

OHIO ETHICS COMMISSION

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May 10, 2001

Informal Opinion 2001-INF-0510-2

Dorothy L. Fiorino, RN, MS
Executive Director
Ohio Board of Nursing

Dear Ms. Fiorino:

In a letter received by the Ohio Ethics Commission on October 17, 2000, you have asked whether members of the Committee on Prescriptive Governance, and members of the Formulary Committee for Advanced Practice Nurses, are "public officials" for purposes of Chapter 102. of the Revised Code. While you have not asked the question, this Advisory Opinion will also consider whether members of each committee are subject to the provisions of R.C. 2921.42 and 2921.43 that are directly related to the Ethics Law sections of Chapter 102.

Opinion Summary

Members of the Committee on Prescriptive Governance and Formulary Committee for Advanced Practice Nurses are subject to R.C. Chapter 102., including R.C. 102.04, and are also subject to R.C. 2921.42 and 2921.43.

Facts

In your letter to the Commission, you explain that the Committee on Prescriptive Governance and the Formulary Committee for Advanced Practice Nurses (Formulary Committee) are established by statute (R.C. 4723.49 and R.C. 4723.57, respectively). You state that the two committees have a unique relationship to the Board of Nursing (the Board) with respect to rule-making which makes it unclear as to whether members of the committees are subject to the Ethics Law. You explain that R.C. 4723.50 provides that the Board shall adopt rules that are consistent with the recommendations the Board receives from the Committee on Prescriptive Governance, while R.C. 4723.58 provides that the Board shall adopt rules that are consistent with the recommendations the Board receives from the Formulary Committee. You also explain that both of these committees are required, in part, to make recommendations to the Board regarding rules to be adopted relative to a formulary which lists the types of drugs qualified nurses may prescribe.

You note that, in accordance with R.C. 4723.49, the Committee on Prescriptive Governance is made up of four nurses appointed by the Board, four physicians appointed by the state medical board, and two pharmacists appointed by the state board of pharmacy. You also note that, in accordance with R.C. 4723.57, the Formulary Committee is composed of three nurses appointed by the nursing board, three physicians appointed by the medical board, a pharmacist appointed by the pharmacy board, and the director of health or his designee as a non-voting member. You explain that members of both committees receive compensation solely for actual and necessary expenses incurred in the performance of their official duties. You also explain that the Formulary Committee will cease to exist on January 17, 2004, while the Committee on Prescriptive Governance has no fixed expiration date.

Based on the information that you have provided, you have asked whether members of the Committee on Prescriptive Governance and members of the Formulary Committee are "public officials" for purposes of Chapter 102. of the Revised Code. You state that the Board would appreciate guidance from the Ethics Commission so that the Board may respond to questions raised by a member of the Committee on Prescriptive Governance regarding this matter. In order to address the question that you have presented, it is necessary to first examine each committee's statutorily prescribed powers and duties.

Power and Authority of the Committee on Prescriptive Governance—R.C. 4723.50

The authority of the Committee on Prescriptive Governance is largely set forth in R.C. 4723.50, which provides, in Division (A), the following:

In accordance with Chapter 119. of the Revised Code, the board of nursing shall adopt rules as necessary to implement the provisions of this chapter pertaining to the authority of clinical nurse specialists, certified nurse-midwives, and certified nurse practitioners to prescribe drugs and therapeutic devices and the issuance and renewal of certificates to prescribe. . . .

The board shall adopt rules that are consistent with the recommendations the board receives from the committee on prescriptive governance pursuant to section 4723.492 [4723.49.2] of the Revised Code. After reviewing a recommendation submitted by the committee, the board may either adopt the recommendation as a rule or ask the committee to reconsider and resubmit the recommendation. The board shall not adopt any rule that does not conform to a recommendation made by the committee. (Emphasis added).

