



OHIO ETHICS COMMISSION

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Advisory Opinion Number 90-009
May 14, 1990

Syllabus by the Commission:

(1) Division (D) of Section 102.03 of the Revised Code prohibits a member of the Real Estate Appraiser Board from using his official position to secure for himself employment to provide teaching services or assistance in course and program development for sponsors of courses which constitute the educational prerequisites for individuals to become state-certified real estate appraisers, the continuing education courses required to maintain that certification, or examination-preparatory courses.

(2) Division (E) of Section 102.03 of the Revised Code prohibits a member of the Real Estate Appraiser Board from accepting compensation for providing teaching services or assistance in course and program development for sponsors of courses which constitute the educational prerequisites for individuals to become state-certified real estate appraisers, the continuing education courses required to maintain that certification, or examination-preparatory courses, unless he is able to withdraw as a Board member from consideration of all matters which directly affect the sponsor for which he provides teaching or consulting services.

(3) Division (D) of Section 102.03 of the Revised Code would prohibit a member of the Real Estate Appraiser Board who provides teaching services or assistance in course and program development for sponsors of examination-preparatory courses from participating as a Board member in matters pertaining to the development, preparation, and administration of Board examinations.

(4) Division (D) of Section 102.03 of the Revised Code prohibits members of the Real Estate Appraiser Board who will take the real estate appraiser examination from having a direct personal involvement in the development of the specific questions and answers used in the examination and from using the authority or influence of their positions to secure their success on the examination.

(5) Division (D) of Section 102.03 of the Revised Code does not prohibit members of the Real Estate Appraiser Board who will take the real estate appraiser examination from adopting rules which establish general examination specifications and criteria for the successful completion of the examination or from procuring questions and answers for the development of the examination from a knowledgeable, disinterested source.

* * *

You ask whether the Ohio Ethics Law and related statutes prohibit a member of the Real Estate Appraiser Board (Board) from providing teaching services or assistance in course and program development. These services would be provided to sponsors of courses which constitute the educational prerequisites for an individual to initially become a State-certified real estate appraiser (appraiser) or which constitute the continuing education courses required to maintain that certification. You have also asked how the four Board members, who are required to be state-certified real estate appraisers, may become certified in a manner consistent with the Ohio Ethics Law and related statutes in light of the fact that the Board is responsible for overseeing the development of the examination which they are required to take.

The Real Estate Appraiser Board is a statutorily created state board within the Department of Commerce. See R.C. 4763.02(D). The Board consists of five members appointed by the Governor with the advice and consent of the Senate; four members of the Board are required to be state-certified real estate appraisers. See R. C. 4763.02(A). The Board has the statutory duty to regulate the practice of real estate appraisal within the state. See generally R.C. 4763.03.

A real estate appraiser practicing in Ohio may become state-certified in accordance with R.C. Chapter 4763. See R.C. 4763.05. An applicant for initial certification must successfully complete a written examination in order to qualify for certification. *Id.* A state-certified real estate appraiser must renew his certification every two years. See R.C. 4763.08. The Board must define by rule the type of educational experience necessary for each class of appraiser. See R.C. 4763.03(A). An applicant for state certification must possess a baccalaureate degree or complete a specified number of classroom hours in subjects related to real estate appraisal presented by a nationally recognized appraisal organization or an institution of higher education, plus fifteen classroom hours related to the standards of professional practice and the provisions of Chapter 4763. of the Revised Code. See R.C. 4763.05(C).

An appraiser must also complete a specified number of hours of continuing education instruction in courses or seminars approved by the Board during the term of the certificate being renewed in order to maintain his certification. See R.C. 4763.07(A). An appraiser may also meet the continuing education requirements by completing an educational program determined by the Board to be equivalent to courses or seminars approved by the Board, or participate, other than as a student, in educational processes or programs approved by the Board, in order to fulfill the continuing education requirements. *Id.* The Board must adopt rules prescribing: (1) the policies and procedures for obtaining Board approval of courses of instruction and seminars; (2) standards, policies, and procedures for evaluating alternative methods of complying with continuing education requirements; and (3) standards, monitoring methods, and systems for recording attendance which sponsors of continuing education courses must meet as a prerequisite to the Board's approval for continuing education credit. See R.C. 4763.07(B).

