

OHIO ETHICS COMMISSION

Ann Marie Tracey, *Chair*
Ben Rose, *Vice Chair*



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.ohio.gov

David E. Freel, *Executive Director*

February 4, 2008

Informal Opinion 2008-INF-0204

Marsha P. Ryan
Ohio Bureau of Workers' Compensation

Dear Ms. Ryan:

On September 14, 2007, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that three members of the Bureau of Workers' Compensation (BWC) Board of Directors (Board), William Lhota, James Matesich, and Kenneth Haffey have asked for guidance about the Ohio Ethics Law and related statutes as they apply to the Board members' various business relationships. Because the facts as they pertain to Mr. Lhota and Mr. Matesich give rise to the same issues under the Ethics Law, this advisory opinion will be limited to addressing the restrictions that apply to them.

You state that William Lhota is the Chairman of the BWC Board and also serves on the Executive Committee (Committee) for the Ohio Chamber of Commerce (Chamber). You state that the Committee makes recommendations on budget and policy issues but does not directly address matters concerning workers' compensation.

You state that James Matesich serves as a Board Member and Treasurer for the Wholesale Beer & Wine Association of Ohio (Association). He has one year remaining in his term and he anticipates that he will serve a two-year term as the Association's vice-president. The Association has a workers' compensation group for premium matters but does not vote on whether to maintain workers' compensation group members. The Association's Third Party Administrator (TPA) provides the Association with semi-annual reports and marketing materials regarding its group-rating program. The TPA makes decisions regarding group membership.

Brief Answer

The Ethics Law, as described more fully in this opinion, does not prohibit either Mr. Lhota or Mr. Matesich from serving with the Board and a private organization. However, the law does condition each board member's actions on the Board as those actions directly affect the private organization. For example, R.C. 102.03(D) prohibits either Board member from participating in any matter before the BWC that would result in a definite and direct benefit to the interests of the organization with which he has a fiduciary connection, such as matters on which the organization has expressed a position.

Soliciting, Accepting, and Securing Things of Value—R.C. 102.03(D) and (E)

— R.C. 102.03(D) and (E) read:

- (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 BWC Board member is a "public official" subject to R.C. 102.03(D) and (E). Ohio Ethics Commission Advisory Opinion No. 93-002. A beneficial or detrimental economic impact that an organization would realize as a definite and direct result of BWC Board decisions is a thing of value under R.C. 102.03. R.C. 1.03 and 102.01(G); Adv. Ops. No. 90-002 and 90-012.

A thing of value can manifest a substantial and improper influence upon a public official or employee with respect to his or her duties if it could impair the official's or employee's objectivity and independence of judgment in the performance of his or her statutorily prescribed duties. Adv. Op. No. 90-012. The application of R.C. 102.03(D) and (E) depends on the facts and circumstances presented. Adv. Op. No. 97-002.

The Commission has explained that R.C. 102.03(D) and (E) do not, per se, prohibit a public official from serving as an officer or board member of a private organization whose members are individuals subject to regulation by the agency. However, when a public official has a fiduciary relationship to a private organization, the law limits the official's conduct in matters affecting the organization. Adv. Op. No. 90-012.

The Commission determined that, when a public official also serves as an officer or board member of a professional association, his objectivity and independence of judgment would be impaired in decisions affecting the interests of the professional organization and its members. Adv. Op. No. 90-012; see also Adv. Op. No. 85-012. In particular, the Commission noted that the public official was prohibited from participating in any matters that would directly benefit the interests of the organization, including those matters on which the organization has taken a position. Compare R.C. 102.03(J) (a public official who is merely a member of a religious, benevolent, fraternal, or professional organization is not prohibited from participating in matters before the agency that affect the organization, while an official with a fiduciary relationship to the organization is prohibited from participating in matters that affect the organization's interests).

