

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

May 18, 2004

Informal Opinion 2004-INF-0518

Joan Weiser, Chief Legal Counsel
Ohio Department of Natural Resources

Dear Ms. Weiser:

On March 3, 2004, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that the Governor appointed Ms. Debra Carey to the Ohio Reclamation Commission (ORC). The ORC is a seven-member adjudicatory board whose purpose is to provide an administrative appeal process to any person claiming to be adversely affected by a decision made by the Chief of the Department of Natural Resources (ODNR) Division of Mineral Resources Management relating to mining and reclamation issues.

You have asked whether a conflict of interest exists related to Ms. Carey's appointment, given the fact that her son is a registered lobbyist who is employed as president of the Ohio Coal Association (Association) and whether her appointment causes concern under the Ethics Law, R.C. Chapter 102. This opinion will consider whether the Ohio Ethics Law prohibits or limits Ms. Carey's service on the ORC given her son's position with the Association.

Brief Answer

As explained below, because her son has a fiduciary relationship to the Coal Association as its president, R.C. 102.03(D) and (E) prohibit Ms. Carey, as a member of the ORC, from participating in any matter before the ORC where her son or the Association is a party to, or directly affected by, the matter.

Ms. Carey has been appointed as the public's sole representative on the ORC. Given her son's employment as president of the Association, it will be impossible for Ms. Carey to fulfill her responsibility to act as the sole representative of the public in all cases before the ORC. The Commission finds that the individual serving as the public's representative should be able to serve without any significant impediment, such as the one present in these facts, that inhibits that person's ability to fully participate in matters before the ORC.

Facts

The ORC is a seven-member adjudicatory board established by R.C. 1513.05. The Governor appoints the members of the ORC. The members represent various interests and concerns, relevant to mining and reclamation issues. R.C. 1513.05 specifically provides: "One of the appointees to the commission shall be a person who, by reason of the person's previous vocation, employment, or affiliations, can be classed as a representative of the public." The Governor appointed Ms. Carey to this position on the ORC.

In its role as an administrative appeals body, the ORC conducts hearings and renders decisions. R.C. 1513.13. Based upon the information presented to the ORC in an adjudicatory hearing, the ORC will affirm, vacate, or modify the decisions made by the Chief of the ODNR Division of Mineral Resources Management under appeal.

The ORC hears matters related to coal and industrial minerals matters. You, and other representatives of ODNR and ORC, have explained that seventy-five to eighty percent of the matters before ORC are related to coal mining. The other twenty to twenty-five percent of the matters before the ORC are matters related to industrial minerals, including aggregate mining and gravel extraction. The decisions of the ORC in coal mining matters can be appealed to the Courts of Common Pleas. The ORC is also empowered to hear appeals regarding mine safety issues, although these matters rarely appear before the ORC.

Ms. Carey's son, Mike Carey, is a registered legislative agent. Mr. Carey is employed as the president of the Ohio Coal Association, a trade association that represents the Ohio coal industry. The question before the Commission is whether the Ohio Ethics Law prohibits or limits Ms. Carey's service on the ORC given her son's employment with the Association.

From conversations with you and other representatives of ODNR and ORC, the Commission understands that the Association has historically been very involved in matters before the ORC. The Association has filed amicus curia briefs and the Association president has testified before the ORC. However, in recent years, the Association has not filed briefs or presented testimony on matters before the ORC. The Association president does attend some hearings of the ORC.

Restrictions on Use of Position—R.C. 102.03(D) and (E)

Your question raises issues under 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.

A "public official," for purposes of this restriction, is any person who is elected or appointed to an office of any public agency. R.C. 102.01(B). "Public agency" includes any commission of the state, excluding certain commissions whose members are uncompensated. The members of the ORC receive compensation of \$150.00 a day. Therefore, the ORC is a "public agency."

Under Ohio law, a person who holds an "office" is an "officer." Muskingum Co. Democratic Exec. Comm. v. Burrier, 31 Ohio Op. 570, 572 (C.P. Muskingum County 1945). See also Ohio Ethics Commission Advisory Opinion No. 85-005. The Ethics Commission has established five elements that, in combination, will determine whether a person is "appointed to an office." The Commission determines whether the person: (1) is appointed; (2) has a title; (3) exercises a function of government concerning the public; (4) is not subject to a contract of employment; and (5) exercises the "sovereign power" of government. See Adv. Ops. No. 74-007, 75-004, and 77-004. In Advisory Opinion No. 77-004, the Commission held that sovereign power "includes the exercise of a duty entrusted to one by virtue of statute or some other public authority, a duty that is not merely clerical, but that involves discretionary, decision-making qualities." See Adv. Op. No. 75-004. See also State ex rel. Landis v. Butler, 95 Ohio St. 157 (1917).

A member of the ORC is appointed to the position, has the title of commissioner, and is not subject to a contract of employment. As noted above, the ORC conducts hearings and renders administrative appeals decisions. The ORC can affirm, vacate, or modify the decisions of the Chief of the ODNR Division of Mineral Resources Management under appeal. The ORC has exclusive original jurisdiction to hear and decide these appeals. R.C. 1513.13(A)(1). The duties of the Reclamation Commissioners are functions of government concerning the public. The duties are assigned by statute, and involve discretionary, decision-making authority.

