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November 2, 2009

Informal Opinion 2009-INF-1102-1

Christina Wendell, Chief Legal Counsel
Rehabilitation Services Commission
[REDACTED]

Dear Ms. Wendell:

On August 17, 2009, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that Dr. Bruce Growick, the Chairman of the Rehabilitation Services Commission (RSC), has contracted with the Social Security Administration (SSA) to provide services as a vocational expert for twenty years. Dr. Growick participates in 8-10 SSA hearings per month. Dr. Growick has served as an RSC member since 2008 and was recently elected Chairman.

You have asked whether the Ethics Law and related statutes prohibit the RSC Chairman from continuing to contract with SSA. You stated that the Chairman has reviewed this request and has agreed to suspend his compensated activity with SSA pending an Ethics Commission advisory opinion. The Chairman has also agreed to cease his compensated activity with SSA if the Ethics Commission determines that any future activity violates the Ethics Law and related statutes.

Brief Answer

As explained below, the conflict of interest provisions of the Ethics Law prohibit the Chairman from continuing to receive compensation from the SSA to serve as a vocational expert.

Purpose of an Advisory Opinion

The purpose of an Ohio Ethics Commission advisory opinion is to provide guidance to a public official or employee upon which he can rely before engaging in activity that is governed by the Ethics Law. The Commission has explained that its function in rendering an advisory opinion is not a fact-finding process. Ohio Ethics Commission Advisory Opinion No. 94-002. Thus, the Ethics Commission can render an advisory opinion only in response to a hypothetical question or a question that involves the prospective conduct of the person who requests the opinion. Adv. Ops. No. 75-037 and 94-002.

Your request for an advisory opinion described activity that has already occurred. Therefore, following the Ethics Commission's precedent, this advisory opinion addresses only the prospective activity of the Chairman. The only way the Ethics Commission can determine whether the Chairman has already violated the Ethics Law and related statutes would be to conduct an investigation pursuant to its confidential investigative authority. In conducting an investigation, the Ethics Commission would examine all pertinent facts.

Facts

Any individual seeking social security disability insurance benefits must satisfy federal statutory requirements. See 42 U.S.C. § 423. The Bureau of Disability Determination (BDD) has been established within RSC as the state agency responsible for performing disability determinations pursuant to the federal requirements. See R.C. 3304.15¹ and OAC 3304-1-01(C). See also 42 USC § 421(a). BDD receives 100 percent of its funding from SSA to process disability claims throughout Ohio.

You explained in your request that under BDD process, a disability claims adjudicator examines the medical evidence and uses SSA criteria to determine if the applicant qualifies for disability benefits. If an applicant is determined not eligible for benefits, then an appeal may be requested. Upon appeal, BDD will attempt to obtain updated information. A different adjudicator and a medical/psychological consultant will review the applicant's claim and make a decision.

If an applicant is determined not eligible for benefits after the second BDD decision, then the applicant can appeal to have his application heard directly by SSA. A SSA administrative law judge hears the application de novo and may request that medical or vocational experts provide information at the hearing. SSA hires vocational experts to serve as expert witnesses in applications before SSA administrative law judges.

You have stated that R.C. 3304.14 was recently amended to enable the Governor to appoint an administrator of RSC to serve at the Governor's pleasure. R.C. 3304.14, as amended, enables the Governor to grant the administrator the authority to appoint, remove, and discipline professional, administrative, and clerical staff as are necessary to carry out the duties and functions of RSC. Prior to this amendment, the members of RSC hired and supervised the administrator.

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

The RSC Chairman is a "public official" subject to R.C. 102.03(E), which provides that no public official or employee shall: "[S]olicit 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." R.C. 102.01(B) and (C). The income, earnings,

¹ The RSC shall establish administrative subdivisions under its control as it determines necessary and prescribe budgets and rules for each divisions.

or other compensation that the Chairman receives from SSA as a vocational expert in hearings before SSA administrative law judges fall within the definition of "anything of value." R.C. 102.01(G); 1.03.

Prohibitions on Soliciting or Accepting a Thing of Value—R.C. 102.03(E)

R.C. 102.03(E) prohibits a public official from soliciting or accepting anything of value that could have a substantial and improper influence upon him with respect to his duties. R.C. 102.03(E) prohibits solicitation or acceptance of such a thing of value even if the official does not use his public authority or influence to secure it. Adv. Op. No. 90-004.² The application of R.C. 102.03(E) to a specific situation is dependent upon the facts and circumstances. Adv. Op. No. 87-008. The fact that the Chairman had contracted with SSA to serve as a vocational expert for nineteen years before he was appointed to RSC illustrates that he has not used his position with RSC to secure the contract the SSA.

The Ethics Commission has determined that the nature of a thing of value and the relationship between the agency and the source of the thing of value determine whether the thing of value is of such a character as to manifest a substantial and improper influence on an agency official with respect to his official duties. Adv. Ops. No. 86-011 and 92-015. A thing of value that is provided to a public official by any person or entity that is interested in matters before, regulated by, or doing or seeking to do business with his own public agency is of such a character as to manifest a substantial and improper influence on the public official with respect to the performance of his public duties. Any such payments received would be of such a character as to improperly influence the official with respect to the performance of his 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 person can simultaneously serve as a public official and engage in private business activity if he is able to withdraw from consideration of matters as a public official that could affect his personal financial interest. Adv. Ops. No. 89-006 and 89-010. However, the Commission has also explained that some public officials possess unique authority from which they cannot withdraw; these officials are prohibited from pursuing certain kinds of private business activity. Adv. Op. No. 92-009.

