



## OHIO ETHICS COMMISSION

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Advisory Opinion No. 75-026

September 24, 1975

Syllabus by the Ohio Ethics Commission:

- 1) Members of the Board of Governors of the Joint Underwriting Association and directors of the Stabilization Reserve Fund, appointed pursuant to Chapter 3929 of the Revised Code, are not required by Section 102.02 (A) of the Revised Code to file financial disclosure statements.
- 2) Members of the Board of Governors of the Joint Underwriting Association and the directors of the Stabilization Reserve Fund established under Chapter 3929 of the Revised Code are persons appointed to an office of the state within the purview of Section 102.04 (A) of the Revised Code and, as such, are prohibited from receiving compensation, directly or indirectly, for services rendered personally by them in any case, proceeding, application or other matter which is before the general assembly or any department, division, institution, instrumentality, board, commission or bureau of the state excluding the courts.
- 3) Members of the Board of Governors of the Joint Underwriting Association and directors of the Stabilization Reserve Fund as established under Chapter 3929 of the Revised Code are not "public officials or employees" for purposes of Section 102.03 of the Revised Code.

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Your request for an Advisory Opinion asks whether persons appointed by the Superintendent of Insurance and serving on the Board of Governors of the Joint Underwriting Association and as directors of the Stabilization Reserve Fund, both of which are established by Chapter 3929 of the Revised Code, are subject to the ethics law, Chapter 102 of the Revised Code, particularly with respect to the financial disclosure filing requirement imposed on directors. You state that Amended Substitute House Bill No. 682 recently enacted by the General Assembly and signed by the Governor, provides for the creation of a Joint Underwriting Association designed to write professional liability insurance coverage for physicians and hospitals in the State of Ohio. The Association is governed by the Board of Governors.

The bill also creates a Stabilization Reserve Fund, which serves as a funding mechanism for the Joint Underwriting Association in the event the association incurs underwriting losses. The reserve Fund is administered by three directors.

The first issue is whether members of the Board of Governors of the Joint Underwriting Association and the directors of the Stabilization Reserve Fund are required to file financial disclosure statements pursuant to Section 102.02 (A) of the Revised Code:

"Every person who is elected to or is a candidate for a state, county, or city office, or the office of member of the United States congress, and every person who is appointed to fill a vacancy for an unexpired term in such an elective office, and the director and deputy director of any department or agency of the state, all members of the board of commissioners on grievances and discipline of the supreme court and of the ethics commission created under section 102.05 of the Revised Code, and every other public official or employee who is designated by the ethics commission created under section 102.05 of the Revised Code, and every other public official or employee who is designated by the ethics commission pursuant to division (B) of this section, excluding any presidential elector or delegate to a national convention shall file with the appropriate ethics commission on a form prescribed by the commission, a statement disclosing: . . . " (Emphasis added)

Members of the Board of Governors of the Joint Underwriting Association are appointed pursuant to Section 3929.77 of the Revised Code:

"The joint underwriting association shall be governed by a board of governors consisting of nine members seven of whom shall be selected from the members of the joint underwriting association and appointed by the superintendent of insurance. Five members shall be selected from insurers and corporations domiciled in this state. Two members shall be selected from insurers and corporations domiciled outside this state. One member shall be an insurance agent licensed and writing insurance in this state. One member shall represent the interests of consumers and shall neither be a member of, or associated with, a health care provider or profession nor associated with an insurance company or an association organized upon Chapter 1737., 1738., 1739., or 1740. of the Revised Code. The directors of the stabilization reserve fund shall serve as ex-officio members of the board of governors."

The directors of the Stabilization Reserve Fund are appointed pursuant to Section 3929.74 of the Revised Code:

"(A) There is hereby created the stabilization reserve fund. The fund shall be administered by three directors, one of whom shall be the superintendent of insurance or his deputy. One of the remaining directors shall be a physician appointed by the superintendent. The remaining director shall be a representative of a hospital appointed by the superintendent."

