

OHIO ETHICS COMMISSION

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David E. Freel, Executive Director

August 29, 2007

Informal Opinion 2007-INF-0829

Marsha P. Ryan
Administrator/CEO
Ohio Bureau of Workers' Compensation

Dear Ms. Ryan:

On June 13, 2007 the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you are the Administrator for the Ohio Bureau of Workers' Compensation (BWC). You have asked for information about the Ethics Law restrictions related to your previous employment interests and personal financial holdings.

Specifically, you have asked whether you are subject to any specific restrictions or concerns under the Ethics Law if matters affecting the interests of your former employer, American Electric Power, or organizations for which you were a board member, come before BWC. If there are any such restrictions, you have asked that the Commission suggest mechanisms to manage the conflicts of interests. Finally, with regard to your ownership of stocks and bonds, you have asked whether there are any restrictions or concerns and whether you are subject to any unique or additional disclosure responsibilities.

Brief Answer

As explained more fully below, because your connections to your former employer and to the organizations you served as a board member have been effectively severed, you are not subject to any specific restrictions or concerns under the Ethics Law if matters involving those organizations come before BWC. Because you are not subject to any specific restrictions or concerns, it is not necessary for the Commission to suggest mechanisms to manage these restrictions.

With regard to your ownership of stocks and bonds, as long as your ownership interest represents less than one percent of the outstanding stock in a publicly traded corporation, and you file the affidavit required by R.C. 2921.42(B), you are not subject to further restrictions. However, whether you own stockholding interests directly or through a managed investment account, you are required to disclose, as investment interests, the names of any corporations in which you have an investment valued at over one thousand dollars.

Facts

You have explained that, before being appointed Administrator for the Ohio Bureau of Workers Compensation, you were an executive employed by American Electric Power (AEP), which is a self-insured employer in Ohio, for sixteen years. You retired from AEP in anticipation of accepting the Administrator position. Your retirement date is May 1, 2007, the first day of the first month following your actual last day (April 17, 2007) of employment.

You explained that, as a result of your appointment to BWC, you have taken a number of steps to resolve the possibility of conflict of interest. Specifically related to your financial holdings and fiduciary service, you no longer hold any stock options or incentive plans for future payment from AEP. You have accepted a separation agreement for performance shares at a value less than future expectations and transferred your 401(k) and retirement plan to an IRA that is not associated with AEP. You will receive payment for vested career shares valued as of the date of your AEP retirement on June 30, 2008, and payments related to a supplemental retirement plan on April 30, 2008, and annually for three years thereafter. You will receive a 50% lump sum and monthly annuity payments beginning on November 9, 2007, from the Non-Qualified Retirement Plan at an amount that has already been determined. You will not accept medical benefits offered to retirees or optional life insurance offered by AEP. You have also resigned from your position as a member of the board of directors of State Auto Mutual Insurance Company (State Auto) and your position as a trustee of Franklin University.

With respect to your personal financial assets, you explained that you and your husband jointly hold ten shares of AEP stock. AEP is publicly traded on the New York Stock Exchange and has 396 million shares outstanding. You also have a joint investment account managed by Ascend Advisory Group, LLC (Ascend). While you and your husband have decision-making authority over the composition of your account, the investments are generally managed and selected by Ascend. None of stock holdings in the account constitutes more than a very small percentage of total shares in any entity.

While you serve as the Administrator of BWC, you explained that the majority of investment-related decisions are made by BWC Board of Directors (Board). However, with the approval of the Board, you exercise hiring authority over the BWC Chief Investment Officer and enter into contracts with investment managers managing BWC's investment portfolio. You have asked whether your previous employment and board-related interests, or your personal financial holdings, present any conflicts of interest under the Ethics Law.

Soliciting or Using Position to Secure Benefit—R.C. 102.03(D) and (E)

The first provisions of that Ethics Law that are implicated by your question are the conflict of interest restrictions, R.C. 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.

The term "anything of value" includes money and every other thing of value. R.C. 103; 102.03(G). A definite and direct pecuniary benefit, or the avoidance of a detriment, is considered to be a thing of value. Ohio Ethics Commission Advisory Opinions 88-004 and 92-019. A decision regarding the award of a public contract is also within the definition of anything of value. Adv. Op. No. 2003-02. As Administrator of BWC, you are a public official subject to these restrictions. R.C. 102.01(B) and (C); R.C. 4121.121.