Application of R.C. 102.03(E)

As explained above, pursuant to 42 U.S.C. § 421, SSA regulates, and stands in a position of authority over, state agencies that are responsible for performing disability determinations

² R.C. 102.03(D) prohibits a public official from using the authority or influence of his position to secure anything of value for himself, his family members or business associates, or others where there is a conflict of interest. Adv. Ops. No. 79-002, 80-004, and 89-006.

pursuant to the federal requirements. Because SSA funds BDD and has the authority to oversee its operations, SSA is a party that is interested in matters over which RSC has statutory responsibility.

The Commissioner of SSA has the statutory authority to determine whether a state agency is failing to make disability determinations in a manner consistent with the applicable federal statutory provisions and rules. 42 USC § 421(a)(1) and (b)(1). In such an instance, or where the state agency has determined that it no longer wishes to make disability determinations, SSA can assume the disability adjudication function from that state agency. 42 USC § 421(b)(1) and (2). SSA has statutory authority to give hiring preference for appropriate employment positions to state employees who are affected by the assumption by SSA of the disability determination function from a state agency. 42 USC § 421(b)(3)(A). As stated above, *BDD receives 100 percent of its funding from SSA to process disability claims throughout Ohio.* 42 USC § 421(f) mandates that all money paid to a state under that section be used solely for the purpose for which it is paid and that the state agency return any money which is not used for such purposes be returned

The supervisory and funding relationship established by federal statute between SSA and BDD illustrates that SSA is a party that is interested in matters before RSC. The agencies may take different positions regarding SSA's determinations of whether RSC is failing to make disability determinations in a manner consistent with the applicable federal statutory provisions and rules. There may also be disputes between the two agencies about whether money paid by SSA to RSC for the purpose of disability determinations is being used solely for the purpose for which it is paid. RSC would have a definite and direct interest in a favorable decision from SSA in either of these circumstances.

The Chairman of RSC holds a position where his official decisions and actions could directly affect the interests of SSA. If the Chairman also receives compensation from SSA under a contract to provide services to SSA as a vocational expert, the compensation he receives from SSA could affect his objectivity and independence of judgment as RSC Chairman on matters that affect SSA. Therefore, R.C. 102.03(E) prohibits the Chairman from accepting this compensation from SSA.

In order for the RSC Chairman to continue receiving compensation from SSA, he would have to be able to fully withdraw from all matters that may come before RSC affecting SSA. In light of the relationship between RSC and SSA established by both state and federal statutes, the duties of the members of RSC relative to the SSA are a fundamental part of their services to the agency. The withdrawal of any RSC member from issues that could affect SSA would interfere with the performance of his or her public duties. Therefore, the Chairman cannot continue to provide compensated services to SSA while serving as a member of RSC. As set forth above, however, the Chairman has agreed to cease his compensated activity with SSA if the Ethics Commission determines that any future activity violates the Ethics Law and related statutes.

Finally, as set forth above, R.C. 3304.14 was recently amended to enable the Governor to appoint an administrator of RSC to serve at the Governor's pleasure. R.C. 3304.14, as amended, enables the Governor to grant the administrator the authority to appoint, remove, and discipline professional, administrative, and clerical staff as are necessary to carry out the duties and functions of RSC. Prior to this amendment, the members of RSC hired and supervised the administrator.

As explained above, the conflict of interest facing the Chairman arises because SSA funds, regulates, and stands in a position of authority over BDD and he is compensated by SSA to provide services to it as a vocational expert. The statutory change regarding the administrator's appointing authority does not affect this conflict facing the Chairman.

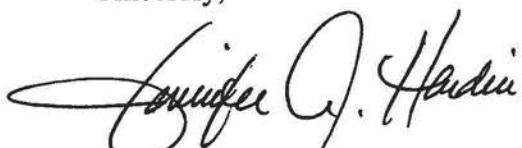
The Ethics Commission is aware that members of state boards and commissions are appointed due to their professional expertise and that knowledgeable individuals may be involved in outside employment or private business activities that involve providing that professional expertise. Adv. Ops. No. 90-009 and 90-012. However, a public official or employee owes his first responsibility to the exercise of the public trust, and this responsibility must not be impaired by his concern for private economic gain. R.C. 102.03(E) is designed to prevent the creation of any situation that may impair the objectivity and impartiality, and therefore the effectiveness, of a public official or employee in the exercise of his public responsibilities. See generally Adv. Ops. No. 89-014 and 90-001. All public officials and employees must accept necessary restrictions to avoid any direct interference with the responsibilities of public office. Adv. Ops. No. 89-010 and 90-009.

Conclusion

As explained above, the conflict of interest provisions of the Ethics Law prohibit the Chairman from continuing to receive compensation from the SSA to serve as a vocational expert.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 30, 2009. 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