

OHIO ETHICS COMMISSION

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October 31, 2005

Informal Opinion 2005-INF-1031

Elizabeth L. Schuster
Chief Legal Counsel
Office of the Governor

Dear Ms. Schuster:

On October 12, 2005, the Ohio Ethics Commission received your letter requesting an advisory opinion. You asked whether a conflict of interest would be present for William Mabe (the candidate) if the Governor were to appoint him to serve as the Administrator of the Ohio Bureau of Workers' Compensation (BWC).

You have explained that there are two issues within your question. First, the candidate is a retiree from Nationwide Insurance (Nationwide) and receives a monthly pension benefit from Nationwide. Second, the candidate's wife and adult daughter are both employed by Nationwide. The possible conflicts of interest arise because GatesMcDonald, a subsidiary of Nationwide, has a business relationship with BWC. You have asked whether either of these situations represents a conflict of interest or requires administrative separation of the candidate, if he is appointed to the position.

Brief Answer

As explained more fully below, and within the scope of the facts you have set forth, the conflict of interest sections of R.C. 102.03(D) and (E) would not prohibit the candidate from serving as the Administrator of BWC and participating in matters that concern GatesMcDonald, a Nationwide subsidiary, if he were to be appointed to the position. However, R.C. 102.03(D) and (E) would prohibit the candidate, if he were to be appointed to the position of Administrator, from using his position to secure any definite and direct benefits for himself, his family members, or a business associate.

Facts—Administrator of Workers' Compensation and Managed Care Organizations

The candidate is being considered for the position of Administrator of BWC. BWC was created by the General Assembly in R.C. 4121.121, and charged with providing a workers' compensation insurance program for the employers and employees in Ohio. R.C. 4121.121 provides that BWC shall be administered by the Administrator of Workers' Compensation, appointed by the Governor. The Administrator is responsible for the management of BWC and for the discharge of all administrative duties imposed on the Administrator by the Ohio Revised Code. R.C. 4121.121(B). Among the duties for which the Administrator is responsible is administration of the Health Partnership Program (HPP) to "provide medical, surgical, nursing, drug, hospital, and rehabilitation services and supplies to an employee for an injury or occupational disease that is compensable" under state workers' compensation provisions. R.C. 4121.44(B) and 4121.441(A). The Administrator is charged with certifying managed care organizations (MCOs) to provide medical management and cost containment services in the HPP. R.C. 4121.44(B)(1).

Each MCO must be certified by BWC to participate in the HPP program and also has an individual contract with BWC to govern its participation in the program. After substantial staff review, the Administrator must sign off on each certification and signs each MCO contract. Each MCO must be recertified every two years, and there is a decertification process for an MCO that fails to meet its obligations under the program. BWC has twenty-eight (28) MCOs.

GatesMcDonald serves as an MCO and Third-Party Administrator (TPA) for BWC. A TPA provides administrative and related services that support the provision of workers' compensation coverage by BWC. GatesMcDonald has been a certified MCO since 1997. It is a wholly owned subsidiary of Nationwide and operates as an individual entity.

Facts—Nationwide Retirement Plan

You have also explained that the candidate was employed by Nationwide for twenty-five years, and retired as Senior Vice President on December 31, 2003. The candidate receives a monthly pension payment from two sources: Fifty percent is a qualified payment received through Nationwide Insurance, as part of the Nationwide Pension Plan (Plan), and fifty percent is a non-qualified payment received from Nationwide Life Insurance. The non-qualified payment is made through an annuity administered through Nationwide Life Insurance. A "non-qualified" plan is an annuity investment plan that does not meet Internal Revenue Service requirements for favorable tax treatment.

The Plan, which is a qualified plan, is a multiple employer pension plan made up of four Nationwide business units: Domestic Property and Casualty Insurance, Life Insurance and Retirement Savings, Asset Management, and Nationwide Strategic Investments, which includes GatesMcDonald. The qualifying retired employees from all of these four business units participate in the Plan.

