



OHIO ETHICS COMMISSION

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May 11, 1989

Informal Opinion 1989-INF-0511-2

Michael E. Kijowski, Executive Secretary
State Board of Chiropractic Examiners

Dear Mr. Kijowski:

In your letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes prohibit a member of the State Board of Chiropractic Examiners (hereinafter Board) from receiving a per diem and travel, meal, and lodging expenses for monitoring a continuing chiropractic education seminar from the organization which sponsors the seminar.

A chiropractor practicing in Ohio is required to be licensed, see R.C. 4734.05, 4734.09, and must renew his license to practice each succeeding year. See R.C. 4734.07. In order to meet the requirement for license renewal a practicing chiropractor must attend not less than one two-day education program conducted by the Ohio State Chiropractic Association, or an equivalent educational program which has received prior approval from the Board. See R.C. 4734.07. See also Ohio Admin. Code 4734-1-14(A) and (D). You state that there are currently three associations in Ohio which conduct Board-approved continuing chiropractic education seminars. A Board member, or an agent of the Board, is required by administrative rule to monitor the seminar and the recording of attendance. See Rule 4734-1-14(G). You state that, customarily, a Board member will monitor a seminar and that the Board will appoint an agent to act as a monitor only in rare instances, such as the illness of a Board member. The sponsor of the seminar is required by Rule 4734-1-14(H) to pay compensation to the Board member or the Board's agent who serves as monitor at least 60 days prior to the date of the seminar, and must pay the monitor's expenses within two weeks after the seminar. The sponsor must contract with the Board to make these payments as a condition to having its program approved by the Board. You have also stated that a sponsor of a seminar currently pays \$10.99 per hour as a per diem, and travel, meal, and lodging expenses directly to the Board member or agent who serves as a monitor. A member of the Board is statutorily entitled to payment for days on which his services are required and necessary expenses. See R.C. 4734.04. Section 4734.04 provides that the rate of payment is that established pursuant to R.C. 124.15(J) and you have stated that \$10.99 per hour is the rate established under R.C. 124.15(J).

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.

R.C. 102.01(B) defines a "public official or employee" for purposes of R.C. 102.03 as "any person who is elected or appointed to an office or is an employee of any public agency." R.C. 102.01(C) defines the term "public agency" to include any board of the state. Therefore, members of the State Board of Chiropractic Examiners and its employees are "public officials or employees" and subject to the provisions of Section 102.03 of the Revised Code.

R.C. 102.03 defines "anything of value" for purposes of R.C. 102.03 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 Ohio Ethics Commission Advisory Opinions No. 79-008, 85-006, 85-011, and 86-007. Therefore, the compensation and travel, meal and lodging expenses paid by a sponsor of a seminar to a Board member are things of value for purposes of Section 102.03.

The Ethics Commission has held that a public official or employee is prohibited by R.C. 102.03(D) and (E) from accepting, soliciting, or using his position to secure anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the agency with which the official or employee serves. See Advisory Opinions No. 79-002, 79-006, 80-004, 84-010 and 86-011. The Board must approve continuing chiropractic education seminars conducted for the purpose of meeting the license renewal requirements. See R.C. 4734.07. Therefore, an association sponsoring a continuing chiropractic education seminar is a party that is regulated by or interested in matters before the Board. The prohibition against a public official or employee receiving anything of value from an improper source applies in instances where the thing of value is given directly to the public official or employee, even where it is given in connection with his official position and under circumstances that directly or indirectly benefit his public agency. See Advisory Opinion No. 89-002. For example, in Advisory Opinion No. 86-011, the Ohio Ethics Commission held that R.C. 102.03(E) prohibits a public official or employee from personally receiving travel, meal, and lodging expenses for official inspections or participation in ceremonial or educational functions, if such expenses are paid by a party that is interested in matters before, regulated by, or doing or seeking to do business with the agency which he serves. A member of the Board is, therefore, prohibited by R.C. 102.03 from accepting, soliciting, or using his position to secure compensation and expenses from a sponsor of a continuing education program approved by the Board.

