



OHIO ETHICS COMMISSION

8 East Long Street, 10th Floor

Columbus, Ohio 43215

Telephone: (614) 466-7090

Fax: (614) 466-8368

December 16, 1996

Informal Opinion 1996-INF-1216-2

Lorraine Barbour, Executive Secretary
State Board of Chiropractic Examiners

Dear Ms. Barbour:

In your letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes prohibit the Board of Chiropractic Examiners (Board) from receiving reimbursement from chiropractic colleges for the cost of sending members of the Board, or its staff, to evaluate the colleges in light of the fact that an administrative rule of the Board requires the colleges to pay for the cost of the evaluation visits.

As explained below, absent statutory authority given by the General Assembly, R.C. 102.03 (D) and (E) prohibit the Board from receiving reimbursement from chiropractic colleges for the cost of sending members of the Board, or its staff, to evaluate the colleges.

Facts

You state that R.C. 4734.05 (B) and R.C. 4734.06 require that the Board approve chiropractic colleges. The Board has promulgated an administrative rule specifying the procedures that a chiropractic college must complete to receive approval by the Board. Ohio Admin. Code 4734-1-06. Division (G)(4) of Admin. Code Section 4734-1-06 provides for an on-site visit of the college by a Board-appointed "approval evaluation visitation team" to determine whether the college meets educational standards as established by the Board. You state that the visitation team may consist of Board members or staff. Division (G)(5) of Admin. Code Section 4734-1-06 provides that the college pay the entire expense of the evaluation visit in advance. The expenses include, but are not limited to, meals, lodging, and per diem expenses of 24 hours per day including the time necessary for travel to and from the college and the time spent during the evaluation visit. Rule 4734-1-06 (G)(5). Also, expenses include payment for the time the visitation team uses to prepare the evaluation report and to present it to the Board. *Id.* Furthermore, the college is required to pay all clerical, administrative, printing, and related expenses of the approval evaluation visit. Rule 4734-1-06 (G)(6). If the expenses incurred by the visitation team are less than the amount that was prepaid by the college, the Board reimburses the college, and if the expenses are greater, then the college pays the Board the additional amount. *Id.*

Prohibition Imposed by R.C. 102.03 (D) and (E)

Your attention is directed to R.C. 102.03 (D) and (E), which read:

- (D) No public official or employee shall use or authorize the use of the authority or influence of 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 the public official or employee with respect to that person's 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 the public official or employee with respect to that person's duties.

The term "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office or is employed by any public agency. The term "public agency" is defined 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 R.C. 102.03.

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. R.C. 1.03, 102.01 (G). The Ethics Commission has held that conference registration fees, honoraria, travel, meal, and lodging expenses, and other similar payments and reimbursements are things of value for purposes of R.C. 102.03 (D) and (E). Advisory Opinions No. 79-006, 84-010, and 86-011.

Prohibition Against Receipt of Expenses

The Ethics Commission has consistently held that 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, or the promise or offer of anything of value, from a party that is interested in matters before, doing or seeking to do business with, or regulated by, the agency with which he serves. Advisory Ops. No. 79-002, 86-011, and 89-014. For example, in Advisory Opinion No. 80-004, the Ethics Commission held that R.C. 102.03 (D) and (E) prohibit a member of a state licensing board from accepting the payment of a registration fee and lodging for his attendance at a conference sponsored by a professional association whose members are regulated by the board.

The Ethics Commission has held that R.C. 102.03 (D) and (E) prohibit a public official or employee from receiving expenses even in situations where the official or employee is performing a function that is directly related to his public duties such as conducting an inspection, representing his public agency at a ceremony, providing information about his agency, or attending a conference or seminar for his professional

development. Advisory Ops. No. 84-010, 86-011, and 92-018. The Commission has explained that the direct or indirect payment of expenses to a official or employee by a party whose interests may depend upon the performance of the official's or employee's responsibilities could impair the official's or employee's objectivity and independence of judgment in future matters affecting the party. Id. Furthermore, the Commission has held that public officials and employees are prohibited from accepting expenses from a prohibited source even if the expenses are paid as reimbursement to the official's or employee's public agency. Advisory Ops. No. 89-013 and 92-018.

Exceptions to the Prohibition

The application of R.C. 102.03 (D) and (E) is dependent upon the facts and circumstances of each situation. Advisory Ops. No. 87-008 and 89-003. The Ethics Commission has recognized three limited exceptions to the prohibition described above. The three exceptions are described below. The facts you have presented do not appear to fall within any of the three exceptions.

Exception Authorized by Statute

In Advisory Opinion No. 87-005, the Ethics Commission held that a public agency is not prohibited from receiving expenses from a regulated party provided that the General Assembly has statutorily authorized the agency to charge for the cost of inspecting the party. In that advisory opinion, the Commission addressed the issue of whether R.C. 102.03 (D) and (E) 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. 131.53 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. . . . 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.)

