



OHIO ETHICS COMMISSION

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August 21, 1991 Informal Opinion 1991-INF-0821-1

Diane W. Poulton
Women's Policy and
Research Commission

Dear Ms. Poulton:

The Ethics Commission has been asked whether members of the Women's Policy and Research Commission and the employees of the Women's Policy and Research Center, including the Executive Director of the Center, are subject to the Ohio Ethics Laws and related statutes including the requirement to file a financial disclosure statement.

Your question concerning the **members** of the Women's Policy and Research Commission (Women's Commission) will be addressed first. The Women's Commission and its statutorily prescribed powers and duties must be examined in order to address this question.

The Women's Commission is a statutorily created commission within state government. See R.C. 121.51 (A). It is comprised of fifteen members. Id. Six members are appointed by the Governor to represent the public; not more than three shall be members of the same political party. Id. Four members are appointed by the President of the Senate; two of these appointees are members of the Senate and two are nonlegislator members representing the public. Id. Four members are appointed by the Speaker of the House of Representatives; two of these appointees are members of the House and two are nonlegislator members representing the public. Id. The Governor or his designee also is a member of the Commission. Id. The members of the Women's Commission receive no compensation; however, members are reimbursed for necessary expenses actually incurred in the conduct of their official business. See R.C. 121.51 (B).

The Women's Commission has the following statutory duties: (1) to establish policies and procedures governing the operation of the Women's Policy and Research Center (Women's Center) established under R.C. Section 121.53; (2) to employ an Executive Director for the Center; and, (3) to furnish a written annual report of its activities to the Governor, President of the Senate, and the Speaker of the House. See R.C. 121.52. The Executive Director of the Women's Center shall appoint the Women's Center's employees with the approval of the Women's Commission. See R.C. 121.53 (B).

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The Women's Commission may: (1) hold hearings to assess the problems and needs of women in this state; (2) create standing or special committees; and, (3) accept gifts, donations, benefits, and other funds from public and private sources to be used in carrying out the duties of the Women's Commission or Women's Center. See R.C. 121.52 (B). All gifts, donations, benefits, and other funds shall be deposited into the Women's Policy and Research Fund which has been established in the state treasury's state special revenue fund group. See R.C. 121.52 (D). The expenses of the Women's Commission and the Women's Center are payable solely out of the funds of the Women's Commission. See R.C. 121.52 (C).

The Women's Center, under the supervision of the Women's Commission, performs the following duties: (1) identifies barriers to women's equality; (2) maintains and makes available a list of persons qualified for appointment to positions in state government; (3) educates the public on the status of women and the impact of public policy on women; (4) issues reports and recommendations on women's policy issues to the executive and legislative branches of state government and the general public; (5) analyzes public policies to determine their impact on women; (6) helps the public and private sectors develop programs and services for women; and, (6) encourages other public agencies and institutions to collaborate on issues of mutual interest. See R.C. 121.53 (A). See also former R.C. 103.01.

The Ethics Commission is empowered to administer, interpret, and help enforce Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. See R.C. 102.02, 102.06, and 102.08. These provisions include Ohio's financial disclosure law, as well as prohibitions against public officials and employees misusing their official position for their own personal benefit or the benefit of their family members or business associates. R.C. 102.01 (B) defines the term "public official or employee" for purposes of Chapter 102. of the Revised Code as "**any person who is elected or appointed to an office** or is an employee of any public agency." (Emphasis added.) R.C. 102.01 (C) defines the term "public agency" as:

[T]he general assembly, all courts, **any** department, division, institution, board, **commission**, authority, bureau or other instrumentality **of the state**, a court, city, village, township, and the five state retirement systems, or any other governmental entity. (Emphasis added.)

R.C. 2921.01 (A) defines the term "public official" for purposes of R.C. Chapter 2921. as:

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[A]ny elected or appointed officer, or employee, or agent of the state or any political subdivision thereof, whether in a temporary or permanent capacity, and including without limitation legislators, judges and law enforcement officers. (Emphasis added.)

Since the Women's Commission is a commission which is established within state government, it is a "public agency" under the statutory definition provided by R.C. 102.01 (C) and a state entity for purposes of R.C. Chapter 2921. The issue becomes whether a member of the Women's Commission is "appointed to an office . . . of any public agency" for purposes of Chapter 102. or is an "appointed officer . . . of the state" for purposes of R.C. 2921.42. (Emphasis added.)