Mr. Lhota serves on the Executive Committee of the Chamber; Mr. Matesich serves as a board member and officer of the Association. Each has a fiduciary relationship to the private organization he serves. Both the Chamber and the Association, as employers regulated by BWC, and the members of each organization, are interested in matters that could be affected by BWC Board decisions. Because of his fiduciary relationship to the organization he serves, R.C. 102.03(D) prohibits each Board member from participating in any matter before the BWC Board that would result in a definite and direct benefit to the organization's interests, including any matter on which the organization has expressed a position in any way. Where an organization board votes or makes a determination on a matter, directs staff to lobby or speak on its behalf on the matter, or otherwise makes its position on the matter known, it has expressed a position on the matter, regardless of whether the position is communicated by the board or staff of the organization.

R.C. 102.03(E) is also applicable to both Board members. The Chamber and the Association are interested in matters before the BWC Board. Therefore, R.C. 102.03(E) prohibits each Board member from receiving any compensation from the organization he serves, unless the Board member is able to fully withdraw from consideration of any matter before the Board that would result in a definite and direct benefit to the organization's interests, including matters on which the organization has expressed a position. Adv. Op. No. 90-012.

Specific Conflict of Interest Prohibition—R.C. 4121.126

While it is not within the Commission's jurisdiction, the Ethics Commission directs the attention of the Board members to R.C. 4142.126, a specific conflict of interest restriction applicable to members of the Board and other officials and employees of the Board and BWC. R.C. 4121.126 provides that no Board member, or employee of the Board or BWC shall: "have any direct or indirect interest in the gains or profits of any investment made by the administrator of workers' compensation or shall receive directly or indirectly any pay or emolument for the member's or employee's services."

Other Relevant Restrictions

If either Board member represents the private organization that he serves before state agencies, he would be subject to R.C. 102.04(A), which provides that no person appointed to any board of the state shall:

[R]eceive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

R.C. 102.04(A) would prohibit a BWC Board member from receiving compensation from a private organization for personally lobbying on behalf of the organization on a matter that is before the Board. There is no exception to this prohibition. If either Board member would be asked to represent the organization he serves before any other state agency, R.C. 102.04(A) would prohibit him from accepting compensation for the service unless he can meet the exception in Division (D). Adv. Op. No. 2007-03 (attached). In order to meet the exception, the Board member would be required to file a statement disclosing his activities and agreeing to disqualify himself from matters before the Board that affect any officials or employees of the agency before which he is representing the organization.

The BWC Board members are also subject to the "Revolving Door" statute, R.C. 102.03(A)(1), which reads:

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.

(Emphasis added.) R.C. 102.03(A)(1) prohibits each BWC Board member, during his service on the Board, from representing the private organization that he serves, or any other person, before any public agency on any matter in which he personally participated as a BWC Board member. Representation includes any formal or informal appearance before, or written or oral communication with, any public agency, on behalf of any person. R.C. 102.03(A)(5).

"Personal participation" includes "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion," and includes supervision or general oversight of other public officials or employees. R.C. 102.03(A)(1); Adv. Op. No. 91-009. The term "matter" includes "any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments." R.C. 102.03(A)(5) (emphasis added.) For example, a policy or directive issued by the BWC Board would be a "matter" on which the Board members personally participated.

Finally, the Board member should note R.C. 102.03(B), which prohibits a public official or employee from disclosing or using confidential information acquired in the performance of his public duties. Each BWC Board member is prohibited from disclosing or using any confidential information he acquired through his service on the BWC Board. There is no time limit for this restriction. Adv. Op. No. 89-009.

Conclusion

The Ethics Law, as described more fully in this opinion, does not prohibit either Mr. Lhota or Mr. Matesich from serving with the Board and a private organization. However, the law does condition each board member's actions on the Board as those actions directly affect the private organization. For example, R.C. 102.03(D) prohibits either Board member from participating in any matter before the BWC that would result in a definite and direct benefit to the interests of the organization with which he has a fiduciary connection, such as matters on which the organization has expressed a position.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on November 28, 2007, subject to final review and approval by Commission members. 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 contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

Enclosures: Advisory Opinions No. 90-012 and 2007-03
Blank R.C. 102.04(D) Statements (2)