It must be noted that despite the fact that R.C. 131.53 provides an exception, the General Assembly enacted a exemption that is limited in scope. R.C. 131.53 does not authorize the Division of Consumer Finance to require the payment of expenses from all regulated parties in all circumstances. By enacting R.C. 131.53, the General Assembly authorized the Division of Consumer Finance to require one group of regulated parties to pay expenses of investigations only when the investigation is conducted out of state and the expenses exceed two hundred dollars.

In the instant situation, absent express statutory authority, the Board may not require chiropractic colleges to pay Board expenses that members and employees incur during an evaluation visit. Promulgation of an administrative rule requiring a chiropractic college to pay such expenses to the Board must be founded upon the Legislature's review and ultimate decision to grant the Board authority to do so. See R.C. 117.13 (A)(1) (statutory authority for the auditor of state to recover costs of audits of state agencies) and R.C. 117.13 (A)(2) (statutory authority to promulgate rules establishing rates to be charged state agencies). The General Assembly's consideration regarding such an exception assures an independent review of its merits and limitations.

Exception Provided by Bid Specification and Contract

In Advisory Opinion No. 87-007, the Ethics Commission held that R.C. 102.03 (D) and (E) do not prohibit an officer 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 that is doing business with the Lottery Commission where the requirement that trips be provided by the party to officers and employee of the Lottery Commission for the purpose of conducting official business is included in the bid specifications. In that situation, the requirement is ultimately included in the contract executed between the successful vendor and 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:

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 costs 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. In the instant situation, the college is not a vendor selling goods or services to the Board. Rather, the college is a regulated party and the Board does not ultimately bear the cost of such expenses. Accordingly, the facts that you have presented do not fall within the exception described in Advisory Opinion No. 87-007 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 public agency.

Exception for Donations in Limited Circumstances

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 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 Ethics 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 benefits 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 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 with 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.)

Furthermore, in Advisory Opinion No. 89-002, the Ethics Commission warned that an appearance of impropriety would be created if a regulated or interested party makes a donation to a public agency and the agency accepts the donation while a specific case is pending before the agency involving that party, or if it could be reasonably foreseen that an action will come before the agency. See also Advisory Op. No. 92-015.

The facts and circumstances in the instant situation differ considerably from those described in Advisory Opinion No. 89-002. In the instant situation, the receipt of reimbursement from chiropractic colleges for the cost of sending members of the Board or its staff to evaluate the colleges is not a "donation." Also, the colleges that are making the payments to the Board are being evaluated by the Board during the time when a specific matter involving the college is pending before the Board. Accordingly, the facts that you have presented do not fall within the exception described in Advisory Opinion No. 89-002

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 public agency.

Application of Precedent

After examining the three exceptions, it is apparent that 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 public agency. As noted above, the Board has promulgated an administrative rule requiring payment of expenses by regulated colleges. The Board's administrative rule conflicts with the prohibitions of R.C. 102.03 (D) and (E). This is an issue that must be examined.

An administrative agency may adopt rules that facilitate the execution of its statutory authority. 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. R.C. 4374.03.

The Ohio Ethics Laws and related statutes are general laws that establish a standard of conduct for all citizens who serve as public officials and employees. These provisions are part of the criminal code that operates uniformly throughout the state. Advisory Ops. No. 83-004 and 89-014. As explained above, the Board's administrative rule requiring regulated parties to pay expenses contravenes R.C. 102.03 (D) and (E). 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. State ex rel. Melvin v. Sweeney 154 Ohio St. 223, 234-35 (1950).

The Ethics Commission has recognized that public agencies face budgetary constraints but has, nonetheless, concluded that "although budgetary considerations are of great concern to any [government agency], the prohibitions of R.C. 102.03 override the [agency's] desire to maximize its budget by having parties that are interested in matters before, regulated by, or doing or seeking to do business with the [agency] pay the travel, meal, and lodging expenses of its officials and employees." Advisory Op. No. 90-001. See also Advisory Op. No. 89-014.

Conclusion

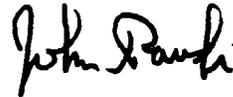
Therefore, as explained above, absent statutory authority, R.C. 102.03 (D) and (E) prohibit the Board from receiving reimbursement from chiropractic colleges for the cost of sending members of the Board or its staff to evaluate the colleges even though the Board has promulgated an administrative rule requiring the colleges to pay for the cost of the evaluation visits. In addition to the restriction imposed upon Board members and employees, private parties must be aware that R.C. 102.03 (F) prohibits them from

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promising or giving anything of value which could manifest a substantial and improper influence upon public officers and employees with respect to their duties. Advisory Ops. No. 90-001 and 92-015.

This informal advisory opinion was approved by the Ethics Commission at its meeting on December 16, 1996. The opinion is based on the facts presented and is limited to questions arising under Chapter 102, and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. If you have any further questions, please feel free to contact this Office again.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Rawski". The signature is written in a cursive, slightly slanted style.

John Rawski
Staff Attorney