Former Associations—AEP, State Auto, and Franklin University

R.C. 102.03(D) and (E) prohibit a public official from soliciting a particular and definite substantial benefit, or using the authority or influence of her public position, formally or informally, in any matter that would render a definite and direct financial benefit or avoid a detriment, for a current employer or someone with whom the official has a close economic or financial relationship. Adv. Ops. No. 88-005 and 89-008. A public official is prohibited from engaging in these activities because her objectivity and independence of judgment could be impaired by the thing of value. Adv. Ops. No. 88-004, 89-008, and 97-002.

However, a public official is generally not prohibited from participating in matters affecting a former employer or someone with whom she formerly had a financial or fiduciary relationship, as long as there is no ongoing financial or fiduciary connection between the parties.¹ Also, there may be situations where the unique facts limit a public official's ability to participate in matters affecting an entity she formerly served or by which she was formerly employed.²

¹ For example, if a public official's former employer owes money related to work she completed, the public official would have a continuing financial relationship with the former employer such that she would be prohibited from participating in matters affecting it. Adv. Op. No. 2003-02. See generally Adv. Op. No. 90-011.

² In Advisory Opinion No. 88-009, the Commission determined that a board member of a community mental health district was prohibited from taking any action on a contract between the mental health board and a private, non-profit agency he formerly served as director, where he signed the contract in his capacity as director of the agency.

With respect to the State Auto and Franklin University, you have resigned from their boards. Because you have resigned, R.C. 102.03(D) and (E) do not prohibit you from participating in matters before BWC affecting them as long as you have no other ongoing connection to them.

With respect to AEP, you have stated that you have severed all employment ties. You will, however, receive payments for vested career shares, payments related to a Supplemental Retirement Savings Plan, and a 50% Combination Lump Sum benefit of your Non-Qualified Retirement Plan. It is significant that the amounts of these payments were valued as of the date of your retirement even though your receipt is forthcoming. The timing of the payments is established by IRS Regulations or other requirements of law. Neither you, nor AEP, can affect the amount or timing of those payments.

Even though you will be receiving future payments related to your former employment at AEP, this does not constitute a continuing relationship between you and your former employer.³ Therefore, R.C. 102.03(D) and (E) do not prohibit you from participating in matters that may arise before BWC that affect AEP. For example, you would not be prohibited from participating in setting policies involving self-insured employers. You would also not be prohibited from participating in lawsuits, as the Administrator of BWC, involving disputes over fees or premiums, or over awards to injured workers, even if AEP has raised the dispute or is the employer affected.

Stock Holdings and Investment Account

With respect to your personal financial assets managed by Ascend, you stated that there is the possibility that an investment manager who is involved in your personal portfolio could seek to do investment-related business with BWC. Even though investment managers are approved with the consent of the Board, as Administrator, you are responsible for signing the contracts and letters of termination for these individuals. R.C. 102.03(D) and (E) would prohibit you from participating in any decisions that would result in a substantial thing of value, such as the award of a BWC investment-related contract, for a manager of your personal investment portfolio. Because of your role in the contracting process, this would effectively prohibit your personal investment manager, as long as it performs that role from doing business with either BWC or the BWC Board.

³ You and your husband are also stockholders of AEP. However, your stockholding (10 shares, which represents less than three millionths of one percent ownership of the outstanding shares of AEP) is not substantial enough to affect your objectivity and independence of judgment in matters affecting AEP. Adv. Op. No. 93-001. You should consult with legal counsel at BWC to determine whether any internal rules or policies prohibit or limit your ability to hold any amount of stock in companies that are regulated by BWC.

Public Contract Law—R.C. 2921.42(A)

As administrator of BWC, you are a “public official” subject to the public contract law, which is set forth in restrictions in R.C. 2921.42(A). R.C. 2921.01(A); R.C. 4121.121. R.C. 2921.42(A) provides that no public official shall knowingly:

- (1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest; . . .
- (4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

A public contract includes any “purchase or acquisition” of property or services by BWC. R.C. 2921.42(G)(1)(a). The hire of a Chief Investment Officer, contracts with investment managers to manage BWC’s investment portfolio, and the investment of BWC funds are all public contracts within the statutory definition.

R.C. 2921.42(A)(1) prohibits you from authorizing any of these contracts, or any other contracts, if you, a business association, or a family member would have a definite and direct interest in the contracts. You function as the administrative head of BWC, subject to review and some approval of your actions by the BWC Board. If you, your family members, or your business associates were to have an interest in any BWC contract under consideration, you would be prohibited from participating in any way with respect to the contract. For example, you would be prohibited from discussing, recommending, approving, signing, or taking any other action to secure a BWC contract.

A “business associate” is any person or entity with whom a public official is engaged in an ongoing business enterprise. Adv. Op. No. 93-001. Some examples of business associates include co-owners of a business and partners in a partnership. Adv. Op. No. 97-002. However, the Commission has concluded that a publicly traded corporation is not a “business associate” of a person whose relationship to the corporation is limited to being a stockholder with a nominal or de minimis stock interest. *Id.* As long as you and your husband are solely stockholders of a publicly traded corporation, and the amount of stock you own is less than one percent of the outstanding stock of the corporation, the corporation is not your business associates.

While R.C. 2921.42(A)(1) prohibits you from using your position to secure authorization of BWC or Board contracts where you have any interest, R.C. 2921.42(A)(4) prohibits you from merely *having* an interest in a contract entered into by BWC or any other public agency with which you are “connected.” As the Administrator of BWC, you are “connected” with the BWC Board. Unless you can meet one of the exceptions to the law, you are prohibited from having an interest in any BWC or BWC Board contract, including the purchase of goods or services and investments. This would be true even if it is the Board that authorizes the contract and, as Administrator, you exercise no direct authority related to the contract.

In order for an interest to be prohibited by R.C. 2921.42(A)(4), it must be definite and direct, but can be either financial or fiduciary. Adv. Op. No. 88-008. An owner of a corporation, including a stockholder, has a financial interest in the contracts of the organization. Adv. Op. No. 93-001. A board member of an organization has a "fiduciary" interest in the contracts of the organization. Therefore, if you hold stock in a corporation, and the corporation were to sell goods or services to BWC or the BWC board, you could have a prohibited interest in the contract. However, R.C. 2921.42(B) contains an exception for small amounts of stock.

Exception—R.C. 2921.42(B)

You have explained that you and your husband own 10 shares of stock in AEP, and stock in other corporations, through your managed investment account with Ascend Advisory Group (Ascend). While the investments in this account are selected and managed by Ascend, you and your husband ultimately control the investment account. You and your husband, jointly, own the stock and other investment assets contained within the account. You have indicated that none of your ownership interests constitutes more than a "very small" percentage of the total shares in any entity.

R.C. 2921.42(B) provides that, in the absence of bribery or a purpose to defraud, a public official who is a stockholder in a company shall not be considered as "having an interest" in a public contract if *all* three of these factors apply:

- (1) The interest of that person is limited to owning or controlling shares of the corporation . . . that is the contractor on the public contract involved . . . ;
- (2) The shares owned or controlled by that person do not exceed five per cent of the outstanding shares of the corporation . . . ;
- (3) That person, prior to the time the public contract is entered into, files with the political subdivision or governmental agency or instrumentality involved, an affidavit giving his exact status in connection with the corporation.

The burden to demonstrate that he or she meets the exception in R.C. 2921.42(B) lies with the public official or employee. As long as you can show that your interest in a corporation is limited to holding stock, and you own less than five percent of the outstanding shares of the corporation, you can meet the exception in R.C. 2921.42(B) by filing the affidavit described in Division (B)(3). The affidavit should disclose your "exact status" as a stockholder of the corporation. The affidavit should be filed with both BWC and the BWC Board. Ordinarily, the affidavit can be filed with the chief executive officer of the public agency. In your case, because you are the chief executive officer of BWC, the affidavit can be filed with the legal counsel for both agencies.

You stated that your investments change from time to time. If new investments are made with corporations that are seeking or doing business with BWC or the Board, you will be required to file a new affidavit reflecting those additional interests.⁴ Despite the fact that there is no legal bar on you regarding a small stockholding in companies, you may wish to request that your investment manager not invest money in corporations that are likely to do business or seek to do business with BWC or the Board.

As long as you meet the exception in R.C. 2921.42(B), you would not have a prohibited interest in a BWC or Board contract. Because you do not have an interest in a BWC or Board contract, R.C. 2921.42(A)(1) does not apply to you, and you are not prohibited from authorizing or participating in the authorization of any contracts between BWC and companies of which you are a stockholder who owns less than five percent of the outstanding stock.

Occupying a Position of Profit

The final provision that is relevant to your question is R.C. 2921.42(A)(3), which provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

R.C. 2921.42(A)(3) and (A)(4) are similar but not the same. It must be assumed that the General Assembly intended Division (A)(3) to prohibit something other than an interest, which is prohibited by Division (A)(4). R.C. 1.47 (in interpreting legislation, it is presumed that, when it enacted a statute, the General Assembly intended the entire statute to be effective and that a just and reasonable result would obtain from the statute). The exception in R.C. 2921.42(B) also refers to an "interest" in a public contract, and does not apply to the restriction in R.C. 2921.42(A)(3).

