



OHIO ETHICS COMMISSION
150 EAST BROAD STREET
COLUMBUS 43215
(614) 466-7090

Advisory Opinion
No. 75-011
June 10, 1975

Syllabus by the Ohio Ethics Commission:

A member of the Ohio Board of Building Appeals is not prohibited by Section 102.04 (A) of the Revised Code from receiving compensation from other state agencies for services rendered or to be rendered by him.

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Your request for an advisory opinion asks whether a member of the Ohio Board of Building Appeals who also is engaged by the State of Ohio in the planning of a new educational facility violates Section 102.04 (A) of the Revised Code. You state by way of history that you represent no private client interests before any board, department, commission or agency of the State of Ohio and that you are an appointed member of a three member board, the Ohio Board of Building Appeals which hears matters related to building code violations.

The first issue is whether you as a member of the Ohio Board of Building Appeals, 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. The Board of Building Appeals is created under Section 3781.19 of the Revised Code.

"There is hereby established in the department of industrial relations a board of building appeals consisting of three members who shall be appointed by the governor with the advice and consent of the senate. Terms of office shall be for four-year terms, . . . One member shall be an attorney-at-law, admitted to the bar of this state and of the remaining members, one shall be a registered architect and one shall be a professional engineer, each of whom shall be duly licensed to practice their respective professions in this state. . . . Each member shall be paid an amount fixed pursuant to section 143.09 of the Revised Code per diem. . . . The board may adopt its own rules of procedure not inconsistent with sections 3781.06 to 3781.18, and 3791.04 of the Revised Code, and may change them in its discretion. A full and complete record of all proceedings of the board shall be kept and be open to public inspection.

In the enforcement by any department of the state or any political subdivision of Chapters 3781., 3791., and sections 4101.083 [4101.08.3], 4101.084, [4101.08.4], 4104.02, 4104.06, 4105.011, [4105.01.1], and 4105.11 of the Revised Code and any rule or

regulation made thereunder, such department is the agency referred to in sections 119.07, 119.08, and 119.10 of the Revised Code. The board of building appeals is the agency within the meaning of sections 119.09 to 119.13 of the Revised Code, which shall conduct the adjudication hearing referred to in such sections and required by section 3781.031 [3781.03.1] of the Revised Code.

In addition to the provisions of Chapter 119. of the Revised Code, the board of building appeals, as the agency conducting the adjudication hearing, may reverse or modify the order of the enforcing agency if it finds that the order is contrary to, or to a fair interpretation or application of, Chapters 3781., 3791., and 4104. and sections 4101.083 [4101.08.3], 4101.084 [4101.08.4], 4105.011 [4105.01.1], and 4105.11 of the Revised Code and any rule or regulation made thereunder, or that a variance from the provisions of such laws or any rule or regulation made thereunder, in the specific case, will not be contrary (sic) to the public interest where a literal enforcement of such provisions will result in unnecessary hardship." (Emphasis added)

The Ohio Ethics Commission in Advisory Opinion No. 74-007, applied certain tests to determine if a member of a board is "appointed to an office." They were: (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. From the enabling legislation cited above, it is evident that a member of the Board of Building Appeals is (1) appointed, (2) does have the title of member of the Board of Building Appeals, (3) does exercise functions of government concerning the public, and (4) is not subject to a contract of employment. The Ohio Ethics Commission in Advisory Opinion No. 75-004 established the additional test of the exercise of sovereign power. It is therefore necessary to review the duties of the Board of Building Appeals to determine whether a person, appointed to that Board, exercises sovereign power and thus holds a public office. The pertinent language of the above cited statute is:

"The board of building appeals is the agency within the meaning of sections 119.09 to 119.13 of the Revised Code which shall conduct adjudication hearings referred to in sections and required by section 3781.031 of the Revised Code."

The Board of Building Appeals thus conducts adjudicatory hearings and may also reverse the decision of other enforcing agencies. Making decisions in an adjudicatory hearing and reversing or modifying an order of an enforcing agency is exercising administrative discretion, and thus constitutes the exercise of sovereign power. Therefore, a member of the Board of Building Appeals is a person who is "appointed to an office of . . . any . . . board

. . . of the state" for purposes of the prohibitions against receipt of compensation for services 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 issue, therefore, is whether a member of the Board of Building Appeals can receive compensation as an architect engaged in the planning of an educational facility either under separate contract with or as an employee of a state agency. If you are indeed, an independent contractor for a state agency you do not fall within the prohibitions of Section 102.04 (A) of the Revised Code. The Ohio Ethics Commission has determined that the phrase "employed by," as used in that section, does not include independent contractors.

Ohio Ethics Commission Advisory Opinion No. 75-010 concluded that the phrase "other than from the agency with which he serves" allows the receipt of compensation for services personally rendered for a state agency by an architect who was also a member of a state board. The rationale was that "agency" as used in that phrase may be read in the plural. Therefore, compensation received from more than one state agency is not prohibited.

Therefore, it is not a violation of Section 102.04 (A) of the Revised Code, for a member of the Ohio Board of Building Appeals to receive compensation as an architect engaged in the planning of an educational facility either as an independent contractor for a state agency, or as an employee 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

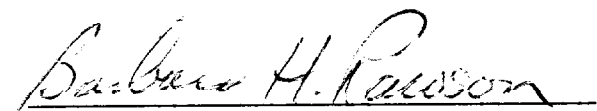
was received and preserving its confidentiality is necessary to the proper conduct of government business. No public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions.

(C) No public official or employee shall participate by a substantial and material exercise of administrative 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 or 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 compatibility of public officials or employees holding multiple public positions. Nothing contained in the Ethics Commission Advisory Opinions should be construed to contravene these compatibility determinations.

Therefore, it is the opinion of the Ohio Ethics Commission and you are so advised that a member of the Ohio Board of Building Appeals is not prohibited by Section 102.04 (A) of the Revised Code from receiving compensation from other state agencies for services rendered or to be rendered by him.


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by (Mrs) Barbara H. Rawson, Chairman