



OHIO ETHICS COMMISSION
THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

October 9, 1992 Informal Opinion 1992-INF-1009-2

John Brant
Department of Industrial Relations

Dear Mr. Brant:

You have asked whether the members of the Ohio Construction Industry Examining Board are subject to the prohibitions imposed by Chapter 102. of the Ohio Revised Code. You have specifically asked if members of the Ohio Construction Industry Examining Board who are appointed by the Director of Industrial Relations are within the class of individuals subject to the requirements of Sections 102.02, 102.03, and 102.04 of the Revised Code.

The Ethics Commission is empowered to administer, interpret, and help enforce Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. See R.C. 102.02, 102.06, and 102.08. These provisions include Ohio's financial disclosure law, as well as prohibitions against public officials and employees misusing their official position for their own personal benefit or the benefit of their family members or business associates or where there is otherwise a conflict of interest. In order to determine whether members of the Board are subject to these statutes, it is necessary to first examine the statutory provisions establishing the Ohio Construction Industry Examining Board.

By way of history, the Ohio Construction Industry Examining Board (Board) was created pursuant to Sub. H.B. 402, effective July 31, 1992 (R.C. 4740.02 (A)). The Board consists of seventeen members, and is divided into four sections: the administrative section, the plumbing section, the electrical section, and the heating, ventilating, air conditioning, and refrigeration (HVACR) section. The members of the Board are appointed by the Director of the Department of Industrial Relations, except that one member of the plumbing section shall be either the Director of the Department of Health or his designee. R.C. 4740.02 (A). The Director of Industrial Relations, or his designee, shall serve on the administrative section, as shall a representative of the public who is not a member of any group certified by the board. The plumbing, electrical, and HVACR sections are each composed of five members. One member of the electrical section shall be a municipal building electrical inspector. R.C. 4740.02 (C). One member of the HVACR section shall be a municipal HVACR inspector. R.C. 4740.02 (D). The plumbing, electrical, and HVACR sections shall each elect one member of their sections to serve a one-year term on the administrative section, along with the Director of Industrial

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Relations and the citizen member. R.C. 4740.02 (A). Each member of the Board is required to take the oath of office required by Section 7 of Article XV of the Ohio Constitution for public officers. R.C. 4740.02 (F). Members of the Board shall receive a per diem payment, set pursuant to the state pay schedule in R.C. 124.15, for days actually attending to matters of the board and in necessary travel, and shall receive actual and necessary expenses incurred. R.C. 4740.02 (G).

The administrative section of the Board is responsible for the administration of R.C. Chapter 4740. The administrative section shall: (1) Schedule, administer, and supervise at least four annual examinations for qualification certificates for HVACR contractors, plumbing contractors, electrical contractors, and hydronics contractors; (2) Issue qualification certificates to individuals who have attained at least the minimum score on an examination prepared by the various contractor sections of the Board; (3) Suspend, revoke, or refuse to issue or renew qualification certificates as directed by the various contractor sections; and (4) Keep records regarding the qualification certificates issued by the Board and the proceedings of the Board. R.C. 4740.04.

The various contractor sections of the Board are responsible for adopting rules for preparing, and setting minimum standards and application procedures for, examinations for HVACR contractors, plumbing contractors, hydronics contractors, and electrical contractors, and selection and approval of continuing education courses for contractors. R.C. 4740.05. The contractor sections are also responsible for the investigation of all allegations in reference to violations of Chapter 4740. Id.

The administration and enforcement of Chapter 4740. which creates the Board is funded through the receipts collected by the Board. All such receipts shall be deposited to the Ohio Construction Industry Examining fund within the state treasury, and the money shall be used by the Board. R.C. 4740.11.

The Ohio Ethics Law and related statutes generally apply to public officials and employees. Certain identified public officials and employees, including directors of state departments, are required by R.C. 102.02 (A) to file financial disclosure statements. The appointed members of the Board are not within the group identified in Division (A) of R.C. 102.02. However, the Ethics Commission is empowered to require other public officials and employees to file financial disclosure statements. R.C. 102.02 (B). The Commission may extend the financial disclosure requirement to:

[A]ny class of public officials or employees under its jurisdiction and not specifically excluded by this

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section whose positions involve a substantial and material exercise of administrative discretion in the formulation of public policy, expenditure of public funds, enforcement of laws and rules of the state or a county or city, or the execution of other public trusts. (Emphasis added.)

