



OHIO ETHICS COMMISSION

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September 26, 1997

Informal Opinion 1997-INF-0926-3

Beatrice Witt, Executive Secretary
Ohio Veterinary Medical Licensing Board

Dear Ms. Witt:

In your letter to the Ethics Commission, you ask questions concerning the restrictions that the Ohio Ethics Law and related statutes impose upon a member of the Ohio Veterinary Medical Licensing Board (Board) who serves as President of the Ohio Veterinary Medical Association (Association).

As more fully explained below, the Board member is not per se prohibited from serving as the Association's President. The Ethics Law and related statutes do, however, prohibit the Board member from receiving anything of value from the Association, including reimbursement for the costs of travel, meal, and lodging expenses incurred while attending meetings in her capacity as the Association's President. Also, the Board member, who is President of the Association, is prohibited from participating, as a Board member, in any matter on which the Association has taken a position or which would directly benefit the interests of the Association. Furthermore, R.C. 102.04(A) and R.C. 102.03(A) impose restrictions on the Board member's representation of the Association before other public agencies. Finally, R.C. 102.03(B) prohibits the Board member from disclosing or using confidential information that she acquired as a Board member, without appropriate authorization.

Facts

You have stated that the individual in question is a member of the Ohio Veterinary Medical Licensing Board. The Board is a statutorily created state board with the duty to regulate the practice of veterinary medicine within the state. R.C. 4741.02. The Board consists of seven members who are appointed by the Governor with the advice and consent of the senate; five members of the Board are required to have been licensed to practice veterinary medicine for not less than five consecutive years prior to appointment, one is required to be a registered veterinary technician for not less than five consecutive years prior to appointment, and one member is required to be a representative of the public. Id. The Board is charged with the duty to issue licenses and temporary permits to practice veterinary medicine. R.C. 4741.13 and 4741.14. The Board is also responsible for the discipline of persons engaged in the unauthorized, negligent, incompetent, or unethical practice of veterinary medicine, or engaged in conduct or activity prohibited by statute, or orders and rules of the Board. See generally R.C. 4741.18 - 4741.26.

You have also stated that the same individual is the President of the Ohio Veterinary Medical Association. You have explained that the Association's mission is to represent the profession, promote the image of veterinary medicine, and provide education and professional development for the Association's members. In your letter, you state that the Association does not compensate the Board member for her service as the Association's President. However, you state that it has been customary for the Association to reimburse the Association's President for expenses incurred for travel, meals, and lodging when attending meetings in her capacity as the Association's President.

You specifically mentioned the Board member's receipt of travel, meal, and lodging expenses from the Association in your letter. That issue will be addressed first.

Receipt of Anything of Value--R.C. 102.03(D) and (E)

Your attention is directed to R.C. 102.03(D) and (E), which read:

- (D) No public official or employee shall use or authorize the use of the authority or influence of 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 the public official or employee with respect to that person's 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 the public official or employee with respect to that person's 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. R.C. 102.01(B). The term "public agency" is defined to include any board of the state. R.C. 102.01(C). A member of the Board is a "public official or employee" for purposes of Chapter 102. and is subject to the prohibitions therein.

R.C. 1.03 defines "anything of value" for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 102.01(G). Travel, meal, and lodging expenses paid by the Association to the Board member are things of value for purposes of R.C. 102.03(D) and (E). Ohio Ethics Commission Advisory Opinions No. 86-011 and 90-012.

The Ethics Commission has held that R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his public office or employment to secure anything of substantial value from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the official's or employee's public agency, or where the thing of substantial value could impair the official's or employee's objectivity and independence of judgment with respect to his official actions and decisions for his public agency. Adv. Ops. No. 86-011, 87-009, and 90-012.

In Advisory Opinion No. 90-012, the Ethics Commission addressed an issue similar to the issue you have presented. In that opinion, the Ethics Commission was asked whether a member of the Respiratory Care Board, a state licensing board, was prohibited from serving as an officer or board member of a professional respiratory care organization. The opinion noted that the Respiratory Care Board regulated, and stood in a position of authority over, practitioners of respiratory care within the state, and found that state and national professional respiratory care organizations that represent such practitioners are interested, on an ongoing basis, in matters that the Respiratory Care Board had the statutory responsibility to regulate. Adv. Op. No. 90-012.

