



OHIO ETHICS COMMISSION

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Advisory Opinion Number 92-009
May 22, 1992

Syllabus by the Commission:

Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit the Executive Director of the Ohio State Barber Board from owning and operating a barber shop.

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You have asked whether the Ohio Ethics Law and related statutes prohibit you from owning and operating a barber shop in light of the fact that you are employed as the Executive Director of the Ohio State Barber Board. You state that you are a licensed barber; however, you do not perform barbering services. You also state that you do not intend to personally perform barbering services in the shop that you desire to open.

In order to address your question, the Ohio State Barber Board's statutory powers and duties with regard to the licensure and regulation of barber shops must be examined.

The Ohio State Barber Board (Board) is a statutorily created board within state government. See R.C. 4709.04 (A). The Board is comprised of three members who are appointed by the Governor with the advice and consent of the Senate. Id. Two members must be barbers and one must be a person who has no connection to the practice of barbering except as a consumer of barbering services. Id. The Board members serve a term of three years and are compensated for their services. See R.C. 4709.04 (A) and (B). The Board members are prohibited from being financially interested in, or having a financial connection with, any barbering school or wholesale cosmetic, barber supply, or equipment business, or from teaching barbering for monetary consideration. See R.C. 4709.04 (A). The Board's statutorily prescribed responsibility is to regulate the practice of barbering within the state. See generally R.C. 4709.05. The Board's regulation of barbering includes licensing barber shop operators and regulating barber shops. See R.C. 4709.02 (B).

Any person, even a person who is not a licensed barber, may apply for a barber shop license by submitting an application to the Board and paying a license and inspection fee. See R.C. 4709.09 (A) and 4709.12 (A)(7). See also Ohio Admin. Code 4709-1-01. In order for an applicant to qualify for a barber shop license, his barber shop must meet requirements established by statute and rules adopted by the Board. See R.C. 4709.09 (B). For example, the applicant's barber shop must be in the charge of, and under the immediate supervision of, a licensed barber, equipped with proper plumbing, meet specified sanitary standards, and display the shop license and the Board's sanitary rules. Id. See also Ohio Admin. Code 4709-1-07 through 4709-1-10. A barber shop operator must renew his barber shop license biennially and

pay the Board a license renewal fee. See R.C. 4709.11 and 4709.12 (A)(8). The Board may refuse to issue or renew a barber shop license, and suspend or revoke a license, for various causes set forth in R.C. 4709.13, including for violation of any rules approved by the Department of Health or the Board. See R.C. 4709.13. The Board is empowered to investigate and inspect barber shops, and Board members and their agents may enter and inspect any place of business of a licensee who is suspected of violating R.C. Chapter 4709. or rules adopted by the Board. See R.C. 4709.05 (M). The Board may levy fines against those who violate provisions established by statute or rule. See R.C. 4709.14 (B). See also R.C. 4709.99. Furthermore, the Board may also seek injunctive relief against persons violating or threatening to violate the law to prevent further violations. See R.C. 4709.14 (A).

Divisions (D) and (E) of Section 102.03 of the Revised Code provide:

(D) No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his 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 him with respect to his duties.

The term "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is an appointed officer or employee of any public agency. See R.C. 102.01 (B). The term "public agency" includes any board of the State. See R.C. 102.01 (C). The Ethics Commission has held that boards established by the General Assembly within State government for the purpose of regulating a profession or occupation are public agencies for purposes of R.C. Chapter 102. See Ohio Ethics Commission Advisory Opinions No. 83-007, 85-012, 90-009, and 90-012. The Barber Board is a State Board established to regulate the practice of barbering within the State. Thus, as Executive Director of the Ohio State Barber Board, you are a "public official or employee" and subject to the prohibitions set forth in R.C. 102.03 (D) and (E).

