

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

July 18, 2003

Informal Opinion 2003-INF-0718-1

John Annarino
Chief Legal Officer
Bureau of Workers' Compensation

Dear Mr. Annarino:

In a letter that was received by the Ohio Ethics Commission on May 16, 2003, you ask whether the Ohio Ethics Law and related statutes will prohibit a person that the Bureau of Workers' Compensation (BWC) is interested in hiring as Medical Director from also working as an independent contractor with the Ohio Police and Fire Pension Fund (OPFPF). In response to questions from the Commission, you submitted a second letter, on June 30, 2003, providing additional information.

Brief Answer

As explained below, the Ethics Law prohibits the Medical Director from becoming an independent contractor with OPFPF, unless the Medical Director declines performing examinations of any person who has pursued, or could pursue, a concurrent BWC claim. In response to a question from the Commission, you explained that a significant portion of the examinations that the Medical Director would perform for OPFPF, perhaps as high as 90%, involve work-related injuries or illnesses. Because they are work-related, these injuries and illnesses could result in concurrent claims filed with BWC. Because of his role at BWC, the Medical Director would then be required to decline OPFPF assignments involving work-related injuries and illnesses.

Further, the Medical Director must withdraw, as Medical Director, from performance of his assigned duties involving persons with work-related injuries for which he had conducted medical examinations, as a contractor of OPFPF, before he assumed his position as Medical Director. The BWC Administrator, the Chief Legal Counsel, and the Medical Director's immediate supervisor must determine whether even this limited outside employment will conflict with the Medical Director's performance of his assigned duties to the detriment of BWC.

Facts

You state that BWC is interested in hiring a specific individual for the position of BWC's Medical Director. The Medical Director provides oversight for all medical components related to workers' compensation claims. The Medical Director would report to the Chief of Medical Management for BWC.

In your initial letter to the Commission, you explained that the duties of BWC's Medical Director include making recommendations on medical coverage issues and physician certification, medical policy issues, reviewing physician exam reports for quality assurance, and overseeing nurses in BWC's health and wellness center. In response to questions from the Commission, you sent later correspondence in which you state that the Medical Director does not perform medical examinations but that his work is primarily related to medical policy direction for BWC. You have clarified that, while the Medical Director does occasionally review individual injured worker files, those situations involve either quality-of-care issues or extraordinary determinations, such as anthrax exposure, smallpox vaccine reactions, SARS cases among health care workers, and asbestos-related claims.

The applicant is currently employed by The Ohio State University (OSU) where he examines workers who are seeking claims under the Ohio Police and Fire Pension Fund (OPFPF). You state that, if the applicant is hired by BWC, he will sever his employment with OSU. You state, however, that the applicant desires to continue to be an independent contractor with OPFPF, examining workers who are seeking claims under OPFPF. In your letter dated June 30, 2003, you state that the applicant would do about ten examinations a month for OPFPF. In a telephone conversation with Commission staff, you explained that as many as 90% of those examinations would involve work-related injuries or illnesses. Because they are work-related, these injuries and illnesses could result in concurrent claims filed with BWC.

BWC Administrative Rule No. 4123-15-03(C)—Conflict of Interest

Before reviewing the application of the Ohio Ethics Law and related statutes to your question, the Commission notes the BWC's Administrative Rule No. 4123-15-03(C), regarding conflicts of interest, which provides:

No employee of [BWC] shall engage in outside employment that results in a conflict or apparent conflict with the employee's official duties and responsibilities.

- (1) Outside employment or activity in which an employee with or without pay represents a claimant or employer in any matter before the industrial commission, a regional board of review or the bureau of workers' compensation is prohibited.

- (2) Outside employment with an attorney, representative or entity that involves work concerning industrial claims, whether filed or to be filed, or which is in any way related to workers' compensation matters is prohibited. (Emphasis added).

The Commission cannot interpret this rule. However, it appears to prohibit the Medical Director from conducting any medical examination, as an independent contractor for OPFPF, of a worker who has filed or may file an industrial claim with BWC.

