

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

February 23, 2007

Informal Opinion 2007-INF-0223

Karen Huey
Chief Legal Counsel
Office of the Auditor of State

Dear Ms. Huey:

In a letter received by the Ethics Commission on December 28, 2006, the former Chief Legal Counsel of the Office of the Auditor of State (Office) asked the Ethics Commission two questions pertaining to the application of the Ohio Ethics Law and related statutes on behalf of the Auditor of State (Auditor). The Ethics Commission answered the first question in an informal advisory opinion approved on January 17, 2007. The second question involves the potential application of the Ethics Law to the Auditor in matters related to a construction management firm her husband owns that does business with public agencies, and will be addressed in this advisory opinion.

Brief Answer

As explained below, under the facts presented, the Auditor is not prohibited from participating in matters, including reviewing and approving audits performed by subordinate employees, involving a public agency because her husband's company may have performed construction management services for the public agency. The fact that her husband's company may have a speculative or indirect interest in a matter that affects a public agency for which the company has performed services is not sufficient to prohibit the Auditor from participating in the matter.

However, if a specific matter were to arise in the course of an audit in which her husband's company has a definite and direct interest, the Auditor would be under a "disability," as used in R.C. 117.06, for purposes of performing her statutorily mandated duties. In that case, the statute duly authorizes the Deputy Auditor to perform all the duties of the Auditor independent of, and without supervision and approval by, the Auditor and to protect against any conflict of interest.

Facts

You state that the husband of the Auditor owns a construction company, Welty Building Company, LLC (Company). The Company bids on construction management contracts let by public agencies. You listed the University of Akron and the Youngstown Community Improvement Corporation as examples of public agencies with which the Company does business.

The Auditor conveyed her interests in the Company to her husband on December 31, 2004. The Auditor does not have any authority in the approval or selection process of construction management contracts by public agencies. You state that the selection process is governed by local policies and by state statutes found in R.C. Chapter 153.

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

R.C. 102.03(D) and (E) read as follows:

- (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 Auditor is a "public official" for purposes of R.C. 102.03(D) and (E). See R.C. 102.01(B) and (C); Ohio Ethics Commission Advisory Opinion No. 82-002. 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 avoidance of a detriment, is a thing of value under R.C. 102.03(D) and (E). Adv. Ops. No. 88-004 and 92-019. A public contract and the payment received under the contract are within the definition of anything of value. In addition, the beneficial or detrimental economic impact of the decision of a public entity is a thing of value for purposes of R.C. 102.03. Adv. Ops. No. 85-012, 90-002, and 90-012.

R.C. 102.03(D) and (E) prohibit a public official or employee from participating in any matter, or securing a thing of value, where she would have an inherent conflict of interest such that her objectivity and independence of judgment with regard to her official decisions and responsibilities could be impaired. Adv. Op. No. 91-004. The prohibitions imposed by R.C. 102.03(D) and (E) serve the public interest in effective, objective, and impartial government by preventing the creation of a situation that may impair the objectivity and independence of

judgment of a public official or employee, and, therefore, the effectiveness of the public office with which she serves. Adv. Ops. No. 89-014 and 90-002. The application of R.C. 102.03(D) and (E) is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 87-007 and 89-003.

In applying these conflict of interest provisions, the Ethics Commission has determined that R.C. 102.03(D) and (E) prohibits a public official or employee from using her authority or influence, formally or informally, to secure anything of value that would have a substantial and improper influence on the official, for members of her family, including her spouse. See Adv. Ops. No. 89-008 (spouse and children), 90-004 (spouse), and 91-004 (spouse). Compare Adv. Ops. No. 86-010 and 92-002 (public officials are also prohibited, by R.C. 2921.42(A)(1), from authorizing public contracts in which "family" members have an interest). The Ethics Commission has also explained that R.C. 102.03(D) and (E) do not apply if the economic impact on the official's spouse would be speculative and indirect rather than definite and direct. Adv. Op. 93-016.

Duties of the Auditor's Office

The Auditor's Office exercises review and supervisory functions over the performance of the public officials who serve public agencies. R.C. 117.11 provides that an audit of a public agency, see R.C. 117.01(D), covers the methods, accuracy, and legality of accounts, financial records, files and reports of the public agency and whether pertinent laws and Auditor requirements have been observed and complied with. Furthermore, the Auditor's Office performs other oversight and regulatory responsibilities over the books, financial records, and fiscal affairs of public agencies. See e.g., R.C. 117.38-44. An audit report from the Auditor's Office may serve as the basis for civil actions for the recovery of public money, or property against public officials and further criminal proceedings against public officials. R.C. 117.01(C), 117.28 and 117.29.

In this situation, the husband of the Auditor is not a public official within the public agency that is subject to audit by the Auditor's Office. As explained above, the husband of the Auditor owns a construction company that bids on construction management contracts let by public agencies, and any public contract is between the public agency and the Company. While an audit may include examination of the public contracts of the agency under audit, and the payments made under that contract, the definite and direct impact of the audit would generally be on the public officials of that public agency.

It is speculative to assume that the Company would have an interest in any audit of a public agency simply because it has contracted with or received money from the public agency being audited. Therefore, the Auditor is not prohibited from participating in matters, including reviewing and approving audits performed by subordinate employees affecting public agencies which her husband's Company has performed construction management services.

However, it is possible that, under some circumstances, an audit of a public agency could have financial impact upon contractors or vendors of the public agency, one of whom could be the Company. The issue becomes whether presented with this conflict of interest, the Auditor of State is able to withdraw from her duties.

R.C. 117.06 Exception

The statutory authority of the Auditor of State resides with the Auditor herself. R.C. 117.09. The Auditor of State is empowered to hire and is the ultimate supervisor of all of the employees of her office. R.C. 117.09 and 117.091. Therefore, even if employees of the Auditor of State would perform work on a matter, the Auditor is required by statute to be the "chief inspector and supervisor of public offices." R.C. 117.09.

The Commission has explained that some high-level public officials and employees possess unique authority from which they cannot withdraw. Adv. Ops. No. 92-004 and 92-009. Alternately, a statute or municipal ordinance may empower an authority who is independent of the official with the conflict of interest to act in the official's stead. Adv. Op. No. 92-004. See also Adv. Ops. No. 85-002, 89-006, and 90-010. The issue is whether such transfer of authority is permitted with the Auditor under relevant statutes.

R.C. 117.06 reads:

During the absence or disability of the auditor of state, or when so directed by him, the deputy auditor of state may perform all the duties of auditor of state.

R.C. 117.06 would appear to allow that the Auditor, when confronted with a definite and direct conflict of interest under the Ethics Law, involving the company her husband owns, to be deemed under "disability" for purposes of performing her statutorily mandated duties. In that case, the Deputy Auditor is empowered to perform all the duties of Auditor independent of, and without supervision and approval by, the Auditor. Compare R.C. 4911.12 (the Consumers' Counsel Governing Board may appoint a Deputy, assign the Deputy the duties of the Consumers' Counsel, and have the Deputy report to the Governing Board on all the assigned matters independent of the Consumers' Counsel).

Conclusion

As explained below, under the facts presented, the Auditor is not prohibited from participating in matters, including reviewing and approving audits performed by subordinate employees, involving a public agency because her husband's company may have performed construction management services for the public agency. The fact that her husband's company may have a speculative or indirect interest in a matter that affects a public agency for which the company has performed services is not sufficient to prohibit the Auditor from participating in the matter.

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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on February 23, 2007. 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,



John Rawski
Advisory Staff Attorney