Each business unit is assessed for pension obligations based on the size of the employer. Each business unit at Nationwide stands alone, although contributions to the Plan are pooled for investment purposes. In 2004, contributions to the Plan totaled \$100 million, of which GatesMcDonald's contribution equaled 0.5% (or \$500,000). Investments for the Plan are made through a group annuity.

The Plan is fully funded, and assets exceed liabilities. The business operating results of Nationwide do not impact the Plan. The Plan is administered by a third-party administrator, Hewitt & Associates, and managed by pension committees outside the business units. The candidate receives a fixed monthly payment based on his years of service and pay. Hewitt & Associates determines the amount. The monthly payment is fixed for life except for potential cost-of-living adjustment increases. Changes in revenue for Nationwide or GatesMcDonald have no effect on the candidate's pension.

Conflict of Interest

R.C. 102.03(D) and (E) apply to the question you have raised:

- (D) No public official or employee shall use or authorize the use of the authority or influence of 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 the public official or employee with respect to that person's duties.
- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

The Administrator of BWC is a "public official or employee" for purposes of R.C. 102.03(D) and (E). See R.C. 102.01(B) and (C); Ohio Ethics Commission Advisory Opinion No. 87-007.

There are two aspects to your first question. The first is whether the candidate is prohibited from accepting a pension payment from Nationwide if he is the Administrator of BWC and BWC has a contract with a Nationwide subsidiary. The second is whether the candidate is prohibited from participating, as Administrator, in matters affecting the interests of a Nationwide subsidiary, if he is receiving a pension payment from Nationwide. The term "anything of value" includes money and every other thing of value. R.C. 1.03; 102.03(G). A definite and direct pecuniary benefit, or the avoidance of a detriment, is considered to be a thing of value under R.C. 102.03(D) and (E). Adv. Ops. No. 88-004 and 92-019. A pension benefit is within the definition of anything of value. A decision regarding the award of a public contract is also within the definition of anything of value.

R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his public position to secure anything of value if the thing of value could have a substantial and improper influence upon the official with respect to the performance of his public duties. The statutes prohibit a public official or employee from soliciting, accepting, or using his position to secure anything of substantial value from a party that is doing or seeking to do business with the public agency he serves. Adv. Op. No. 2001-03. A Nationwide subsidiary is doing business with BWC.

R.C. 102.03(D) also prohibits a public official or employee from using the authority or influence of his public position, formally or informally, in any matter that would render a definite and direct financial benefit or detriment for a person with whom the official has a close business relationship. Adv. Ops. No. 88-005 and 89-008. R.C. 102.03(E) prohibits a public official or employee from soliciting a particular and definite benefit for a person with whom the official has a close business relationship.

A public official or employer is prohibited from participating in the matters that definitely and directly affect the interests of a current employer because the public official or employee has a close business relationship with his employer. Adv. Op. No. 89-006. However, a public employee's former employer is generally not a person with whom the public employee has a close business relationship, such that he would be prohibited from participating in matters affecting the employer, as long as it is clear that there is no significant ongoing connection between the public employee and his former employer.¹ See Adv. Op. No. 2003-02.

In all questions, the application of the Ethics Law is dependent upon the facts and circumstances of the individual situation. Adv. Op. No. 89-006.

Application of the Law to Presented Facts—GatesMcDonald

If the candidate were to be appointed to the position of Administrator, the question would be whether continuing to accept his Nationwide pension would have a substantial and improper influence upon him with respect to the performance of his duties related to the MCO or TPA contracts between BWC and GatesMcDonald, a Nationwide subsidiary.

You have explained that the Plan is administered by a third party, that the candidate receives a fixed amount that will not be increased (except for COLA), that the business operating results of Nationwide do not impact the Plan, and that changes in revenue for Nationwide and GatesMcDonald have no effect on the candidate's pension. Further, the candidate worked for and retired from Nationwide, and the Plan is the Nationwide Plan. In contrast, the MCO and TPA contracts that the Administrator must oversee are with GatesMcDonald, not Nationwide. GatesMcDonald has no control over the Plan and its contributions to the Plan are one-half of one percent of the total contributions.

