

OHIO ETHICS COMMISSION

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June 29, 2006

Informal Opinion 2006-INF-0629-1

James N. Turner
Ohio Department of Commerce

Dear Mr. Turner:

On December 15, 2005, the Ohio Ethics Commission received your request for an advisory opinion. In your letter, you asked a question pertaining to the restriction imposed by the Ohio Ethics Law and related statutes upon the ability of the state's Chief Building Official (CBO) to engage in private business activity selling plan examination services to political subdivisions with building authorities that are outside the jurisdiction of the CBO.

On April 7, 2004, the Ethics Commission approved an informal advisory opinion for Jeffrey Tyler (Tyler opinion), who was a Deputy Director for the Department of Commerce serving as the Assistant Superintendent of the Division of Industrial Compliance and the CBO. In the Tyler opinion, the Commission concluded that the Ethics Law prohibited the CBO from selling code-related consultation services, including architectural design, historic preservation, and building planning services, to any party doing or seeking to do business with, regulated by, or interested in matters before the Department. The opinion's conclusion was based on the fact that, as Assistant Superintendent, the CBO occupied a key role in the operation of the Division of Industrial Compliance and that the parties to whom he proposed to sell private consulting services are directly regulated by and interested in matters before the Bureaus of Construction Compliance and Plans and Specifications.

Your question, in essence, is whether the Department can alter the job duties and structure the authority of the CBO in such a way as to accommodate the private employment interests of the person holding the position of CBO, so that the Ethics Law would not prohibit the CBO from selling plan examination services to some political subdivisions.

Brief Answer

As explained below, because of the uniqueness of the position and scope of its authority, as set forth in the position descriptions you included with your request, the Ethics Law prohibits the state's CBO from providing plan examination services to political subdivisions. The CBO would also be prohibited from providing any other consulting services of the kind you have described if they are related to the statutory activities of the Department.

Facts

You state that the Superintendent of the Division of Industrial Compliance (Division) is considering naming Geoffrey Eaton, who is presently the Acting CBO, as the CBO. In his capacity as the CBO, Mr. Eaton would not serve as the Assistant Superintendent of the Division.

Your opinion request asks whether the restrictions imposed by the Ohio Ethics Law and related statutes upon private employment prohibit Mr. Eaton from providing plan examination services to political subdivisions with building authorities that are outside the jurisdiction of the CBO if he is employed as CBO.

The Superintendent of Industrial Compliance is created as an office within the Division. R.C. 121.04. The Division is charged with, among other duties, reviewing building plans to insure compliance with the Ohio Building Code for new construction projects as well as major renovations, additions, and alterations to existing structures. R.C. 121.083, 3781.03(B), and 3791.04. The Division has jurisdiction over all state universities, state funded projects, state owned properties and all structures other than one, two, and three family dwellings, except where local certified building departments have jurisdiction.

You state that the title "CBO" refers to the position within Division's table of organization. The CBO is the state's party responsible for enforcing the rules of the Board of Building Standards in areas of the state where a political subdivision has not created its own building department to enforce building codes. R.C.121.083(F) and 4104.43(D).

Selling Services to Political Subdivisions

In the instant situation, the issue is whether R.C. 102.03(D) and (E) prohibit the CBO from selling plan examination services to political subdivisions with building authorities that are outside the jurisdiction of the Department.

A political subdivision is statutorily permitted to create a building department to enforce building codes. R.C. 3781.10(E). In such a situation, plan review and building code enforcement within the political subdivision is not subject to the jurisdiction of the Division. However, the Board of Building Standards is authorized to certify municipal, township, and county building departments to enforce the Ohio Basic Building Code. *Id.* A political subdivision's certification can be revoked for cause. See City of Middleburg Heights v. Ohio Board of Building Standards,

65 Ohio St. 3d. 510 (1992). Because a political subdivision's certification is subject to review by the Division, a political subdivision that has created a building department to enforce building codes within its jurisdiction is a party that is interested in matters before the Division.

This relationship between a political subdivision and the Division was the basis of the Tyler opinion in which the Commission concluded that the Ohio Ethics Law and related statutes prohibited the CBO who was also serving as the Assistant Superintendent of the Division from selling code-related consultation services to a political subdivision with its own building authority.

In the Tyler opinion, the Ethics Commission explained that in some situations a public official or employee may be able to withdraw from consideration of matters that could pose a conflict of interest. Adv. Ops. No. 89-006, 90-002, and 93-015. If a public official or employee wishes to withdraw from a matter in order to avoid a conflict under R.C. 102.03(D) and (E), then a person with superior or equal authority to the official or employee must oversee the resolution of the matter. Adv. Op. No. 90-010. A public official or employee cannot delegate matters from which he must withdraw to any person that he is required to supervise.

The Tyler opinion examined the possibility of a CBO who was also Assistant Superintendent of the Division withdrawing from consideration of matters that could pose a conflict of interest. The opinion determined that, because of his supervisory position in the Division, the CBO's proposed private employment would create an untenable situation for any employee of the Division whose work he had to evaluate to make decisions regarding his private clients.

The Ethics Commission has explained that the Ohio Ethics Law and related statutes do not prohibit public officials and employees from engaging in outside business activity provided that no conflict of interest exists between the official's or employee's assigned duties as a public official or employee and private financial interests. Adv. Op. No. 96-004. The Ethics Commission has, however, identified situations where a public official's or employee's private business or financial interests could be of such a character as to manifest a substantial and improper influence upon the public official or employee with regard to his official decisions and responsibilities. In those cases, the official's or employee's private activities give rise to an insurmountable conflict of interest and divided loyalties between his public duties and private interests. In those situations, R.C. 102.03(D) and (E) prohibit the public official or employee from engaging in the private outside business activity. Adv. Ops. No. 92-008 (a township clerk is prohibited from holding employment with a bank that is a depository of township funds) and 92-009 (the Executive Director of the Ohio State Barber Board is prohibited from owning and operating a barber shop). See also Adv. Ops. No. 84-009, 88-002, and 89-015.

In the situation you have set forth, even though the CBO would not serve as Assistant Superintendent of the Division, the Commission concludes that the nature and scope of his authority is such that the conflict of interest provisions set forth in the Ethics Law and explain in the Tyler opinion would prohibit him from engaging in the outside consulting activity you described.

Conclusion

As explained above, because of the uniqueness of the position and scope of its authority, as set forth in the position descriptions you included with your request, the Ethics Law prohibits the state's CBO from providing plan examination services to political subdivisions. The CBO would also be prohibited from providing any other consulting services of the kind you have described if they are related to that statutory activities of the Department.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on June 29, 2006. The Commission commends the Department and the Acting CBO for requesting guidance before taking any actions that could be prohibited by law.

This 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