The conflict of interest, post employment, and confidentiality provisions of the Ethics Law, set forth in R.C. 102.03, all pertain to "public officials or employees." The provisions of R.C. 102.04 (A) and (B) limit the actions of any individual "elected or appointed to an office of or employed by [any entity] of the state, excluding the courts," with respect to services rendered on matters pending before state entities and sales of goods or services to state entities. Revised Code Section 2921.42 of the Ethics Law applies to every "public official." Revised Code Section 2921.43 prohibits the actions of "public servants."

You have asked if members of the Ohio Construction Industry Examining Board who are appointed by the Director of Industrial Relations are within the class of individuals subject to the requirements of Sections 102.02, 102.03, and 102.04. The two members of the electrical section and the HVACR section of the Board who are municipal inspectors are unquestionably within the class of individuals subject to the prohibitions of the Ohio Ethics Law, by virtue of their employment with municipalities. See Advisory Opinions No. 88-006 and 91-011. With regard to the other members, however, the Ethics Commission would generally determine if the members of the newly created state body exercise sovereign power, and thus would be within the class of individuals subject to the Ohio Ethics Law. See, e.g., Ohio Ethics Commission Advisory Opinions No. 85-005, 92-001, and 92-011. However, in the situation you have set forth, the application of the Ethics Law must be examined in light of R.C. 4740.02 (I), which reads:

Membership on the board and holding an office of the board does not constitute the holding of a public office or employment within the meaning of any section of the Revised Code, or an interest, either direct or indirect, in a contract or expenditure of money by the state or any municipal corporation, township, special district, school district, county, or other political subdivision. No member or officer of the board is disqualified from holding any public office or employment nor shall the officer or member forfeit any office or employment by reason of his position as an officer or member of the board. (Emphasis added.)

R.C. 4740.02 (I) indicates that members of the Board are not considered to be "holding . . . public office or employment within

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the meaning of any section of the Revised Code." The question is whether this provision exempts members of the Board from the provisions of Chapter 102.

As stated above, R.C. 102.02 (B) and R.C. 102.03 apply to every "public official or employee" in the state. The term "public official or employee" is defined, for purposes of these sections, in R.C. 102.01 (B), as any person elected or appointed to any office with, or employed by, any public agency. A "public agency" is defined, in R.C. 102.01 (C), as:

[T]he general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, township, and the five state retirement systems, or any other governmental entity. "Public agency" does not include a department, division, institution, board, commission, authority, or other instrumentality of the state or a county, municipal corporation, township, or other governmental entity that functions exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes; does not expend more than ten thousand dollars per calendar year, excluding salaries and wages of employees; and whose members are uncompensated. (Emphasis added.)

Since the Ohio Construction Industry Examining Board is a board of the state, the Board is considered a "public agency" within the definition in R.C. 102.01 (C).

The provisions of R.C. 102.04 (A) and (B) apply to any individual "elected or appointed to an office of or employed by [any entity] of the state, excluding the courts."

At this point in its analysis, the Ethics Commission would normally consider the powers of the Board and the duties of its members to determine if they are considered "public officials or employees," for purposes of R.C. 102.02 and 102.03, or "appointed to an office of or employed by" any state entity, for purposes of R.C. 102.04, and therefore subject to the Ethics Law prohibitions set forth in Chapter 102. It is probable, based upon the regulatory duties of the Board, that the Ethics Commission would conclude that the Board members are public officials, and appointed to an office of a state entity, and therefore subject to the provisions set forth in Chapter 102. See Advisory Opinions No. 92-001 and 92-011. See also Advisory Opinions No. 90-009 and 90-012 (interpreting the Ohio Ethics Law as it applies to members of, respectively, the Real Estate Appraisers' Board and the Respiratory Care Board).

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However, R.C. 4740.02 (I) provides that "membership on the [Ohio Construction Industry Examining Board] and holding an office of the board does not constitute the holding of a public office or employment within the meaning of any section of the Revised Code." Therefore, since a "public official or employee" is defined in R.C. Chapter 102. for purposes of R.C. 102.02 and R.C. 102.03 to include only those individuals who are elected or appointed to an office with, or employed by, a public agency, members of the Board are not within the class of individuals identified as "public officials or employees." Accordingly, the thirteen members of the Board who are appointed by the Director of Industrial Relations, and are not municipal employees, are not subject to R.C. 102.02 (B) and 102.03.