The application of R.C. 102.03(D) and (E) is dependent on the facts and circumstances of each individual situation, see Advisory Opinions No. 87-008 and 89-003, and the Ethics Commission has carved three limited exceptions to the general prohibition against a public official or employee receiving anything of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with his public agency. However, as described below, the facts you have presented do not fall within any of these exceptions.

In Advisory Opinion No. 87-007, the Ethics Commission held that R.C. 102.03(D) and (E) do not prohibit an official or employee of the Ohio Lottery Commission from soliciting, accepting, or using the authority or influence of his office or employment to secure travel expenses from a party which is doing business with the Lottery Commission where the requirement that trips be provided by the party to officers or employees of the Lottery Commission for the purpose of conducting official business is included in the bid specifications, and ultimately in the contract executed between the successful vendor

and the Commission, and the Lottery Commission pays consideration to the vendor for the receipt of the travel expenses. The Ethics Commission held in Advisory Opinion No. 87-007 that:

It is apparent that parties, in submitting a bid to the [Lottery] Commission, will include the cost of the trips in their proposals, and that such expenses are a cost included in the final contract price. Therefore, the travel expenses are a cost for which the Commission pays consideration. Ultimately, it is the Commission which bears the cost of the trips. Under these circumstances, the travel expenses are not of such a character as to manifest a substantial and improper influence upon a Lottery Commission officer or employee. (Emphasis added.)

The facts and circumstances of the instant situation differ considerably from those described in Advisory Opinion No. 87-007. While the sponsor is required to enter into a contract with the Chiropractic Board to pay compensation and expenses to the Board member in order to have the program approved by the Board, the Board does not pay consideration to the sponsor in exchange for goods or services provided by the sponsor to the Board. Therefore, since the Board does not ultimately bear the cost of such expenses, the holding of Advisory Opinion No. 87-007 is inapplicable in this instance.

In Advisory Opinion No. 89-002, the Ethics Commission held that R.C. 102.03(D) and (E) do not prohibit a public official or employee of the Industrial Commission from soliciting or receiving a donation of industrial and safety equipment from a party that is regulated by the Industrial Commission where the solicitation or acceptance of the donated equipment is on behalf of the Industrial Commission and the Commission official or employee will not benefit personally. The Commission held in Advisory Opinion No. 89-002:

In [previous] opinions, payment was prohibited where made to the public official or employee himself, rather than to the public agency he served, even though in some instances, the payment benefited the agency, or was related to the performance of the official's or employee's official responsibilities. The direct payment or contribution of money or other items of value to a public official or employee from a party whose interests may depend upon the performance of that official's or employee's official responsibilities is of such character as to unduly influence or impair the objectivity of the official or employee, and thus is prohibited by R.C. 102.03.

. . .

The donations are not accruing to the officials' or employees' personal benefit or to the benefit of anyone with whom they are connected in their personal capacities. The benefit is accruing to the agency which they serve in their official capacity and they are soliciting or receiving the donations as part of their official responsibilities. Therefore, the donations to the Industrial Commission would not be of such a character as to manifest a substantial and improper influence upon the officials or employees with respect to their duties. (Emphasis in original.)

Again, the facts and circumstances in the instant situation differ from those described in Advisory Opinion No. 89-002. In the instant situation the payments made by the sponsors do not accrue to the Chiropractic Board, but rather are made directly to an individual Board member for his own benefit.

In Advisory Opinion No. 87-005, the Commission addressed the issue of whether R.C. 102.03 would prohibit the Division of Consumer Finance from receiving travel, lodging and meal expenses from a regulated party where the Division was statutorily authorized to charge for the cost of inspecting or examining the party. The Commission held in Advisory Opinion No. 87-005:

R.C. 1321.53 authorizes the Division of Consumer Finance to require second mortgage lenders to pay the Division expenses incurred in conducting investigations outside the state when it appears expenses will exceed two hundred dollars. Expenses are paid to the agency itself, rather than to a specific public official or employee. An itemized list of expenses must be provided by the Division to the lender. Presumably, such an itemization requires full disclosure of all expenses incurred by the Division for the lender's review. R.C. 102.03(E) does not prohibit a public agency from soliciting or accepting travel, meal, and lodging expenses which may be charged to a regulated party pursuant to statute. (Emphasis added.)

