



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

Advisory Opinion Number 90-012
August 16, 1990

Syllabus by the Commission:

- (1) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of the Respiratory Care Board from soliciting, accepting, or using the authority or influence of his official position to secure anything of value from a professional organization whose members are regulated by the Respiratory Care Board;
- (2) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of the Respiratory Care Board from soliciting, accepting, or using the authority or influence of his official position to secure a position as an officer, board member, member of a special committee of, or lobbyist for, a professional respiratory care organization if he would receive compensation, a fee, or anything else of value for such service;
- (3) Division (D) of Section 102.03 of the Revised Code prohibits a member of the Respiratory Care Board who serves as an officer or board member of a professional organization from participating in any matter on which the organization has taken a position or which would directly benefit the interests of the organization, even though he receives no compensation for serving as an officer or board member of the organization;
- (4) Division (D) of Section 102.03 of the Revised Code prohibits a member of the Respiratory Care Board who serves a professional organization as a lobbyist or who serves on a special committee from participating in deliberations, voting, or otherwise using his official position with regard to a matter where he has assumed a particular responsibility in the organization with regard to that subject matter or has advocated a position as a lobbyist for the professional organization;
- (5) Division (B) of Section 102.03 of the Revised Code prohibits a Respiratory Care Board member who serves a professional organization as a board member or officer, or in some other capacity from disclosing or using confidential information he has acquired in his official duties, or taking any action on behalf of the organization if he will base his action on confidential information acquired in his official duties.

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In your letter to the Ethics Commission you ask whether the Ohio Ethics Law and related statutes prohibit a member of the Respiratory Care Board (Board) from serving as an officer or board member of a national or state professional respiratory care organization, serving on the organizations' special committees, or being a state registered lobbyist for the organizations in

light of the fact that the Board has the statutory authority and responsibility to regulate the profession. You state that the professional organizations promote the interests of respiratory care professionals by adopting standards for the practice of the profession and lobbying for the introduction of legislation or support of pending legislation which the organizations determine is beneficial to the profession.

The Ohio Respiratory Care Board is a statutorily created state board with the duty to regulate the practice of respiratory care within the state. See R.C. 4761.03. The Board consists of five individuals appointed by the Governor with the advice and consent of the Senate; three members of the Board are required to be respiratory care professionals, one is required to be a physician licensed to practice in the state, and one member represents the public. See R.C. 4761.02. Three organizations within the state, the Ohio State Medical Association, the board of directors of the Ohio Society for Respiratory Care, Inc., and the American Lung Association of Ohio may submit to the Governor nominees to be considered in making appointments to the Board. Id. The Governor must consider these nominees in making the appointments. Id. The Board is responsible for the examination, re-examination, and licensure of respiratory care professionals and the establishment of standards for educational programs required for licensure and license renewal. See R.C. 4761.03(A)-(D). The Board is also responsible for the discipline of persons engaged in the unauthorized, negligent, incompetent, or unethical practice of respiratory care, or engaged in conduct or activity which is prohibited by statute, or orders and rules of the Board. See R.C. 4761.09 and R.C. 4761.10.

You first ask whether a member of the Respiratory Care Board may serve as an elected officer or board member of a national or state professional respiratory care organization.

Division (D) of Section 102.03 of the Revised Code provides:

(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.

The term "Public official or employee" is defined for purposes of R.C. 102.03 to include any person who is appointed to 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 Respiratory Care Board is a "public official or employee" for purposes of R.C. Chapter 102. and subject to the prohibitions therein. See Generally Ohio Ethics Commission Opinions No. 80-004, 85-012, and 90-009. 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. See R.C. 1.03, 102.01(G).

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his official position to secure anything of value, for himself or any other party, that is of an improper character. See Advisory Opinions No. 80-007, 85-006, 86-003, 86-007, 88-004, and 89-006. The Ethics Commission has held that 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 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, 80-004, 84-009, 84-010, 87-006, 87-009, and 89-006.

The Ethics Commission addressed the issue whether a member of a state regulatory board may serve as an officer or board member of a professional organization whose members are regulated by his board in Advisory Opinion No. 85-012. The Commission held that R.C. 102.03(D) did not per se prohibit a member of a state licensing board from serving as an officer or board member of a state professional organization but that it conditioned the board member's official conduct, holding:

An officer or board member of the state professional association would be in a policy-making position and would have a clear interest in a favorable decision from the state licensing board on matters in which the association is interested. If the member were to participate in discussions or vote on such matters before the state licensing board, he would be using his official position to secure something of value for himself as an officer or board member of the state professional association, which would be of such character as to have a substantial and improper influence on him with respect to his official duties. Therefore, Division (D) of Section 102.03 of the Revised Code prohibits a member of a state licensing board who is an officer or board member of a state professional association from participating in deliberations, voting or otherwise using his official position with regard to any matter before the board on which the state professional association has filed comments or taken a formal position. (Emphasis added).

