



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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COLUMBUS, OHIO 43215-2940
(614) 466-7090

June 16, 1988

Informal Opinion 1988-INF-0616

Max Kravitz
Capital University Law and Graduate Center
[REDACTED]

Dear Mr. Kravitz:

You asked whether the Ohio Ethics Law and related statutes place certain limitations upon you if you are appointed as a member of the Ohio State Racing Commission (Racing Commission). If appointed, you ask whether you must sell your entire investment interests in standardbred horses which are involved in out-of-state and in-state racing events. You also asked whether you may serve as a member of the Commission during the appeal period of cases in which you, as a lawyer, represented clients affected by Commission decisions.

You state as background, that you have asked the Governor to consider your qualifications to be appointed as a member of the Racing Commission. You indicate that you currently have financial interests in standardbred horses that may conflict with your duties as a member of the Commission. Presently, you own shares in horses, stabled in North Carolina and primarily used for breeding, which will not race within or enter the State of Ohio. You own standardbred horses racing in Illinois and one staked to races throughout the country, except Ohio. In addition, you own one horse training in Ohio, and presently staked to the Ohio Sires Stakes and other Ohio races. Your wife also owns a race horse, presently in New Jersey, and also scheduled to race in Ohio. You and your wife are willing to sell your interests in the two race horses scheduled to race in Ohio, but cannot currently sell your entire financial interests in the out-of-state horses.

Finally, you state that as an attorney, you presently represent two clients in cases the Racing Commission has considered. One client has appealed an adverse decision by the Commission to the Franklin County Court of Common Pleas. The other client, in a case likely to be decided by the Racing Commission prior to your possible appointment, probably will appeal any adverse ruling to the Common Pleas Court. You state that each case involves an owner and a harness race driver. You question whether, after you withdraw as your clients' counsel, you may accept a possible appointment to the Racing Commission while the cases remain pending on appeal.

Divisions (D) and (E) of Section 102.03 of the Revised Code read as follows:

- (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.

Division (B) of Section 102.01 of the Revised Code defines "public official or employee" as "any person elected or appointed to an office . . . of any public agency." Division (C) of Section 102.01 states that a "public agency" means "any department, division, institution, board, commission, authority, bureau or other instrumentality of the state" If appointed to the Racing Commission by the Governor pursuant to Section 3769.02 of the Revised Code, you would become a "public official or employee" within the meaning of Divisions (D) and (E) of Section 102.03 of the Revised Code. See Ohio Ethics Commission Advisory Opinion No. 75-025.

Members of the Racing Commission must meet certain qualifications to be eligible for appointment. Among those qualifications, Section 3769.02 of the Revised Code states:

No person shall be appointed to the commission nor be an employee thereof nor officiate at pari-mutuel meetings conducted in this state who is licensed or regulated, directly or indirectly, by this commission other than for the position to which he is appointed, nor shall he have any legal or beneficial interest, direct or indirect, pecuniary or otherwise, in any firm, association, or corporation so licensed or regulated or which participates in pari-mutuel meetings in any manner, nor shall he participate in pari-mutuel meetings in any manner, other than his official capacity.

Section 3760.03 requires that the Racing Commission:

. . . shall prescribe the rules and conditions under which horse racing may be conducted, and may issue, deny, suspend, diminish, or revoke permits to conduct horse racing as authorized by sections 3769.01 to 3769.14 of the Revised Code. The commission may impose, in addition to any other penalty imposed by the commission, fines in an amount not to exceed one thousand dollars on any permit holder or any other person who violates the rules or orders of the commission.

....

The state racing commission may issue, deny, suspend, or revoke licenses to such persons engaged in racing . . . as is in the public interest for the purpose of maintaining a proper control over horse-racing meetings.

Pursuant to this authority, the Racing Commission has issued many regulations which require, among other things, that persons participating in racing, including owners of any horse, must be licensed by the Commission. See Administrative Rule Sections 3769-11-14, 3769-12-24, 3769-15-02, and 3769-17-01. Those regulations set out the requirements for a license application, restrict the conduct of license holders, and provide sanctions for violations. See Administrative Rule Chapter 3769-12 and Section 3769-17-02 (owner's requirements for corporations and partnerships).

Revised Code Sections 102.03(D) and (E) prohibit a public official or employee, including a member of the Racing Commission, from soliciting, accepting, or using his official authority or influence to secure anything of value for himself or anyone else if the thing of value is of such character as to manifest a substantial and improper influence upon him with respect to his duties. The term "anything of value" is defined for purposes of Section 102.03 to include money and every other thing of value. See Revised Code Sections 102.01(G) and 1.03. An ownership interest in a racehorse, and the financial benefits derived from running such horse at racing meetings, fall within the term "anything of value." Fees from professional services or profits generated from a private law practice are also within the definition of "anything of value." See Advisory Opinion No. 86-004. Therefore, a member of the Racing Commission would be prohibited by Divisions (D) and (E) of Section 102.03 of the Revised Code from soliciting, accepting, or using his official authority or influence to secure legal fees, racehorses, or the financial benefits from running such racehorses, if they are of such character as to manifest a substantial and improper influence upon him with respect to his duties.

