

OHIO ETHICS COMMISSION

Dr. Herb Asher, *Chair*
Merom Brachman, *Vice Chair*



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.state.oh.us

David E. Freel, *Executive Director*

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Informal Opinion 2003-INF-0508-1

Martin D. Susec
Assistant Attorney General
Constitutional Offices Section



Dear Mr. Susec:

In a letter that the Ethics Commission received on February 27, 2003, you ask whether members of the Governing Board of the Ohio Consumers' Counsel (Board) are subject to the Ohio Ethics Law and related statutes. You state that, while the Board members receive \$150 compensation for each meeting they attend, they were not compensated for their services until 1999. You also ask whether the Board members face potential conflicts under the Ohio Ethics Law and related statutes with respect to their decisions on public utility matters because of their representation of labor, residential consumer, and farming group interests.

Brief Answer

As explained below, Board members are, and have been, subject to the prohibitions imposed by Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code because the Board exercises the "sovereign power" of government. The fact that the Board members did not receive compensation for their services until 1999 is not a factor in determining whether the Board exercises the "sovereign power" of government.

As further described below, a Board member is not prohibited from participating in general public utility matters that would provide a uniform benefit to all members of a particular group that he represents despite the fact that he would also receive a benefit that is in common with the group's members. However, a Board member is prohibited from participating in a matter that would result in a definite and direct personal pecuniary gain or benefit for the Board member, a family member, or a business associate.

Facts—The Consumer Counsel’s Governing Board

The Board is a statutorily created entity within state government. R.C. 4911.17. It is comprised of nine members. Id. The members are chosen as representatives of organized groups in the areas of labor, residential consumers, and family farmers. Id. The Board members serve three-year terms. Id. Not more than five members shall be members of the same political party. Id. The Board members are appointed by the Attorney General with the advice and consent of the Senate. Id. The Board members are compensated one hundred and fifty dollars for each meeting of the Board that they attend and are reimbursed for actual and necessary expenses incurred in the conduct of their official duties. Id.

At the first meeting of each year, the Board is required to select a chairperson. R.C. 4911.17. The Board is statutorily required to meet at least every third month of the year and may meet more often if requested by a majority of the board members or at the call of the Board chairperson. Id. The Board chairperson is a member of the Public Utilities Commission Nominating Council, which has the duty to review, evaluate, and recommend to the Governor possible appointees for the office of Commissioner of the Public Utilities Commission. R.C. 4901.021(D).

The Board appoints the consumers’ counsel and determines his salary. R.C. 4911.02 and 4911.07. The consumers’ counsel holds his office at the pleasure of the Board and is, at all times, responsible to the Board. R.C. 4911.17. The Board also determines the need for a deputy consumers’ counsel, establishes his salary, and assigns his duties. R.C. 4911.20. The Board furnishes a written annual report to the General Assembly stating the expenditures, participation in proceedings, and other relevant activities of the office of the consumers’ counsel. R.C. 4911.17.

The Ohio Ethics Law and Related Statutes—Purpose and Definitions

The Ethics Commission is empowered to administer, interpret, and enforce Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. R.C. 102.02, 102.06, and 102.08. These statutes include Ohio’s financial disclosure law, as well as prohibitions against public officials and employees misusing their official positions for their own personal benefit or the benefit of their family members or business associates.

R.C. 102.01(B) defines the term “public official or employee” for purposes of Chapter 102. of the Revised Code 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” as:

[T]he general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a court, city, village, township, and the five state retirement systems, or any other governmental entity. (Emphasis added.)

R.C. 102.04 does not use the term “public official or employee,” but Divisions (A) and (B) of R.C. 102.04 apply to any “person” who is “elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.” Ohio Ethics Commission Advisory Opinions No. 74-004 and 92-005.

R.C. 2921.01 (A) defines the term “public official” for purposes of R.C. Chapter 2921. as:

[A]ny elected or appointed officer, or employee, or agent of the state or any political subdivision thereof, whether in a temporary or permanent capacity, and including without limitation legislators, judges and law enforcement officers. (Emphasis added.)

The issue becomes whether a member of the Board is “appointed to an office . . . of any public agency” for purposes of Chapter 102. or is an “appointed officer . . . of the state” for purposes of R.C. 2921.42.

Precedent—Holding a Public Office

Under Ohio law, a person who holds an “office” is an “officer.” In the case of Muskingum County Democratic Executive Committee v. Burrier, 31 Ohio Op. 570 (C.P. Muskingum County 1945), the Court held:

The terms “officer” and “office” are paronymous, and in their original and proper sense, are to be regarded as strictly correlative.