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. See R.C. 102.01 (G). A definite, pecuniary benefit is considered to be a thing of value under R.C. 102.03, see Advisory Opinions No. 79-008, 88-004, 90-004, and 92-006, and a financial interest in a private business falls under the definition of "anything of value." See Advisory Opinions No. 89-010, 90-002, and 90-003. Also, a license issued by a regulatory board is a thing of value. See Advisory Opinions No. 86-007 and 90-009. Furthermore, a beneficial licensing or regulatory decision is a thing of value for purposes of R.C. 102.03 (D) and (E). See Advisory Opinions No. 86-007 and 90-002.

The Ethics Commission has held that the Ethics Law and related statutes do not prohibit a public official and employee from engaging in private business activity or holding private employment so long as no conflict of interest exists between the public official's or employee's public position and private financial interests. See Advisory Opinions No. 84-009, 85-006, 86-007, 86-008, 87-006, 89-010, and 90-002. However, R.C. 102.03 (D) and (E) prohibit a public

official or employee from accepting, soliciting, or using the authority or influence of his office or employment to secure, anything of value where the thing of value could impair his objectivity and independence of judgment with respect to his official actions and decisions for the agency with which he serves or is employed. See Advisory Opinions No. 79-002, 80-004, 84-009, 84-010, 87-006, 87-009, 89-006, and 90-012. The Commission has explained that the limitations and restrictions on the conduct of a public official or employee who wishes to engage in a private business or hold outside employment is dependent on the facts and circumstances of each individual situation. See Advisory Opinions No. 77-003, 89-003, and 90-002. See also Advisory Opinion No. 86-007.

In some circumstances, the Commission has held that the public official or employee is not prohibited from engaging in a private business or holding outside employment provided that he withdraw from consideration of matters which would pose a conflict of interest. See Advisory Opinions No. 89-006 (Ohio Department of Mental Health officials and employees accepting employment from colleges or universities which receive grants from ODMH), 89-010 (a Department of Agriculture employee selling services to a state institution which is regulated by the Department of Agriculture), and 90-002 (a Department of Agriculture employee owning and operating a plant which is regulated by the Department of Agriculture). However, the Commission has held that such a withdrawal: (1) may not interfere with the official's or employee's performance of his duties; and (2) must be approved by the appropriate officials at his public agency. Id.

In other instances, the Commission has recognized that a public official's or employee's private financial interests give rise to an insurmountable conflict of interest and divided loyalties between his public duties and private interests to the extent that R.C. 102.03 (D) and (E) prohibit him from engaging in a certain private business or holding outside employment. See Advisory Opinions No. 81-007 (an employee of a county recorder's office may not conduct private title searches), 83-007 (employees of the Board of Cosmetology may not sell products to regulated parties), 88-002 (the President of the Controlling Board may not hold employment with a state agency), and 92-008 (a township clerk may not be an employee of a bank which receives township funds.)

Therefore, the powers and duties of the Executive Director must be examined in order to determine the limitations and restrictions imposed upon you in the instant situation.

The position of Executive Director of the State Barber Board is statutorily created. R.C. 4709.05 (G) provides that the Board shall:

Employ an executive director who shall do all things requested by the board for the administration and enforcement of this chapter. The executive director shall employ inspectors, clerks, and other assistants as he determines necessary.

Also, the Executive Director is required to deposit in the state treasury receipts which the Board receives. See R.C. 4709.06 (B). Furthermore, the Executive Director may be authorized by the Board to sign vouchers of the Board. See R.C. 4709.06 (C). The Executive Director is

required to give a bond to the State conditioned for the faithful performance of the duties of his office. See R.C. 4709.06 (A).