As discussed above, the provisions of R.C. 102.04 (A) and (B) impose limitations upon the actions of every individual "elected or appointed to an office of or employed by [any entity] of the state, excluding the courts." R.C. 4740.02 (I), once again, provides that "membership on the board and holding an office of the board does not constitute the holding of a public office or employment within the meaning of any section of the Revised Code." Therefore, members of the Ohio Construction Industry Examining Board are not considered to have been appointed to an "office of or employed by [an entity] of the state." Accordingly, the prohibitions set forth in R.C. 102.04 (A) and (B) also do not apply to the thirteen above-mentioned members and officers of the Ohio Construction Industry Examining Board.

In response to your specific questions, the thirteen appointed members of the Ohio Construction Industry Examining Board who are not municipal employees are not within the group of individuals subject to the provisions of the Ohio Ethics Law set forth in Chapter 102. However, once again, the two appointed members of the Board who are municipal employees are within the class of individuals covered by the Ohio Ethics Law, by virtue of their public employment, and are, accordingly, subject to the prohibitions of the Ohio Ethics Law set forth in Chapter 102. However, as municipal employees, these two individuals are not within the group of public officials and employees required to file financial disclosure statements by R.C. 102.02, unless they are elected to their city positions.

You have not specifically asked about the application of the Ethics Law prohibitions set forth in R.C. 2921.42 and 2921.43 to members of the Board. However, the Ethics Commission has jurisdiction over the prohibitions in R.C. 2921.42, concerning public contracts, and 2921.43, concerning improper compensation, as well as Chapter 102. Therefore, it is necessary to consider whether members of the Board would be considered bound by these statutes.

The prohibitions in R.C. 2921.42 apply to all "public officials." The prohibitions of R.C. 2921.43 apply to "public servants." The term "public official" is defined as "any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and including without limitation legislators, judges, and law enforcement officers." R.C. 2921.01 (A) (emphasis added). The term "public servant" is defined as:

- (1) Any public official;
- (2) Any person performing ad hoc a governmental function, including without limitation a juror, member of a temporary commission, master, arbitrator, advisor, or consultant;
- (3) A candidate for public office, whether or not he is elected or appointed to the office for which he is a candidate. A person is a candidate for purposes of this division if he has been nominated according to law for election or appointment to public office, or if he has filed a petition or petitions as required by law to have his name placed on the ballot in a primary, general, or special election, or if he campaigns as a write-in candidate in any primary, general, or special election.

The two appointed members of the Board who are municipal employees are "public officials" for purposes of R.C. 2921.42 and "public servants" for purposes of R.C. 2921.43 by virtue of their municipal employment. See Advisory Opinions No. 88-006 and 90-001. The question is whether the other thirteen appointed members of the Board, who are not municipal employees, are "public officials" or "public servants."

Again, R.C. 4107.02 (I) provides that "[m]embership on the [Ohio Construction Industry Examining] board and holding an office of the board does not constitute the holding of any public office or employment." Therefore, the members of the Board who are not municipal employees are not "elected or appointed officers, or employees" of the state or a political subdivision for purposes of R.C. 2921.01 (A). However, R.C. 2921.01 (A) also includes "agents of the state" within the definition of "public official," and "public officials" are subject to both R.C. 2921.42 and 2921.43.

The Ethics Commission has stated that a person is an "agent of the state" where: (1) the person has the power to act on behalf of and bind the State; (2) the State has the right to control the actions of the person; and (3) the actions of the person are directed toward the attainment of an objective sought by the State.

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Advisory Opinion No. 92-001. All three factors must be present in order for an agency relationship to exist.

The function of the Ohio Construction Industry Examining Board is to issue consistent licenses for electrical, plumbing, hydronics, and HVACR contractors. Municipalities and counties may require electrical, plumbing, hydronics, and HVACR contractors to successfully complete any examination, test, or demonstration of skills in order to receive a license to engage in those occupations in the municipality or county. R.C. 715.27 and 3781.102. However, municipalities and counties may not require these contractors to complete an examination, test, or skill demonstration to receive a license to engage in those occupations in the municipality or county if the contractor holds a valid and unexpired qualification certificate issued by the Ohio Construction Industry Examining Board, except that if the municipality or county has adopted, prior to July 31, 1992, an electronics, plumbing, hydronics, or HVACR code, the municipality or county may require the contractors to complete an examination in areas that differ from requirements established under Chapters 3781. and 3791. Id.

As set forth above, the Ohio Construction Industry Examining Board is responsible for scheduling, administering, and supervising qualification certification examinations for electrical, plumbing, and HVACR contractors in the state. R.C. 4740.04. The Board has the further authority to investigate all allegations of violations of Chapter 4740., which details the authority of the Board. R.C. 4740.05.