The Ethics Commission, in Advisory Opinion No. 74-007, established a test to determine whether one is “appointed to an office;” that is, whether the person: (1) is appointed; (2) has a title; (3) exercises a function of government concerning the public; and (4) is not subject to a contract of employment. The Commission emphasized that no one factor controls and combinations of factors will determine whether a person is deemed to hold an office. Adv. Op. No. 74-007. The Commission modified this test in Advisory Opinion No. 75-004 when it added the requirement that in order for an individual to be deemed to be “appointed to an office,” it is essential that he exercise the “sovereign power” of government.

The Commission explained “sovereign power” in Advisory Opinion No. 75-004:

The concept of sovereign power originates with the idea that the office is created by public authority, be it executive order, the Constitution or some statute. Furthermore, it has been held that “if a man is placed in a position which is continuous and permanent and has certain powers which, under the law, only he can exercise; then he has sovereign power delegated to him.” Shaw v. Jones, 40 O.N.P. 372 (1897).

In Advisory Opinion No. 92-011, the Ethics Commission stated:

The Commission has relied upon the Ohio Supreme Court's holding in State ex rel. Landis v. Butler, 95 Ohio St. 157 (1917) that a public agency exercises "sovereign power" when it is created by some public authority, such as executive order, the Constitution, or statute and, in order to perform its prescribed duties, is invested with decision-making authority which is not merely clerical but is final and discretionary, including the authority to determine the disposition of public property or incur financial obligations upon the part of the State or its political subdivisions.

See also Adv. Op. No. 77-004.

In Advisory Opinion No. 85-005, the Ethics Commission determined that members of a public agency that functions exclusively for advisory purposes and does not exercise the sovereign powers of government are not deemed to be "appointed to an office" or "officers." In that opinion, the Ethics Commission explained that members of the Technical Advisory Committee to the Coal Development Office do not exercise sovereign power because the statutes establishing the Committee and defining its duties do not confer upon its members the power to exercise final decision-making authority. Therefore, the members of the Committee are not appointed to an office of the state and are not subject to the prohibitions of R.C. Chapter 102. or Section 2921.42.

Application of Precedent

In the instant situation, the members of the Board: (1) are appointed to their position for a specific term; (2) have a title; (3) exercise a function of government concerning the public; and (4) are not subject to a contract of employment. The issue thus becomes whether the Board exercises "sovereign power." As explained above, a determination whether a public agency exercises "sovereign power" depends upon whether the public agency has the power to exercise final, discretionary decision-making authority.

The Revised Code provides that the Board appoints and determines the salary of the consumers' counsel, who holds his office at the pleasure of the Board and is, at all times, responsible to the Board. In addition, the Board determines the need for a deputy consumers' counsel, establishes his salary, and assigns his duties. The consumers' counsel exercises important authority, on behalf of the utility consumers, with respect to utility regulation in this State. R.C. 4911.02 et seq. The Board has the discretion to assign any of the statutory duties of the consumers' counsel to the deputy consumers' counsel. With respect to the performance of these duties, the deputy consumers' counsel is required to report to the Board. R.C. 4911.20.

While the authority of the consumers' counsel resides with the counsel, rather than the Board, it is clear that the Board exercises substantial control, in the form of appointment and removal of the consumers' counsel and deputy consumers' counsel, over the performance of that authority. R.C. 4911.02, 4911.17, and 4911.20. Furthermore, the Board chairperson is a member

of the Public Utilities Commission Nominating Council, which has the duty to review, evaluate, and recommend to the Governor possible appointees for the office of Commissioner of the Public Utilities Commission. These functions are not merely clerical or advisory but involve the exercise of final decision-making authority.

Therefore, it is clear that the Board exercises the "sovereign power" of government, and a member of the Board is "appointed to an office" of the state for purposes of R.C. Chapter 102., including R.C. 102.04, and is an "appointed officer . . . of the state" for purposes of R.C. 2921.42 and 2921.43. It must be noted that the fact that the Board members did not receive compensation for their services until 1999 is not a factor in determining whether the Board exercises "sovereign power" or is a "volunteer advisory board." A number of public servants exercise sovereign authority, and are public officials as a result of their service, regardless of the fact that they are uncompensated. For example, state college and university trustees, and members of many other state boards and commissions, are public officials even though they are uncompensated. See Adv. Op. No. 93-005 (members of the Tax Credit Authority, an uncompensated board, are subject to the provisions of the Ohio Ethics Law and related statutes, including the requirement to file financial disclosure statements). Thus, in response to your first question, Board members are subject to the prohibition imposed by Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.

Potential Conflicts Under the Ethics Law and Related Statutes

As explained above, the Board members are chosen as representatives of organized groups in the areas of labor, residential consumers, and family farmers. You have asked whether the Board members face potential conflicts under the Ohio Ethics Law and related statutes with respect to their decisions on public utility matters because of their representation of labor, residential consumer, and farming group interests.

