

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

June 29, 2006

Informal Opinion 2006-INF-0629-2

Catherine M. Moseley
Chief of Staff
Ohio Bureau of Workers' Compensation
[REDACTED]

Dear Ms. Moseley:

In a letter received by the Ohio Ethics Commission on March 1, 2006, you asked whether the Ethics Law and related statutes prohibit you, as the Chief of Staff for the Bureau of Workers' Compensation (BWC), from providing tax and accounting services through your private business.

Brief Answer

As explained below, given the nature of your position and authority to review and access all areas of BWC, if you were to withdraw from matters that would affect clients of your private business, such a withdrawal could interfere with the performance of your unique duties as the BWC Chief of Staff. Therefore, R.C 102.03 (D) and (E) prohibit you, while you serve as BWC's Chief of Staff, from receiving compensation from private clients who are interested in matters before, regulated by, or doing or seeking to business with BWC.

Facts

In your letter, you explained that you were recently appointed to serve as BWC's Chief of Staff and you have a private business that predates your employment with the state. You explained that your private practice is limited to providing tax and accounting advice and services and that you do not provide services related to BWC. You also indicated that none of your private clients are managed care organizations, investment fund managers, or legislative agents.

You indicated that, as BWC's Chief of Staff, you serve as the executive assistant to the BWC/Administrator Chief Executive Officer (CEO). You are responsible for developing and implementing policies to comply with the requirements of the Sarbanes-Oxley Act of 2002 and overseeing internal auditing, ethics, and financial risk management. You indicated that you have no authority requiring direct contact with parties regulated by or doing business with BWC, except as a spokesperson. You noted, however, that as a member of BWC's executive staff, you may at times authorize public contracts. You stated that although your clients may potentially be interested in matters before or regulated by BWC, neither you nor the BWC employees you supervise are in a position to make decisions affecting the interest of any individual medical provider, injured worker, employer, or investment fund manager. You attached a copy of your state position description and BWC's organizational chart to your letter.

Conflict of Interest Prohibitions—R.C. 102.03(D) and (E)

The provisions of the Ethics Law that are most applicable to the situation you have described are 102.03(D) and (E), which provide:

- (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.

A BWC employee is a "public official or employee" as defined in R.C. 102.03(B). Ohio Ethics Commission Advisory Opinion No. 93-002.

The term "anything of value" is defined for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 1.03, 102.01(G); Adv.Ops. No. 82-002 and 89-003. The income, earnings, or other compensation that you would receive for providing services in an outside business or in outside employment would constitute a thing of value for purposes of R.C. 102.03(D) and (E).

General Restrictions on Outside Private Business or Employment Activity

The Ethics Law does not prohibit a public official or employee from engaging in private employment or business activity provided that there is neither a conflict of interest between her public duties and private financial interests nor a misuse of the authority or influence of her

public office or employment. Adv. Op. No. 96-004. Whenever private employment or business activity is not prohibited, the Ethics Law imposes general restrictions on all public officials and employees who engage in private employment or business activity. These restrictions are summarized below and described more fully in Ohio Ethics Commission Advisory Opinion No. 96-004, which is attached to this advisory opinion.

Prohibitions Imposed By R.C. 102.03(D)

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of her position to secure anything of value for herself, family members, business associates, or others where there is a conflict of interest. Adv. Ops. No. 79-002, 80-004, and 89-006. The application of the prohibition is dependent upon the facts and circumstances of each situation. Adv. Op. No. 87-008.

The Ethics Commission has determined that, under certain circumstances, the public interest could be adversely affected when a public official or employee receives compensation from private employment or business activity as a result of her use of, or failure to exercise, her official authority, or if the receipt of compensation could impair the performance of her public duties. Adv. Op. No. 96-004. Therefore, R.C. 102.03(D) prohibits a public official or employee who is engaged in private employment or business from:

- (a) using public time, facilities, personnel, or resources in conducting her private employment or business, including using public equipment to conduct demonstrations for clients;
- (b) using her official title or identification on private business cards or other written materials;
- (c) using her relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding her private interests;
- (d) discussing, deliberating, or voting on any matter involving her private interests;
- (e) receiving compensation for providing services rendered on projects that she has recommended in her official capacity;
- (f) participating in decisions or recommendations regarding her competitors;
and
- (g) using her public position or authority in any other way to secure a benefit for her outside employer or private business.

Prohibitions Imposed By R.C. 102.03(E)

R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting anything of value that would have an improper influence upon her with respect to her duties. Unlike R.C. 102.03(D), R.C. 102.03(E) prohibits a public official or employee from merely soliciting or accepting an improper thing of value even if she does not use her official authority or influence to secure it. Adv. Op. No. 90-004.

The Ethics Commission has determined that the relationship between a public official or employee and the source of the thing of value determines whether the receipt of the thing of substantial value may improperly influence the public official or employee with respect to her official duties. Adv. Ops. No. 86-011 and 92-015. The Commission has explained that the receipt of a thing of substantial value will improperly influence a public official's or employee's objectivity and independence of judgment with regard to her official duties if she were to solicit or accept the thing of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with her own public agency. Adv. Op. No. 83-007.