Advisory Opinion No. 85-012 was rendered before Am. Sub. H.B. 300, 116th Gen.A. (1986) (eff. September 17, 1986) amended R.C. 102.03(D). Prior to the enactment of Am. Sub. H.B. 300, R.C. 102.03(D) prohibited a public official or employee from using the authority or influence of his office or employment to secure anything of value for himself if the thing of value were of such character as to manifest a substantial and improper influence upon him with respect to his duties. See Advisory Opinion No. 88004. Am. Sub. H.B. 300 amended R.C. 102.03(D) to delete the requirement that the thing of value be for the public official or employee himself, thus broadening the scope of the prohibition of R.C. 102.03(D). Id. The Commission has held that a public official is prohibited by R.C. 102.03(D), as amended by Am. Sub. H.B. 300, from voting, discussing or otherwise participating in any matter that would benefit an organization which he serves as an officer or board member, since the relationship between the public official and the organization he serves in a fiduciary capacity is such that his objectivity and independence of judgment as a public official could be impaired. See Advisory Opinions No. 88-005 and 89-005. See also R.C. 102.03(J) (discussed below).

Am. Sub. H.B. 300 also enacted Division (E) of Section 102.03, which reads as follows:

(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 this duties.

Division (E) of Section 102.03 of the Revised Code does not require that a public official or employee use the authority or influence of his office to secure the thing of value, but prohibits a public official or employee from merely soliciting or accepting anything of value where the thing of value could manifest a substantial and improper influence upon him with respect to his official duties. See Generally Advisory Opinions No. 89-006 and 90-009.

The Ethics Commission has held that R.C. 102.03(E) prohibits a public official or employee from soliciting or 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, 89-006 and 90-009. Therefore, the issue becomes whether the holding of Advisory Opinion No. 85-012 that a member of a state licensing board is not per se prohibited from serving as an officer or board member of a professional organization is still applicable in light of the enactment of R.C. 102.03(E) by Am. Sub. H.B. 300.

As explained above, the Respiratory Care Board regulates, and stands in a position of authority over, practitioners of respiratory care within the state. It is apparent that state and national professional respiratory care organizations which represent such practitioners are interested in matters which the Respiratory Care Board has the statutory responsibility to regulate. Therefore, R.C. 102.03(D) and (E) prohibit a Board member from accepting, soliciting, or using the authority or influence of his office to secure anything of value from professional respiratory care organizations. See Advisory Opinion No. 90-009. See also Advisory Opinions No. 80-004, 85-012 and 87-006 (payments of honoraria, conference registration fees, travel, meal and lodging expenses and the compensation received from private outside employment are things of value for purposes of R.C. 102.03). Therefore, a Board member is prohibited by R.C. 102.03(E) from serving as an officer or board member of a professional, respiratory care organization if he would receive compensation, a fee, or anything else of value for such service. Division (D) would prohibit a Board member from using his official authority or influence to secure a position as an officer or board member of a professional organization if he would receive compensation or anything else of value for such service.

R.C. 102.03(J), which was enacted by Am. H.B. 610, 118th Gen.A. (1990) (eff. July 10, 1990) and provides an exemption to the prohibitions of 102.03(D) and (E), reads as follows:

For purposes of divisions (D), (E), and (F) of this section, the membership of a public official or employee in an organization shall not be considered, in and of itself, to be of such a character as to manifest a substantial and improper influence on him with respect to his duties. As used in this division, "organization" means a . . . professional organization that is tax exempt under subsection 501(A) and described in subsection 501(C) (3), (4), (8), (10), or (19) of the "Internal Revenue Code of 1986.11..... This division does not apply to a public official or employee who is-an employee of an organization, serves as a trustee, director, or officer of an organization, or otherwise holds a fiduciary relationship with an organization. This division does not allow a public official or employee who is a member of an organization to participate, formally or informally, in deliberations, discussions, or voting on a matter or to use his official

position with regard to the interests of the organization on the matter if he has assumed a particular responsibility in the organization on the matter or if the matter would affect his personal, pecuniary interests. (Emphasis added.)

However, the exemption provided by R.C. 102.03(J) is not applicable in the instant situation since the Board member would be serving the professional care organization in a fiduciary capacity as an officer or board member.

The issue remains, however, whether R.C. 102.03 would prohibit a Board member from serving as an officer or board member of a professional organization where he has not used the authority or influence of his official position to secure such a position and also does not receive or waives compensation for his service with the organization. The Ethics Commission has held that a position which does not provide any compensation or other thing of value does not constitute "anything of value" for purposes of R.C. 102.03. See Advisory Opinion No. 88-002. If elected board members or officers of professional organizations do not receive compensation for their service, then holding such a position would not constitute "anything of value" for purposes of R.C. 102.03. Therefore, in such a situation R.C. 102.03 would not prohibit a Board member from accepting a position as an officer or board member of a state or national professional organization.

