

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

November 5, 2007

Informal Opinion 2007-INF-1105

Gregory Jewell, MD

Dear Dr. Jewell:

On July 19, 2007, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you currently serve as the Medical Director for the Ohio Bureau of Workers' Compensation (BWC). In your letter, you have outlined significant and extensive management responsibilities you exercised on behalf of BWC as Medical Director and, formerly, Chief of Medical Services.

You have asked if the Ethics Law and related statutes prohibit you, after you leave BWC, from accepting one of two employment opportunities to perform medical services that involve injured workers. You have described four activities in which you may be asked to engage—(1) clinical services; (2) consultation and onsite physician services; (3) file reviews; and (4) independent medical evaluations—and asked for guidance about each of these proposed activities.

Brief Answer

As explained below, the Ethics Law prohibits you from seeking employment from any source that is doing or seeking to do business with, regulated by, or interested in matters before BWC *unless* you are able to fully withdraw from consideration of matters affecting the potential source of employment. After you leave your BWC position, the "Revolving Door" restriction within the Ethics Law prohibits you, for one year, from representing an injured worker, an employer, or any other person, on any matter in which you personally participated as BWC Medical Director. As the opinion describes below, because of the breadth of the term "matter," you may face a large number of potential conflicts. As a result of the extensive authority you exercised in your BWC employment, these restrictions will significantly limit some of the potential future employment activities you have described in your detailed questions.

Additionally, you are prohibited from profiting from any public contracts that you, or a board or committee of which you were a member, authorized, including the 2007 managed care organization contract, unless the contract was let by competitive bidding to the lowest and best bidder. Finally, you are prohibited from using or disclosing confidential information that you acquired while in your public position for any purpose. There is no time limit on this prohibition.

Facts

You have attached a copy of your current position description and curriculum vitae to your request. As BWC's Medical Director, your job duties include establishing policies for all medical services provided by BWC, providing oversight for *all* medical components of workers' compensation claims, and serving as the medical consultant for the BWC. You also supervise the disability evaluator panel (a group of BWC contracted physicians who perform independent medical evaluations and file reviews for BWC), which involves establishing criteria for contracting, writing policy, training physicians, reviewing complaints, and performing quality assurance reviews. In addition, you develop provider reimbursement incentive programs and review and approve complex rehabilitation plans by private providers.

You explained that, from February 2006 to June 2007, you also served as BWC's Chief of Medical Services with oversight and direction over all aspects of medical services, vocational rehabilitation, and the managed care organizations (MCO). You indicated that you have continued your role as the Medical Director, but your job duties were expanded to include developing reimbursement for all medical providers, including hospitals, negotiating and writing the 2007 MCO contract, and implementing strategic planning initiatives. In a telephone conversation with Commission staff, you explained that you requested that BWC remove you from any job duties related to the 2008 MCO contract, which will begin in January 2008. BWC acceded to your request, and you have not participated and will not participate, in any way, in the preparation, review, or award of that contract.

You explained that you have two employment options if you leave BWC.¹ Both opportunities would include performing clinical, consultation, and on-site physician services, file reviews, independent medical evaluations, and treatment of injured workers. The clinical services would include regulatory and pre-employment evaluations. The consultation and on-site physician services are similar to the clinical services except that you would also be working with individual employers on disability issues and management of injured workers. The file review services and independent medical evaluations would include reviewing medical records, rendering opinions, and interviewing and examining patients.

¹ You also asked if you are prohibited from performing disability management file reviews for companies outside of Ohio, while you are employed by BWC. However, because you have since made it clear that you intend to leave your position at BWC, it is unnecessary for the Commission to consider this issue.

You indicated that possible sources of the file reviews and independent medical evaluations include: BWC (as part of the BWC disability evaluator panel), the Industrial Commission, self-insured employers or third party administrators, MCOs, agencies such the Ohio Highway Patrol or the Police and Fire Pension Fund, attorneys, and large disability insurers outside of Ohio. You stated that you do not believe you will be involved in any contract or vendor relationship with BWC or any other state agency.