In the instant situation, your realization of a financial benefit from acquiring and holding a barber shop license in order to own and operate a barber shop is dependent upon favorable licensure and regulatory decisions of the Barber Board. While the Board itself is the ultimate authority to render decisions on licensure and regulative matters, with respect to both individual applicants or licensees and the promulgation of rules for the regulation of the practice of barbering as a whole, it is apparent that the Board delegates at least a portion of its investigative, enforcement, administrative, and regulatory authority to its Executive Director and to the inspectors, clerks, and assistants whom he hires in order that they may assist the Board in making its final decisions. See, e.g., R.C. 4709.05 (M) (in conducting investigations and inspections of persons and barbering establishments, any member of the board or its authorized agents may enter and inspect places of business during normal business hours.) See also Waspe v. Ohio State Dental Board, 27 Ohio App. 3d 13, 15 (Franklin County 1985) ("It is ludicrous to suggest that the [dental] board must traverse the state, dealing with every matter involving an investigation, without being able to delegate any such power to employees"). As stated above, the Executive Director is statutorily required to do all things requested by the Board.

The Barber Board has the ultimate authority to decide matters pertaining to the operation of barber shops within the state. The Board must decide whether a barber shop license should be issued and whether a license, once issued, should be renewed, suspended or revoked, or whether the operator should be fined or an application made to a court to issue an injunction against the shop's operation. However, it is apparent that as the chief administrative officer of the Board, the Executive Director performs a crucial and unique role in assisting the Board in the performance of its duties. For example, the Executive Director, with the aid of other employees, must assist the Board by providing information or factually determining whether an applicant or licensee has paid the required fees, and whether a barber shop is in the charge and under the immediate supervision of a licensed barber, equipped with proper plumbing, meets specified sanitary standards, displays the shop license and the Board's sanitary rules, is identified as a barber shop by a sign or barber pole, and meets all other requirements of statute and rule. See R.C. 4709.09 (B) and 4709.13 (A). The Executive Director of the Barber Board is the chief administrative officer of the Board and supervises all other Board employees. He is required to do all things requested by the Board. If you owned a barber shop, you would be prohibited by R.C. 102.03 (D) from personally participating in any matter involving your own barber shop and you would also be rendered unable to supervise or make decisions concerning the actions of the Board's inspectors, clerks, and assistants, who would be responsible for helping the Board determine whether your shop meets requirements established by statute and rules adopted by the Board. See Advisory Opinion No. 89-015 (it is impossible for a city law director to abstain from any case in which the city is a party even though one of his subordinates may handle the daily details of the case.) See also R.C. 102.03 (C).

As Executive Director, you must exercise independence and objectivity of judgment in performing your duties. See Advisory Opinion No. 89-010 (a public employee owes his responsibility to the exercise of the public trust by performing the tasks assigned to him by his employing agency without impairment by the employee's concern for his own financial

interests). That objectivity and independence of judgment could be impaired if you owned and operated a barber shop subject to the Board's licensure and regulation. You would be rendered unable to perform your statutorily mandated duties if you owned a barber shop.

Furthermore, the Executive Director of the Barber Board is the appointing authority for the Board's inspectors, clerks, and other assistants and has the discretion to determine the need for their employment. See R.C. 4709.05 (G). If you were to apply for a barber shop license, then the Board, as assisted by its employees, would have to determine whether your barber shop meets requirements established by statute and rules adopted by the Board. The Board employees over which you are the appointing authority would be required to inspect your shop and otherwise help the Board determine whether you are in compliance with the law in obtaining and maintaining a barber shop license. As Executive Director you are required to supervise the employees' work, and would be in a position to control the work product and determine what will be reported to the Board. Also, you would be required to evaluate the performance of the Board employees in accomplishing their tasks. This would result in an untenable situation for the Board's employees. See Advisory Opinion No. 89-015.

As discussed above, the Ethics Commission has held, in certain circumstances, that an official or employee is not absolutely prohibited from holding an outside business interest, but must withdraw from consideration of matters which would pose a conflict of interest for him. As explained above, a withdrawal by a public official or employee from a matter which poses a conflict of interest: (1) may not interfere with the official's or employee's performance of his duties; and (2) must be approved by the appropriate officials at his public agency.

The second criterion is a matter for the determination of the affected agency. In Advisory Opinion No. 89-010, the Ethics Commission held:

There may be instances where a state agency is willing to accommodate the personal interests of its employees and excuse or reassign an employee with outside interests in order to avoid inherent conflicts of interest where the agency determines that such special consideration would not interfere with the agency's operations or work hardship upon other employees.