Your first question is whether a member of the Real Estate Appraiser Board may provide teaching services or assistance in course and program development for sponsors of courses which constitute the educational prerequisites for an individual to initially become a state-certified real estate appraiser or which constitute the continuing education courses required to maintain that certification.

Your attention is directed to Divisions (D) and (E) of Section 102.03 of the Revised Code, which read:

(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.

The term "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is appointed to an office of a public agency. See R.C. 102.01 (B). The term "public agency" is defined to include any board of the state. See R.C. 102.01(C). Therefore, a member of the Real Estate Appraiser Board is a "public official or employee" for purposes of Chapter 102. and subject to the prohibitions therein. See generally Ohio Ethics Commission Advisory Opinions No. 80-004 and 85-012.

The term "anything of value" is defined for purposes of R.C. 102.03 to include money, a promise of future employment, and every other thing of value. See R.C. 1.03, 102.01(G). More specifically, the Ethics Commission has held that the compensation received for providing teaching or consulting services is a thing of value. See Advisory Opinions No. 88-002 and 84-009, respectively. The issue is whether the compensation earned by a Board member for providing teaching or consulting services for providers or sponsors of the educational courses and seminars described above is of such character as to manifest a substantial and improper influence upon him with respect to his duties.

The Ethics Commission has held that Division (D) of Section 102.03 of the Revised Code prohibits a public official or employee from using the authority or influence of his office or employment to secure anything of value, including employment, from a party that is interested in matters before, regulated by, or doing or Seeking to do business with, the public agency with which he serves, or where the thing of value could impair the officials or employee's objectivity and independence of judgment with respect to his official actions and decisions for the agency which he serves. See Advisory Opinions No. 79-002, 79-006, 80-004, 84-009, 84-010, 87-006, 87-009, and 89-006. Division (E) of Section 102.03 of the Revised Code prohibits a public official or employee from accepting anything, of value from a party that is interested in matters before, regulated by, or doing or Seeking to do business with, the public agency with which he serves, or where the receipt of such a thing of value could impair his objectivity and independence of judgment with regard to his official decisions and responsibilities. See Advisory Opinions No. 86-011 and 89-006. It is, therefore, necessary to examine the pertinent statutory responsibilities of the members of the Board.

You have asked whether a Board member may teach or assist in the development of the courses which will satisfy the educational prerequisites for initial state certification as a real estate appraiser. As described above, the Board exercises broad authority in establishing the professional and educational standards of real estate appraisers within the state. The Board must

define by rule the type of educational experience necessary for each class of appraiser. See R.C. 4763.03(A) and 4763.05(C). An applicant for state certification must possess a baccalaureate degree or a specified number of classroom hours in subjects related to real estate appraisal presented by a nationally recognized appraisal organization or an institution of higher education, plus fifteen classroom hours related to the standards of professional practice and the provisions of R.C. Chapter 4763. See R.C. 4763.05(C). Although the term "institution of higher education" is defined by statute, See R.C. 4763.01(0), the Board must determine what constitutes a "nationally recognized appraisal organization." The Board must also set standards for what constitutes the acceptable content and subject matter of courses taken for certification, and must establish the standards for successful completion of the courses.

You have also asked whether a Board member may teach or develop the continuing education courses which are necessary for an appraiser to maintain his certification. The Board, as noted above, must adopt rules to implement a continuing education program and establish standards for individual courses of instruction and seminars offered to appraisers for continuing education credit. See R.C. 4763.03(A) and 4763.07(B). The Board must adopt rules prescribing the policies and procedures for obtaining Board approval of courses and seminars and must then approve individual courses of instruction and seminars. Also, the Board must adopt rules for evaluating alternative methods of complying with continuing education requirements, such as participation in educational programs and processes, other than as a student, which presumably would include teaching and program development. See R.C. 4763.07.

It is apparent that the parties offering courses which constitute the educational prerequisites for an individual to initially become a state-certified real estate appraiser or which constitute the continuing education courses required to maintain that certification are parties that are interested in matters before, and regulated by the Board. Therefore, Division (D) of Section 102.03 would prohibit a Board member from using the authority or influence of his position to secure for himself a teaching or consulting position with a sponsor or provider of courses which constitute the educational prerequisites for certification or continuing education courses.