Job-Seeking—R.C. 102.03 (D) and (E)

Before considering the post-employment restrictions, it is necessary to review the conflict of interest restrictions in R.C. 102.03(D) and (E) as they apply to your question:

- (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.

As the Medical Director for BWC, you are a public official subject to R.C. 102.03(D) and (E). R.C. 102.01(B) and (C). "Anything of value" is defined to include "the promise of future employment." R.C. 1.03; 102.01(G).

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his public position to secure an employment opportunity for himself. Ohio Ethics Commission Advisory Opinions No. 86-006 and 87-004. In addition, R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting employment opportunities from a party while performing his official duties with respect to that party. Adv. Op. No. 92-005. Future employment, in these situations, would impair the public official's objectivity and independence of judgment with respect to the exercise of his authority in matters affecting employers who have current matters before BWC. Adv. Ops. No. 91-010 and 95-001.

In order to seek employment from any party that is regulated by, doing or seeking to do business with, or interested in matters before, the public agency with which he serves, the official must be able to fully withdraw from any use of his position or authority on matters affecting the interests of that party. See Adv. Ops. No. 91-009 and 92-005. In order for a public official to effectively withdraw from any matters, they must be handled by an official or employee whose position is superior to, or acts as a check upon, the official's authority. Adv. Ops. No. 92-004 and 92-008. The transfer of authority necessary for withdrawal must also be allowable under relevant provisions of the Revised Code and the official's withdrawal cannot interfere with the official's overall performance of his public duties. Adv. Ops. No. 89-006, 89-010, and 90-002.

Gregory Jewell, MD

November 5, 2007

Page 4

Because BWC regulates a broad class of individuals and entities, most or all businesses and organizations in Ohio with which you may be seeking employment opportunities would also be doing business with or regulated by BWC. An MCO, an attorney who represents injured workers, and any other employer in Ohio subject to regulation by BWC, would be an improper source of employment for you. Accordingly, R.C. 102.03(D) and (E) prohibit you from soliciting, accepting, or using your position as BWC Medical Director to seek employment with any of these improper parties unless you are able to fully withdraw from participating in any matters before BWC that affect the interests of the potential source of employment. Adv. Op. No. 91-009. You must be able to withdraw while you are seeking employment and for the duration of your remaining service with BWC.

In order to withdraw effectively, your authority regarding the potential source of employment must be reassigned to another employee at BWC whose work you do not supervise. Of course, your withdrawal cannot affect your ability to substantially perform your job duties—for example, while you may be able to withdraw from matters affecting one MCO, you could not withdraw from all matters affecting all MCOs. You should consult with your supervisor and the Chief Legal Counsel at BWC who can assist you in withdrawing in order to pursue employment.

Revolving Door Restriction—R.C. 102.03(A)(1)

After you have left your position at BWC, you will be subject to the restriction in R.C. 102.03(A)(1), the “Revolving Door” law, which applies to you for one year after you leave your public position. Because of your extensive oversight and duties as the BWC Medical Director and Chief of Medical Services, the revolving door law will significantly restrict your ability to perform services on workers’ compensation matters for the first year after you leave your public positions.

R.C. 102.03(A)(1) provides:

No present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

As noted above, you are a public official subject to the restrictions in R.C. 102.03.

A “matter” includes “any case, proceeding, application, determination, *issue*, or *question*.” R.C. 102.03(A)(5) (Emphasis added.). A “matter” can include concrete items, such as a specific occurrence or problem requiring discussion, decision, research, or investigation, a lawsuit or legal proceedings, an oral or written application, and a settlement of a dispute or question. Adv. Op. No. 99-001. It can also include abstract items, such as a dispute of special or public importance and a controversy submitted for consideration. Id.

As it applies to you, a “matter” could include a specific workers’ compensation claim or a series of claims involving the same employer or injured worker, or a question or issue underlying the claims. “Matter” would also include a policy established by BWC, a contract, or a complaint.

“Personal participation” includes decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion, including supervision or general oversight over other personnel in their work on a matter. R.C. 102.03(A); Adv. Op. No. 91-009. As Medical Director at BWC, you exercised authority over the agency’s medical program. You would be considered to have personally participated in all of those matters you directed. For example, the 2007 MCO contract is a matter in which you personally participated.