It is presumed for purposes of this opinion that the racehorses and financial benefits connected therewith, and the legal fees at issue are of a "substantial" rather than of a de minimus nature. Furthermore, it is apparent, in light of the Racing Commission's duties and responsibilities, that those things of value which accrue to the owner of a horse which races in Ohio are of such a character as to manifest an improper influence upon a member of the Racing Commission. The Racing Commission licenses and regulates owners of racehorses. Additionally, because of the extent of statutory and regulative authority of the Racing Commission over the racing industry and its participants, any license holder, such as an owner of standardbred racehorses, would be interested in matters before the Racing Commission on a recurring basis. Therefore, a member of the Racing Commission who was also a party licensed and regulated by the Commission would be subject to conflicting interests, and would be unable to objectively fulfill his official duties. See generally Advisory Opinions No. 86-011, 87-006, and 88-002. In examining R.C. 3769.02, setting forth the statutory qualifications for appointment as a member of the Racing Commission, it is readily apparent that a person licensed to own racehorses in the State of Ohio may not qualify as a member. (It is specifically noted, however, that the Ethics Commission has no statutory authority to interpret Section 3769.02. Such authority would reside in the Attorney General of the State of Ohio, or the Racing Commission itself.) R.C. 3769.02 is a statutory reflection of the fact that a member of the Racing Commission who had an ownership interest in a horse which raced in Ohio would be subject to an inherent conflict of interest. Therefore, Section 102.03(D) and (E) would prohibit a member of the Racing Commission from holding an ownership interest in any horse that would race within the State of Ohio.

Prior to the enactment of Am. Sub. H.B. 300, effective September 17, 1986, R.C. 102.03(D) prohibited a public official or employee from using his authority or influence 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. The Commission interpreted this language as prohibiting a public official from participating in his official capacity in matters that would benefit the property, business, or other interests of his spouse or his employer, since he would derive some benefit as a result of his actions. See Advisory Opinions No. 79-008, 84-010, and 85-011. Cf. Advisory Opinions No. 86-007 (R.C. 102.03(D) "does not apply to things of value accruing to a family member or business associate, provided the public official does not benefit

personally;" however, it would create the appearance of impropriety for a public official to participate in discussions or vote on matters concerning a business owned by a family member or business associate, even though he has no personal financial interest).

However, 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). See Advisory Opinion No. 87-004. Therefore, it is no longer necessary to demonstrate that a public official or employee would himself derive a personal, pecuniary benefit from his participation in an official matter in order to show a violation of R.C. 102.03(D). However, R.C. 102.03(D) still requires that the thing of value, whether it is secured for the official or for someone else, be of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

The statutory language of Division (E) of Section 102.03, similar to that of amended Division (D) and also an enactment of Am. Sub. H.B. 300, would prohibit the solicitation or receipt of a thing of value, whether secured for the official or someone else, if it is of such character as to manifest a substantial and improper influence upon the public official with respect to his duties. Therefore, Divisions (D) and (E) of Section 102.03 of the Revised Code would prohibit a member of the Racing Commission from soliciting, or using the authority or influence of his position to secure, any benefit or favorable treatment for his spouse with regard to her ownership interest in any horse which is racing in the State of Ohio.

In addition, you have indicated that your spouse is willing to sell her interest in a horse scheduled to race in Ohio. If you are appointed to the Racing Commission, the action of your spouse in divesting her financial interest in horses racing in Ohio would alleviate any potential violations of Divisions (D) and (E) of Section 102.03 concerning her ownership of those horses, as well as diminish any appearance of impropriety attendant to you or your spouse as a result.

A member of the Racing Commission, or his spouse, would not otherwise be prohibited by Divisions (D) and (E) of Section 102.03 from owning or investing in racehorses outside of the State of Ohio. Divisions (D) and (E) would, however, prohibit the member from using his position as a member of the Ohio State Racing Commission in matters in other states in order to solicit or receive any beneficial or favorable treatment in matters affecting horses he or his spouse own or in which they have investments. You should contact the Attorney General's Office or the Racing Commission for a determination whether R.C. 3769.02 would prohibit an individual from serving on the Commission where his spouse owned racehorses, or where he or his spouse owned racehorses outside of the State.

Finally, pursuant to Sections 102.03(D) and (E), a member of the Racing Commission would be prohibited from soliciting, receiving or using the authority or influence of his office to secure fees for continuing legal services rendered to clients on matters before, or appealed from, the Racing Commission. See Advisory Opinion No. 87-009 (construing Sections 102.03(D) and (E), and also Section 102.04). An individual may serve on the Racing Commission if he withdraws from representing clients on any matter involving the Commission or its decisions, but he may not participate as a member of the Commission in any discussion, deliberation, or action upon such matters in which he had been previously involved as an attorney while such cases remain pending. A member who

Max Kravitz
June 16, 1988
Page 5

is also an attorney may otherwise be governed in his conduct as a public official by restrictions of the Code of Professional Responsibility. This interpretation of Sections 102.03(D) and (E) is not intended to supplant any restriction the Code may place upon such a member of the Racing Commission.

This informal staff opinion was approved by the Ethics Commission at its meeting on June 16, 1988. It is based upon the facts you have presented, and is limited to questions arising within the jurisdiction of the Ohio Ethics Commission, as contained in Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. If you have any further questions regarding this matter, please contact me.

Sincerely,



Melissa A. Warheit
Executive Director

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