



OHIO ETHICS COMMISSION

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Advisory Opinion

No. 75-010

June 10, 1975

Syllabus by the Ohio Ethics Commission:

An architect member of the Ohio Board of Building Standards is not prohibited by Section 102.04 (A) of the Revised Code from receiving or agreeing to receive compensation for services rendered or to be rendered by him personally as an employee or independent contractor of another state agency.

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Your request for an advisory opinion asks whether an architect member of the Ohio Board of Building Standards is prohibited by Section 102.04 (A) of the Revised Code from performing architectural services for the state while serving as a member of that board. You state, by way of history, that you are a principle in an architectural firm and you have been a member of the Ohio Board of Building Standards since 1972. You state further that members are compensated for time spent in performance of their official duties. You state that you have performed architectural services for a city on a project which may be undertaken by the State. You anticipate working on the project for the State unless such activity is contrary to Chapter 102 of the Revised Code.

The pertinent provision of Chapter 102 of the Revised Code, as noted in your question, is Division (A) of Section 102.04 of the Revised Code:

"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 which is before the general assembly or any department, division, institution, instrumentality, board, commission or bureau of the state, excluding the courts."

The first issue is whether you as a member of the Board of Building Standards are a person who has been "appointed to an office of . . . any . . . board . . . of the state," and thus fall within the purview of Section 102.04 (A) of the Revised Code.

Ohio Ethics Commission Advisory Opinion No. 74-007 established the following tests for determining whether one is appointed to an "office" of the state: (1) was he appointed; (2) does he have a title; (3) does he exercise functions

of government concerning the public; and, (4) is he not subject to a contract of employment. The exercise of sovereign power which is reflected by the exercise of "substantial and material administrative discretion" rather than the mere formulation of plans or making of recommendations is an additional test established in Ohio Ethics Commission Advisory Opinion No. 75-004.

It is necessary to examine the legislation establishing the Ohio Board of Building Standards in order to determine whether these tests are met. Section 3781.07 of the Revised Code establishes the Board of Building Standards:

"There is hereby established in the department of industrial relations a board of building standards consisting of eleven members. The board shall appoint a secretary who shall serve in the unclassified civil service. Such secretary shall be appointed for a term of six years at a salary to be fixed pursuant to Section 143.09 of the Revised Code. The board may employ additional staff in the classified civil service. The secretary may be removed by the board under such rules as the board may adopt. An employee of the department of health who is a sanitary engineer, to be designated by the director of said department, and an employee of the industrial commission to be designated by the commission, and an employee of the department of education to be designated by said department, shall be members of the board. The other members shall be appointed by the governor with the advice and consent of the senate. Terms of office of appointed members shall be for four years, . . . Of the members so appointed by the governor, one shall be an attorney at law, admitted to the bar of this state; two shall be registered architects; two shall be professional engineers, one in the field of mechanical and one in the field of structural engineering, each of whom shall be duly licensed to practice his profession in this state; one shall be a person of recognized ability; broad training, and fifteen years experience in problems and practice incidental to the construction and equipment of buildings specified in Section 3781.06 of the Revised Code; one shall be a member of the fire service with recognized ability and broad training in the field of fire protection and suppression; and one shall be a general contractor with experience in residential and commercial construction. Each member of the board, not otherwise required to take an oath of office, shall take the oath prescribed by the constitution. Each member appointed by the governor shall receive as compensation an amount fixed pursuant to Section 143.09 of the Revised Code, and shall receive his actual and necessary expenses in the performance of his official duties. The amount of such expenses shall be certified by the secretary of the board and paid in the same manner as the expenses of employees of the department of industrial relations are paid."

Therefore, members of the Board of Building Standards are appointed by virtue of Section 3781.07 of the Revised Code, do not have a contract of employment and have the title of member of the Board of Building Standards. Thus, they would be appointed to an "office" for purposes of Section 102.04 (A) of the Revised Code if they exercise functions of government concerning the public and meet the test of sovereign power.

A review of the statutory duties of the Board of Building Standards answers the question. Members of the Board of Building Standards exercise sovereign power and functions of government concerning the public. Section 3781.10 of the Revised Code states:

"The board of building standards shall:

(A) Formulate and adopt regulations governing the erection, construction, repair, alteration, and maintenance of all buildings or classes of buildings specified in section 3781.06 of the Revised Code, . . .

(C) Determine by rule or regulation, on its own motion or on application made under section 3781.12 and 3781.13 of the Revised Code, . . . that any particular fixture, device, material . . . complies with performance standards adopted pursuant to section 3781.11 of the Revised Code . . .

(E) Certify municipal and county building departments to exercise enforcement authority and to accept and approve plans and specifications and make inspections pursuant to sections 3781.03 and 3791.04 of the Revised Code.