You have explained that, from February 2006 to May 2007, when you served as Chief of Medical Services for BWC, you exercised oversight and direction of all aspects of medical services, vocational rehabilitation, and the MCOs. You were returned to the position of Medical Director in May 2007, where you continued to exercise considerable, although more limited authority, related to medical policy issues and reimbursements, oversight of the Disability Evaluator Panel (DEP), medical issues involving MCOs and clinical aspects of the pharmacy program.

Please note that any policies you recommended or implemented, any reimbursement guidelines you instituted or administered, or any decisions you have made related to the DEP, or other issues involving the medical or pharmacy programs at BWC are matters in which you personally participated. For the first year after you leave BWC, you are prohibited from representing any person, including any new employer and any employer or injured worker, on these matters.

The term “represent” is defined to include “any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person.” R.C. 102.03(A)(5); Adv. Op. No. 86-001. The restriction applies to representation before BWC, and before all other public agencies, including the Industrial Commission, the Highway Patrol, the Police and Fire Pension Fund, and other state and local agencies.

Examples of the types of activities that would fall within the definition of the term “represent” range from appearances in formal proceedings or meetings to informal “lobbying” of agency personnel by telephone or in person. Also included within the definition of “represent” is the preparation of any written communication that is submitted to a public agency, including formal documents, filings, informal letters, notes, and e-mails, regardless of whether the former employee signs the communication. Adv. Ops. No. 86-001, 87-001, and 92-005.

While R.C. 102.03(A)(1) prohibits you from representing anyone before any public agency on matters in which you personally participated, the law does not prohibit you from discussing the project with colleagues in your new employment situation. Adv. Op. No. 89-003.

The Commission has explained that a former public official is not prohibited from engaging in behind-the-scenes consultation with a new employer or coworkers on matters in which the official personally participated during his public service. *Id.* You are not prohibited from sharing your opinions or impressions about any matter, or providing advice and guidance about the best way to present a claim or other matter to BWC or any other public agency. Adv. Op. No. 89-003. You are prohibited from contacting BWC, the Industrial Commission, or any other public agency in Ohio with respect to any matter in which you personally participated.

For example, for the first year after you leave BWC, you are prohibited from preparing documents, filings, or reports that would be submitted to BWC or the Industrial Commission regarding a workers' compensation claim that you reviewed or on which you provided oversight, including consultations with BWC staff, while you were employed by BWC. You are prohibited from calling or e-mailing BWC staff on behalf of an employer regarding a policy or procedure that you reviewed or established while working at BWC. You are prohibited from sending letters or reports to BWC or the Industrial Commission regarding claims that were pending at BWC during your service or on new claims whose underlying issues involve policies or other matters you decided or recommended while at BWC.

The Commission has consistently noted that the law does not prohibit a former public official from representing an employer or others on *new* matters that arose after he left his public position, in which the former official did not personally participate. Adv. Ops. No. 89-003, 91-009, and 92-005. However, you must be very careful when assessing new matters to determine whether they involve underlying matters in which you personally participated. As noted above, because of the significant authority of both positions you have held at BWC, there are likely to be many workers' compensation claims, both pending and filed *after* you leave the agency, in which you will be considered to have personally participated. Even if you did not review the specific claim, underlying policies of BWC you developed or implemented may be part of the matter that is before the agency. You would be prohibited from providing representation on those matters in the year after you leave BWC. In other words, the fact that a claim arose after you left BWC is not determinative of whether you can represent a new employer or patient in connection with the claim.

Application to Specific Questions

You have described your potential future employment activities as falling into four broad categories: (1) clinical services; (2) consultation and onsite physician services; (3) file reviews; and (4) independent medical evaluations.