The regulation of a profession, through examination, registration, and investigation of alleged violations of law, is a valid exercise of the police power. See generally Katsafaros v. Agathakos, 52 Ohio App. 290 (Mahoning County App. 1935). The duties of the Board, when considered with the provisions of R.C. 715.27 and 3781.102, indicate that the Board is carrying out an objective sought by the State, which is to make consistent statewide certification for plumbing, electronics, hydronics, and HVACR contractors.

The other factors which indicate that an individual has an agency relationship with the state are that the person has the power to act on behalf of and bind the State and that the State has the right to control the actions of the person. The Board, and its contractor sections, shall "do all things necessary to carry out" Chapter 4740. R.C. 4740.04 and 4740.05. The Board has the authority to employ a secretary to aid the Board in the performance of its responsibilities. R.C. 4740.03 (B). The Chairman of the Board or the Secretary, or both, as authorized by the Board, have the authority to sign all vouchers of the Board. R.C. 4740.03 (D). The Director of the Office of Budget and Management must approve

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the payment of signed, itemized, and supported Board vouchers. Id. The Board has the authority to collect receipts of fees for the qualification certificates and their renewal, and for the examinations for qualifications certificates. R.C. 4740.09. The Board deposits these receipts into the state treasury to the credit of the Board, and uses the money in the fund for the administration and enforcement of Chapter 4740. R.C. 4740.11. The Department of Industrial Relations is required to supply the Board with personnel, office space, and supplies, as the administrative section of the Board determines appropriate. R.C. 4740.03(C). You have explained, in conversations with the Commission staff, that the Board may contract with a private entity to write and validate the various certification tests required by Chapter 4740. It is apparent, from these factors, that the Board has the power to act on behalf of the State and bind the State.

The final question is whether the State controls the actions of the Board. All state agencies which perform necessary government functions are subject to control by the State. The Board is part of the state Department of Industrial Relations for administrative purposes. R.C. 4740.02 (J). Fifteen of the seventeen Board members are appointed by the Director of the Department of Industrial Relations. R.C. 4740.02 (A). Each member of the Board, before entering upon the discharge of his duties, must take the Oath of Office required by Ohio Constitution Article XV, section 7, which provides: "Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the Constitution of the United States, and of this state, and also an oath of office." R.C. 4740.02 (F). The Director of Industrial Relations may, for malfeasance, misfeasance, or nonfeasance, remove any members of the Board that he appoints. R.C. 4740.02 (H). The Board collects fees for the examination and certification of contractors and may increase these fees, but the increase must be approved by the Controlling Board. R.C. 4740.09 (B). Additionally, as set forth above, the vouchers of the Board are paid through the Office of Budget and Management. R.C. 4740.03 (D). The Board is not only connected with the State, but is subject to the control of the Department of Industrial Relations and other state entities, for example, the Controlling Board, in the performance of its duties.

Therefore, the fifteen appointed Board members are "agents" of the State and thus "public officials" who are subject to Section 2921.42 of the Revised Code since: (1) the Board has the authority to "do all things necessary" to carry out the duties of Chapter 4740., and can accordingly bind the State; (2) the State exercises the right of control over the Board; and (3) the Board's actions are directed toward the attainment of an objective sought by the State. As stated above, an individual who is a "public official"

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for purposes of R.C. 2921.42 is also a "public servant" for purposes of R.C. 2921.43 and, therefore, is also bound by the prohibitions of R.C. 2921.43.

R.C. 2921.42 (A)(4) prohibits a public official from having a definite and direct personal pecuniary or fiduciary interest in a public contract entered into by or for the use of the governmental agency with which he is connected. See Advisory Opinion No. 92-001. Therefore, members of the Board are prohibited from having an interest in a public contract entered into by or for the use of the Ohio Construction Industry Examining Board. Further, R.C. 2921.42 (A)(4) prohibits members of the Board from having an interest in the public contracts of all other governmental agencies with which they are connected. See Advisory Opinion No. 89-004. In Advisory Opinion No. 87-002, the Ethics Commission stated: "common usage indicates that to be 'connected with' something is to be related to, or associated with, that entity." In the situation you have described, the Board members are "connected" with the Department of Industrial Relations, as well as with the Construction Industry Examining Board itself. The Board is part of the Department of Industrial Relations for administrative purposes. R.C. 4740.02 (J). Therefore, members of the Board are prohibited from having an interest in contracts entered into by or for the use of the Department of Industrial Relations.