See also Advisory Opinions No. 89-006 and 90-002. However, the issue in determining whether you could own and operate a barber shop and withdraw from matters involving the shop is whether your withdrawal from matters involving your own barber shop, including the supervision of subordinates who would be required to inspect your shop and make reports and recommendations to the Board, would interfere with the performance of your duties as Executive Director.

The Ethics Commission has recognized that in some instances, a public official's or employee's withdrawal from a matter will not interfere with the performance of his duties provided that the official or employee delegates responsibility to a subordinate, with review of the subordinate's action by an official or entity independent of, or superior to, the official with the conflict of interest, or empowers an authority who is independent of, or superior to, the official with the conflict of interest to approve the matter, if such transfer of authority is

permitted under relevant statutes. See Advisory Opinions No. 92-004 and 92-008. As explained above, the Board's Executive Director holds a statutorily created position and is charged by statute with the responsibility to do all things requested by the Board and to hire inspectors, clerks, and other assistants as he determines necessary. It is apparent that the Executive Director of the Barber Board holds a unique position since the Executive Director, and no one else, is required to perform these duties; it would be impossible for the Executive Director to withdraw from performing duties which are statutorily imposed upon him and transfer that authority to another party and still hold employment as Executive Director. See generally Advisory Opinions No. 92-004 and 92-008. See also Advisory Opinion No. 89-015.

Therefore, in the instant situation, your withdrawal from matters involving your own barber shop, including supervision of the Board employees who would be responsible for inspecting and otherwise regulating your shop, would interfere with your duties as Executive Director. Accordingly, R.C. 102.03 (D) and (E) prohibit you from owning and operating a barber shop while you are employed as the Executive Director of the Ohio State Barber Board.

You contend that if you were to own and operate a barber shop, then you would not be in a different position from the two members of the Board who are statutorily required to be barbers. See R.C. 4709.04 (A) (one member who is a barber must be an employer barber and the other employed as a barber). The two situations appear, at first glance, to be similar; however, a close scrutiny discloses compelling differences.

While there is a statutory requirement that two members of the Barber Board be barbers, there is no similar statutory requirement that the Barber Board's Executive Director be either a licensed barber shop operator or a licensed barber. The General Assembly, by mandating that two members of the Barber Board be licensed barbers, has legislatively determined that some members of the Barber Board must be knowledgeable of barbering in order to effectively regulate the practice of barbering, and that the need for this expertise outweighs the potential conflict of interest which a Board member may face as a member of the class of persons regulated by the Board. The Ethics Commission has recognized that members of state professional boards are appointed due to their expertise in a particular field and that knowledgeable individuals who are dedicated to serving their profession and the public may be involved in various activities involving that profession. See Advisory Opinions No. 90-009 and 90-012. The Commission has held that the provisions of R.C. 102.03 (D) and (E), and other statutes under the Commission's jurisdiction, prohibit members of state professional boards from voting, discussing, or otherwise using the authority or influence of their official position, formally or informally, with regard to matters affecting their own personal pecuniary interests or the interests of their business associates including their employers. Id. Accordingly, a board member is required to withdraw from matters which would result in a definite and direct personal pecuniary gain or benefit for the board member or a business associate. Id.

This application of the Ethics Law and related statutes affects members of the Barber Board. For example, the Board member who is an employee barber is prohibited by R.C. 102.03 (D) from participating in any matter which would directly affect the pecuniary interests of his employer. See Advisory Opinion No. 89-008 (describing how the relationship between a public official and his employer could impair the official's objectivity and independence of judgment).

