



**Department of Transformation and Shared Services**  
Governor Asa Hutchinson  
Secretary Amy Fecher

May 6, 2022

Dr. S. Keith Berry  
Vice-President  
Economic and Financial Consulting Group, Inc.  
7 Redtail Point  
Little Rock, Arkansas 72211

RE: Advisory Opinion No. 2022-06

Dear Dr. Berry:

This letter is in response to a written request for an advisory opinion and a waiver pursuant to Arkansas Code Annotated §19-11-715(b) and (c), which was sent to me electronically in a letter received on April 27, 2022, regarding a one-year extension of a contract between Economic and Financial Consulting Group, Inc. (Consulting Group) and the Arkansas Public Service Commission (PSC).

This opinion is based upon the following information that you have presented to me and upon which I am relying. It should be noted that if one or more of these information items are later shown to be incorrect, that could result in a revised opinion.

1. You were employed by PSC from July 1979 through August 1989, during which time you worked initially as the Manager of the Finance Section and then were promoted to the Director of Research and Policy Development;
2. You are now a principal member in the Consulting Group;
3. The Consulting Group has a current contract with PSC to perform consultation services;
4. The Consulting Group has been an independent contractor for PSC since 1990;
5. In your role as a principal member of the Consulting Group, you provide the PSC Commissioners and their staff with analysis and advice concerning financial and economic issues encountered in public utility ratemaking;
6. Since July 26, 2021, your son, Spencer Berry, has been employed by PSC as an Administrative Analyst for the PSC General Staff;
7. Your son's work at PSC is completely separate from, and does not interfere with, the Consulting Group's work for PSC;
8. The Consulting Group provides consultation services for the PSC Commissioners and their staff, and your son provides services to the PSC General Staff; and
9. Your son does not have any contracting authority or procurement responsibilities with PSC.

**I. Relevant Law**

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For purposes of interpreting Arkansas Code Annotated §19-11-701 *et seq.*, Arkansas Code Annotated §19-11-701(8) defines “employee,” as “an individual drawing a salary from a state agency, whether elected or not, and any non-salaried individual performing personal services for any state agency.” “State agency” is defined in Arkansas Code Annotated §19-11-701(16) as meaning “any office, department, commission, council, board, bureau, committee, institution, legislative body, agency, government corporation, or other establishment or official of the executive, judicial, or legislative branch of this state.”

Arkansas Code Annotated §19-11-701(2) defines “business” to mean “any corporation, partnership, individual, sole proprietorship, joint-stock company, joint venture, or any other legal entity.” The term “financial interest” is defined in Arkansas Code Annotated §19-11-701(9) as meaning:

- (A) Ownership of any interest or involvement in any relationship from which, or as a result of which, a person within the past year has received, or is presently or in the future entitled to receive, more than one thousand dollars (\$1,000) per year, or its equivalent;
- (B) Ownership of more than a five percent (5%) interest in any business; or
- (C) Holding a position in a business such as an officer, director, trustee, partner, employee, or the like, or holding any position of management;

The ethical strictures set forth in Arkansas Code Annotated §19-11-705(a)(1)(A) prohibit state employees from participating directly or indirectly in any particular matter pertaining to any state agency contracts in which an employee or an employee's immediate family member has a financial interest. *See* Arkansas Code Annotated §19-11-705. Arkansas Code Annotated §19-11-705(a)(2) defines “direct or indirect participation” as including, but not being limited to, “involvement through decision, approval, disapproval, recommendation, preparation of any part of a procurement request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.”

## II. Analysis

Based on the above representations, your son’s employment at PSC classifies him as a state employee, and your role as a principal member of the Consulting Group establishes that you have a financial interest in the proposed renewal of a PSC contract.

However, your representations that 1) the Consulting Group has been an independent contractor for PSC since 1990, 2) your son began working at PSC on July 26, 2021, 3) your respective employment roles for the PSC Commissioners and their staff and the PSC General Staff are separate and distinct from each other, and 4) your son does not have any contracting authority or procurement responsibilities with PSC demonstrate that a conflict does not exist at this time or is insubstantial or remote so as not to taint the procurement process.

## III. Decision

Thank you for seeking my counsel and approaching the issue with transparency. I am persuaded that under the representations as stated above, any ethical conflict that might exist is insubstantial or remote, and I grant permission to proceed to such extent and upon such terms and conditions as specified in this letter. This decision grants a waiver in accordance with Arkansas Code Annotated § 19-11-715(c) and, to the extent that the underlying circumstances do not change, the Consulting Group may continue to perform services for PSC with proper disclosure regarding the existing PSC contract. Compliance with the above

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course of conduct is deemed to constitute compliance with the ethical standards of Arkansas Code Annotated §19-11-701 *et seq.*

Sincerely,



Amy Fecher  
Secretary

cc: Mitch Rouse, Office of State Procurement