Under Ohio law, a person who holds an "office" is an "officer". In the case of Muskingum County Democratic Executive Committee v. Burrier, 31 Ohio Op. 570 (C.P. Muskingum County 1945) the Court held:

The terms "officer" and "office" are paronymous, and in their original and proper sense, are to be regarded as strictly correlative.

See also Ohio Ethics Commission Advisory Opinion No. 85-005.

The Ethics Commission, in Advisory Opinion No. 74-007, established a test to determine whether one is "appointed to an office;" that is, whether the person: (1) is appointed; (2) has a title; (3) exercises a function of government concerning the public; (4) is not subject to a contract of employment. The Commission emphasized that no one indicium controls and combinations of factors will determine whether a person is deemed to hold an office. See Advisory Opinion No. 75-004. This test was modified in Advisory Opinion No. 75-004 when the Commission added the requirement that the person exercise the "sovereign power" of government as an additional and essential criterion. The Commission explained "sovereign power" in Advisory Opinion No. 75-004:

The concept of sovereign power originates with the idea that the office is created by public authority, be it executive order, the Constitution or some statute. Furthermore, it has been held that "if a man is placed in a position which is continuous and permanent and has certain powers which, under the law, only he can exercise; then he has sovereign power delegated to him." Shaw v. Jones, 40 O.N.P. 372 (1897).

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In Advisory Opinion No. 77-004 the Commission held:

Sovereign power includes the exercise of a duty entrusted to one by virtue of statute or some other public authority, a duty that is not merely clerical, but that involves discretionary, decision-making qualities.

The Commission quoted from the Ohio Supreme Court case of State ex rel. Landis v. Butler, 95 Ohio St. 157 (1917), in Advisory Opinion No. 85-005, as follows:

[I]f the appointee is invested with the independent power in the disposition of public property or with the power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.

In Advisory Opinion No. 85-005, the Ethics Commission held that members of a public agency which functions exclusively for advisory purposes and does not exercise the sovereign powers of government are not deemed to be "appointed to an office" or "officers". In that opinion the Ethics Commission held that members of the Technical Advisory Committee to the Coal Development Office do not exercise sovereign power and thus are not appointed to an office of the state and are not subject to the prohibitions of R.C. Chapter 102. or Section 2921.42, since the statutes establishing the Committee and defining its duties do not confer upon its members the power to exercise final decision-making authority.

The issue becomes whether the Women's Commission exercises "sovereign power." As explained above, a determination whether a public agency exercises "sovereign power" depends on whether the public agency has the power to exercise final, discretionary decision-making authority. As explained above, the principal duties of the Women's Policy and Research Commission and the Women's Policy and Research Center consist of conducting research, collecting and compiling information, educating the public, providing aid for the development of programs and services, and issuing reports and recommendations. No statute grants final decision-making authority to the Women's Commission or provides that the advice and recommendations rendered by the Women's Commission to the executive and legislative branches are binding.

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As stated above, other indicia of sovereign power include whether a public agency has statutory and independent duties with regard to the disposition of public property or the ability to incur financial obligations upon the part of the state. See Advisory Opinion No. 85-005. As explained above, the Women's Commission is statutorily authorized to: (1) employ an Executive Director for the Women's Center and approve the employment of other employees; (2) accept gifts, donations, benefits, and other funds from public and private sources to be used in carrying out the duties of the Women's Commission or Women's Center; and, (3) pay its expenses and those of the Women's Center. It thus becomes necessary to determine whether the ability of the Women's Commission to exercise functions involving the hiring of employees and the utilization of public and private moneys to pay expenses in the performance of its statutorily prescribed duties constitutes the exercise of "sovereign power."

In Advisory Opinion No. 75-007, the Ethics Commission held that members of the Cuyahoga County Soldiers and Sailors Monument Commission did not perform functions constituting the exercise of sovereign power despite the fact that the Commission was statutorily authorized to hire a custodian and set his compensation. The Ethics Commission explained in Advisory Opinion No. 75-007 that even though a commission performs acts which result in the provision of a public service, the commission's principal duty must be examined in order to determine whether the commission's actions are the exercise of sovereign power, holding:

The principle [sic] duty of the Commission is "caring for the monument and the grounds surrounding the same." To this end the Commission may draft rules and regulations for their internal government, hire a custodian and set his compensation, set restrictions on the use of what is described as the "southeast corner of the public square," make repairs and improvements on the monument and the like. These acts are indeed a public service performed by the members of the Commission; however, they are not an exercise of "sovereign power."

