



## OHIO ETHICS COMMISSION

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Advisory Opinion

No. 75-022

August 19, 1975

Syllabus by the Ohio Ethics Commission:

- 1) A member of the Ohio Board of Regents is not a "public official or employee" as that phrase is defined in Section 102.01 (B) of the Revised Code, and therefore, is not subject to the provisions of Section 102.03 of the Revised Code.
- 2) A member of the Ohio Board of Regents is a person appointed to an office of a board of the state and therefore is within the purview of Section 102.04 (A) of the Revised Code.

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Your request for an advisory opinion asks whether a member of the Ohio Board of Regents (hereinafter the "Board") who is also a real estate developer may, pursuant to Chapter 102 of the Revised Code, participate in a consulting capacity and/or as a developer or co-developer in the redevelopment of an inner city area in cooperation with a non-profit corporation and a private university situated within the area. Specifically the question arises when the private university has received funds from the Board in the past and requested additional funds from the Board to be used for the redevelopment of the inner city area around the university.

You state the Board member is a real estate developer and the sole shareholder and president of a private real estate development corporation operated for profit (hereinafter the "development corporation"). You further state that he was appointed to the Ohio Board of Regents in 1973 and confirmed as a member in February, 1974.

You state further, a non-profit corporation has been engaged in the planning of the redevelopment of an inner city area surrounding a private university for the past fifteen years. That the private university has been closely associated with the non-profit corporation's activities and in 1970 received from the Board a Higher Education Act of 1965, Title I grant to be used in the formulation of redevelopment plans in the area.

In November, 1973, the president of the private university submitted a second proposal to the Board for an additional Higher Education Act of 1965, Title I, grant. These funds were necessary to continue formulation and research of redevelopment plans for the area.

Also in November, 1973, the Board member was contacted by the non-profit corporation and asked to evaluate the development potential of the university area; to assist, if necessary, in the formulation and processing of reapplication for additional funding, and; if feasible, to participate as a private developer or co-developer of the area.

In response, the Board member's development corporation has proposed a planning study of development alternatives for the redevelopment area. The development corporation would work closely with the non-profit corporation in making recommendations for development of the area. However, the Board member has been advised by the non-profit corporation that no part of the Title I funding previously granted, or granted in the future by the Board to the private university, for the formulation and research of a development plan for the area has been, or will be, used to pay any of the expenses of the development corporation. If the planning study indicates private development of the area is feasible, the development corporation will consider becoming a private developer or co-developer within the area.

The issue is whether any of the prohibitions established in Chapter 102 of the Revised Code apply to a member of the Board. Section 102.03 of the Revised Code applies only to a person who is a "public official or employee." The definitional section of Chapter 102 of the Revised Code -- Section 102.01 of the Revised Code -- provides:

"As used in Chapter 102. of the Revised Code:

. . .

(B) 'public official or employee' means any person who is elected or appointed to an elective office or employed by any public agency. . . . "

Section 3333.01 of the Revised Code states that members of the Board are appointed by the Governor with the advice and consent of the Senate. Thus, the Board members are not elected or appointed to an elective office. The question remains are Board members employees of a public agency so as to be within the purview of Section 102.03 of the Revised Code.

Four tests are established in 35 O. Jur. 2d, Master and Servant, Section 3, to be applied in determining whether an employee-employer relationship exists. They are:

- 1) the selection and engagement of the employee;
- 2) the payment of salary or wages;
- 3) the power of dismissal; and
- 4) the power of control of the employee's conduct.

These tests are applied in a balancing manner and no single test is determinative, although the test of "control of the employee's conduct" is essential to an employer-employee relationship.

Section 3333.01 of the Revised Code provides Board members shall serve without compensation and only be reimbursed for actual and necessary expenses; and that Board members are appointed for nine year terms. Members of the Board are not subject to anyone's control, but rather are given the authority by Sections 3333.04 to 3333.14 of the Revised Code to conduct the Board's business within the guidelines of those sections.

Thus, members of the Board are not employees of a public agency since they do not receive a salary or wages; do serve a specific term and therefore are not subject to dismissal by an employer; and are not subject to control by an employer, but rather are free to act at their own discretion within the guidelines of Chapter 3333. of the Revised Code.

Thus, members of the Board are not persons elected or appointed to an elective office or employed by a public agency and, therefore, are not public officials or employees subject to the provisions of Section 102.03 of the Revised Code.

Section 102.04 (A) of the Revised Code applies to a "person . . . appointed to an office of . . . any board . . . of the state." The Ohio Ethics Commission in Advisory Opinion No. 75-004, used several tests to determine whether someone has been appointed to an "office" for purposes of Section 102-04 (A) of the Revised Code: (1) was he appointed; (2) does he have a title; (3) does he exercise functions of government concerning the public; (4) is he not subject to a contract of employment; and, (5) does he exercise sovereign power. Sovereign power is " . . . a concept meant to imply the exercise of a duty entrusted to one by virtue of statute or some public authority. Those duties are not merely clerical, but involve some discretionary, decision-making qualities." That Advisory Opinion held that finding facts, assisting in the formulation of plans and the making of recommendations was not an exercise of sovereign power.

Section 3333.01 of the Revised Code states a member of the Board is appointed; has the title of member of the Board of Regents; exercises a function of government, regulating Ohio's colleges and universities; and the members are not subject to a contract of employment. Section 3333.04 et. seq. of the Revised Code authorizes the Board of Regents to: approve or disapprove the establishment of new branches or academic centers of state colleges and universities, technical colleges and other state institutions of higher education; review the appropriation requests of public and private institutions of higher learning and recommend action to the state director of finance on the requests; approve community college district plans; prepare a state plan for participation in federal acts relative to construction of higher education facilities; purchase land for lease back to public universities; and establish and administer instructional grants for undergraduate students.

Thus, it is clear that members of the Board exercise sovereign power as well as meeting the other four tests and are, therefore, persons appointed to an office of a board of the state for purposes of Section 102.04 (A) of the Revised Code.

Section 102.04 (A) of the Revised Code provides in pertinent part that:

"No person . . . appointed to an office of . . . any . . . board . . . of the state . . . 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 . . . instrumentality . . . of the state, . . . "

Therefore, the Board member would be prohibited from receiving compensation other than from the Board itself or other state instrumentality, for rendering services in any case, proceeding, application, or other matter which is before any state agency. Specifically, if an application for funding or any other matter comes before the Board while the member is serving on the Board, he is prohibited from receiving compensation from the non-profit corporation, the private university or any other source other than the Board for personally rendering services regarding that application.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised that a member of the Ohio Board of Regents is not a "public official or employee" as that phrase is defined in Section 102.01 (B) of the Revised Code and, therefore, is not subject to the provisions of Section 102.03 of the Revised Code; and, that a member of the Ohio Board of Regents is a person appointed to an office of a board of the state and therefore is within the purview of Section 102.04 (A) of the Revised Code.

  
OHIO ETHICS COMMISSION

(Mrs) Barbara H. Rawson, Chairman