In the instant situation, the Board has no express statutory authority to require sponsors to pay Board members' compensation and expenses. Rather, the Board has promulgated an administrative rule requiring a regulated party, the sponsor of a seminar, to make payments for a Board member's monitoring services and his travel, meal and lodging expenses. The payments are made directly to an individual Board member rather than to the Board itself. A further distinction is that in the instant situation a full itemization and disclosure of all payments and expenses is not made for accountability purposes.

In summary, the facts you have presented do not fall within any of the exceptions to the general prohibition against a public official or employee accepting, soliciting, or using his position to secure anything of value from a party that is regulated by or interested in matters before the official's or employee's agency. As noted above, the Board has promulgated a rule requiring sponsors to pay the per diem and expenses of its monitors. An administrative agency may adopt rules which facilitate the execution of its statutory authority. See Carrol v. Department of Administrative Services 10 Ohio App. 3d 108, 110 (Franklin County 1983). In the instant situation, the Board has the statutory authority to establish rules governing the practice of chiropractic. See R.C. 4374.03. The Ohio Ethics Laws and related statutes are general laws establishing a standard of conduct for all citizens who serve as public officials and employees. These provisions are part of the criminal code which operates uniformly throughout the state. See Advisory Opinion No. 83-004. As explained above, the Board's administrative rule requiring regulated parties to pay a per diem and the travel, meal and lodging expenses of board members is in contravention of Divisions (D) and (E) of Section 102.03. The Supreme Court of Ohio has held that an administrative rule is invalid where it conflicts with the constitution and statutes of the state of Ohio. See State ex rel. Melvin v. Sweeny 154 Ohio St. 223, 234-35 (1950).

The Ethics Commission does not have the authority to invalidate an administrative rule of a state board; however, a Board member whose actions are made in reliance upon an administrative rule which contravenes the Ohio Ethics Law is not insulated from

actions which may be taken by the Ethics Commission pursuant to R.C. 102.06. The Ethics Commission has the authority, pursuant to R.C. 102.06, to investigate and conduct hearings upon allegations of violations of Chapter 102., Section 2921.42, or Section 2921.43 of the Revised Code. Any party may file a complaint in the form of an affidavit made upon personal knowledge that a public official has violated a provision of the Ohio Ethics Law and related statutes. Also, the Commission may initiate a complaint against a public official based upon reasonable cause to believe a violation has occurred. During an investigation, the Commission staff will attempt to discern all facts relevant to the alleged violation, and a hearing will be held where the facts so warrant. In hearing a case, the Commission receives evidence presented by the Commission staff and by the respondent, and if the Commission finds, by a preponderance of the evidence, that the facts alleged in the complaint are true and constitute a violation of the statutory prohibitions under its jurisdiction, it shall refer the matter to the appropriate prosecuting authority and the respondent's appointing authority. Also, prosecuting authorities have concurrent jurisdiction with the Ethics Commission over the Ethics Law and related statutes and are not precluded from prosecuting a Board member for a violation of R.C. 102.03 even if no complaint has been made to the Ethics Commission or initiated by the Commission.

Therefore, you are advised that R.C. 102.03(D) and (E) prohibit a Board member from receiving a per diem and travel, meal, and lodging expenses from a sponsor of a continuing chiropractic education seminar, even though the Board has promulgated a rule authorizing such receipt. This is not to say that Board members are not permitted to receive a per diem and expenses for monitoring educational programs. Board members are entitled to receive these payments pursuant to R.C. 4734.04. However, such payments must be made by the Board, rather than the program sponsors.

This informal advisory opinion was approved by the Ohio Ethics Commission at its meeting on May 11, 1989. The opinion is based upon the facts presented, and 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. If you have questions, please contact me.

Very truly yours,



John Rawski
Staff Attorney

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