See also Advisory Opinion No. 75-012 (members of the former Ohio Constitution Review Commission did not perform functions constituting the exercise of sovereign power despite the fact that the Committee was statutorily authorized to employ consultants.) Also, the Ethics Commission determined at its meeting on September 1, 1988 that members of the Ohio Public Works Commission were not subject to Chapter 102. and Section 2921.42 since the Ohio Public Works Commission exercises advisory rather than sovereign functions despite the fact it is authorized to appoint a director who is statutorily granted discretionary decision-making sovereign power.

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In the instant situation, the Women's Commission is authorized to hire an Executive Director, approve the employment of other employees, and to utilize private and public funds to perform a public service and thus achieve its principal duties; however, these acts are not an exercise of sovereign power since they only advance the principal statutory duties of the Women's Commission which, as described above, consist of conducting research, collecting and compiling information, educating the public, aiding the development of programs and services, and issuing non-binding reports and recommendations. These principal duties do not involve the exercise of any final discretionary decision-making authority and do not constitute the exercise of sovereign power. Therefore, since the Women's Commission does not exercise sovereign power, a member of the Women's Commission is neither "appointed to an office" for purposes of R.C. Chapter 102. nor an "officer . . . of the state" for purposes of R.C. 2921.42.

Furthermore, the Women's Commission members do not hold an employment relationship with the State, since: (1) the members receive no salary but only reimbursement for expenses incurred in performing their duties; (2) many appointees are chosen due to their outside vocation, employment, or interests; (3) the members serve a limited term; and, (4) the members are required to meet four times annually. See generally Advisory Opinions No. 75-022 and 85-005. Therefore, a member of the Women's Commission is neither "an employee of a public agency" for purposes of R.C. Chapter 102. nor an "employee . . . of the state" for purposes of R.C. 2921.42.

However, R.C. 2921.01 also includes "agents" of the state, as well as officers and employees, within the definition of "public official" for purposes of R.C. 2921.42. The issue remains therefore, whether a member of the Women's Commission can be considered an "agent" of the state for purposes of R.C. 2921.42.

The Ethics Commission has held that an individual is an "agent" of the state when the state has empowered her or her board to act on the state's behalf, and to bind the state. See Advisory Opinion No. 85-005. As described above, the Women's Commission's principal statutory duties consist of conducting research, collecting and compiling information, providing information, and issuing reports and recommendations. These duties are advisory functions which do not empower the Women's Commission to act on behalf of, or bind, the state. Therefore, a member of the Women's Commission is not an "agent" of the state who is subject to Section 2921.42 of the Revised Code. However, this would not preclude a finding that a member, under the appropriate circumstances, has acted to bind the state and, thus created an agency relationship.

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It should be noted, however, that a member of the Women's Commission who is otherwise a public official or employee is subject to the provisions of Chapter 102. and Section 2921.42 of the Revised Code due to his or her position as a public official or employee, but not due to his or her membership on the Women's Commission.

In Advisory Opinion No. 85-005, the Ethics Commission cautioned members of the Technical Advisory Committee to the Coal Development Office that even though they are not subject to Chapter 102. or Section 2921.42, their participation in matters which could advance their private interests or the interests of their institutions could create an appearance of impropriety. In this instance, although the members of the Women's Commission are not subject to Chapter 102. or Section 2921.42, members of the Women's Commission should abstain from participating in matters which would benefit their own interests or the interests of organizations with which they serve in order to avoid the appearance of favoritism or impropriety.

R.C. 2921.43 also falls within the Ethics Law and this statute applies to "public servants." R.C. 2921.01 (B) defines the term "public servant" as used in R.C. 2921.43 as: any public official as defined in R.C. 2921.01 (A); a candidate for public office; and, "[a]ny person performing ad hoc a governmental function, including without limitation a juror, member of a temporary commission, master, arbitrator, advisor, or consultant." A member of the Women's Commission is not, as discussed above, a public official under the definition set forth in Division (A) of Section 2921.01; however, the Women's Commission members are performing a governmental function by providing advice and recommendations to the executive and legislative branches of state government. Therefore, a member of the Women's Commission is a "public servant" for purposes of R.C. 2921.43.

