1990, as explained below. The former employees were, of course, also bound by the prohibitions of the general Revolving Door statute. See Advisory Opinion No. 89-003.

Under the provisions of the H.B. 592 restriction, the former city employee was prohibited, for a period of two years from the time she left her public position, from representing a facility owner or operator, or an applicant for a facility license or permit before any public agency on any matter. Your company is a facility owner and operator. Accordingly, between the time she left city employment in July, 1990, and December 31, 1990, your employee was prohibited from representing your company before the EPA, the city for which she worked, or any other public agency. The affected employee was prohibited from representing your firm

concerning any matter, not merely those matters in which she personally participated, or those matters which involved solid waste issues. See Advisory Opinion No. 89-003.

During the 118th General Assembly, Am. Sub. S.B. 382 was passed, effective January 1, 1991. This bill amended the portion of R.C. 102.03(A) initially enacted in H.B. 592. This new provision conditions your employee's activities from January 1, 1991, for the balance of the two years from the date she left public employment. The statute now provides:

For twenty-four months after the conclusion of his employment or service, no former public official or employee who personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, the development or adoption of solid waste management plans, investigation, inspection, or other substantial exercise of administrative discretion under Chapter 343. or 3734. of the Revised Code shall represent a person who is the owner or operator of a facility, as defined in section 3734.01 of the Revised Code, or who is an applicant for a permit or license for a facility under that chapter, on any matter in which he personally participated as a public official or employee.

The pertinent elements of this provision are: 1) a former public official or employee who participated through decision, approval, disapproval, recommendation, the rendering of advice, the development or adoption of solid waste management plans, investigation, inspection, or other substantial exercise of administrative discretion under Chapter 343. or 3734.; 2) is prohibited from representing an owner or operator of a solid, infectious, or hazardous waste facility, or an applicant for a permit or license for such a facility; 3) before his former agency or any other public agency; 4) for two years after the conclusion of his employment or service; 5) on any matter in which he personally participated as a public official or employee.

The prohibition of R.C. 102.03(A) as amended by S.B. 382 is less restrictive than the prohibition created by H.B. 592. While H.B. 592 prohibited a former official or employee from representing a facility owner, operator, or applicant, on any matter regardless of whether he personally participated in that matter as a public official or employee, the S.B. 382 amendment is more consistent with the general Revolving Door law, in that a former official or employee is prohibited from representing facility owners, operators, or applicants on only those matters in which he personally participated while he was a public official or employee. The S.B. 382 amendment prohibits the former public official or employee from representing a facility owner, operator, or applicant, on any matter in which the former official or employee participated, not merely those matters involving R.C. Chapter 343 or 3734. However, while the general Revolving Door prohibition extends during the employee's public service and for twelve months after he leaves public service, the amendment of S.B. 382 prohibits an affected employee from representing a facility owner, operator, or applicant, for twenty-four months after he leaves his public position.

The amended language in R.C. 102.03(A) prohibits an affected former employee from representing, for a period of two years after leaving public service, the owner or operator of, or an applicant for a permit or license to operate, a facility, before any public agency on any matter in which the former public employee personally participated while in public service. The

prohibition applies to representation undertaken on or after January 1, 1991 by former officials or employees who, during their public service, participated under Chapters 343. or 3734. after June 24, 1988.

As explained above, the term "represent" includes "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." Therefore, your employee is now prohibited from submitting to any public agency reports or other documents which she prepared on behalf of the solid waste facility, on any matter in which she personally participated as a public employee.

As set forth above, the term "matter" is defined very broadly and includes a wide variety of issues. You have explained that the employee was an inspector of solid waste facilities in Ohio. See R.C. 3734.07. Therefore, she is prohibited, by R.C. 102.03 (A), from January 1, 1991, the effective date of S.B. 382, until July of 1992, which represents two years after she left public service, from submitting reports or other documents she prepared on your company's behalf to any public agency, if the reports deal with any issue, question, proceeding, application, or other matter in which she personally participated while she was a public employee. See Advisory Opinion No. 89-009. R.C. 102.03 (A) does not prohibit the employee from preparing a report or another document which will be submitted to a public agency, including the city by which she was formerly employed, on a new matter, or a matter in which she did not participate while she worked for the city board of health. However, as discussed above, she was prohibited by H.B. 592 from preparing such documents after she left city employment in July, 1990, until January 1, 1991.

As explained previously, the former public employee was subject to the stricter H.B. 592 restrictions of R.C. 102.03 (A) for several months before the statute was amended by S.B. 382. Revised Code Section 1.58, the saving law of the Ohio Revised Code, provides, in pertinent part:

(A) The reenactment, amendment, or repeal of a statute does not . . . :

(1) Affect the prior operation of the statute or any prior action thereunder;

(2) Affect any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder;

(3) Affect any violation thereof or penalty, forfeiture, or punishment incurred in respect thereto, prior to the amendment or repeal;

(4) Affect any investigation, proceeding, or remedy in respect of any such privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended. (Emphasis added.)