From the above quoted statutes it is evident that neither the members of the Board of Governors of the Joint Underwriting Association nor the directors of the Stabilization Reserve Fund are persons who are; (1) elected, (2) appointed to an elective office, (3) members of the Board of Commissioners on Grievances and Discipline of the Supreme Court or the Ethics Commission created under Section 102.05 of the Revised Code. Furthermore, they are not

directors or deputy directors of any department or agency of the state as that class has been defined by the Ohio Ethics Commission. The directors of the departments and agencies of the state under Section 102.02 (A) of the Revised Code are those directors listed in Section 121.03 of the Revised Code. The Ohio Ethics Commission has determined that a deputy director is any person who is designated as a deputy director for payroll classification purposes and who functions within the departmental structure as a deputy director.

The Ohio Ethics Commission has not extended the financial disclosure filing requirement pursuant to Division (B) of Section 102.02 of the Revised Code to the members of the Board of Governors of the Joint underwriting Association nor to the directors of the Stabilization Reserve Fund. Members of the Board of Governors of the Joint Underwriting Association and directors of the Stabilization Reserve Fund, therefore, are not required to file financial disclosure statements under Section 102.02 (A) or (B) of the Revised Code.

The next issue is whether members of the Board of Governors of the Joint Underwriting Association and the directors of the Stabilization Reserve Fund are persons "appointed to an office of . . . any department . . . of the state" for purposes of Section 102.04 (A) of the Revised Code.

The Ohio Ethics Commission in Advisory Opinion No. 75-004, used several tests to determine whether a person 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.

The duties and responsibilities of the directors of the Stabilization Reserve Fund are set forth in Section 3929.74 of the Revised Code:

". . .

(G) All money received by the fund shall be held in trust by a corporate trustee selected by the directors. The corporate trustee may invest the money held in trust, subject to the approval of the directors. All investment income shall be credited to the fund. All expenses of administration of the fund shall be charged against the fund. The money held in trust shall be used for the purpose of reimbursing the association for any deficit which arises out of the operations of the association and any other purposes, if approved by the board of directors, and if reasonably consistent with the purposes of this chapter. Such payment to the association shall be made by the directors upon certification to them by the association of the amount due.

(H) If the fund exceeds the sum of forty million dollars at the end of any fiscal year exclusive of dollars allocated for pending claims and after payment of all claims and

expenses, the superintendent shall reduce the surcharge to association policyholders and the amount collected from malpractice insurer for each malpractice policy issued by them."

From Division (A) of Section 3929.74 of the Revised Code set forth above which outlines the appointment procedure for the directors of the Stabilization Reserve Fund and from Division (G) and (H) of that section which outlines the duties and responsibilities of the directors, it becomes evident that they are; (1) appointed, (2) have a title, (3) exercise a function of government concerning the public, (4) are not subject to a contract of employment, and (5) exercise sovereign power. Therefore, the directors of the Stabilization Reserve Fund are appointed to an office of the state for purposes of Section 102.04 (A) of the Revised Code. As such, they are prohibited from receiving compensation for services rendered or to be rendered by them personally, in any case, proceeding, application or other matter which is before the General Assembly, or any department, division, institution, instrumentality, board, commission or bureau of the state.

The duties of the members of the Board of Governors of the Joint Underwriting Association are set forth in Section 3929.78 of the Revised Code:

"Any insurer or other person aggrieved by any action or decision of the joint underwriting association, or of any insurer as a result of its participation therein, may appeal to the board of governors. The decision of the board of governors may be appealed to the superintendent of insurance within thirty days from the date of the action or the decision. The superintendent shall, after hearing held upon proper notice, issue an order approving or disapproving the action or decision, with respect to the matter which is the subject of the appeal. All final orders and decisions of the superintendent are subject to judicial review as provided in Chapter 119. of the Revised Code."

In addition, Section 3929.79 of the Revised Code indicates that the Board of Governors of the Joint Underwriting Association are responsible for making reports and communications concerning risks insured or to be insured by the Association and conducting administrative hearings in connection therewith. The reports and communications in connection with the hearings are not public documents.

From the responsibilities and duties reflected in the above cited sections and from the appointment procedures set out in Section 3929.77 of the Revised Code, it is evident that the Board of Governors of the Joint Underwriting Association are; (1) appointed, (2) have a title, (3) exercise a function of government concerning the public, (4) are not subject to a contract of employment, and (5) exercise sovereign power. Therefore, they are also persons appointed to an office of the state for purposes of Section 102.04 (A) of the Revised Code. As such, they are prohibited from receiving or agreeing to receive, directly or indirectly, compensation for services rendered or to be rendered by them personally, in any case, proceeding, application or other matter which is before the general assembly or any department, division institution, instrumentality, board, commission or bureau of the state.

