

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

July 30, 2007

Informal Opinion 2007-INF-0730-2

William J. Lhota

Dear Mr. Lhota:

On June 18, 2007, the Ohio Ethics Commission received your request for an advisory opinion. In your letter, you explained that you have applied for nomination to the Ohio Workers' Compensation Board of Directors (Board) and asked whether there are any Ethics Law restrictions prohibiting you from serving on the Board if you are appointed.

Brief Answer

As explained more fully below, the Ethics Law and related statutes do not prohibit you from accepting an appointment to or serving on the Board. However, as a member of the Board, you will be prohibited from participating in any matters that definitely and directly affect your own interests, the interests of your employer, or the interests of any other board or commission on which you serve. You are also prohibited from disclosing or using any confidential information you acquire as a board member.

Facts

Your question involves the Bureau of Workers' Compensation Board of Directors. The Board was created by the General Assembly in Am. Sub. H.B. 100 to replace the BWC Oversight Commission. The General Assembly amended the statutory provision establishing the Oversight Commission into a provision establishing the Board.

The Board is composed of eleven members appointed by the Governor with the advice and consent of the Senate. R.C. 4121.12 (A). As it relates to your question, the members of the Board include three individuals who can be classed as representatives of employers. Of these three, one shall be a representative of self-insuring employers. R.C. 4121.12(A).

Among other duties and authority, the Board is empowered to establish the overall administrative policy for BWC and approve the investment policy developed by the Board's investment committee. R.C. 4121.12(F). The Board is also empowered to review the progress of BWC in meeting its costs and quality objectives and complying with its statutory objectives, study BWC issues as requested by the BWC Administrator and Governor, and provide advice and consent on administrative rules, the duties and authority conferred on the Administrator, and the rules the Administrator adopts for the health partnership program and qualified health plan. R.C. 4121.12(F).

You explained that, as of the date of your letter, you submitted an application to the Workers' Compensation Board of Directors Nominating Committee for nomination to serve on the Board. Subsequent to your request, you were among the individuals nominated, by the Nominating Committee, for appointment to the Board by the Governor. The Governor has not yet made appointments to the Board. If you are appointed to the Board, you will receive compensation not to exceed \$60,000 for your board service, depending upon the extent of your duties to the Board.

You explained that you are employed as President and Chief Executive Officer of the Central Ohio Transit Authority (COTA), as well as a member of the Ohio Board of Building Appeals (OBBA) and the Columbus Regional Airport Authority (CRAA). At the time you were being considered for appointment to the position with COTA, your attorney asked the Ethics Commission for an advisory opinion on your behalf regarding your ability to serve in these three positions simultaneously. The request letter stated that there was no interaction and no contractual, regulatory, or other relationship between COTA and either OBBA or CRAA. It was also stated that you were paid a fixed per diem for your service on OBBA. On September 29, 2004, the Commission issued an informal opinion in response, concluding that the Ethics Law and related statutes did not prohibit you from serving in these three positions, but those positions need to be addressed in responding to your current question.

You have asked whether there are *any* conflicts of interest that arise under the Ethics Law that would preclude you from accepting an appointment to the Board while you continue to serve in the other three public positions you currently hold.

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

R.C. 102.03(D) and (E) 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.

In each of the public positions you currently hold, or are seeking, you are a public official or employee subject to these restrictions. R.C. 102.01(B) and (C). The term "thing of value" includes money and every other thing of value. Compensation received from outside employment or service is a thing of value. R.C. 102.01(B) and (C).

R.C. 102.03(D) and (E) prohibit a public official from using the authority or influence of his or her position to accept, solicit, or secure anything of value as described below for himself or herself, family members, business associates, or others where there is a conflict of interest. Ohio Ethics Commission Advisory Opinions. No. 79-002, 80-004, and 89-006. When a public official is engaged in compensated employment, the compensation he or she receives could manifest a substantial and improper influence on him or her if matters before the public agency would definitely and directly affect his or her outside employer. Adv. Op. No. 2007-01. In that case, the official's objectivity and independence of judgment can be impaired when matters result in a definite and direct benefit to, or avoid a detriment to, his outside employer. *Id.* This is true regardless of whether the employer is a private corporation or another public agency. Adv. Ops. No. 91-006 and 2007-01. R.C. 102.03(D) and (E) prohibit a public official from participating, in any manner, in matters before his or her public agency that affect the interests of his or her employer.

R.C. 102.03(D) and (E) also apply when a person serves as a member of more than one public board or commission. In that circumstance, if a matter is before a board on which he or she serves that definitely and directly affects the other board, the official's objectivity and independence of judgment can be impaired by fiduciary obligations to the citizens he or she serves as a member of both boards. R.C. 102.03(D) and (E) prohibit a public official or employee from participating in any way, formally or informally, in matters before the public agency he or she serves that affect the interests of any public body of which he or she is a fiduciary. Adv. Ops. No. 96-005 and 2007-01.

In some cases, R.C. 102.03(D) and (E) prohibit a person from serving in a public position because there is a significant conflict between the public duties he or she would be required to perform and his or her private interest. However, if the public official is able to withdraw from consideration of matters that would pose a conflict of interest, the public official is not prohibited from engaging in the outside employment. Adv. Ops. No. 89-006 and 92-009.