In response to the Commission question about the application of this administrative rule, you have stated that medical opinions provided by the individual for OPFPF in no way affect, and are irrelevant to, any BWC claims. Further, you have stated that the allowance of a BWC claim is irrelevant to disability determination for the OPFPF as those determinations focus on medical conditions, not just those injuries and diseases received in the course of employment. However, it is possible that the one worker could file concurrent claims with OPFPF and BWC involving the same injury or illness. The question for you, in interpreting BWC's rule, is whether the BWC Medical Director, who is performing, as a contractor for OPFPF, medical examinations of individuals presenting injuries and illnesses received in the course of employment, would be engaged in "outside employment with an . . . entity that involves work concerning industrial claims, whether filed or to be filed, or which is in any way related to workers' compensation matters." As noted above, the Commission cannot render an opinion on this matter.

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

With respect to the application of the Ohio Ethics Law, your attention is directed to the conflict of interest restrictions, set forth in 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 "public agency," as used in R.C. Chapter 102., is defined in 102.01(C) as:

[T]he general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, township, and the five state retirement systems, or any other governmental entity.

An employee of a state department or bureau is a "public official or employee" for purposes of R.C. 102.03 (D) and (E). See R.C. 102.01 (B) and (C). A person employed as the Medical Director of BWC is a "public official or employee" who is subject to the prohibitions of R.C. 102.03 (D) and (E). See Ohio Ethics Commission Advisory Opinion No. 93-002.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 1.03, 102.01(G); Adv. Ops. No. 82-002 and 89-003. Outside business activity, and the compensation derived from it, are things of value for purposes of these restrictions. Adv. Op. No. 92-015. The compensation that the BWC Medical Director would receive from performing medical examinations for OPFPF claimants as an independent contractor to OPFPF is a thing of value for purposes of R.C. 102.03(D) and (E).

The Ethics Commission has explained that the Ohio Ethics Law and related statutes do not prohibit public officials and employees from engaging in outside business activity provided that no conflict of interest exists between the official's or employee's assigned duties as a public official or employee and private financial interests. Adv. Op. No. 96-004. The Ethics Commission has, however, identified situations where a public official's or employee's private business interests could be of such a character as to manifest a substantial and improper influence upon the public official or employee with regard to his official decisions and responsibilities. In such situations, R.C. 102.03(D) and (E) prohibit the public official or employee from engaging in the private outside business activity. Adv. Ops. No. 92-008 (a township clerk is prohibited from holding employment with a bank that is a depository of township funds) and 92-009 (the Executive Director of the Ohio State Barber Board is prohibited from owning and operating a barber shop). See also Adv. Ops. No. 84-009, 88-002, and 89-015.

In 1996, the Ethics Commission issued a comprehensive advisory opinion, detailing the application of R.C. 102.03(D) and (E) to outside employment. Adv. Op. No. 96-004 (attached). This opinion will discuss specific aspects of Advisory Opinion No. 96-004 that are relevant to your situation.

Prohibitions Imposed By R.C. 102.03(D) and (E)

Division (D) prohibits any action or inaction by a public official or employee that would result in securing a substantial and improper thing of value. Adv. Op. No. 89-006. R.C. 102.03(E) does not require that a public official or employee use his authority or influence to secure an improper thing of value but merely prohibits a public official or employee from soliciting or accepting an improper thing of value. The application of the prohibitions of R.C. 102.03(D) and (E) are dependent upon the facts and circumstances of each individual situation. Adv. Op. No. 87-008.

Generally, the Ethics Commission has explained that the public interest could be adversely affected when a public official or employee receives compensation for services provided by him in his private capacity if the compensation is paid as a result of the public official's or employee's use of, or failure to exercise, his official authority, or if the receipt of compensation could impair the independent performance of his public duties to the detriment of his public agency. The Ethics Commission has therefore reasoned that R.C. 102.03(D) prohibits

a public official or employee who is engaged in a private business activity from reviewing, in his official capacity, work that he has performed in his private capacity. Adv. Ops. No. 78-004, 84-004, and 88-009.

