Office of Government Ethics
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Letter to a DAEO dated November 16, 1983

This is in response to your request for our opinion as to whether [a] Commissioner [in your agency] must continue to recuse himself from participation in adjudicatory proceedings in which one of the parties before the Commission is represented by a law firm with which the Commissioner's son is engaged as an associate. Our view is that recusal from all such matters is not absolutely necessary, but that each case should be examined to determine whether the Commissioner's participation would be appropriate under the circumstances.

Our analysis of your question began with the criminal conflict of interest statutes, which we conclude would not preclude [the Commissioner's] participation in matters in which one of the parties is represented by his son's law firm. The only criminal statute which comes close to being applicable, 18 U.S.C. § 208, precludes official participation by a Government employee in matters in which he, his spouse, or his minor child has a financial interest, and thus does not reach the present situation.

Beyond the criminal statutes, [the Commissioner's] freedom to participate in official matters is limited both by the constitutional requirement of due process and by applicable standards of conduct. We do not read the due process cases as requiring recusal under the circumstances you have presented. See, e.g., Withrow v. Larkin, 421 U.S. 35 (1975); Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 (4th Cir. 1974); Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970); American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966). However, you should be aware that in the absence of informed consent by all parties, participation by the Commissioner in a case in which one party is represented by his son's law firm might provide a basis for a subsequent challenge to the Commission's decision.

Governmentwide standards of conduct provide as follows:

> An employee shall avoid any action, whether or not specifically prohibited . . . , which might result in,

or create the appearance of:

(a) Using public office for private gain;

(b) Giving preferential treatment to any person;

(c) Impeding Government efficiency or economy;

(d) Losing complete independence or impartiality;

(e) Making a Government decision outside official channels; or

(f) Affecting adversely the confidence of the public in the integrity of the Government.

5 C.F.R. § 735.201a. [Citation to agency regulations deleted.]

Assuming that his judgment would not in fact be affected, we must also consider whether an impermissible adverse appearance would result from [the Commissioner's] participation in a matter in which one of the parties is represented by a law firm with which the Commissioner's son is an associate. Because the Commission's proceedings are adjudicatory in nature, we believe that guidance may be drawn from the rules applicable to judges. See Duffield v. Charleston Area Medical Center, supra.

Disqualification of Federal judges is governed by 28 U.S.C. § 455. That section, which is in effect a codification of Canon 3 of the ABA Code of Judicial Conduct, provides in pertinent part:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

. . . .

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any

> other interest that could be substantially affected by the outcome of the proceeding;
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such person: (i) Is a party to the proceeding, or an officer, director, or trustee of a party; (ii) Is acting as a lawyer in the proceeding; (iii) Is known to have an interest that could be substantially affected by the outcome of the proceeding; or (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

Like 18 U.S.C. § 208, section 455(b)(4) is limited to spouses and minor children and does not reach the present situation. However, problems may be presented by section 455(a) and section 455(b)(5). It could be argued, for example, that by virtue of his firm's representation of a party, the Commissioner's son is acting as a lawyer in the proceeding. However, the commentary to the parallel provision in Canon 3 of the Judicial Code of Conduct provides:

> The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" . . . or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" . . . may require his disqualification.

Thus, it seems that the rules applicable to judges would require an inquiry similar to that required by the standards of conduct: whether under the particular circumstances the Commissioner's impartiality might reasonably be questioned, or, put another way, whether the Commissioner's official participation would create an intolerable adverse appearance.

In SCA Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977), it was held that the trial judge should have recused himself because his impartiality might reasonably be questioned where his brother was a partner in a firm which had entered a general appearance for one of the parties. We recognize that the situation you have presented is different, in that the

Commissioner's son is an associate with the law firm and is thus less likely to have a financial interest in the outcome of any particular case. In United States ex rel. Weinberger v. Equifax, 557 F.2d 456 (5th Cir. 1977), cert. denied, 434 U.S. 1035 (1978), it was held that the district judge did not err in declining to recuse himself where his son was an associate with a law firm which participated in the proceedings. However, we cannot go so far as to say that the Commissioner's son's status as an associate would negate any appearance problems that might arise under any circumstances. Therefore, our recommendation is that the Commissioner consider on a case-by-case basis whether his participation in any particular matter would create any of the adverse appearances prohibited by the standards of conduct.

Your second question was whether our opinion would be different in a case in which the Commissioner's vote is needed to break a tie vote. We wish to distinguish between the situation where an individual's participation is essential for the presence of a quorum, or because no other decision maker is available, from the one you have presented. In the former case, the rule of necessity operates to authorize, or perhaps to require, participation where recusal would otherwise be mandated. See, e.g., United States v. Will, 449 U.S. 200 (1980); Duffield v. Charleston Area Medical Center, supra. In the situation you have posed, the potentially biased individual would be called in at some late stage of the proceeding to cast what would obviously be the deciding vote. This, in our view, would be far worse than his having participated in the matter from the beginning.

We hope this opinion provides some guidance to you and to [the Commissioner]. Please feel free to contact us if we can be of assistance on this or any other matter in the future.

Sincerely,

David H. Martin
Director