

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

January 16, 2008

Informal Opinion 2008-INF-0116

J. Anthony Logan
Chief Legal Counsel
Ohio Department of Natural Resources

Dear Mr. Logan:

On November 5, 2007, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that the Ohio Department of Natural Resources (ODNR) has hired Richard Milleson to fill the position of Assistant Director. As Assistant Director, Mr. Milleson will assist the ODNR Director in supervising the chiefs of all ODNR divisions and formulating ODNR policies, procedures, and programs. Mr. Milleson may also serve on statutory boards and commissions as the Director's designee.

In your request, you have explained that Mr. Milleson's wife is one of three trustees and a future beneficiary of a family trust that receives money from a coal company. Further, Mr. Milleson is the owner of an insurance agency that has several customers who are either ODNR employees or individuals regulated by ODNR. You ask for advice concerning the application of the Ethics Law and related statutes to Mr. Milleson regarding his duties at ODNR in light of his wife's interests in the coal industry and his business activity.

Brief Answer

As explained below, the Ethics Law prohibits Mr. Milleson from taking any formal or informal actions, within the scope of his authority as Assistant Director, on any matter directly affecting the coal company owned by his wife's family. Further, because of his unique authority as the ODNR Assistant Director, while he retains an interest in his private insurance agency, the Ethics Law prohibits Mr. Milleson's insurance agency from continuing to service the insurance accounts of ODNR employees or individuals regulated by ODNR.

Facts

You have explained that Mr. Milleson's wife is one of three trustees and one of several future beneficiaries of a family trust that receives funding from the Cravat Coal Company (Cravat). Mrs. Milleson's father and two of her uncles own Cravat. The trust, which was created to provide financial support for Mrs. Milleson's parents, receives compensation from Cravat in the form of dividends that are declared by Cravat's Board of Directors. Mrs. Milleson has received no distributions from the trust. Mr. Milleson is not an owner or officer of Cravat and is not a beneficiary of his wife's family trust.

Cravat sold its reserves and equipment to Oxford Mining in May 2007 and is in the process of transferring all of its permits to Oxford Mining. While Cravat is no longer mining coal in Ohio, you stated that Oxford has applications pending before the ODNR Division of Mineral Resource Management (DMRM) which, if granted, could result in coal royalties payable to Cravat. The DMRM has the statutory authority to regulate the mining and reclamation process. Any party issued an order or citation by the Chief or a field inspector of DMRM may directly appeal to the Reclamation Commission. You have noted that the Assistant Director has no statutory authority to issue or deny citations or orders.

You have also explained that Mr. Milleson serves privately as a licensed "captive" agent for Nationwide Insurance and employs four agents in an insurance agency with two offices. Mr. Milleson's insurance offices sell variable annuities and mutual funds, and fire, casualty, life, homeowner's, and automobile insurance policies. The agency's customers currently include some ODNR employees and some individuals and entities that are regulated by ODNR. You stated in your letter that other agents will handle activities that conflict with Mr. Milleson's agency duties and that Mr. Milleson has agreed in writing to refrain from any future contact during state working hours with individuals who are insured through his agency. Following conversations between Commission and ODNR staff about the potential conflicts presented, the Assistant Director sent a letter to ODNR Director Sean Logan, dated December 28, 2007, in which the Assistant Director explained that he is instructing his agency staff to inform customers who are ODNR employees that they will have to transfer their policies to a licensed representative that is not associated with his agency. The letter does not refer to the agency's customers who are regulated by ODNR.¹

¹ It is clear from your letter that, at the time Mr. Milleson was hired by ODNR, he had the interests described. The purpose of an Ethics Commission advisory opinion is to provide guidance to a public official upon which he can rely before engaging in an action that may be prohibited by the law. The Commission has explained that its function in rendering an advisory opinion is not a fact-finding process. Adv. Op. No. 94-002. The Commission can render an advisory opinion only in response to a question that involves the prospective conduct of the person who requests the opinion. Adv. Ops. No. 75-037 and 94-002. Therefore, this advisory opinion addresses only the prospective matters you have described and does not reach any conclusions with respect to matters that have already occurred.

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

The Ethics Commission has explained that the Ohio Ethics Law and related statutes do not generally prohibit a public official from engaging in private outside employment or the practice of a profession *provided that* no conflict of interest exists between the official's private interests and public duties. Ohio Ethics Commission Advisory Opinion No. 96-004 (described more fully below). However, the Commission has also explained that a public official is restricted from engaging in private employment where a conflict of interest impairs the objectivity and impartiality, and therefore, the effectiveness, of the official and the agency he or she serves. Adv. Ops. No. 89-014 and 90-002.