The rationale of these opinions is that the public official's or employee's personal pecuniary interest in the fees earned in his private capacity could impair his independence of judgment when reviewing work that he has prepared. Adv. Ops. No. 82-001, 83-001, and 88-009. The Commission has also explained that that R.C. 102.03(E) prohibits a public official or employee from merely soliciting or accepting outside business opportunities from any party if the receipt of compensation from that party could impair his objectivity and independence of judgment with regard to his official actions.

You state that the Medical Director would do about ten examinations a month for OPFPF, and that as many as 90% of those examinations would involve work-related injuries or illnesses. In these cases, it is possible that some of the workers pursuing a claim under OPFPF could concurrently pursue a claim with BWC. You state that it is possible that the Medical Director could be required to advise BWC in his capacity as Medical Director regarding a workers' compensation claim of a worker that he had examined for OPFPF.

Based on the job description you have provided, the Medical Director's role will be to oversee the development and implementation of policies and procedures for all healthcare related services. The Medical Director provides oversight for all medical components related to workers' compensation claims. The Medical Director is responsible for providing leadership and medical expertise for development of medical treatment guidelines, evaluations of medical technology, and plans, coordinates, and directs medical services for operations divisions. Even though the Medical Director does not review all individual claims for BWC, it is clear, from this job description, that he will perform a key role with respect to the medical aspects of claims filed with BWC.

Because of the scope of the Medical Director's authority with respect to the healthcare related services and medical components of BWC claims, R.C. 102.03(D) and (E) would prohibit this individual from serving as Medical Director if he continues to perform medical examinations, as a contractor for OPFPF, of workers with work-related injuries who have pursued, or could pursue, concurrent claims with BWC.

You have explained that the applicant would be one of several individuals performing medical examinations for OPFPF. Therefore, the Medical Director may be able, in theory, to do some contractual medical examinations for OPFPF and avoid a conflict of interest by performing examinations of individuals who do not have work-related injuries or illnesses. The Medical Director would have to decline OPFPF work involving work-related injuries or illnesses. The Medical Director would have to exercise extraordinary diligence, as an independent contractor for OPFPF, to make certain that any patient he is asked to examine does not present a work-related injury or illness for which that person could have a concurrent claim with BWC.

Withdrawal as Medical Director

If the Medical Director decides either to cease his outside employment with OPFPF, or to perform examinations for OPFPF in the manner described above, he will be required to withdraw, as a BWC employee, from examination of any worker's file if he has performed a medical examination on that worker for OPFPF in the past.

The Ethics Commission has held that in certain situations, a public official or employee may withdraw from consideration of matters that could pose a conflict of interest. Adv. Ops. No. 90-002 and 93-015. A public official's or employee's withdrawal from consideration of issues concerning parties who are interested in matters before, regulated by, or doing or seeking to do business with his own public agency may be accomplished only when such a withdrawal: (1) does not interfere with the official's or employee's performance of his assigned duties; and (2) is approved by his employing agency. Adv. Ops. No. 89-010 and 90-002. See also Adv. Op. No. 90-010.

R.C. 102.03(D) and (E) would require that the Medical Director is able to and does withdraw from all discussions and deliberations, formal and informal, as a BWC employee, involving the files of an individual injured worker or the recommendation of benefits and allowed conditions for the worker, if he had also examined the worker who is seeking a concurrent claim under the OPFPF. Again, the Medical Director must exercise diligence to make certain that he withdraws from any such matter that arises.