Therefore, it is clear that the members of the ORC are appointed to a public office, and are "public officials" as that term is defined in R.C. 102.01(B). As such, members of the ORC are subject to the restrictions in R.C. 102.03(D) and (E).

Soliciting or Using Position to Secure Anything of Value—R.C. 102.03(D) and (E)

R.C. 102.03(D) prohibits the ORC member from using her position to secure anything of value if the thing of value could have a substantial and improper influence upon her with respect to the performance of her public duties. R.C. 102.03(E) prohibits the official from soliciting anything of value if it could have a substantial and improper influence upon her with respect to her duties.

The term "anything of value" is defined for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 102.01(G); 1.03. A definite and direct, pecuniary benefit to the financial interests of an individual, business, or entity, either private or public, is considered to be a thing of value under R.C. 102.03(D). See Adv. Ops. No. 88-004, 88-005 and 89-008. The Ethics Commission has held that a public agency's regulatory decision that affects a party's pecuniary interests is a thing of value for purposes of R.C. 102.03(D). See Adv. Ops. No. 86-007 and 90-002. Decisions of the ORC that definitely and directly affect the interests of any party fall within the definition of "anything of value."

R.C. 102.03(D) prohibits a public official from participating in matters that will benefit either the official herself or parties with whom she has a close family, economic, or business relationship because the benefit is a thing of value that could have a substantial and improper influence upon the official with respect to the performance of her public duties. Adv. Op. No. 98-002. R.C. 102.03(E) prohibits a public official from merely soliciting an improper thing of value for a party with whom the official has a close family, economic, or business relationship.

Application to Specific Facts

As explained above, the ORC has considerable and significant authority related to the regulation of coal mine operations. Parties who can appeal matters to the ORC include mine operators, landowners, citizen groups, governmental units, and other parties who have been aggrieved or adversely affected by the decisions of the ODNR Chief of the Division of Mineral Resources Management. ORC decisions will definitely and directly affect the interests of these parties.

In the situation you have set forth, R.C. 102.03(D) and (E) would prohibit the ORC member from participating in any matter in which her son has a definite and direct interest. Because her son is the president of the Association, he has a fiduciary relationship to the Association. Therefore, any matter that affects the Association affects her son as a fiduciary of the Association.

If the Association is a party to an appeal before the ORC, the ORC's decision in the matter will definitely and directly affect the interests of the Association. The ORC member is prohibited from participating in matters before the ORC that definitely and directly affect the interests of the Association because of her son's fiduciary connection to the Association. Further, if the ORC member's son, as the president of the Association, is a party to an appeal before the ORC, the ORC member is prohibited from participating in that matter because of her son's interest in the matter.

The Commission understands that this issue has already been raised in a motion filed for Ms. Carey's recusal on a case before the ORC because the Association filed an amicus curiae brief in a matter related to the case. In tribute to Ms. Carey, she abstained from participation on the case while awaiting guidance from the Commission. However, if future motions of the same kind are filed, other members of the ORC may be put in the position where they will be forced to rule on motions for disqualification involving one of their colleagues, which may hamper the ORC's ability to act as an adjudicatory body.

Because more than seventy-five percent of the cases before the ORC involve coal mining and affect the members of the Coal Association, and there are likely to be situations where Ms. Carey will be required to abstain because of her son's affiliation with the Association, it will be impossible for Ms. Carey to fulfill her responsibility to act as the sole representative of the public in all cases before the ORC. While the fact that the son of an ORC member is the president of a trade association that represents the coal mining industry does not, in and of itself, prohibit her from serving on the ORC, it does substantially compromise her ability to fully serve as the public's sole representative on the ORC, which is the position to which she has been appointed.

The law may not prohibit Ms. Carey from serving on the ORC, as long as she abstains from those matters where the Association or her son are interested; however, the mere fact that Ms. Carey will be required to abstain from matters involving those interests prevents her from fully serving as the public's sole representative on the ORC. The Commission finds that the individual serving as the public's representative should be able to serve without any significant impediment, such as the one present in these facts, that inhibits that person's ability to participate fully in matters before the ORC.

Conclusion

As explained above, because her son has a fiduciary relationship to the Coal Association as its president, R.C. 102.03(D) and (E) prohibit Ms. Carey, as a member of the ORC, from participating in any matter before the ORC where her son or the Association is a party to, or directly affected by, the matter.

Ms. Carey has been appointed as the public's sole representative on the ORC. Given her son's employment as president of the Association, it will be impossible for Ms. Carey to fulfill her responsibility to act as the sole representative of the public in all cases before the ORC. The Commission finds that the individual serving as the public's representative should be able to serve without any significant impediment, such as the one present in these facts, that inhibits that person's ability to fully participate in matters before the ORC.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on May 18, 2004. The Commission commends you for requesting guidance on behalf of the ORC member and the ORC.

Joan Weiser
May 18, 2004
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The opinion is based on the facts presented and the precedent of the Commission. 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 black ink, appearing to read "Jennifer A. Hardin". The signature is written in a cursive style with a large, looping initial "J".

Jennifer A. Hardin
Chief Advisory Attorney