The General Assembly, by mandating that Board members represent organized groups in the areas of labor, residential consumers, and family farmers, has determined that Board members must possess specialized knowledge and experience to effectively participate in issues pertaining to public utility matters, and that the need for this expertise outweighs the potential conflict of interest which a Board member may face as a member of the class of persons interested in matters before the Board. The Ethics Commission has recognized that members of many state boards are appointed due to their expertise in a particular field and these knowledgeable individuals may be part of a class that is involved in activities affected by the decisions of their state board. Adv. Ops. No. 90-009, 90-012, and 92-009.

In Advisory Opinion No. 85-006, the Ethics Commission addressed the issue of whether a public official could participate in general issues that would affect the official in the same manner as all other persons within the official's jurisdiction. In Advisory Opinion No. 85-006, the Commission explained:

Not all "conflicts of interest" are prohibited by Division (D) of Section 102.03 of the Revised Code, but only those in which a public official has a dual interest that would impair his independence of judgment in making decisions. For example, many general issues before local governmental bodies would provide a uniform benefit to all citizens in a jurisdiction, including the public officials making the decision. This would include general legislation on such matters as taxes, police and fire protection, schools, zoning, sewer and water services, and parks. In most cases, the benefits derived by the public officials in common with their constituents would ordinarily accrue to them in the performance of their official duties, and would not be of such character as to manifest a substantial and improper influence on them. Furthermore, it is not sufficient merely to identify some indirect or indefinite benefit that a public official may accrue from the performance of an official act. A public official should not be precluded from participating in such decisions that he was duly elected or appointed to make, unless he would secure a particular benefit for himself that creates a conflict of interest.

The Ethics Commission reaffirmed the analysis of Advisory Opinion No. 85-006 in Advisory Opinion No. 88-004, wherein the Commission considered whether a member of city council was prohibited from participating in issues such as widening roads and installing water and sewer lines where the improvements would benefit or serve his property, as well as other property in the same area. The Commission stated in Advisory Opinion No. 88-004:

Applying the reasoning of [Advisory Opinion No. 85-006], a city council member may participate or vote on general legislation which provides a uniform benefit to all citizens within the city, or a large portion thereof, but may not participate in matters which provide a particular and definite pecuniary benefit to property in which he, or, as discussed below, certain other parties, have an interest. For example, a council member may participate in enacting a general zoning code for the city, but may not discuss or vote to approve a zoning change or variance affecting property in which he has an interest.

I have enclosed Advisory Opinions No. 85-006 and 88-004 for your reference.

The conclusions of Advisory Opinions No. 85-006 and 88-004 apply to the situation you have presented. Therefore, a Board member is not prohibited from participating in general public utility matters that would provide a uniform benefit to all members of a particular group that he represents despite the fact that he is also a member of the group.

However, the Ethics Law and related statutes prohibit a Board member from voting, discussing, deliberating, formally or informally lobbying, or taking any other official action with respect to any matter pending before the Board that would result in a definite and direct personal pecuniary gain or benefit for the Board member, a family member, or a business associate. But see R.C. 102.03(J) (a public official is not prohibited from participating in matters that affect a church, or a tax exempt religious, benevolent, fraternal, or professional organization of which

he is a member, unless he is also an employee, trustee, director, or officer of the organization). Board members are also subject to the statutes pertaining to the disclosure of confidential information, outside employment, representation, and supplemental compensation set forth in R.C. 102.03(A), (B), (D), and (E), 102.04(A), and 2921.43. Finally, R.C. 2921.42 prohibits a Board member from having an interest in a Board contract or authorizing a contract in which the Board member, a family member, or a business associate has an interest. The Board members are invited to contact the Ethics Commission directly if they desire further guidance on these matters.

Conclusion

As explained above, Board members are, and have been, subject to the prohibitions imposed by Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code because the Board exercises the "sovereign power" of government. The fact that the Board members did not receive compensation for their services until 1999 is not a factor in determining whether the Board exercises the "sovereign power" of government.

As further described below, a Board member is not prohibited from participating in general public utility matters that would provide a uniform benefit to all members of a particular group that he represents despite the fact that he would also receive a benefit that is in common with the group's members. However, a Board member is prohibited from participating in a matter that would result in a definite and direct personal pecuniary gain or benefit for the Board member, a family member, or a business associate.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on May 8, 2003. The Commission commends the members of the Consumers' Counsel Governing Board for seeking its assistance.

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 or desire additional information, please contact this Office again.

Sincerely,



John Rawski
Staff Attorney

Enclosures: Advisory Opinions No. 85-006 and 88-004