In the instant situation you have stated that the initial Board contains two members who are engaged in teaching real estate appraisal courses and were so engaged before being appointed to the Board. Since their employment preexisted the creation of the Real Estate Appraiser Board it is apparent that the two Board members have not used the authority or influence of their office to secure their positions. See generally Advisory Opinion No. 90-004.

The issue becomes whether Division (E) of Section 102.03 would prohibit a Board member from accepting compensation from the sponsor of an educational course. As noted above, Division (E) generally prohibits a public official from accepting outside employment from a party that is interested in matters before, or regulated by, the officials agency, or where the officials independence of judgment could be impaired by the outside employment. See Advisory Opinion No. 89-006. However, the Ethics Commission has held that in certain circumstances, a public official or employee may withdraw from consideration of matters which would pose a conflict of interest. See Advisory Opinions No. 89-006, 89-010, and 90-002. Therefore, a Board member is prohibited from providing teaching or consulting services for an interested or regulated party unless he withdraws as a Board member from consideration of all matters which directly affect the sponsor for which he provides teaching or consulting services.

An affected Board member is prohibited from voting, deliberating, participating in discussions, or otherwise using the authority or influence of his position with regard to issues which affect the interests of the sponsor for whom he is supplying teaching or consulting services. It must also be noted that R.C. 102.03 would prohibit a Board member from negotiating or Seeking employment with a sponsor unless he withdraws from consideration of, or participation in, any matter involving the interests of that sponsor prior to acceptance of, or negotiation for, the position. See Advisory Opinions No. 87-004 and 89-006. A Board member would be prohibited from using his official position with regard to a sponsor with whom he is negotiating, or has accepted employment. Id.

The Commission has held, however, that a public officials or employee's withdrawal from consideration of matters which pose a conflict of interest due to the provisions of R.C. 102.03 may not substantially interfere with the off officials or employee's performance of his duties, or the operations of the agency. See Advisory Opinion No. 89-010. Therefore, a Board member's withdrawal from issues which affect a sponsor's interest during the pendency of the matter must not restrict the Board's ability to meet its statutorily defined duties. The issue is raised whether a Board member would be required to withdraw from consideration of all matters which would affect the sponsor for whom he is providing teaching or consulting services, including the adoption of rules prescribing the standards for educational coursework for precertification and continuing education.

The Commission has held that R.C. 102.03(D) does not prohibit public officials from acting upon general matters which uniformly affect individuals within the officials' jurisdiction, including the public officials making the decision. See Advisory Opinions No. 85-006 and 88-004. As stated above, the Board is statutorily required to adopt rules which establish the educational standards for initial certification and continuing educational requirements. The members of the Board would not be prohibited from c' adopting such rules since the rules are of general application and would have a uniform effect upon all individuals affected by the Board's actions, including the Board members engaged in providing teaching or consulting services and the sponsors who employ them.

R.C. 102.03 will, however, otherwise limit and condition the actions of a Board member who has accepted employment from a sponsor. He would be prohibited from making recommendations or otherwise using his official position, formally or informally, to secure anything of value for a sponsor with which he is Seeking or has accepted employment. See Advisory Opinions No. 87-004 and 89-006. The Ethics Commission has held also that a public official or employee is prohibited from reviewing in his official capacity, work which he has performed in his private capacity. See Advisory Opinion No. 78-004, 79-007, 82-001, 83-001, 84-004, 84-012 and 88-009. Therefore, if a Board member had developed a program for a sponsor of a continuing education program, he would be prohibited from approving that program for continuing education credit regardless of the fact that he will not teach that course or seminar or have any further consulting relationship with the sponsor. Also, R.C. 102.03(D) would prohibit a Board member from approving a course or seminar where he has been asked to teach that course or seminar. See Advisory Opinions No. 79-003, 79-008, and 88-005. Further, R.C. 102.03(D) would also prohibit a Board member from using state time, resources or facilities to provide teaching or consulting services, and from using his official Board title while engaging in any outside private activity. See Advisory Opinions No. 84-012, 84-013, and 90-003.