It must be noted that if a public official wishes to withdraw from a matter in order to avoid a conflict under R.C. 102.03(D) and (E), then a person with superior or equal authority to the official or employee must oversee the resolution of the matter. Adv. Op. No. 90-010. The Medical Director cannot delegate matters from which he must withdraw to any person he is required to supervise. The Chief of Medical Management would be the appropriate person to oversee the resolution of matters from which the Medical Director is required to withdraw, and where necessary, assign those duties to other officials and employees. Further, the supervisor of the Medical Director, BWC's Chief Legal Officer, and the Administrator must determine whether hiring this Medical Director, who will have to withdraw from consideration of matters that could pose a conflict of interest, will impair the functioning of BWC. See Adv. Op. No. 89-010.

Sale of Services by a State Employee to State Agencies—R.C. 102.04(B)

R.C. 102.04(B) prohibits state employees from selling any service to any department, division, institution, instrumentality, board, commission or bureau of the state, except through competitive bidding. However, in Ohio Ethics Commission Advisory Opinion No. 77-006, the Commission explained that the prohibitions of R.C. 102.04(B) do not apply to the provision of personal, professional services. Adv. Op. No. 77-006. See also Adv. Op. No. 88-001 (a physician who is employed by the Department of Mental Retardation and Developmental Disabilities is not prohibited by R.C. 102.04(B) from entering into a personal service contract with the Department for the provision of professional medical services even though such contract was not competitively bid). Therefore, any possible application of R.C. 102.04(B) to the instant situation need not be addressed.

Job Seeking and Post-Employment Restrictions—R.C. 102.03(A), (D), and (E)

In a telephone conversation with Commission staff on July 7, 2003, you explained that the candidate for Medical Director, as an employee of OSU, performs duties similar to those he would perform as Medical Director pursuant to a contract between BWC and OSU. While you did not mention the candidate's current job duties in your letter or ask about this issue, the candidate should be cognizant of the job seeking restrictions, which condition his conduct now while he is an employee of OSU, and the post-employment restrictions, which will condition his conduct after he leaves his position at OSU to work for BWC.

Briefly, R.C. 102.03(D) and (E) prohibit the employee at OSU from seeking employment from BWC, which is doing business with OSU, unless he is able to fully withdraw, as an employee of OSU, from any matters that involve the interests of BWC. Further, R.C. 102.03(A) will prohibit the individual, if he is hired by BWC, from representing BWC, through formal or informal appearances before, or written or oral communications with, OSU and any other public agency, on any matter in which he personally participated while he was an employee at OSU. This restriction is in place for one year from the date the individual leaves his employment with OSU. The post-employment restriction may seriously limit the individual, as Medical Director for BWC, if he is expected to have any interactions with other public agencies on behalf of BWC.

For more information about the job-seeking and post-employment restrictions, the Commission's Revolving Door Memorandum is attached. If the candidate has more questions about these restrictions, he should contact the Commission for further guidance.

Conclusion

As explained above, the Ethics Law prohibits the Medical Director from becoming an independent contractor with OPFPF, unless the Medical Director declines performing examinations of any person who has pursued, or could pursue, a concurrent BWC claim. In response to a question from the Commission, you explained that a significant portion of the examinations that the Medical Director would perform for OPFPF, perhaps as high as 90%, involve work-related injuries or illnesses. Because they are work-related, these injuries and illnesses could result in concurrent claims filed with BWC. Because of his role at BWC, the Medical Director would then be required to decline OPFPF assignments involving work-related injuries and illnesses.

Further, the Medical Director must withdraw, as Medical Director, from performance of his assigned duties involving persons with work-related injuries for which he had conducted medical examinations, as a contractor of OPFPF, before he assumed his position as Medical Director. The BWC Administrator, the Chief Legal Counsel, and the Medical Director's immediate supervisor must determine whether even this limited outside employment will conflict with the Medical Director's performance of his assigned duties to the detriment of BWC.

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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on July 18, 2003. The Commission commends you for requesting guidance before taking any actions that could be prohibited by the Ethics 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,

A handwritten signature in cursive script that reads "John Rawski".

John Rawski
Staff Attorney

Enclosed: Advisory Opinion No. 96-004
 Revolving Door Memorandum