¹ While your question involves Nationwide, if the candidate has a significant ongoing business or family connection with any other former employer, restrictions in R.C. 102.03(D) and (E) would apply to matters involving that party.

All of these factors, taken together, indicate that the candidate's receipt of pension payments from the Plan would not have a substantial and improper influence upon the candidate, with respect to the performance of his duties related to GatesMcDonald and the other certified MCOs, if he were selected to be the BWC Administrator. The Ethics Law does not prohibit the candidate, if he were to become Administrator, from continuing to accept payments under a Plan established by his former employer. The Law also does not prohibit him from participating fully in decisions, as Administrator, related to an MCO that is a Nationwide subsidiary. Because the law does not prohibit the candidate, if he becomes the Administrator, from participating in these matters, there is no required administrative segregation of duties of the candidate should he be the selected Administrator.

However, if there are any changes to the Plan that would alter the relationship between the candidate and any former employer, the Ethics Law may impose further restrictions on the candidate. If such changes are being considered, the candidate should notify the Ethics Commission about the change and request further guidance.

Family Members of Candidates

R.C. 102.03(D) and (E) also prohibit a public official or employee from soliciting or using his position to secure anything of value, for himself or individuals with whom he has a close family connection, if the thing of value could have a substantial and improper influence upon him with respect to his public position. Adv. Op. No. 98-002. A public official is prohibited from soliciting or using his position to secure anything of value for his wife or his children, whether dependent or not. Adv. Op. No. 89-008. If the candidate were selected to be the Administrator, he would be prohibited from soliciting, or using his position to secure, anything of value for his wife or his adult daughter. He would be prohibited from soliciting, or using his position to secure, anything of value for his wife's or his daughter's employer, if his wife or daughter would receive any definite and direct benefit as a result of decisions that affect their employer. Adv. Op. No. 89-009.

You have explained that the candidate's wife is employed by Nationwide Property and Casualty as Senior Vice President for Marketing. Her primary responsibilities are to provide marketing services to Nationwide Property and Casualty. The candidate's adult daughter is as a communications specialist in the sales division of Nationwide Property and Casualty. Nationwide Property and Casualty and GatesMcDonald have no business dealings with one another. BWC has no contractual or other relationship with Nationwide Property and Casualty.

The possibility that the BWC Administrator's decisions related to a contract with a Nationwide subsidiary would result in anything of value for his family members who are employed by a different Nationwide subsidiary is remote and speculative. Adv. Op. No. 89-009. Therefore, R.C. 102.03(D) and (E) would not prohibit the candidate, if he were appointed to the position of BWC Administrator, from participating in decisions related to the MCO and TPA

contracts with GatesMcDonald, even though his wife and adult daughter are both employed by Nationwide.

However, if the employment of the candidate's wife or daughter were to change after the candidate became the Administrator, such that either family member would receive a definite and direct benefit from decisions related to GatesMcDonald, the Ethics Law would limit or prohibit the Administrator's ability to participate in these matters. If there are any changes of that kind contemplated, the candidate should notify the Ethics Commission about the change and request further guidance. Also, as explained above, the Ethics Law would prohibit the candidate, if he became the Administrator, from using his position to secure anything of value for his wife or adult daughter, and may prohibit the candidate from participating in matters that affect the interests of Nationwide, his family members' employer.

Conclusion

As explained more fully above, and within the scope of the facts you have set forth, the conflict of interest sections of R.C. 102.03(D) and (E) would not prohibit the candidate from serving as the Administrator of BWC and participating in matters that concern GatesMcDonald, a Nationwide subsidiary, if he were to be appointed to the position. However, R.C. 102.03(D) and (E) would prohibit the candidate, if he were to be appointed to the position of Administrator, from using his position to secure any definite and direct benefits for himself, his family members, or a business associate.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 28, 2005. The Commission commends you for requesting guidance before taking any actions that could be prohibited by law.

The opinion is based on the facts presented. It 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. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney