

OHIO ETHICS COMMISSION

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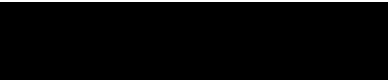


8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.ohio.gov

David E. Freel, *Executive Director*

December 17, 2007 Informal Opinion 2007-INF-1217

Marsha P. Ryan, Administrator
Ohio Bureau of Workers' Compensation



Dear Ms. Ryan:

On September 14, 2007, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that three members of the Bureau of Workers' Compensation (BWC) Board of Directors (Board), Kenneth Haffey, William Lhota, and James Matesich have asked for guidance about the Ohio Ethics Law and related statutes related to various business interests. Because the facts as they pertain to Mr. Lhota and Mr. Matesich present the same issues under the Ethics Law, their questions were answered in a separate advisory opinion.

You state that Kenneth Haffey is a CPA and that one of his former clients is a managed care organization (MCO) that provides services to BWC. A partner at his firm is currently in charge of the MCO's work. Mr. Haffey has asserted that a 'Chinese Wall' has been created at his firm and that he has no ongoing involvement with this client.

Brief Answer

As explained more fully below, R.C. 102.03(D) does not prohibit the Board member from participating in a matter before the Board that affects an MCO that is a client of his CPA firm, provided that: (1) the MCO is not the Board member's client; and (2) the CPA firm is not representing and has not provided services to the MCO in connection with the matter before the Board. The law also does not prohibit the Board member from participating in matters that uniformly affect all MCOs including his firm's client.

Securing Things of Value for Business Associate—R.C. 102.03(D)

The conflict of interest law, R.C. 102.03(D), is applicable to your question and states:

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.

A BWC Board member is a "public official" subject to R.C. 102.03(D). See R.C. 4121.12; Ohio Ethics Commission Advisory Opinion No. 93-002. The term "anything of value" is defined in R.C. 1.03 to include money and every other thing of value. See R.C. 102.01(G). Any definite and direct pecuniary benefit, or the avoidance of a detriment, that results from the decisions of a public body, would fall within the definition of "anything of value." Adv. Ops. No. 88-004 and 92-019. A thing of value could have a substantial and improper influence on a public official if it is of a nature or value that it could impair the official's objectivity and independence of judgment. Adv. Op. No. 2001-03.

The application of R.C. 102.03(D) depends on the facts and circumstances presented. Adv. Op. No. 97-002. The Ethics Commission has examined R.C. 102.03(D), in a variety of different factual situations, as it applies to a public official or employee who represents or provides services to clients. While these opinions frequently discuss attorneys, the conclusions would apply to any professional who represents clients. First, the Commission has explained that an attorney or other professional who is also a public official is prohibited from acting on any matter before his or her public agency if a person he or she represents as a client has a definite and direct interest in the matter. Adv. Op. No. 90-008. The relationship between an attorney or similar professional and his or her client is so close that any benefit or detriment to the official's client resulting from the decision of the agency would be of such a character as to manifest a substantial and improper influence on the official.

Further, R.C. 102.03(D) prohibits a public official from participating in a matter that affects a person who is a client of his or her firm, but is not a client of the official, if the official's firm represents or provides services to the client on that matter that is before the agency. Adv. Op. No. 90-008.¹ In this situation, the fact that the firm's interests will also be definitely and directly affected by the decision of the public agency is the determining factor in the application of R.C. 102.03(D). Even though the official does not have a close relationship to the client, his or her relationship to the *firm* is sufficiently close that any benefit or detriment to the firm resulting from the agency's decisions is of such a character as to manifest a substantial and improper influence upon the official. Id.

However, R.C. 102.03(D) does *not* prohibit a public official from participating in a matter that affects a client of his or her firm provided that: (1) the official does not represent the client on any matters; and (2) the firm does not represent or provide services to the client on the particular matter that is before the agency. Adv. Op. No. 90-008. The relationship between a public official

¹ If the official's firm represents or provides services to a client on a matter before the board of which he is a member, the official is also prohibited from receiving any portion of the fees the client pays to the firm in connection with the work. R.C. 102.03(E); Adv. Op. No. 90-008.

and a client of his or her professional firm, where both of these factors are present, is not sufficiently close that a thing of value to the client resulting from a decision of the public agency the official serves could manifest a substantial and improper influence upon the official.

Application to Facts Presented

As described in R.C. 4121.12(F), the BWC Board has broad authority over the investment and overall administrative policy of BWC. However, it is the BWC Administrator, rather than the Board, authorized to enter into contracts with MCOs, Third Party Administrators, and other services providers. R.C. 4121.121(B). The MCO's contract is with BWC, rather than with the BWC Board. While there are numerous and significant links between BWC and the BWC Board, they are two separate public agencies.

In the situation you have described, the Board member does not provide services to the MCO; rather, the MCO is represented by another partner at his firm. The Commission has explained that R.C. 102.03(D) prohibits the Board member from participating in a matter before the Board that affects the MCO if the CPA firm: (1) is representing the MCO's interests before the BWC Board; or (2) has provided services to the MCO on the matter that is before the BWC Board.²

R.C. 102.03(D) does not prohibit the Board member from participating in matters before the Board that uniformly affect all MCOs, including the client of his CPA firm. For example, the Board member is not prohibited from participating in discussion or decisions about policies affecting all MCOs as a class. Further, R.C. 102.03(D) does not prohibit the Board Member from participating in a matter affecting the MCO that is a client of his firm provided that the firm is not representing, or providing services to, the MCO on the matter before the Board.

Other Matters

The Board member should also be aware of the "Revolving Door" statute, R.C. 102.03(A)(1), which prohibits him from representing any person, before any public agency, on matters in which he personally participated during his board service. The restriction applies to the Board member while he serves on the Board and for one year thereafter. This section prohibits the Board Member from representing clients of his CPA firm before any public agency on any matter in which he personally participated as a BWC Board member.

Further, R.C. 102.03(B) prohibits a public official or employee from disclosing or using confidential information acquired in the performance of his public duties. Mr. Haffey is prohibited from disclosing or using any confidential information he acquired through his service on the BWC Board. There is no time limit for this restriction. Adv. Op. No. 89-009.

² In both of these instances, R.C. 102.03(E) would prohibit the Board member from receiving any distributive share of the fees the firm earns from the client for its work on the matter. Adv. Op. No. 90-008.

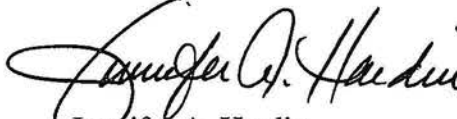
Finally, as a CPA, Mr. Haffey may be subject to a professional code of conduct or ethics. Because such a code would not be within the jurisdiction of the Ethics Commission to interpret or enforce, it is not considered in this opinion. If Mr. Haffey has any questions about the application of a professional code of conduct or ethics to the situation you have described, he should contact the Accountancy Board of Ohio or the relevant professional association.

Conclusion

As explained more fully above, R.C. 102.03(D) does not prohibit the Board member from participating in a matter before the Board that affects an MCO that is a client of his CPA firm, provided that: (1) the MCO is not the Board member's client; and (2) the CPA firm is not representing and has not provided services to the MCO in connection with the matter before the Board. The law also does not prohibit the Board member from participating in matters that uniformly affect all MCOs including his firm's client.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on November 28, 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

Enclosure: Advisory Opinion No. 90-008