R.C. 2921.43 (A) prohibits a public servant from accepting compensation, other than allowed by law, to perform her official duties. R.C. 2921.43 (A) also prohibits a person, including an individual, corporation, partnership, association or other similar entity, see R.C. 1.59, from promising or giving to a public servant any compensation, other than allowed by law, to perform any act in her public capacity or generally perform the duties of her public position. See Advisory Opinions No. 89-012, 89-013, 89-014, and 90-001. In the instant situation, R.C. 2921.43 (A) prohibits members of the Women's Commission from accepting, and prohibits private parties from promising or giving to members of the Women's Commission, any compensation other than allowed by law. See R.C. 121.51 (B). R.C. 2921.43 (B) and (C) also prohibit a public servant from soliciting or accepting anything of value, or coercing a campaign contribution, in consideration of an appointment to a

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public position, or other kind of action material to any aspect of a public position.

The issue remains whether members of the Women's Commission are subject to Ohio's financial disclosure law. R.C. 102.02, which contains the financial disclosure law, does not use the term "public official or employee" as defined in R.C. 102.01 (B) and (C) to determine the scope of its applicability, but rather uses different standards in setting forth who is subject to its requirement.

R.C. 102.02 (A) requires individuals who are elected to state, county, and city office, candidates and appointees for these elective offices, specified upper level state officials, and state employees who are paid according to Schedule "C" of R.C. Section 124.15 to file a financial disclosure statement with the Ohio Ethics Commission. The members of the Women's Commission do not fall within the group of officials required to file a financial disclosure statement under R.C. 102.02 (A).

R.C. 102.02 (B) provides that other public officials or employees may be required to file financial disclosure statements if they hold positions that involve a "**substantial and material** exercise of administrative discretion in the formulation of public policy, expenditure of public funds, enforcement of laws and rules of the state . . . or the execution of other public trusts". (Emphasis added.) The Ethics Commission has held that a financial disclosure filing is required from officials of state boards and commissions if the officials exercise such substantial and material discretion.

As described above, the principal statutory duties of the Women's Commission consist of conducting research, collecting and compiling information, providing information, and issuing reports and recommendations. As explained above, these duties are advisory functions, rather than decision-making, and do not empower the Women's Commission to act on behalf of, or bind, the state. Accordingly, these duties do not involve a "substantial and material" exercise of administrative discretion in the formulation of public policy, the enforcement of laws and rules of the state, or the execution of other public trusts. While the Women's Commission has statutory authority to utilize public and private moneys to pay expenses incurred in the performance of its prescribed advisory functions, the expenditure of such funds does not constitute a "substantial and material" exercise of administrative discretion in the expenditure of public funds, as explained above. Therefore, members of the Women's Commission are not required to file a financial disclosure statement with the Ohio Ethics Commission. Of course, a Women's Commission member must file a statement if the member is required to file because of

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service or employment in another public position.

Therefore to summarize the response to your first question, a member of the Women's Commission: (1) is not subject to the provisions of Chapter 102. or Section 2921.42 of the Revised Code since a member is not an officer, employee, or agent of the state; (2) is a "public servant" for purposes of Section 2921.43 of the Revised Code and subject to the provisions thereof; and, (3) is not required to file a financial disclosure statement.

Your second question is whether the employees of the Women's Policy and Research Center (Women's Center) established under R.C. Section 121.53, including the Executive Director of the Women's Center, are subject to the Ohio Ethics Laws and related statutes including the requirement to file a financial disclosure statement.

The determination whether an individual who is employed by a public agency is subject to Chapter 102. and Section 2921.42 is a separate and distinct issue from whether the board members of the public agency exercise sovereign power. In order to explain this distinction it is necessary to closely examine the statutory definitions provided by Chapters 102. and 2921.

R.C. 102.01 (B) defines the term "public official or employee" for purposes of Chapter 102. of the Revised Code as **any person who is elected or appointed to an office or is an employee of any public agency.** (Emphasis added.) As set forth above, R.C. 102.01 (C) defines the term "public agency" to include "any . . . commission . . . of the state." (Emphasis added.)

R.C. 2921.01 (A) defines the term "public official" for purposes of R.C. 2921.42 as:

[A]ny elected or appointed officer, or **employee**, or agent **of the state** or any political subdivision thereof, whether in a temporary or permanent capacity, and including without limitation legislators, judges and law enforcement officers. (Emphasis added.)

R.C. 2921.01 (B) also defines the term "public servant" for purposes of R.C. 2921.43 to include "[a]ny public official."