With respect to the first category, you have stated that, as a clinician, you would conduct regulatory evaluations in occupational medicine, such as Department of Transportation (ODOT) examinations for truck drivers, pre-employment evaluations, and respirator clearance examinations. You anticipate that you would also provide worker's compensation injury care, such as treatment of lacerations, and back and extremity injuries, to patients who present at your office or clinic. R.C. 102.03(A)(1) does *not* prohibit you from providing medical services as a

Gregory Jewell, MD

November 5, 2007

Page 7

clinician to injured workers or from conducting regulatory evaluations in occupational medicine, provided that you will *not* also be appearing on behalf of or otherwise representing those patients before, or preparing documents for submission to, any public agency on matters in which you personally participated. From your description, it appears that these activities may not involve representation on matters in which you personally participated. For example, it is likely that the truck driver examinations will be presented to a public agency (ODOT), but it does not appear that your duties and authority at BWC included these kinds of evaluations.

Under the second category, consultation and onsite physician services, you have stated that you would provide services similar to clinical services except that they are performed for an individual employer and reimbursed by the employer. R.C. 102.03(A)(1) would not prohibit you from acting as a company physician or medical director for a company, *provided that* you would not be representing the company before BWC, the Industrial Commission, or any other public agency on matters in which you personally participated as a BWC employee.

For example, you have stated that an employer may ask you to perform two kinds of services: (1) working on disability issues; and (2) managing the company's injured workers. This second activity, in particular, is likely to raise significant issues under the Ethics Law. You may be expected or required, in the course of managing a company's injured workers, to represent the company's interests before BWC or some other public agency. As noted above, you are prohibited from preparing any documents, filings, or reports to be submitted to BWC or the Industrial Commission regarding a claim that you reviewed or on which you provided oversight, including consultations with BWC staff. You are prohibited from calling or e-mailing BWC staff on behalf of the employer regarding a policy, guideline, protocol, or procedure that you reviewed or established while working at BWC, and from communicating with any public agency on claims that were pending during your service or on new claims whose underlying issues involve matters in which you personally participated while at BWC.

You have explained that, within the third category—file reviews—you would be reviewing medical records to render an opinion on issues within a claim. The first type of file review would involve BWC files as part of the BWC DEP. Provided that you are performing these services for BWC, compensated by BWC, R.C. 102.03(A)(1) would not prohibit you from performing these file reviews. An exception to the law, R.C. 102.03(A)(6), provides that the revolving door law does *not* prohibit a former public official from being retained by his or her former public employer to assist the former employer. However, you would be prohibited from performing file reviews for an employer, Third-Party Administrator (TPA), MCO, attorney, or other person, if file reviews involve injuries that were the subject of claims during your service with BWC, or that involve underlying matters on which you personally participated while at BWC, *and* your reports would be submitted to any public agency.

You have also asked about performing file reviews for disability and other issues for agencies such as Police and Fire Pension Fund (OPF) and the Ohio Highway Patrol, and for large disability insurers involving companies from outside of Ohio. Provided that these file review services do not involve any claims or other matters in which you personally participated as BWC

Medical Director, R.C. 102.03(A)(1) would not prohibit you from engaging in these activities. For example, working with companies outside Ohio, on claims that will never be filed in Ohio, would not be prohibited. However, R.C. 102.03(A)(1) would prohibit you from reviewing files for any other parties involving injuries that were the subject of claims while you were employed at BWC, or that involve underlying policies, rules, or other issues in which you personally participated, if your review report would ultimately be presented to any public agency in Ohio.

You describe the final category of activities as independent medical evaluations, which would include the review of medical records, and interviews and examinations of patients, to render medical opinions. You would provide these services for a variety of parties, including the Industrial Commission, on the issue of permanent total disability. You have explained that you have not written policies on this matter. Provided that your medical evaluations on permanent total disability would not involve any claims pending before the BWC during your tenure, or any underlying policies, rules, or other issues in which you personally participated, R.C. 102.03(A)(1) would not prohibit you from engaging in those activities.

You have also stated that you may be asked to do independent medical evaluations for large state agencies, such as OPF. Again, if the evaluations involve claims or other matters on which you personally participated at BWC, and would be presented to OPF, or any other large state agency, R.C. 102.03(A)(1) would prohibit you from engaging in that activity for one year from the date you leave BWC. Finally, you have stated that you may be asked to the independent medical examinations on workers' compensation matters for the BWC DEP, self-insured employers, TPAs, attorneys, and MCOs. Provided that you are performing independent medical examinations for BWC, compensated by BWC, R.C. 102.03(A)(1) would not prohibit you from performing these file reviews. An exception, R.C. 102.03(A)(6), provides that the revolving door law does not prohibit a former public official from being retained *by* his or her former public employer to assist the former employer. However, you would be prohibited from performing independent medical examinations for an employer, TPA, attorney, MCO, or any other person, if file reviews involve injuries that were the subject of claims during your service with BWC, or any underlying matters on which you personally participated while at BWC, and your reports would be submitted to any public agency.