The rules adopted by the Board under R.C. 4723.50 are directed to establish the following: (1) A formulary listing the types of drugs and therapeutic devices that may be prescribed; (2) Safety standards to be followed by a nurse when personally furnishing to patients complete or partial supplies of certain drugs; (3) Criteria for the components of the standard care arrangements described in R.C. 4723.431; (4) Standards and procedures for issuance and renewal of a certificate to prescribe; (5) Requirements for board approval of the instruction in advanced

pharmacology and related topics; and (6) Standards and procedures for the appropriate conduct of an externship required by R.C. 4723.484(B)(1). See R.C. 4723.50(B)(1)-(6).

Power and Authority of the Formulary Committee—R.C. 4723.58

The authority of the Formulary Committee is set forth in R.C. 4723.58(A), which provides the following:

In accordance with Chapter 119. of the Revised Code, the board of nursing shall adopt rules regarding the approval of advanced practice nurses under section 4723.56 of the Revised Code to prescribe drugs and therapeutic devices. The rules shall be consistent with the recommendations of the formulary committee for advanced practice nurses and shall establish all of the following:

- (1) A formulary listing the drugs and therapeutic devices, including types and classes where appropriate, that may be prescribed by advanced practice nurses;
- (2) Requirements pertaining to the protocol that is required to be established between an advanced practice nurse and the nurse's collaborating physician;
- (3) Requirements regarding the pharmacology courses that an advanced practice nurse is required to complete to receive approval or renewal of approval to prescribe drugs and therapeutic devices;
- (4) Standards and procedures for approval and renewal of approval of advanced practice nurses to prescribe drugs and therapeutic devices;
- (5) Any other requirements with regard to advanced practice nurses approved to prescribe drugs and therapeutic devices. (Emphasis added).

Definition of "Public Official" for Purposes of the Ethics Law and Related Statutes

The Ethics Commission's jurisdiction is limited to Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. See R.C. 102.02, 102.06, and 102.08. These statutes contain definitions that determine whether an individual is subject to the prohibitions imposed by the Ethics Law and related statutes. See R.C. 102.01(B) and (C), and 2921.01(A), described below.

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." 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 county, city, village, township, and the five state retirement systems, or any other

governmental entity. "Public agency" does not include a department, division, institution, board, commission, authority, or other instrumentality of the state or a county, municipal corporation, township, or other governmental entity that functions exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes; does not expend more than ten thousand dollars per calendar year, excluding salaries and wages of employees; and whose members are uncompensated. (Emphasis added).

Both committees are instrumentalities established within state government. Therefore, they are both public agencies unless the exclusion applies. R.C. 102.01(C) excludes, from the definition of public agency, those instrumentalities of the state that: (1) function exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes; (2) do not expend more than ten thousand dollars per calendar year; and (3) whose members are uncompensated. The Commission on Prescriptive Governance and the Formulary Committee meet two of the three requirements of this exclusion in that they do not expend funds and their members are not compensated. The question then is whether the committees exist exclusively for cultural, educational, historical, humanitarian, advisory, or research purposes.

Public Agency—R.C. 102.01(C)

The statutorily defined role of the Committee on Prescriptive Governance, as set forth more fully below, demonstrates that the Committee performs a function beyond that which may be characterized as advisory. In particular, R.C. 4723.50(A) provides that the Board shall not adopt any rule that does not conform to a recommendation made by the Committee on Prescriptive Governance. This provision cloaks the Committee with binding authority in the Board's adoption of rules pertaining to the authority of clinical nurse specialists, certified nurse-midwives, and certified nurse practitioners to prescribe drugs and therapeutic devices and the issuance and renewal of certificates to prescribe. Based on the nature of the Committee's authority, the exclusion to the definition of "public agency" as contained in R.C. 102.01(C) does not apply.

The statutorily defined role of the Formulary Committee, as set forth more fully below, demonstrates that the Formulary Committee also performs a function beyond that which may be characterized as advisory. In particular, R.C. 4723.58(A) provides that the Board shall adopt rules that are consistent with the recommendations made by the Formulary Committee. This provision cloaks the Formulary Committee with binding authority in the Board's adoption of rules pertaining to the approval of advanced practice nurses under section 4723.56 of the Revised Code to prescribe drugs and therapeutic devices. Based on the nature of the Formulary Committee's authority, the exclusion to the definition of "public agency" as contained in R.C. 102.01(C) does not apply.