The third issue is whether any of the remaining prohibitions contained in Chapter 102 of the Revised Code apply to the members of the Board of Governors of the Joint Underwriting Association or the directors of the Stabilization Reserve Fund. Section 102.03 of the Revised Code, the only other section of Chapter 102 of the Revised Code containing prohibitions, applies to "public officials or employees." 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. . . . "

The members of the Board of Governors of the Joint Underwriting Association are appointed by the superintendent of insurance pursuant to Section 3929.77 of the Revised Code. The directors of the Stabilization Reserve Fund, as reflected in Section 3929.74 of the Revised Code, serve either by virtue of being the superintendent of insurance or appointed by him. Thus, they are not elected or appointed to an elective office.

The question remains whether any of the members of the Board of Governors or directors of the Stabilization Reserve Fund are employees of a "public agency." Ohio Ethics Commission Advisory Opinion No. 75-022 applies four tests in determining whether an employee-employer relationship exists. They are: (1) selection and engagement of the employee; (2) payment of salary and wages; (3) the power of dismissal; and, (4) the power of control of the employees conduct. That Advisory Opinion further states that, "[T]hese tests are applied in a balancing manner and no single test is determinative, though the test of control of the employee's conduct is essential to an employer-employee relationship."

Division (B) of Section 3929.74 of the Revised Code provides that the directors of the Stabilization Reserve Fund shall serve without salary but shall be reimbursed for actual and necessary expenses incurred in the performance of their duties as directors of the fund. No definite term of appointment is set forth. The directors are not subject to anyone's control but rather are given the authority by Division (G) of Section 3929.74 of the Revised Code to perform their duties at their own discretion.

Hence, the directors are not employees of a public agency since they do not receive a salary or wages; and are not subject to control by any employer, but are free to act at their own discretion within the guidelines of Chapter 3929 of the Revised Code. Thus, they are neither persons elected or appointed to an elective office nor are they persons employed by a public agency. Therefore, the directors are not "public officials or employees" subject to the provisions of Section 102.03 of the Revised Code.

Section 3929.77 of the Revised Code provides that the members of the Board of Governors of the Joint Underwriting Association be selected from the members of the Joint Underwriting Association and be appointed by the superintendent of insurance. There is no provision for compensation of members of the Board of Governors within the section and there are no terms of service indicated. The duties of the Board are outlined in Section 3929.78 of the Revised Code and indicate that the Board is not subject to control by an employer. In reaching

their decisions and making recommendations, they do so by an exercise of their own discretion. Thus, members of the Board of Governors are not employees of a "public agency" since they do not receive salary or wages; they are not subject to dismissal by an employer; and, they are not subject to control by an employer. Therefore, members of the Board of Governors of the Joint Underwriting Association are not persons elected or appointed to an elective office or employed by a public agency and, hence, not "public officials or employees" as that term is used in Section 102.03 of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised that: members of the Board of Governors of the Joint Underwriting Association and directors of the Stabilization Reserve Fund, appointed pursuant to Chapter 3929 of the Revised Code, are not required by Section 102.02 (A) of the Revised Code to file financial disclosure statements; members of the Board of Governors of the Joint Underwriting Association and the directors of the Stabilization Reserve Fund established under Chapter 3929 of the Revised Code are persons appointed to an office of the state within the purview of Section 102.04 (A) of the Revised Code and, as such, are prohibited from receiving compensation, directly or indirectly, for services rendered personally by them in any case, proceeding, application or other matter which is before the general assembly or any department, division, institution, instrumentality, board, commission or bureau of the state excluding the courts; and members of the Board of Governors of the Joint Underwriting Association and directors of the Stabilization Reserve Fund as established under Chapter 3929. of the Revised Code are not "public officials or employees" for purposes of Section 102.03 of the Revised Code.

  
OHIO ETHICS COMMISSION

(Mrs) Barbara H. Rawson, Chairman