It must also be noted that by prohibiting Barber Board members from being financially interested in, or having a financial connection with, any barbering school or wholesale cosmetic, barber supply, or equipment business, or from teaching barbering for monetary consideration, the General Assembly has imposed restrictions upon Board members which avoid some conflicts of interest, including conflicts which the Ethics Commission has previously identified and addressed. See Advisory Opinions No. 83-007 (employees of the Board of Cosmetology selling cosmetology products to salons which they regulate) and 90-009 (members of a professional board teaching courses or assisting in the development of the courses).

However, unlike the Executive Director, an individual Board member is able to abstain from a matter which affects him, his business associates, or employer, or where there is otherwise a conflict of interest since it is the Ohio State Barber Board, not an individual Board member, that is the governmental authority empowered by statute to act. See generally R.C. 4709.05. If a provision of the Ethics Law prohibits one Board member from participating in a particular matter, then the other Board members can act on behalf of the Barber Board. See Advisory Opinion No. 92-008. In contrast, as explained above, R.C. 4709.05 (G) imposes specific statutory duties upon the individual who is employed as Executive Director. See Advisory Opinion No. 92-008 (it is impossible for a township clerk to withdraw from performing the actions and decisions statutorily imposed upon her office and transfer that authority to another party).

As stated above, you hold a barber's license but do not perform barbering services. As explained above, a license issued by a regulatory board is a thing of value for purposes of R.C. 102.03 (D) and (E). See Advisory Opinions No. 86-007 and 90-009. A licensed barber must renew his license biennially and pay the Board a license renewal fee. See R.C. 4709.12 (A)(4).

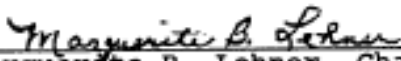
The Barber Board has the statutory authority to adopt rules governing the practice of barbering and establishing grounds upon which the Board may refuse to issue or renew, or may suspend or revoke, or may impose conditions upon, a barber's license. See R.C. 4709.05 (J) and 4709.13. Also, the Board may require continuing education for those who are licensed. See R.C. 4709.05 (J)(3). Since, as stated above, the Executive Director has the responsibility to do all things required by the Board, you could be required to assist the Board in its drafting and adoption of rules. It is apparent that rules adopted by the Board which govern the practice of barbering will affect you as a licensed barber. However, the Ethics Commission has held that R.C. 102.03 (D) does not prohibit public officials or employees from acting upon general matters which have a uniform effect upon all individuals affected by the official's or employee's actions, including the officials or employees themselves, provided that the official or employee does not realize a direct personal pecuniary gain or benefit from his actions. See Advisory Opinions No. 88-004 and 90-009. Therefore, R.C. 102.03 (D) does not prohibit you from assisting the Board in its adoption of rules pertaining to the licensing of barbers even though you hold a barber's license.

The Barber Board may refuse to issue or renew or may suspend or revoke, a license to practice barbering, may issue fines and seek injunctions for violations of statute or rule, in a manner similar to that for barber shop licenses. See R.C. 4709.13 and 4709.14. However, since you do not perform barbering services, the possibility that the Board may exercise regulatory

power over your license is reduced. Under the present circumstances, R.C. 102.03 (D) and (E) do not prohibit you from holding a barber's license while being employed as the Barber Board's Executive Director. However, owning and operating a barber shop would increase the potential for a conflict of interest to an insurmountable level since every aspect of your shop's operation would be subject to the scrutiny of the Board on an ongoing basis. While you are not per se prohibited from continuing to hold a barber's license, R.C. 102.03 (D) prohibits you from using the authority or influence of your position as Executive Director to secure your barber's license if the Board finds cause for nonrenewal, suspension, revocation, or the imposition of a fine or injunction. You would also be prohibited by R.C. 102.03 (D) from otherwise using your authority or influence to secure any favorable decision or action concerning your license. See also R.C. 102.03 (C). You should contact the Ethics Commission for guidance should issues arise concerning your license.

This advisory 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.

Therefore, it is opinion of the Ohio Ethics Commission, and you are so advised, that Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit the Executive Director of the Ohio State Barber Board from owning and operating a barber shop.



Marguerite B. Lehner, Chair
Ohio Ethics Commission