(1) Enforcement authority for approval of plans and specifications and may be exercised, and plans and specifications approved on behalf of a municipal corporation or county, by any of the following who meet the qualifications established by the board of building standards . . .

(2) Enforcement authority for inspections may be exercised, and inspections may be made on behalf of a municipal corporation or county, by any of the following who meet the qualifications established by the board of building standards . . .

(5) The board of building standards shall adopt regulations governing:

(a) The qualifications of building department personnel and those employees of persons, firms, or corporations exercising authority pursuant to division (E) (1) and (E) (2) of this section . . .

(6) Such certification may be revoked or suspended with respect to any or all of the building occupancies to which it relates on petition to the board of building standards . . .

(F) Conduct such hearings, in addition to those required by sections 3781.06 and 3781.18, inclusive, and section 3791.04 of the Revised Code, and make such investigations and tests, and require from other state departments, officers, boards, and commissions such information as the board deems necessary or desirable in order to assist it in the discharge of any duty or in the exercise of any power mentioned in this section or in sections 3781.06 to 3781.18, inclusive, and section 3791.04 of the Revised Code;

(G) Formulate regulations and establish reasonable fees for the review of all applications submitted where the applicant applies for the authority to use a new material, assembly, or product of a manufacturing process . . .

(H) Compile and publish, in the form of a model code, rules and regulations pertaining to one, two, and three-family dwelling houses which any municipality or county may incorporate into its building code" (Emphasis added)

These duties and responsibilities indicate that the duties of the Board of Building Standards are not merely clerical but involve some discretionary, decision-making qualities. The members of the Board of Building Standards therefore exercise sovereign power and perform functions of government concerning the public. Thus, they are appointed to "an office of . . . any . . . board . . . of the state. . ." for purposes of falling within the purview of Section 102.04 (A) of the Revised Code. As such, a member cannot "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 which is before the General Assembly, or the department. . ." (Emphasis added)

There exists in Section 102.04 (A) of the Revised Code an exception which is controlling in this situation. Compensation received "from the agency with which he serves" is not prohibited compensation. The term agency, in the phrase "other than from the agency with which he serves" can be read in the singular or plural, by virtue of Section 1.43 of the Revised Code which states that "the singular includes the plural and the plural includes the singular." Thus, "agency" means agencies as well. Therefore, Section 102.04 of the Revised Code does not prohibit receipt of compensation from more than one agency of a governmental entity.

Furthermore, the Ohio Ethics Commission has determined that an independent contractor is not a person who is "employed by" an agency as that term is used in Section 102.04 of the Revised Code. Thus, a person who is appointed to an office of a board of the state is not prohibited by Section 102.04 (A) of the Revised Code from receipt of compensation as an independent contractor of a state agency.

Section 102.03 of the Revised Code places some additional restrictions on the activities of state and public officials and employees and your attention is directed to this section:

"(A) No state official or employee shall represent a client before the public agency by which he is or within the preceding twelve months was employed or on which he serves or within the preceding twelve months had served on any matter with which the person is or was directly concerned and in which he personally participated during his employment or service by a substantial and material exercise of administrative discretion. As used in this division, "matter" does not include the proposal, consideration, or enactment of statutes, rules, regulations, ordinances, resolutions, or charter or constitutional amendments.

(B) During the period of his employment or service and for two years thereafter, no public official or employee shall disclose or use for his personal profit, without appropriate authorization, any information acquired by him in the course of his official duties 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. No 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.

(C) No public official or employee shall participate by a substantial discretion in any license or rate-making proceeding which directly affects the license or rates of any person to whom the official or employee or his immediate family, or a partnership, trust, business trust, corporation or association of which he or his family owns or controls more than five per cent, has sold goods or services totaling more than one thousand dollars during the preceding year, unless the official or employee has filed a written statement acknowledging such sale with the clerk of secretary of the state agency and the statement is entered in any public record of the agency's proceedings. This division shall not be construed to require the disclosure of clients of attorneys or patients of persons certified under section 4731.14 of the Revised Code which would be otherwise confidential.

(D) No public official or employee shall use or attempt to use his official position to secure any valuable thing or valuable benefit for himself that would not ordinarily accrue to him in the performance of his official duties, which thing or benefit is of such character as to manifest a substantial and improper influence upon him with respect to his duties."

The Office of the Attorney General offers opinions on the compatability of public officials or employees holding multiple public positions. Nothing contained in the Ethics Commission Advisory Opinions should be construed to contravene these compatability determinations.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised that an architect member of the Ohio Board of Building Standards is not prohibited by Section 102.04 (A) of the Revised Code from receiving or agreeing to receive compensation for services rendered or to be rendered by him personally as an employee or independent contractor of another state agency.


OHIO ETHICS COMMISSION

(Mrs) Barbara H. Rawson, Chairman