



OHIO ETHICS COMMISSION

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COLUMBUS 43215

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Advisory Opinion

No. 75-008

June 10, 1975

Syllabus by the Ohio Ethics Commission:

A member of a county board of mental retardation is prohibited by Section 102.04 (B) of the Revised Code from receiving or agreeing 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 which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which he is an officer or employee.

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Your request for an advisory opinion asks whether a member of a county board of mental retardation is prohibited by Section 102.04 (B) of the Revised Code from receiving compensation for services personally rendered on behalf of clients before the county commissioners of that county.

You state, by way of history, that you are a member of a county board of mental retardation having been appointed to that position by the county commissioners. You relate further that you are a practicing attorney and your practice involves representation of clients' interest before the county commissioners.

If certain criteria are met, the type of representation to which you refer would fall within the class of activities contemplated by the language of Section 102.04 (B) of the Revised Code:

"No person who is elected or appointed to an office of or employed by a county, township, municipal corporation, or any other governmental entity, excluding the courts, shall receive 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 which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which he is an officer or employee."

As stated above, certain criteria must be met before the prohibition described in the section will apply. The first is to ascertain whether as a member of the county board of mental retardation, you have been "appointed to an office of . . . a county."

Ohio Ethics Advisory Opinion No. 74-007 established the following tests for determining whether one is appointed to an "office": (1) was he appointed; (2) does he have a title; (3) does he exercise functions of government concerning the public; and, (4) is he not subject to a contract of employment. In Advisory Opinion No. 74-004, the Ohio Ethics Commission added a further test of the exercise of sovereign power, reflected by the exercise of "substantial and material administrative discretion" rather than the mere formulation of plans or making of recommendations.

Ohio Ethics Commission Advisory Opinion No. 75-007 applies these tests at the county level to determine whether county positions fall within the purview of Division (B) of Section 102.04 of the Revised Code. It is, therefore, necessary to examine Section 5126.01 of the Revised Code establishing county boards of mental retardation to determine whether these tests are met:

"There is hereby created in each county a county board of mental retardation consisting of seven members, five of whom shall be appointed by the board of county commissioners of the county, and the other two shall be the probate judge of the county or his delegate and one other person appointed by him. Each member shall be a resident of the county. Of the five members appointed by the board of county commissioners, at least one shall be a parent of a mentally retarded person and four shall be persons interested or knowledgeable in the problems of mental retardation and other allied fields. . . . Board members shall serve without compensation, but shall be reimbursed for necessary expenses incurred in the conduct of board business."

From Section 5126.01 of the Revised Code, it can be determined that members of a board of mental retardation exercise functions of government concerning the public, do not have a contract of employment and have the title of member of the board of mental retardation. They therefore would be appointed to an "office" for purposes of Section 102.04 of the Revised Code if they also meet the test of sovereign power.

The statutorily imposed duties of the board of mental retardation obviates the question. The members of a mental retardation board exercise administrative discretion and have authority in excess of the mere formulation of plans or making of recommendations.

Section 5126.03 of the Revised Code lists the following duties of the county boards of mental retardation:

"The county board of mental retardation, subject to the rules, regulations, and standards of the chief of the division of mental retardation and developmental disabilities shall:

(A) Administer and supervise facilities, programs and services established under section 5127.01 of the Revised Code and exercise such powers and duties as prescribed by the chief;

(B) Submit an annual report of its work and expenditures, pursuant to section 5127.01 of the Revised Code, to the chief and to the board of county commissioners at the close of the fiscal year and at such other time as may be requested;

(C) Employ such personnel and provide such services, facilities, transportation, and equipment as are necessary;

(D) Provide such funds as are necessary for the operation of facilities, programs, and services established under section 5127.01 of the Revised Code.

Any county board of mental retardation may enter into a contract with another such board or with a public or non-profit agency or an organization of the same or another county, to provide the facilities, programs, and services authorized in section 5127.01 of the Revised Code, upon such terms as may be agreeable.

The board of county commissioners shall levy taxes and make appropriations sufficient to enable the county board of mental retardation to perform its functions and duties as provided by this section." (Emphasis added)

Additionally, Section 5126.04 of the Revised Code allows the board to appoint an administrator to carry on the day to day work of the board subject to the regulations of the board.

Those duties and responsibilities emphasized in the above section indicate that the duties of members of mental retardation boards are not merely clerical but involve some discretionary, decision-making qualities. The members of mental retardation boards, therefore, exercise sovereign power in performance of their duties. Thus, it can be said that they are appointed to "an office" for purposes of Section 102.04 (B) of the Revised Code.

The office of member of a county mental retardation board is a county office. The boards statutorily function within county boundaries, and are appointed by elected county officials -- the county commissioners and the judge of the court of common pleas. Thus, the board members are prohibited from receiving compensation other than from the county for rendering services before county agencies such as the county commissioners.

Therefore, it is the opinion of the Ohio Ethics Commission and you are so advised, members of mental retardation boards, as appointed county officers fall within the purview of Section 102.04 (B) of the Revised Code and cannot receive or agree to receive directly or indirectly compensation, other than from the agency with which they serve, for any service rendered or to be rendered by them personally, in any case, proceeding, application or other matter which is before any agency, department, board, commission, or other instrumentality, including the county commissioners of the county in which they serve.

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