This statute "may be said to embody the overall legislative intention, applicable to all its enactments, about how statutes shall be interpreted and applied." See State v. Smith, 16 Ohio

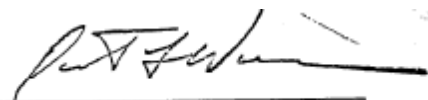
App. 3d 114, 117 (Hamilton County 1984). R.C. 1.58 provides that if an alleged violation of the H.B. 592 law had occurred, during the time H.B. 592 was in effect, from June 24, 1988 through December 31, 1990, an investigation or prosecution of the activity may be instituted or continued as if the statute had not been amended, and, if warranted, a punishment may be imposed for violation of the H.B. 592 law. See Ohio Att'y Gen. Op. No. 74-087. The fact that R.C. 102.03 (A) was amended by S.B. 382 does not affect the initiation or continuation of any investigation or prosecution for any violation of H.B. 592 that occurred between June 24, 1988 and December 31, 1990, or the imposition of punishment therefor. Any person who exercised administrative responsibility with regard to solid or hazardous waste matters as a public official or employee, on or after June 24, 1988, and who left her public position between June 24, 1988 and December 31, 1990, was subject to the prohibition contained in H.B. 592. Therefore, if such a public official or employee left her public position between June 24, 1988 and December 31, 1990, and performed acts prohibited under the former H.B. 592 language of the statute between June 24, 1988 and December 31, 1990, the appropriate investigative authority may institute or continue a proceeding as provided by its statutory authority, and may refer any violation to the appropriate prosecuting authority for the initiation or continuation of proceedings leading to enforcement of the law "as if the statute had not been . . . amended" by S.B. 382. R.C. 1.58. See Op. Att'y Gen. No. 74-087. See generally Giant Tiger Drugs v. Kosydar, 43 Ohio St. 2d 103, 107-08 (1975); Duffy v. Heffernan, 9 Ohio App. 3d 273, 274-75 (Franklin County 1983).

As stated above, any public official or employee who exercised administrative responsibility with regard to solid or hazardous waste matters, and who left her public position between June 24, 1988 and December 31, 1990, was subject to the prohibition contained in H.B. 592. H.B. 592 provided that an affected former official or employee was subject to its prohibition for two years from the date that she left public service. Thus, it may be argued that a former public official or employee who fell within the terms of H.B. 592 and who left her public position between June 24, 1988 and December 31, 1990, would be subject to the stricter prohibition of H.B. 592 for the entire two years after leaving public service, and not just until January 1, 1991, the effective date of S.B. 382. However, the S.B. 382 amendment states that a "former public official or employee" is prohibited from representing a facility owner or operator, before any public agency, on any matter in which she personally participated while a public official or employee. See R.C. 102.03 (A), and discussion above. A public official or employee who personally participated in matters under Chapters 343. or 3734. of the Revised Code, and who left her public position between June 24, 1988 and December 31, 1990, would be a "former public official or employee" for purposes of the prohibition contained within Am. S.B. 382, effective January 1, 1991. The statute does not make a distinction between employees who left their public positions prior to the effective date of S.B. 382, and those who left on or after the effective date. R.C. 2901.04 (A) requires that statutes which define offenses shall be strictly construed against the state. See R.C. 2901.04 (A); In re Pirko, 44 Ohio App. 3d 3, 5 (Franklin County, 1988). Therefore, any former public official or employee, who personally participated in matters under Chapters 343. and 3734. of the Revised Code, and who left her public position between June 24, 1988 and December 31, 1990, is subject to the amended provision of R.C. 102.03 (A), contained in Am. S.B. 382, in representing a facility owner or operator before any public agency during the portion of the twenty-four month period which remains after December 31, 1990.

Accordingly, from July of 1990 through December 31, 1990, the affected former employee in your question was subject to the H.B. 592 standard of R.C. 102.03 (A) which was in effect during that time. Any activities in violation of that standard that occurred during June 24, 1988 and December 31, 1990 may still be investigated, prosecuted, and punished through the appropriate authorities. The former public employee is subject to the provision of R.C. 102.03 (A), as amended pursuant to Am. S.B. 382, from January 1, 1991 until twenty-four months from the date that she left her former public position.

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.

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 prohibits a former public official or employee who personally participated as a public official or employee through the exercise of administrative discretion under R.C. Chapter 343. or 3734. from representing an owner or operator of a facility as defined in R.C. 3734.01 (N) or an applicant for a permit or license for a facility under that chapter, before any public agency for twenty-four months after the conclusion of her employment or service on any matter in which she personally participated as a public official or employee. (Advisory Opinion No. 89-003 overruled in part due to legislative amendment.); (2) A former public official or employee who participated as a public official or employee through the exercise of administrative discretion under R.C. Chapter 343. or 3734., on or after June 24, 1988, and who left public service before January 1, 1991, is bound by the former prohibition of R.C. 102.03 (A) as enacted by Am. Sub. H.B. 592 for twenty-four months from the date she left public office or until January 1, 1991, whichever is earlier; (3) A former public official or employee who participated as a public official or employee through the exercise of administrative discretion under R.C. Chapter 343. or 3734., on or after June 24, 1988, and who left public service before January 1, 1991, is bound by the present prohibition of R.C. 102.03 (A), as enacted by Am. Sub. S.B. 382, from January 1, 1991, until such time as she has been gone from public service for two years.



Dr. David L. Warren, Chairman
Ohio Ethics Commission