It must also be noted that a Board member would clearly be prohibited from receiving compensation for teaching or developing a class on the provisions of R.C. Chapter 4763. Board members may reasonably be expected to make presentations on R.C. Chapter 4763 as part of their official duties, and R.C. 102.03 prohibits a public official from rendering a service for compensation that is his duty to provide as a public official. See Advisory Opinions No. 84-012 and 85-013. This conduct would also be prohibited by R.C. 2921.43, which prohibits a public servant from receiving compensation from an outside source for performing his official duties. See generally Advisory Opinion 89-012.

It is also possible that a Board member may wish to teach or assist in the development of courses which are designed and offered to prepare applicants for the state certification examination. The examination, which must be successfully completed by an individual in order to become a state certified real estate appraiser, is developed and administered by the Board, as described more fully below. It is apparent that a Board member who assists in the development, preparation, and administration of the examination, and the sponsor who employs him would hold an advantageous position in developing and offering an examination-preparatory course over competitors who offer similar courses. R.C. 102.03(D) prohibits a public official from using his official position either formally or informally with regard to matters which affect his pecuniary interests or the interests of his private outside employer. See Advisory Opinions No. 88-005 and 89-008. If a Board member were to teach or assist in the development of examination preparatory courses, then he would be required to withdraw from participating in matters pertaining to the development, preparation, and administration of Board examinations. Division (B) of Section 102.03, as discussed below, would prohibit the Board member from disclosing or using confidential information concerning the examinations.

If a Board member desires to provide teaching or consulting services for a state college or university, then Section 102.04 of the Revised Code would be implicated. Divisions (A) and (B) of Section 102.04 provide:

(A) Except as provided in division (D) of this section, no person 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, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

(B) Except as provided in division (D) of this section, no person 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, shall sell or agree to sell, except through competitive bidding, any goods or services to the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

Division (B) of Section 102.04 prohibits a Board member from selling, except through competitive bidding, any services to any instrumentality of the state, which would include a state

college or university. See Advisory Opinions No. 89-006. Division (A) prohibits a Board member from receiving compensation from any state college or university for personally rendering any service in any case, proceeding, application, or other matter that is before the Real Estate Appraiser Board or any other department, agency, or entity of the state. *Id.* Division (D) of Section 102.04 provides an exception to the prohibitions of Division A) and (B) and is available to nonelected officials and public employees. See Advisory Opinion No. 89-006 (describing exception).

Also, Division (A) of Section 102.03 of the Revised Code provides, in pertinent part:

No present or former public official or employee shall, during his public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which he personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion As used in this division, "matter" includes any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments. As used in this division, "represent" includes any formal or informal appearance before, or any written or oral communication with any public agency on behalf of any person. (Emphasis added.)

A Board member who provides teaching or consulting services is prohibited by R.C. 102.03(A) from representing his private outside employer or any other person before the Real Estate Appraiser Board or any other public agency on any matter in which he personally participated as Board member. See Advisory Opinion No. 87-001.

Division (B) of Section 102.03 reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

A Board member who provides teaching or consulting services is prohibited from disclosing confidential information to his private outside employer or any other party, or using such confidential information, without appropriate authorization. No time limitation exists for this prohibition, and it is effective while the Board member serves and after he leaves the Real Estate Appraiser Board. See Advisory Opinion No. 88-009.

You have also asked how the four Board members who are required to be state certified real estate appraisers may become certified in a manner consistent with the Ohio Ethics Law and related statutes in light of the fact that the Board is responsible for overseeing the development of the examination which they are required to take. The Board is statutorily required to: (1) adopt

rules which establish examination specifications; (2) provide or procure appropriate questions and answers for the required examination; and, (3) establish the criteria for the successful completion of the examinations. See R.C. 4763.03(A). Section 7 of Senate Bill 202, 118th Gen.A. (1989) (eff. July 26, 1989), which established the Board, provides that although the initial members of the Board must meet the requirements to become certified they are not actually required to become certified until six months after the initial examination is held. Section 8 of Senate Bill 202 requires that the first examination be administered on or before January 1, 1991.

A license issued by a regulatory board provides a person with a definite and particular pecuniary benefit and is a thing of value for purposes of R.C. 102.03(D). See Advisory Opinion No. 86-007. As stated above, R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his office or employment to secure anything, of value for himself but does not prohibit a public official or employee from acting upon general matters which uniformly affect individuals within the officials jurisdiction, including the public officials making the decision. The Board is statutorily required to adopt rules which establish examination specifications and establish the criteria for the successful completion of the examination. See R.C. 4763.03(A). The members of the Board would not be prohibited from adopting rules establishing examination specifications and criteria for the successful completion of the examination since the rules are of general application and would have a uniform effect upon individuals under the Board's jurisdiction, including the Board members.