When the private financial interests of a public official or employee, or those of his or her family members, can be definitely and directly affected by actions of the agency he or she serves, R.C. 102.03(D) and (E) applies to the official or employee:

- (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 Assistant Director of ODNR is a public official subject to R.C. 102.03(D) and (E). Adv. Op. No. 92-018. The term "anything of value" includes money and every other thing of value. R.C. 102.03(G) and R.C. 1.03. A definite and direct financial benefit or the avoidance of a definite and direct detriment that results from an action or decision of a public entity is a thing of value. Adv. Ops. No. 93-016.

R.C. 102.03(D) and (E) prohibit a public official from soliciting, or using the authority or influence of his or her position to secure, anything of value if the thing of value is of such a character as to impair his or her independence of judgment in the performance of his or her official duties or affect his or her decisions in matters involving the source of the thing of value. Adv. Op. No. 84-010. See also Adv. Op. No. 93-014. The public official is prohibited from soliciting or using his or her position to secure the thing of value personally, or for any person with whom the official has a close family relationship. Adv. Ops. No. 87-006 and 88-004.

The application of R.C. 102.03(D) and (E) to any situation depends on the facts and circumstances presented. Adv. Op. No. 97-002. When the situation involves the interests of a public official's family member, the Commission has explained that R.C. 102.03(D) and (E)

prohibit the official from participating in decision-making of the public agency he or she serves on any matter if the interests of a close family member, such as a spouse, will be definitely and directly affected. See Adv. Op. No. 98-002 (a public official is prohibited from participating in a land use matter that affects the value of her brother's property). If a public official's close family member has an ownership or fiduciary interest in a business, the official is prohibited from participating in matters that definitely and directly affect the business. Adv. Op. No. 89-008.

When the situation involves a public official who receives payments from clients, the Commission has explained that a public official who engages in a private outside business or the practice of a profession is prohibited from accepting, soliciting, or using his or her authority or influence to secure commissions, fees, or other payments from a person or entity that is regulated by, doing or seeking to do business with, or interested in matters before the official's public agency. Adv. Op. No. 96-004. The commissions, fees, or other payments, when provided by any of these related parties, would be of such a character as to improperly influence the official with respect to the performance of his or her duties regarding the sources of the payments. Adv. Ops. No. 83-007, 84-009, and 84-014.

The Ethics Commission has stated that, in some circumstances, a public official is not prohibited from accepting commissions, fees, or other payments from an otherwise prohibited source provided that the official is able to withdraw, in his or her official capacity, from consideration of matters affecting the source of the funds. Adv. Ops. No. 89-006 and 90-002. However, officials who hold high-ranking public positions may be required to discharge such crucial and unique authority for their public agencies that they cannot withdraw from issues affecting the financial interests of clients without interference in the performance of their duties. Adv. Op. No. 92-009. Because they cannot withdraw from the performance of their duties, it is impossible for these officials to accept fees or commissions from clients that are regulated by, doing or seeking to do business with, or interested in matters before the agencies they serve.

Application of Restrictions

According to your letter, the attached position description, and the ODNR Table of Organization, the Assistant Director is directly subordinate to the Director of the Agency. There is only one Assistant Director, and all of the Deputy Directors and Divisions of ODNR report to Assistant Director and then the Director. In the absence or disability of the Director, the Assistant Director shall act as Director of ODNR. R.C. 121.05. As a result, the Assistant Director of ODNR has broad authority and will perform a wide range of official duties that involve discretionary decision-making pertaining to the operation of ODNR. The Assistant Director's exercise of his authority directly affects the financial interests of ODNR employees, as well as individuals and entities that are regulated by ODNR.

As ODNR Assistant Director, Mr. Milleson is required to supervise all ODNR employees and is in a position to exercise control over their general performance and work product. The Assistant Director may also be required to evaluate the decisions of ODNR employees in accomplishing their regulatory tasks. Because of the nature and extent of his authority, the

Assistant Director is unable to effectively withdraw from matters affecting employees of ODNR and entities that are regulated by ODNR, on a routine basis, without placing an undue burden upon the Director and adversely affecting the operation of ODNR. However, because the nature of the Assistant Director's two interests differs, the application of the restrictions to the two sources of conflict also differs.

With respect to the interests of Mr. Milleson's wife and the trust of which she is a trustee, R.C. 102.03(D) and (E) prohibit the Assistant Director from soliciting or using his position to secure any definite and direct benefit for his wife. You have explained that the ODNR Assistant Director has no direct statutory authority to issue or deny citations or orders regarding the mining and reclamation process. This authority is within the purview of the Chief of DMRM or a field inspector. Any party to which an order or citation has been issued can appeal to the Reclamation Commission.