The first question which was addressed in this opinion was whether a member of the Women's Commission was "appointed to an office" of a "public agency" or was an "appointed officer" of the state. As explained above, a member of the Women's Commission is not an "officer" or "appointed to an office" since the public agency or state commission with which they serve does not exercise "sovereign power." The employees of the Women's Center do not exercise powers greater than those exercised by the Advisory

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Commission. Therefore, they are not "officers" or "appointed to an office."

However, when an individual serves a public agency as an "employee" it is not necessary that the individual, or the agency with which she serves, exercise the sovereign power of government in order for her to be deemed an "employee" of the public agency. All that is required is that the individual be an "employee" of either a "public agency" for purposes of Chapter 102., or "of the state" for purposes of R.C. 2921.01 (A) and (B).

In Advisory Opinion No. 75-012 the Ethics Commission addressed the same issues which are present in the instant situation. In Advisory Opinion No. 75-012 the Commission determined that members of the Ohio Constitutional Revision Commission were not "appointed to an office" and thus were not subject to R.C. 102.04. However, in the same opinion the Commission was asked whether consultants who were employed by the Ohio Constitution Review Commission were subject to R.C. 102.04.

The Commission determined in Advisory Opinion No. 75-012 that consultants who were employed by the Ohio Constitutional Review Commission were not employees but were independent contractors due to the manner in which the consultants were hired, the type of work that they performed, and the degree of control exercised over them by the members of the Ohio Constitutional Review Commission. See also Advisory Opinions No. 75-010, 75-016, 77-008, 89-003, and 89-009. It is apparent, however, that the Commission was prepared to determine that the consultants who were hired by the Ohio Constitutional Review Commission were "employees" of the Commission if the traditional tests used to distinguish employees from independent contractors, had established that the consultants were employees rather than independent contractors, even though the Ethics Commission had deemed that the members of the Revision Commission were not appointed to an office.

In the instant situation, the employees of the Women's Center, including the Executive Director, fall within the statutory definition of "an employee of any public agency" for purposes of Chapter 102. and an "employee . . . of the state" for purposes of R.C. 2921.01 (A) and (B) and are subject to the provisions of R.C. Chapter 102. and Sections 2921.42 and 2921.43. See Gillum v. Industrial Commission, 141 Ohio St. 373, 381-82 (1943).

The issue remains whether the Executive Director and employees of the Women's Center are required to file a financial disclosure statement with the Ethics Commission. As stated above, R.C. 102.02 (A) requires every state employee who is paid in accordance with Schedule "C" of Section 124.15 to file a financial disclosure statement. Therefore, R.C. 102.02 (A) would require the Executive


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Director and employees of the Women's Center to file a financial disclosure statement if they are paid in accordance with Schedule "C." The issue becomes whether R.C. 102.02 (B) requires the Executive Director and employees of the Women's Center are required to file if they are not paid in accordance with Schedule "C."

As explained above, R.C. 102.02 (B) does not require members of the Women's Commission to file a financial disclosure statement since the principal duties exercised by the Women's Commission do not involve a substantial and material exercise of administrative discretion in the formulation of public policy, the expenditure of public funds, the enforcement of laws and rules of the state, or the execution of other public trusts. The employees of the Women's Center, including its Executive Director, do not have statutory authority to exercise any powers and duties in addition to those exercised by the Women's Commission. In the absence of such express statutory authority, the Executive Director and employees of the Women's Center are unable to exercise greater authority than that which is conferred by statute upon the Women's Commission. Cf. R.C. 164.05 (the director of the Ohio Public Works Commission has the statutory authority to exercise substantial and material discretion in the formulation of public policy, expenditures of public funds, enforcement of laws and rules, and the execution of other public trusts even though the Commission itself does not). Therefore, no employee of the Women's Center, including its Executive Director, is required to file a financial disclosure statement with the Ohio Ethics Commission.

To summarize the response to your second question, employees of the Women's Center, including the Executive Director: (1) are "employees" of a "public agency" and "the state" and are thus subject to the provisions of Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code; and, (2) are not required to file a financial disclosure statement with the Ohio Ethics Commission.

This informal staff advisory opinion was approved by the Ethics Commission at its meeting on August 21, 1991. The opinion is based on the facts presented, and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. It interprets the Ohio Ethics Law and related statutes and does not purport to interpret other laws or rules. Please contact me if you have any questions or wish to request a formal advisory opinion from the Ethics Commission.

Sincerely,

John Rawski
Staff Attorney