Appointed to an Office of a Public Agency

The issue becomes whether a person who is appointed to a position on either committee and who is not otherwise a public official or employee is "appointed to an office . . . of a public agency" for purposes of Chapter 102, or is an "appointed officer . . . of the state for purposes of R.C. 2921.42 and 2921.43. (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 (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, reviewed existing case law and recognized factors which established a test to determine whether one is "appointed to an office." The factors are whether the person: (1) is appointed; (2) has a title; (3) exercises a function of government concerning the public; and (4) is not subject to a contract of employment. The Ethics Commission modified this test in Advisory Opinion No. 75-004 when it determined that whether the person exercises the "sovereign power" of government, as explained in case law, is an additional and essential criterion for determining whether one is "appointed to an office."

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 some sovereign power delegated to him." Shaw v. Jones, 40 O.N.P. 372 (1897).

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:

If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if 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.

The Commission emphasized that no one of the indicia controls and combinations of factors will determine whether a person is deemed to hold an office. See Adv. Op. No. 75-004.

In Advisory Opinion No. 85-005, the Ethics Commission determined that the Technical Advisory Committee to the Coal Development Office of the Department of Development does not exercise sovereign power since its statutorily authorized function is exclusively to provide non-binding advice on research and development projects to the Coal Development Office and not to exercise final, discretionary decision-making authority. Accordingly, the Ethics Commission held that members of the Technical Advisory Committee are neither "officers" nor "appointed to an office" of the state and are not subject to the prohibitions of R.C. Chapter 102. or Section 2921.42. See Adv. Op. No. 85-005.

The issue becomes whether the Committee on Prescriptive Governance, or the Formulary Committee, 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 described above, the Committee on Prescriptive Governance's principal duty is to recommend rules as necessary to implement the provisions of Chapter 4723. pertaining to the authority of clinical nurse specialists, certified nurse-midwives, and certified nurse practitioners to prescribe drugs and therapeutic devices and the issuance and renewal of certificates to prescribe. The principal duty of the Formulary Committee is to recommend rules regarding the approval of advanced practice nurses under section 4723.56 of the Revised Code to prescribe drugs and therapeutic devices. The Board, however, cannot adopt any rule necessary to implement the provisions of Chapter 4723. of the Revised Code pertaining to the authority of clinical nurse specialists, certified nurse-midwives, and certified nurse practitioners to prescribe drugs and therapeutic devices and the issuance and renewal of certificates to prescribe that does not conform to the recommendations of the Committee on Prescriptive Governance. Further, the Board must adopt rules regarding the approval of advanced practice nurses under section 4723.56 of the Revised Code to prescribe drugs and therapeutic devices that are consistent with the recommendations of the Formulary Committee.

Therefore, unlike the non-binding advice of the Technical Advisory Committee which was examined in Advisory Opinion No. 85-005, the recommendations provided by the Committee on Prescriptive Governance and the Formulary Committee have a binding effect. The statutory authority to provide these binding recommendations is indicative of each committee's power to exercise final, discretionary, decision-making authority.

As explained above, one of the indicia of sovereign power is the statutory authority of the public agency to exercise the police powers of the state. See Adv. Op. No. 85-005. Another indicia of sovereign power is the power to act in cases involving business or political dealings between individuals and the public, wherein the public must necessarily act through an official agency. Id.

A review of the statutory authority of the Committee on Prescriptive Governance and the Formulary Committee indicates that both committees possess these two characteristics of sovereign power. For instance, the Committee on Prescriptive Governance provides binding recommendations for the adoption of rules as necessary to implement the provisions pertaining to the authority of clinical nurse specialists, certified nurse-midwives, and certified nurse practitioners to prescribe drugs and therapeutic devices and the issuance and renewal of certificates to prescribe. The rules adopted by the Board pursuant to the Committee on Prescriptive Governance's binding recommendations are directed to establish the following: (1) A formulary listing the types of drugs and therapeutic devices that may be prescribed; (2) Safety standards to be followed by a nurse when personally furnishing to patients complete or partial supplies of certain drugs; (3) Criteria for the components of the standard care arrangements described in R.C. 4723.431; (4) Standards and procedures for issuance and renewal of a certificate to prescribe; (5) Requirements for board approval of the instruction in advanced pharmacology and related topics; and (6) Standards and procedures for the appropriate conduct of an externship required by R.C. 4723.484(B)(1). See R.C. 4723.50(B)(1)-(6).