R.C. 2921.42 (A)(1) prohibits a public official from authorizing, voting, or otherwise using the authority or influence of his office to secure approval of a public contract in which he, any member of his family, or a business associate has an interest. See Advisory Opinions No. 80-001, 85-001, and 86-004. Therefore, R.C. 2921.42 (A)(1) prohibits Board members from authorizing or otherwise participating with regard to any public contracts in which they, members of their families, or any of their business associates have an interest.

R.C. 2921.42 (A)(3) prohibits a public official from occupying a position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization and not let by competitive bidding, or where let by competitive bidding was not the lowest and best bid. See Advisory Opinions No. 87-004 and 88-008. R.C. 2921.42 (A)(3) prohibits any Board member from occupying a position of profit in the prosecution of any public contract authorized by him or by the Board while he is a member, and not let by competitive bidding to the lowest and best bidder. It should be noted that R.C. 2921.42 (A)(3) does not refer to the "interest" of the public official or employee, but is tied instead to the "profit" of the public official. See Advisory Opinion No. 92-013.

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As set forth fully above, R.C. 4740.02 (I) provides that "[m]embership on the board and holding an office of the board does not constitute . . . an interest, either direct or indirect, in a contract or expenditure of money by the state or any municipal corporation, township, special district, school district, county, or other political subdivision." Accordingly, an individual's membership on the board or holding an office of the board does not constitute an interest in a public contract with any governmental entity. This is consistent with the statutory language stating that membership on the board and holding an office of the board does not constitute the holding of public employment. R.C. 4740.02 (I). See Advisory Opinions No. 85-015, 90-010, and 92-012 (a contract for employment is a public contract for purposes of R.C. 2921.42). The exemption of R.C. 4740.02 (I) does not, however, provide that members and officers of the Board do not have an interest in the public contracts of the governmental entities, i.e. the Board and the Department of Industrial Relations, with which they are connected. This language, therefore, cannot be construed to provide that a member or officer of the Board is exempted from the public contract provisions of R.C. 2921.42, which prohibit the public official from having an "interest" in a public contract, and from authorizing a public contract in which he, a family member, or business associate has an interest. Furthermore, as mentioned above, Division (A)(3) of Section 2921.42 speaks in terms of "profit," rather than "interest." Accordingly, members of the Board are not exempted from the provisions of R.C. 2921.42 (A), and a Board member is prohibited from having an interest in contracts of the Board and the Department of Industrial Relations, from occupying a position of profit in the prosecution of a contract authorized by him or by the Board unless the competitive bidding exception is met, and from authorizing or using his authority or influence to secure authorization of any contract in which he, members of his family, or business associates have an interest.

As discussed above, Board members are also subject to R.C. 2921.43. R.C. 2921.43 (A) prohibits a public servant from accepting compensation, other than as allowed by law, to perform his official duties. R.C. 2921.43 (A) also prohibits a person, including an individual, corporation, partnership, association or other similar entity, see R.C. 1.59, from promising or giving to a public servant any compensation, other than as allowed by law, to perform any act in his public capacity or generally perform the duties of his public position. See Advisory Opinions No. 89-012, 89-013, 89-014, and 90-001. In the instant situation, R.C. 2921.43 (A) prohibits Board members from accepting, and prohibits private parties from promising or giving to Board members, any compensation other than as allowed by law.

Once again, the two members of the Board who are also municipal employees are bound by all provisions of the Ohio Ethics

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Law by virtue of their municipal employment. See Advisory Opinions No. 88-006 and 91-011. It should also be noted that the Director of Department of Health and the Director of the Department of Industrial Relations and their designees fall within the scope of the prohibitions of Chapter 102. and Sections 2921.42 and 2921.43 and are accordingly subject to all provisions of the Ohio Ethics Law, including financial disclosure, by virtue of their positions as directors of departments of the state.

Finally, the Ethics Commission must express its concern about R.C. 4740.02 (I) and statutory language of its kind. This provision was apparently intended to exempt state officials who receive a statutory salary from the limitations and prohibitions of the Ohio Ethics Law. Exemptions of this type are serious risks not only to the integrity of the system specifically established to combat abuses of power, but to the citizens of the State of Ohio, who are ensured a level of ethical behavior by the Ohio Ethics Law. Broadly exempting public officials and employees from the disclosure requirements and prohibitions of the Ethics Law can have only one result: the reduced accountability of public servants to the very public they serve.

This informal advisory opinion was approved by the Ethics Commission at its meeting on October 9, 1992. The opinion is based on 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 any questions, please feel free to contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "Melissa A. Warheit". The signature is written in a cursive style with a large, stylized initial "M" and "W".

Melissa A. Warheit
Executive Director