However, as explained above, R.C. 102.03(D), as amended by Am. H.B. 300, prohibits a public official from using the authority or influence of his position to secure anything of value for an organization which he serves in a fiduciary capacity. A favorable decision from a state regulatory board is a thing of value for purposes of R.C. 102.03. See Advisory Opinions No. 85-012 and 90-002. It is possible that a professional organization and the Board may take different positions regarding the development of policies and standards for the profession, the introduction or support of legislation, the enactment, interpretation, or application of orders or rules adopted by the Board, or a determination made by the Board in a particular case regarding a member of the professional organization. A professional organization and the members which it represents would have a definite and direct interest in a favorable decision from the state licensing board which regulates the profession. A member of the Respiratory Care Board who served as an officer or board member of a professional organization would be in a position where his official actions could have a direct effect upon the professional organizations' interests. The relationship between such a Board member and the professional organization could affect his objectivity and independence of judgment in making recommendations or decisions with regard to the interests of the professional organization and the members which it represents. Therefore, R.C. 102.03(D) prohibits a Board member who serves as an officer or board member of a professional organization from participating in any matter on which the organization has taken a position or which would directly benefit the interests of the organization, even though he receives no compensation for serving as an officer or board member of the organization. See also R.C. 102.03(J).

It is apparent that the Board and professional organizations serve different interests. As discussed above, the responsibility of the Board is to protect the public safety and welfare through the regulation of the profession, see generally *Nesmith v. State*, 101 Ohio St. 158 (1920), while the function of professional organizations is to promote the interests of the members of the

profession. As further noted, the Board and professional organizations may take different positions on various issues, and it is apparent that professional organizations will be interested in matters pending before the Board on a regular, ongoing basis. Therefore, as recognized in Advisory Opinion No. 85012:

[I]t would create the appearance of impropriety for a member of a state licensing board to serve as an officer or board member of a state professional association whose members are regulated by the board.

You have also asked whether a Board member may chair or serve on special committees of a professional organization. You state that the national respiratory care professional organization has a joint review committee which surveys and approves schools which provide respiratory care educational programs. The Board has the statutory duty to adopt standards for respiratory care education programs which must at least be equal to the standards developed by the American Medical Association in cooperation with the joint review committee for respiratory care education. See R.C. 4761.03(A)(3). You also state that a state professional organization has a standing legislative committee that monitors and lobbies for state health care legislation and has established a political action committee to lobby for legislation to promote respiratory care.

As stated above, R.C. 102.03(E) prohibits a Board member from accepting anything of value from a respiratory care professional organization. Therefore, if the Board member would receive compensation, a fee, or anything else of value for chairing or serving on a professional organization special committee, then R.C. 102.03(E) would prohibit such service. However, if chairing or serving on a special committee does not result in the payment of compensation for such service, then holding such a position would not constitute "anything of value" for purposes of R.C. 102.03 and such service by a Board member would not be prohibited by R.C. 102.03(E).

A Board member who chairs or serves on a special committee is, however, subject to the conditions imposed by R.C. 102.03(D), even though he receives no compensation. The Ethics Commission has held that R.C. 102.03(D) prohibits a public official or employee who is a member in an organization from participating in deliberations, voting, or otherwise using his official position with regard to a matter where he has assumed a particular responsibility in the organization with regard to that subject matter. See Advisory Opinion No. 89-005. See also 102.03(J). The Commission has also held that R.C. 102.03(D) prohibits a public official or employee from reviewing, in his official capacity, work he has performed in his private capacity. See Advisory Opinions No. 78004, 79-007, 82-001, 83-001, and 84-004.

If a Board member chairs or serves on a legislative committee, a PAC, or the joint review committee, then he would assume a particular responsibility in the organization regarding issues and matters which directly concern the Board. As stated above, R.C. 102.03(D) prohibits a public official from participating in a matter which secures a thing of value for any party where the relationship between the official and the party is such that the official's objectivity and independence of judgment could be impaired with respect to his official actions and decisions. For example, as stated above, the Respiratory Care Board must adopt standards for respiratory care education programs. If a Board member were to review and approve, in his official capacity, education programs in Ohio which he had surveyed and approved in his private capacity as a

member of the joint review committee, then he would be subject to an inherent conflict of interest and divided loyalties such that his independence and objectivity of judgment could be impaired with regard to his official decisions and responsibilities. See Advisory Opinion No. 88-009.