The Ethics Commission concluded, in Advisory Opinion No. 90-012, that, while the Ethics Law and related statutes do not per se prohibit the board member from serving as an officer of the association, the Ethics Laws and related statutes do impose conditions upon the board member's conduct. Adv. Op. No. 90-012. See also Adv. Op. No. 85-012. For example, the Ethics Commission held that R.C. 102.03(E) would prohibit the board member from receiving compensation, a fee, or anything else of value for service as an officer or board member of an organization that is interested, on an ongoing basis, in matters pending before the board and whose members are regulated by the board. The Commission also held that R.C. 102.03(D) would prohibit the board member from using his official authority or influence to secure compensation or anything else of value for service as an officer or board member of such an organization.

The same analysis used in Advisory Opinion No. 90-012 is applicable to your situation. As stated above, R.C. 102.03(D) and (E) prohibit a member of a regulatory board from soliciting, accepting, or using his or her position to secure anything of value from an association that is composed of regulated parties and that is interested in matters pending before the regulatory board. It is apparent that individual members of the Association are regulated by the Board, and that the Association, which represents the profession, is interested in matters pending before the Board. Accordingly, in the instant situation, R.C. 102.03(D) and (E) prohibit the Board member from soliciting, accepting, or using the authority or influence of her public office to secure anything of value, such as compensation or reimbursement for the costs of travel, meal, and lodging expenses, from the Association.

In the situation you have described, the Association will not compensate the Board member for her service as the Association's President. The Ethics Commission has held that an uncompensated position is not a thing of value for purposes of R.C. 102.03(D) and (E). Adv. Op. No. 88-002. Therefore, the Board member's service as the Association's President is not a thing of value, and she is not prohibited, by R.C. 102.03(D) and (E), from holding the position. However, as stated above, it is customary for the Association to reimburse the Association's President for expenses incurred for travel, meals, and lodging when attending meetings in her capacity as the Association's President. R.C. 102.03(D) and (E) prohibit the Board member from receiving reimbursement from the Association for the costs of travel, meal, and lodging expenses incurred while attending meetings in her capacity as the Association's President.

Participating in Matters Affecting Organization--R.C. 102.03(D) and (E)

The second issue to be addressed concerns the limitations imposed upon the actions of the Board member in matters before the Board that would concern the Association.

In Advisory Opinion No. 90-012, the Ethics Commission held that R.C. 102.03(D) prohibited a member of the Respiratory Care Board from securing anything of value for an organization that he serves in a fiduciary capacity. The Commission has held that the economic impact of a favorable decision from a state regulatory board is a thing of value for purposes of R.C. 102.03. Adv. Ops. No. 85-012, 90-002, and 90-012. The Commission held, in Advisory Opinion No. 90-012:

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. . . . The relationship between such a Board member and the professional organization could affect his objectivity and independence of judgment in making recommendations or decision 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.

Adv. Op. No. 90-012. See also Adv. Op. No. 92-004.

Once again, the conclusions in Advisory Opinion No. 90-012 apply to your question. The member of the Board who serves as the president of the Association has a fiduciary relationship with the Association. R.C. 102.03(D) prohibits the Board member from participating, as a Board member, in any matter on which the Association has taken a position or which would directly benefit the interests of the Association.

The Commission's conclusions in Advisory Opinion No. 90-012 are supported by R.C. 102.03(J). R.C. 102.03(J) provides a limited exemption to the prohibitions of R.C. 102.03(D) and (E), and 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 church or a religious, benevolent, fraternal, or 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." This division does not apply to a public official or employee who is an employee of an organization, serves as [an] . . . 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 with respect to the matter or if the matter would affect his personal, pecuniary interests. (Emphasis added).

The exemption provided by R.C. 102.03(J) demonstrates the General Assembly's support of a public official's mere membership in an organization, without any other tie between the individual and the organization, as not being of such a character to improperly influence the official such that the public official would be prohibited from acting on matters that affect that organization. However, the exemption does not apply to any person who is serving the Association in a fiduciary capacity as an officer. Clearly, the General Assembly also determined that an officer in an organization does have a relationship with the organization such that his objectivity would be impaired with respect to matters that affect the organization. The exemption in R.C. 102.03(J) does not apply in the situation you have presented because the individual in your question is an officer of the organization. Adv. Op. No. 90-012.

There are a number of other provisions of the Ethics Law that may also apply to the Board member in your question. These sections are briefly described below. If any matter that implicates these restrictions should arise, please do not hesitate to call this Office.