The Formulary Committee provides binding recommendations for the adoption of rules regarding the approval of advanced practice nurses under section 4723.56 of the Revised Code to prescribe drugs and therapeutic devices. The rules must establish such things as the following: (1) A formulary listing the drugs and therapeutic devices, including types and classes where appropriate, that may be prescribed by advanced practice nurses; (2) Requirements regarding the pharmacology courses that an advanced practice nurse is required to complete to receive approval or renewal of approval to prescribe drugs and therapeutic devices; (3) Standards and procedures for approval and renewal of approval of advanced practice nurses to prescribe drugs and therapeutic devices; and (4) Any other requirements with regard to advanced practice nurses approved to prescribe drugs and therapeutic devices.

While neither committee has the authority to incur financial obligations on the part of the state, the binding regulatory authority of both committees in areas involving safety in dispensing prescription drugs is both significant and vital to the well-being of the citizens of this State. Therefore, both committees exercise the sovereign authority of the state, and their members are "appointed to an office" of the state, and are subject to the prohibitions of R.C. Chapter 102., and R.C. 2921.42 and 2921.43.

Application of R.C. 102.04(A) and (B) to Committee Members

The next question that must be addressed is whether members of each committee are subject to the provisions of R.C. 102.04. In particular, R.C. 102.04(A) and (B) provide the following:

- (A) 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.
- (B) 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 sell or agree to sell, except through competitive bidding, any goods or services to the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts. (Emphasis added).

R.C. 102.04(A) and (B) apply to persons appointed to an office of an instrumentality of the state. As stated above, members of the Formulary Committee and the Committee on Prescriptive Governance are appointed to an office of an instrumentality of the state, and, therefore, are also subject to the prohibitions of R.C. 102.04(A) and (B). Division (A) of Section 102.04 prohibits members of the Formulary Committee and the Committee on Prescriptive Governance from receiving compensation, except from their own public agencies, for representing persons before instrumentalities of the state. Division (B) of Section 102.04 prohibits members of the Formulary Committee and the Committee on Prescriptive Governance from selling, except through competitive bidding, any goods or services to any instrumentality of the state.

Division (D) of Section 102.04 provides an exception to the prohibitions of Divisions (A) and (B) and is available to nonelected officials and public employees. Both of the following criteria must be met before the exception will apply:

- (1) The agency to which the official or employee wants to sell the goods or services, or before which the matter that involves the rendering of his services is pending, is an agency other than the one with which he serves;
- (2) Prior to rendering the personal services or selling or agreeing to sell the goods or services, he files a statement with the appropriate ethics commission, with the public agency with which he serves, and with the public agency before which the matter is pending or that is purchasing or has agreed to purchase goods or services.

Division (D) specifies the information which must be contained in the statement filed pursuant to that provision, including a declaration that the official or employee disqualifies himself for two

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years from participating in any matter involving any public official or employee of the agency before which the matter is pending or to which goods or services are to be sold. Division (E) emphasizes this disqualification, in providing the following:

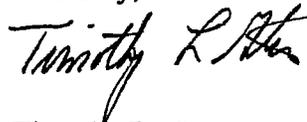
No public official or employee who files a statement or is required to file a statement under division (D) of this section shall knowingly fail to disqualify himself from any participation as a public official or employee of the agency with which he serves in any matter involving any official or employee of an agency before which a matter for which he rendered personal services was pending or of a public agency that purchased or agreed to purchase goods or services.

Conclusion

As explained above, members of the Committee on Prescriptive Governance and Formulary Committee are subject to R.C. Chapter 102., including R.C. 102.04, and are also subject to R.C. 2921.42 and 2921.43.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on May 10, 2001. 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 questions or desire additional information, please contact this Office again.

Sincerely,



Timothy L. Gates
Staff Attorney