Therefore, R.C. 102.03(D) prohibits a Board member, who serves on a special committee of a professional organization or a PAC, from reviewing, or participating in deliberations, voting, or otherwise using his official position with regard to a matter, where he has assumed a particular responsibility in the organization with respect to that subject matter while serving with the committee. As explained above, a Board member, by chairing or serving on a special committee would assume a particular responsibility in the professional organization with regard to that subject matter and therefore the exemption provided by R.C. 102.03(J) would not apply. R.C. 102.03(J) states that "this division does not allow a public official or employee who is a member of an organization to participate, formally or informally, in deliberations, discussions, or voting on a matter or to use his official position with regard to the interests of the organization on the matter if he has assumed a particular responsibility in the organization on the matter."

You have also asked if a Board member may serve as a state registered lobbyist for a professional organization. Your attention is directed to R.C. 102.04(A) which reads:

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.

R.C. 102.04(A) would prohibit a Board member from receiving compensation from a professional organization for personally lobbying on behalf of the professional organization on a matter that is before the General Assembly, the Respiratory Care Board, or other agency of the state. See Advisory Opinion No. 78-007. Division (D) of Section 102.04 provides an exception to the prohibitions of Division (A) and is available to nonelected officials and public employees, who wish to render services on matters pending before agencies other than their own. See Advisory Opinion No. 89-006 (describing exception). Under no circumstances, however, may the Board member represent a professional organization before the Respiratory Care Board. See Advisory Opinion No. 89-016. There is no exception to this prohibition. Id. Further, as stated above, R.C. 102.03(E) also prohibits the Board member from receiving any compensation from a professional organization. Also, R.C. 102.03(D) prohibits a Board member from participating on any matter in which he has advocated a position as a lobbyist, even if he receives no compensation for his services.

Such representation is further conditioned by R.C. 102.03(A) which provides, in pertinent part:

No present for 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.)

R.C. 102.03(A) prohibits a Board member, during his service on the Board and for one year after leaving his position, from representing a professional organization before any public agency, including the Respiratory Care Board, on any matter in which he had personally participated as a Board member. See Advisory Opinion No. 79-007.

A Board member occupies a position of great visibility in the profession such that lobbying on behalf of a professional organization may create the appearance of impropriety by injecting the prestige of his public office into his private activities for the professional organization. A Board member acting as a lobbyist may create the impression that such lobbying on behalf of the professional organization represents the official views and interests of the Board.

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 Respiratory Care Board member is prohibited from disclosing confidential information to a professional organization, its members, or any other party, or from 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 Respiratory Care Board. See Advisory Opinion No. 88-009. A Respiratory Care Board member who serves a professional organization as a board member or officer, or in some other capacity is prohibited by R.C. 102.03(B) from taking any action on behalf of the organization if he will base such action on confidential information acquired in his official duties.

The Commission is aware that members of state 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. See Advisory Opinion No. 90-009. However, a public official or employee owes his

first responsibility to the exercise of the public trust; this responsibility must not be impaired by the officials concern for a professional organization which he serves in some capacity. R.C. 102.03 is designed to prevent the creation of any situation which may impair the objectivity and impartiality, and therefore the effectiveness, of a public official or employee in the exercise of his public responsibilities. See generally Advisory Opinion No. 89-014 and 90-001. All public officials and employees must accept necessary restrictions to avoid any possible interference with the responsibilities of public office. See Advisory Opinions No. 89-010 and 90-009.

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 Ethics Commission, and you are so advised, that: (1) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of the Respiratory Care Board from soliciting, accepting, or using the authority or influence of his official position to secure anything of value from a professional organization whose members are regulated by the Respiratory Care Board; (2) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a member of the Respiratory Care Board from soliciting, accepting, or using the authority or influence of his official position to secure a position as an officer, board member, or member of a special committee of, or lobbyist for, a professional respiratory care organization if he would receive compensation, a fee, or anything else of value for such service; (3) Division (D) of Section 102.03 of the Revised Code prohibits a member of the Respiratory Care Board who serves as an officer or board member of a professional organization from participating in any matter on which the organization has taken a position or which would directly benefit the interests of the organization, even though he receives no compensation for serving as an officer or board member of the organization; (4) Division (D) of Section 102.03 of the Revised Code prohibits a member of the Respiratory Care Board who serves a professional organization as a lobbyist or who serves on a special committee from participating in deliberations, voting, or otherwise using his official position with regard to a matter where he has assumed a particular responsibility in the organization with regard to that subject matter or has advocated a position as a lobbyist for the professional organization; and (5) Division (B) of Section 102.03 of the Revised Code prohibits a Respiratory Care Board member who serves a professional organization as a board member or officer, or in some other capacity from disclosing or using confidential information he has acquired in his official duties, or taking any action on behalf of the organization if he will base his decision on confidential information acquired in his official duties.



David L. Warren, Chairman
Ohio Ethics Commission