Profiting from a Public Contract—R.C. 2921.42(A)(3)

Another post-employment provision, R.C. 2921.43(A)(3), prohibits any public official from knowingly:

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

As the Medical Director for BWC, you are a public official subject to R.C. 2921.42(A)(3), during your public service and for one year after you leave your position at BWC.

You have indicated that, in your role as the Chief of Medical Services, you negotiated and wrote the 2007 MCO contract. Therefore, you are prohibited from profiting from the MCO contract in any way, including being compensated by any MCO to whom you awarded a contract, for performing any services, including the services you have described, if they are related to the contract. You would not be prohibited from providing services to an MCO provided that the services are unrelated to the MCOs contract with BWC. For example, you could provide services to an MCO regarding its clients or patients in other states.

In a telephone conversation with Commission staff, you explained that you have been removed from all matters regarding the 2008 MCO contract which is currently being negotiated. R.C. 2921.42(A)(3) would not prohibit you from being engaged by an MCO to perform services related to the 2008 contract, provided that you did not participate, in any way, in BWC's authorization of that contract. However, even where R.C. 2921.42(A)(3) does not prohibit you from performing services for an MCO under the 2008 contract, you are still governed by R.C. 102.03(A)(1) (discussed above), which would prohibit you from representing an MCO before any public agency on matters in which you personally participated.

Confidential Information—R.C. 102.03(B)

The final revolving door provision, R.C. 102.03(B), prohibits a current or former public official or employee from disclosing or using, without appropriate authorization, any confidential information that he acquired in the course of his official duties. No time limitation exists for this prohibition. Adv. Op. No. 88-009. You are prohibited from using any confidential information you obtained about during your employment with BWC for any purpose.

Issues Outside the Ethics Law

You should also note that BWC's Code of Ethics may condition your post-employment.² Although a public agency cannot create a policy or rule that is less restrictive than the prohibitions in the Ohio Ethics Laws and related statutes, an agency may impose a policy or rule that is more restrictive than the Ethics Laws. The Ethics Commission does not have the authority to apply BWC's policies or rules to the facts that you have presented. You should contact BWC's legal advisor to determine whether any of your proposed post-employment activities would violate any of BWC's policies or rules.

² O.A.C. 4123-15-03(C) (conflicts of interest), O.A.C. 4123-15-03(G), and O.A.C. 4123-15-02.

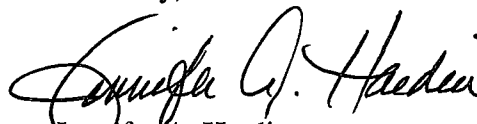
Conclusion

As explained above, the Ethics Law prohibits you from seeking employment from any source that is doing or seeking to do business with, regulated by, or interested in matters before BWC *unless* you are able to fully withdraw from consideration of matters affecting the potential source of employment. After you leave your BWC position, the "Revolving Door" restriction within the Ethics Law prohibits you, for one year, from representing an injured worker, an employer, or any other person, on any matter in which you personally participated as BWC Medical Director. As the opinion describes below, because of the breadth of the term "matter," you may face a large number of potential conflicts. As a result of the extensive authority you exercised in your BWC employment, these restrictions will significantly limit some of the potential future employment activities you have described in your detailed questions.

Additionally, you are prohibited from profiting from any public contracts that you, or a board or committee of which you were a member, authorized, including the 2007 managed care organization contract, unless the contract was let by competitive bidding to the lowest and best bidder. Finally, you are prohibited from using or disclosing confidential information that you acquired while in your public position for any purpose. There is no time limit on this prohibition.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 31, 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

Enclosures: Revolving Door Overview