However, the Board is also statutorily required to develop an examination that all real estate appraisers in the state must successfully complete in order to become state certified. See R.C. 4763.03(A)(2). It is apparent from your inquiry to the Commission that it is recognized that the statutory structure which requires Board members to oversee the development of the examinations which they will have to take to be certified and remain on the Board creates an inherent conflict of interest. R.C. 102.03(D) would, however, prohibit a Board member from personally providing the questions and answers for an examination that he would in turn take in order to become certified and remain on the Board. Such an arrangement would obviously constitute the use of a Board member's authority to secure something of value that is of an improper character.

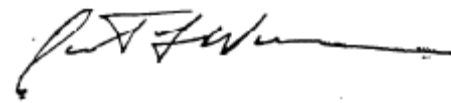
As stated above, under some circumstances a public official or employee may withdraw from a matter which poses a conflict of interest. It is noted that R.C. 4763.03(A)(2) statutorily authorizes the Board to [p]rovide or procure appropriate examination questions and answers for the examinations." (Emphasis added.) Therefore, in order to avoid the arrangement described above, the Board could adopt rules establishing the general examination specifications and the criteria for the successful completion of the examination, and then procure the appropriate questions and answers from a knowledgeable disinterested source without any direct personal involvement of the Board members in the development of the specific questions and answers for the examination. It is noted that the superintendent of real estate has statutory authority over matters involving the required examinations and administering R.C. Chapter 4763. See R.C. 4763.03(B). The Board members could request that the superintendent of real estate assist in procuring the examination questions and answers for the initial examination or the examination which any Board member would take, and take all necessary steps to insulate themselves from access to the examination questions and answers. The Board members would be prohibited by

R.C. 102.03(D) from using the authority or influence of their position over the superintendent or otherwise in order to secure their success on the examination.

The Commission is aware that members of state professional boards are appointed due to their professional expertise and that knowledgeable individuals who are dedicated to serving or promoting the interests of their profession may be involved in various activities concerning that profession. However, a public official or employee must accept necessary restrictions to avoid any possible interference with the responsibilities of his public service. See Advisory Opinion No. 89-010.

This advisory opinion is based on the facts presented and is rendered only with regard to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission and you are so advised, that: (1) Division (D) of Section 102.03 of the Revised Code prohibits a member of the Real Estate Appraiser Board from using his official position to secure for himself employment to provide teaching services or assistance in course and program development for sponsors of courses which constitute the educational prerequisites for individuals to become state-certified real estate appraisers, the continuing education courses required to maintain that certification, or examination-preparatory courses; (2) Division (E) of Section 102.03 of the Revised Code prohibits a member of the Real Estate Appraiser Board from accepting compensation for providing teaching services or assistance in course and program development for sponsors of courses which constitute the educational prerequisites for individuals to become state-certified real estate appraisers, the continuing education courses required to maintain that certification, or examination-preparatory courses, unless he is able to withdraw as a Board member from consideration of all matters which directly affect the sponsor for which he provides teaching or consulting services; (3) Division (D) of Section 102.03 of the Revised Code would prohibit a member of the Real Estate Appraiser Board who provides teaching services or assistance in course and program development for sponsors of examination preparatory courses from participating as a Board member in matters pertaining to the development, preparation, and administration of the Board examinations; (4) Division (D) of Section 102.03 of the Revised Code prohibits members of the Real Estate Appraiser Board who will take the real estate appraiser examination from having a direct personal involvement in the development of the specific questions and answers used in the examination and from using the authority or influence of their positions to secure their success on the examination; (5) Division (D) of Section 102.03 of the Revised Code does not prohibit members of the Real Estate Appraiser Board who will take the real estate appraiser examination from adopting rules which establish general examination specifications and criteria for the successful completion of the examination or from procuring questions and answers for the development of the examination from a knowledgeable, disinterested source.



David L. Warren, Chairman
Ohio Ethics Commission