R.C. 102.03(E) prohibits a public official or employee from engaging in private employment or business activity with, and securing fees or other payments from, a party that is interested in matters before, regulated by, or doing or seeking to do business with her own public agency. The payments received from these parties are of such a character as to improperly influence the official or employee with respect to the performance of her official duties regarding the source of the payments. See, e.g., Adv. Ops. No. 83-007 (an employee of the Board of Cosmetology is prohibited from selling products to regulated salons) and 93-014 (a member of a board of education is prohibited from selling annuities to school district employees).

The Ethics Commission has explained that in certain situations, a public official or employee who engages in private employment or business activity may withdraw from consideration of matters as a public official or employee that could pose a conflict of interest. Adv. Ops. No. 89-006 and 89-010. However, the Commission also explained that some high-level public officials and employees possess unique authority from which they cannot withdraw and therefore they are prohibited from pursuing certain kinds of private employment or business activity. Adv. Op. No. 92-009.

A public official's or employee's withdrawal from consideration of issues concerning parties who are interested in matters before, regulated by, or doing or seeking to do business with her own public agency may be accomplished only if such a withdrawal: (1) does not interfere with the official's or employee's performance of her assigned duties; and (2) is approved by her employing agency. Adv. Op. No. 90-002. In Advisory Opinion No 89-010, the Ethics Commission explained that an employee of a public agency owes her responsibility to the exercise of the public trust by performing the tasks assigned to her by the agency. The Commission continued: "This duty must not be impaired by a public employee's concern

for his own personal interests.” A public agency may, in some instances, be willing to accommodate the personal financial interests of its employees, but it is within the discretion of the agency to determine whether it is possible or desirable to make that accommodation. An advisory opinion from the Commission does not compel any public agency to accommodate the private financial interests of its officials or employees. Adv. Op. No. 90-002.

Application of R.C. 102.03(D) and (E)

In Advisory Opinion No. 93-002, the Ethics Commission recognized that BWC regulates a broad class of individuals and entities. Therefore, nearly every potential client of a BWC employee who engages in private outside business activity could be subject to regulation by BWC. Adv. Op. No. 93-002. As you acknowledged with regard to your own private clients, “any of these clients may provide services for which they seek reimbursement in a workers’ compensation claim, any of these clients may receive in the future or may have received in the past injuries that may be compensable under workers’ compensation laws, and any of these clients may be or become employers amenable to workers’ compensation laws.” As a result, you are prohibited from engaging in the kind of business activity you have described unless you are able to withdraw from consideration of issues concerning your private clients who are interested in matters before, regulated by, or doing or seeking to do business with BWC.

According to the information you provided, as a member of BWC’s executive staff, the Chief of Staff has a fiduciary responsibility to the CEO and represents the CEO when necessary. The Chief of Staff analyzes reports submitted by the Chief Executive Investment Officer and Chief Financial Officer to determine potential financial risks and establishes policies to be followed by these officers to ensure compliance with laws applicable to the program. The Chief of Staff also establishes codes of conduct for all levels of BWC employees including defining acceptable standards for conducting business on behalf of the CEO and providing guidance regarding the Ethics Law and related statutes. Also, the Chief of Staff supervises subordinate BWC employees, including the internal and MCO audit divisions, the quality assurance division, and insurance risk management division.

As noted above, some high-level public officials and employees are charged with unique authority from which they cannot withdraw. Adv. Op. No. 92-009. Because they cannot withdraw from the performance of their official duties, it is impossible for those officials and employees to pursue certain kinds of outside business activity. You stated in your letter that, although your clients may potentially be interested in matters before or regulated by BWC, neither you nor the BWC employees you supervise are in a position to make decisions affecting the interest of any individual medical provider, injured worker, employer, or investment fund manager. Even so, given the nature of your position and authority to review and access all areas of BWC, if you were to withdraw from matters that would affect clients of your private business, including supervision of your subordinate employees, such a withdrawal could interfere with the performance of your unique duties as the BWC Chief of Staff. Therefore, R.C 102.03 (D) and

(E) prohibit you, while you serve as BWC's Chief of Staff, from receiving compensation from private clients who are interested in matters before, regulated by, or doing or seeking to business with BWC.

Prohibitions Outside of the Ethics Law

Finally, you should note that BWC's Code of Ethics may also condition your private employment.¹ Although a public agency cannot create a policy or rule that is less restrictive than the prohibitions in the Ohio Ethics Laws and related statutes, an agency may impose a policy or rule that is more restrictive than the Ethics Laws. The Ethics Commission does not have the authority to apply the BWC's policies or rules to the facts that you have presented. You should contact BWC's legal advisor to determine whether any of your private employment activities would violate any of BWC's policies or rules.

Conclusion

As explained above, given the nature of your position and authority to review and access all areas of BWC, if you were to withdraw from matters that would affect clients of your private business, such a withdrawal could interfere with the performance of your unique duties as the BWC Chief of Staff. Therefore, R.C 102.03 (D) and (E) prohibit you, while you serve as BWC's Chief of Staff, from receiving compensation from private clients who are interested in matters before, regulated by, or doing or seeking to business with BWC.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on June 29, 2006. 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,


Karen R. King
Advisory Staff Attorney

¹ O.A.C. 4123-15-03(C) (conflicts of interest), O.A.C. 4123-15-03(G), and O.A.C. 4123-15-02.