While matters involving mining would not normally be within the Assistant Director's authority, R.C. 102.03(D) and (E) prohibits the Assistant Director from participating in any direct exercise of authority over the staff of DMRM related to mining and reclamation issues that affect Oxford Mining and its payment of royalties to Cravat. The Assistant Director is also required to avoid any informal contact with any ODNR personnel, including the Chief of DMRM or field inspectors, on any matter affecting Oxford Mining while Cravat is in the process of transferring its permits to Oxford Mining.

Where matters involving the regulation of Oxford Mining are routine matters that would not fall directly under the Assistant Director's authority, there is no insurmountable conflict of interest for the Assistant Director. However, should any matters involving Oxford Mining come before the Assistant Director, he must be able to remove himself from participating in these matters. The Assistant Director cannot assign a matter to a subordinate in order to remove himself. Rather, he must go to the Director, who can then assign the matter to another ODNR employee and instruct the employee to report to the Director on the matter. Provided that the Director is available to handle those matter or assignment, or action on the matter can be deferred until the Director is available, the law does not prohibit the Assistant Director from serving in his public position. If any specific matter arises in which the Assistant Director would be required to participate, please do not hesitate to contact this Office for further guidance.

With respect to Mr. Milleson's insurance agency, the likelihood of conflicts of interest is higher than it is with respect to his wife's interests. The frequency and timing of such conflicts is likely to be more prevalent and it would be impossible to predict when conflicts would arise. The compensation that the Assistant Director would receive from a private client who is an ODNR employee or regulated entity would be a thing of value that could impair his objectivity and independence of judgment in the performance of his duties. Adv. Ops. No. 84-010, 93-014, and 93-015. Therefore, R.C. 102.03(D) and (E) would prohibit the Assistant Director from soliciting, accepting, or using his position to secure these payments unless he can withdraw from the exercise of his authority as it affects the source of the payments.

While the Assistant Director may be able to withdraw from matters that affect one regulated entity (as discussed above), the nature and scope of his authority would make it impossible for him to routinely withdraw from matters affecting various employees of ODNR and entities that are regulated by ODNR, who are also clients of his insurance agency, without adversely affecting the operation of ODNR and placing an undue burden upon the Director. It is, therefore, impossible for the Assistant Director to either pursue or continue business activity as the owner of an insurance agency with accounts of ODNR employees and individuals and entities regulated by ODNR. The Assistant Director must either relinquish his interest in the agency or facilitate the transfer of these accounts to an agency that is not affiliated with his agency.

In his December letter to Director Logan, Mr. Milleson indicated that he will be informing his clients who are employees of ODNR that they will need to transfer their policies to another agent not associated with his agency. In order to comply with R.C. 102.03(D) and (E), Mr. Milleson will also have to inform any clients who are regulated by ODNR or otherwise directly subject to ODNR in the exercise of its duties to transfer their policies. The transfers should take place as soon as possible.

General Outside Employment Restrictions

Even after any individuals who are employed or regulated by ODNR have severed their ties to the agency, such that Mr. Milleson is not prohibited from operating the private insurance agency while he is employed by ODNR, the Assistant Director is subject to general outside employment restrictions in the Ethics Law. The restrictions are more fully described in Advisory Opinion No. 96-004, which is enclosed for Mr. Milleson's reference. The Assistant Director is prohibited, for example, from:

- (a) Using public time, facilities, personnel, or resources in conducting his private business, including using public equipment to conduct demonstrations for clients;
- (b) Using his official title or identification on private business cards or other written materials;
- (c) Using his relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding his private interests;
- (d) Discussing, deliberating, or voting on any matter involving his private interest;
- (e) Receiving compensation for providing services rendered on projects that he has recommended in his official capacity;
- (f) Participating in decisions or recommendations regarding his competitors; and

- (g) Using his public position or authority in any other way to secure a benefit for his private business.

Finally, the Assistant Director should be aware that there may be provisions outside the Ethics Law and related statutes that govern his outside employment. For example, the Assistant Director must comply with any specific conflict of interest provisions in the laws and administrative rules that govern the operation of ODNR. As Chief Legal Counsel for ODNR, you are the appropriate person to advise the Assistant Director about the existence and application of any such provisions.

Conclusion

As explained above, the Ethics Law prohibits Mr. Milleson from taking any formal or informal actions, within the scope of his authority as Assistant Director, on any matter directly affecting the coal company owned by his wife's family. Further, because of his unique authority as the ODNR Assistant Director, while he retains an interest in his private insurance agency, the Ethics Law prohibits Mr. Milleson's insurance agency from continuing to service the insurance accounts of ODNR employees or individuals regulated by ODNR.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 11, 2008. 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. 96-004

cc: Kent Markus, Chief Counsel
Office of the Governor