Compensated Representation Before State Agencies--R.C. 102.04(A)

The Board member is also subject 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) prohibits the Board member from receiving compensation from the Association for representing the Association on a matter that is before the General Assembly, the Board, or any other agency of the state. Adv. Ops. No. 78-007 and 90-012. There is an exception to this prohibition, set forth in R.C. 102.04(D), which would allow a state official or employee to receive compensation for representing a party before state agencies in some situations. It is unnecessary to examine whether the exception provided by R.C. 102.04(D) would apply in this situation to allow the Board member to receive compensation to represent the Association before state agencies, because, as stated above, R.C. 102.03(E) prohibits the Board member from receiving any compensation from the Association. You have also stated that the Association provides no compensation to the Board member. If the Board member desires to represent the Association before any public agency other than the Board, she must continue to forgo any compensation for performing such services in accordance with R.C. 102.04.

Also, as stated above, it must be stressed that there is no exception to the prohibition against a public officer or employee representing a party before his own public agency. Adv. Ops. No. 89-016 and 90-012. Therefore, in the instant situation, R.C. 102.04(A) prohibits the Board member from representing the Association before the Board even if she is not paid for performing the services.

Revolving Door Provisions--R.C. 102.03(A)

The actions of the Board member who serves as the Association's President are further conditioned by R.C. 102.03(A)(1), which provides, in pertinent part:

No present or 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 the public official or employee 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.

The basic elements of R.C. 102.03(A) are: (1) a present or former public official or employee; (2) is prohibited from representing or acting in a representative capacity for any person; (3) before any public agency; (4) on any matter in which he personally participated as a public official or employee; (5) during government service and for one year thereafter. Adv. Ops. No. 86-001 and 92-005.

Under R.C. 102.03(A), the term "represent" includes "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." The term "person" includes "an individual, corporation, business trust, estate, trust, partnership, and association." R.C. 1.59. The Ethics Commission, in explaining the types of activities that would encompass the term "represent," stated:

[T]his would include activities ranging from an appearance on behalf of a private client in a formal proceeding or meeting to informal "lobbying" of agency personnel by telephone or in person. It also includes written communications ranging from formal documents and filings to informal letters and notes. Even if the attorney or consultant does not sign the documents, letters, or notes, the prohibition would apply if she prepared the communication. If she merely consulted with the attorneys or other personnel who prepared the documents, letters, or notes, the prohibition would not apply.

Advisory Op. No. 86-001. See also Advisory Ops. No. 89-003, 91-003, 91-009, and 92-005. Therefore, R.C. 102.03(A) prohibits the Board member, during her service on the Board, and for one year after leaving her position, from representing the Association before any public agency, including the Board, on any matter in which she had personally participated as a Board member. Adv. Ops. No. 79-007 and 90-012.

Release of Confidential Information--R.C.102.03(B)

Your attention is directed to Division (B) of R.C. 102.03, which 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.

R.C. 102.03(B) prohibits the Board member from disclosing confidential information to the Association, 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 she leaves the Board. Adv. Ops. No. 88-009 and 90-012. Because R.C. 102.03(B) prohibits the Board member from using, in addition to merely releasing, confidential information, she cannot take any action as Association President if she will base her action on confidential information acquired in her official capacity as a Board member. Adv. Op. No. 90-012.

Conclusion

As explained above, the Board member is not per se prohibited from serving as the Association's President. The Ethics Law and related statutes do, however, prohibit the Board member from receiving anything of value from the Association, including reimbursement for the costs of travel, meal, and lodging expenses incurred while attending meetings in her capacity as the Association's President. Also, the Board member is prohibited from participating, as a Board

Beatrice Witt
September 26
Page 8

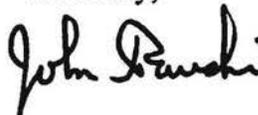
member, in any matter on which the Association has taken a position or which would directly benefit the interests of the Association. Furthermore, R.C. 102.04(A) and R.C. 102.03(A) impose restrictions on the Board member's representation of the Association before public agencies. Finally, R.C. 102.03(B) prohibits the Board member from disclosing or using confidential information that she acquired as a Board member, without appropriate authorization.

Finally, it must be stressed that a member of a state regulatory board who serves as an officer or board member of a professional organization that is comprised of individuals who are regulated by the member's board is placed in an inherently difficult situation due to the potential conflicts of interest between the board and the professional association. The Ethics Commission, in Advisory Opinion No. 90-012, expressed its concern, stating:

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. 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 official's concern for a professional organization which he serves in some capacity. . . . All public officials and employees must accept necessary restrictions to avoid any possible interference with the responsibilities of public office.

This informal advisory opinion was approved by the Ethics Commission at its meeting on September 26, 1997. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. If you have any further questions, please feel free to contact this Office again.

Sincerely,



John Rawski
Staff Attorney