You have explained that, as Administrator, you do not possess sole discretion related to contracts. However, you do have authority to sign contracts and make decisions in conjunction with the Board or policies adopted by the Board. If you participate, in any way, in the authorization of any BWC contract, including signature, recommendation, review, advice, or supervision of agency staff related to the contract authorization, even if the Board has oversight authority related to the contract, you are prohibited from occupying a "position of profit" in the prosecution of the contract. Adv. Op. No. 92-013.

⁴ If you and your husband own shares of mutual funds, you are considered to have an ownership interest in the mutual fund and not any companies with whom the mutual fund has invested. Therefore, you would not be required to file an affidavit to reflect those interests.

The Commission has explained that a public official occupies a position of profit in the prosecution of a public contract when he or she receives some financial gain or benefit that is definitely and directly related to the carrying out and completion of a contract that he or she authorized, or that was authorized by a board of which he or she is a member. Adv. Ops. No. 92-013 and 93-001. In Advisory Opinion No. 93-001, the Commission stated: "An 'indirect' rather than a definite and direct standard for either Division (A)(4) or (A)(3) would effectively render it difficult for the State or political subdivision to enter into public contracts and would bar substantial numbers of individuals from public office or employment." Further, the Commission has explained that the restriction in R.C. 2921.42(A)(4), because it prohibits both financial and fiduciary interests, is broader than the one in (A)(3), which prohibits "profit." Id.

While it may be true that a stockholder of a publicly traded corporation benefits from any contracts of the corporation, through dividends and increases in the value of the stock, a prohibited position of profit in the prosecution of a specific contract depends upon the nature of person's interest in the company. Where a public official owns less than one percent of the stock in a publicly traded corporation, and has no other financial or fiduciary connection to the corporation, his or her profit from the investment is not definitely and directly related to the performance of any of the individual contracts of the corporation.

Therefore, in the situation you have described, where you and your husband jointly own less than one percent of the outstanding stock of a publicly traded corporation, you are not considered to occupy a position of profit in the prosecution of any BWC or Board contracts with the corporation. Further, as long as you can meet the exception in Division (B) and, as a result, do not have a prohibited interest in the contracts of the corporation, you would not be prohibited from participating in the authorization of contracts to the corporation.⁵

You *would* be considered to occupy a position of profit in the prosecution of a public contract between BWC and a publicly traded corporation if: (1) the shares you own of a publicly traded corporation are more than a fractional (less than one percent) interest in the corporation; (2) you have some financial or fiduciary relationship to the corporation (such as board member, trustee, employee, contractor, or officer) in addition to your stockholding relationship; or (3) the corporation exists solely or largely to serve the interests of BWC or the Board, and a majority of its contracts are with BWC or the Board.⁶ You would also be considered to occupy a position of profit in the prosecution of a public contract between BWC and a closely held corporation with a limited number of stockholders, regardless of the number of shares or percentage of ownership interest you have in the corporation.

⁵ This advisory opinion does not consider any restrictions related to stock ownership or investments that may apply to you and exist outside the Ethics Law and related statutes, such as restrictions related to insider trading.

⁶ For example, a company that serves as Managed Care Organization or Third-Party Administrator for Ohio BWC claims.

Financial Disclosure

You have asked for guidance about the disclosure of your financial interests on your annual financial disclosure statement. You will be required to disclose AEP as the source of income for each year in which you receive payments in connection with your negotiated separation agreement. R.C. 102.02(A)(2). You are required to disclose, as an investment interest, the name of any corporation transacting business in Ohio in which you and your husband own stock valued at over one thousand dollars regardless of whether you own the stock directly or through a managed investment account. R.C. 102.02(A)(3). These requirements apply to all financial disclosure filers, and are not unique to your situation.

Conclusion

As explained more fully above, because your connections to your former employer and to the organizations you served as a board member have been effectively severed, you are not subject to any specific restrictions or concerns under the Ethics Law if matters involving those organizations come before BWC. Because you are not subject to any specific restrictions or concerns, it is not necessary for the Commission to suggest mechanisms to manage these restrictions.

With regard to your ownership of stocks and bonds, as long as your ownership interest represents less than one percent of the outstanding stock in a publicly traded corporation, and you file the affidavit required by R.C. 2921.42(B), you are not subject to further restrictions. However, whether you own stockholding interests directly or through a managed investment account, you are required to disclose, as investment interests, the names of any corporations in which you have an investment valued at over one thousand dollars.

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

cc: David E. Freel, Executive Director
Ohio Ethics Commission