Application to the Facts Presented

In the situation you have described, you are the president and CEO of COTA, as well as a member of the Ohio Board of Building Appeals and Columbus Regional Airport Authority. You are compensated by COTA and OBBA.

If appointed to the Workers' Compensation Board of Trustees, the Ethics Law does not prohibit you from accepting the nomination or serving on the Board. However, R.C. 102.03(D) and (E) will prohibit you, as a Board member, from using your public position on any matters that affect the interests of COTA, OBBA, or CRAA. You are prohibited from soliciting, or using your position to secure, a favorable decision or action by Board officials or employees on matters that definitely and directly affect COTA, OBBA, or CRAA. You must withdraw from participating, in any manner, in matters relating COTA, OBBA, and CRAA that arise before the Board.

Because the OBBA does not have employees, and due to the authority of both boards, it is unlikely that matters before the Board will definitely and directly affect OBBA. However, both CRAA and COTA are employers regulated by BWC.¹ When the General Assembly configured the composition of the Board and converted existing roles by amending current law, it specifically required that members of the Board represent the interests of employers and employees regulated by BWC or the Board. These representatives, in many cases, have current ties to regulated parties.

The Commission has concluded that, when the General Assembly mandates that a public board shall include individuals who are regulated by the board, it has legislatively determined that some members of the board must be directly knowledgeable about the area under regulation in order to effectively govern. Adv. Op. No. 92-009. The need for this expertise counterbalances the conflicts of interest the board member will face when issues before the board affect him or her in common with other members of the regulated class. Id.

In these situations, while the law does not prohibit the individuals from serving on regulatory boards, R.C. 102.03 (D) and (E) and other statutes under the Commission's jurisdiction prohibit board members from voting, discussing, or otherwise using the authority or influence of their official position, formally or informally, with regard to matters that would result in a definite and direct personal pecuniary gain or benefit for the board member or a business associate. Adv. Op. No. 90-009. It is important to note that the law does not prohibit board members from participating in matters that affect all or a significant part of the regulated community. Id. However, where a matter before the board would directly affect only the board member or his business associates, or affect them in a unique or differential manner than other regulated parties, the board member is prohibited from participating in the matter. Id.

Therefore, R.C. 102.03(D) and (E) do not prohibit you from serving with the Board, even though COTA and CRAA are regulated by BWC. However, R.C. 102.03(D) and (E) prohibit you from participating in any matter before the Board if the interests of COTA or the CRAA will be affected in a way that is unique or differential from the way the matter affects all other similarly situated employers.

¹ Even though COTA is a self-insured employer, it is subject to regulation by BWC. R.C. 4123.35. For example, self-insured employers are required to make contributions to a guaranty fund to pay claims for employees of any defaulting self-insured employer. R.C. 4123.351. BWC sets the rates for employers' contributions to the fund. CRAA is also subject to regulation regardless of whether it is a self-insured or plan employer.

Confidential Information—R.C. 102.03(B)

Division (B) of Section 102.03 of the Revised Code provides:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

R.C. 102.03(B) prohibits you, as a public official, from disclosing or using, without proper authorization, information acquired by you in the course of your official duties that either is confidential by statutory provision or has been clearly designated to you as confidential when such designation is warranted and necessary for the proper conduct of government business. It is important to note that no time limit exists for this prohibition and it is effective while you serve as a board member and after you leave office. See Adv. Ops. No. 81-002 and 88-003.

Other Matters

The Commission notes with concern that you currently hold three other public roles, in addition to your interest in the new and significant post as a member of the Board. Because of the number of public positions in which you could be serving simultaneously if you are appointed to the Board, the Commission reminds you of two additional important considerations. First, R.C. 2921.43(A)(1) provides that no public servant shall knowingly accept:

Any compensation, other than as allowed by . . . provisions of law, to perform the public servant's official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation.

The Board position for which you are a nominee is a compensated position, up to a maximum compensation of \$60,000. The OBBA position you hold is also compensated, at more than thirty-seven dollars an hour, with approximately fifty hours spent on hearings each month. The salary you receive as COTA CEO is not described in your question.

The Commission cautions that R.C. 2921.43(A)(1) would prohibit you from receiving compensation from any one of these public agencies for the time you spend performing services for another public agency. It must be clear, for example, that during the time you are acting as a member of OBBA, you are not receiving any compensation from COTA.

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Second, in addition to the potential for conflicts of interest among your existing public roles, the Commission notes that whenever a person holds more than one public position at the same time, the question of compatibility of positions is raised. The Commission has no authority to render a decision on whether the four positions you have described are compatible, and whether one person can hold all of them simultaneously. For more guidance on this question, you should consult with the Attorney General's Office.

Conclusion

As explained more fully above, the Ethics Law and related statutes do not prohibit you from accepting an appointment to or serving on the Board. However, as a member of the Board, you will be prohibited from participating in any matters that definitely and directly affect your own interests, the interests of your employer, or the interests of any other board or commission on which you serve. You are also prohibited from disclosing or using any confidential information you acquire as a board member.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on July 26, 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

cc: Candace Jones, Chief Legal Counsel & Ethics Officer
Ohio Department of Development
(serving as counsel for the Bureau of Workers' Compensation Board of Directors
Nominating Council)