

OHIO ETHICS COMMISSION

Merom Brachman
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web Site: <http://www.ethics.state.oh.us>

July 27, 2001

Informal Opinion 2001-INF-0727-3

Donald P. Braun, Ph.D.
Administrative Director
Medical College of Ohio
Ruppert Health Center
[REDACTED]

Dear Dr. Braun:

In a letter to the Ethics Commission, you state that the Cancer Institute of the Medical College of Ohio (MCO) has created an MCO Cancer Institute External Advisory Board (Board). The Cancer Institute created the Board to advise it regarding developing programs and experimental therapies for its patients. The Board is comprised of individuals from the private sector who may be affiliated with private institutions that contract with MCO or its Cancer Institute to provide clinical trials with their drugs. The Board has no authority to either allocate MCO resources or make decisions on behalf of MCO and its Cancer Institute.

You ask whether the Ohio Ethics Law and related statutes prohibit MCO from providing an honorarium to the Board members.

Brief Answer

As explained below, as you describe the advisory role of the Board, members of the Board are not public officials and employees subject to either R.C. Chapter 102., or R.C. 2921.42. MCO is not prohibited, by provisions of Ohio's Ethics Law and related statutes, from providing an honorarium to the members of the Board.

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

The critical issue you have raised is whether the Board members are subject to the Ohio Ethics Laws and related statutes.

The Ethics Commission's jurisdiction is limited to Chapter 102. and Sections 2921.42, 2921.421, 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.

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

The MCO meets the definition of "public agency" for purposes of R.C. 102.01(B) because it is an instrumentality established by statute within state government. R.C. 3350.01. Therefore, it is clear that officers and employees of MCO are within the definition of "public official or employee" for purposes of R.C. Chapter 102. However, the issue is whether the Board members fall within the definition of "public agency."

As stated above, the Board was created by the Cancer Institute of MCO. Therefore, the Board is an instrumentality of the state. As also stated above, the Board functions exclusively for advisory purposes. The issue becomes whether a Board member is "appointed to an office . . . of any public agency" for purposes of R.C. Chapter 102.01 or is an "appointed officer . . . of the state" for purposes of R.C. 2921.42.

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 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 Board 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 you have described the Board, the Cancer Institute created the Board to advise it regarding developing programs and experimental therapies for the Cancer Institute's patients, and the Board has

no authority to either allocate MCO resources or make decisions on behalf of MCO and its Cancer Institute.

Therefore, it is apparent that the Board provides non-binding advice to the Cancer Institute of MCO which is similar to the duty exercised by the Technical Advisory Committee which was examined by the Ethics Commission in Advisory Opinion No. 85-005.

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. In the instant situation, as stated above, the Board performs no function beyond that which may be characterized as advisory. Therefore, a member of the Board 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, because the Board was empanelled to provide non-binding advice to the Cancer Institute, it is apparent that they do not serve pursuant to a contract of employment with the Cancer Institute or MCO. Therefore, a member of the Board 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.

R.C. 2921.01 also includes "agents" of the state, as well as officers and employee, within the definition of "public official" for purposes of R.C. 2921.42. However, the Ethics Commission has held that a person or entity is an "agent" of the state if the state has empowered the individual or entity to act on the state's behalf and to bind the state. Adv. Op. No. 92-001. In the instant situation, as described above, the Board provides non-binding advice and has no authority to either allocate MCO resources or make decisions on behalf of MCO and its Cancer Institute. Therefore, a member of the Board is not an "agent" of the state who is subject to R.C. 2921.42.

If, however, the functions or duties of the Board are changed in any way, and the Board is given the authority to act on behalf of MCO, or bind MCO by its decisions, the Board members may be "public officials" for purposes of the Ethics Law and related statutes. If the functions or duties of the Board are changed in the future, please contact the Ethics Commission for further guidance.

Conclusion

As explained above, as you describe the advisory role of the Board, members of the Board are not public officials and employees subject to either R.C. Chapter 102., or R.C. 2921.42. MCO is not prohibited, by provisions of Ohio's Ethics Law and related statutes, from providing an honorarium to the members of the Board. Whether MCO otherwise has the statutory authority to pay the honoraria described, or such a payment raises broader issues of appropriateness or appearances under other state, federal, or university rules is for MCO to decide.

Donald P. Braun, Ph.D.

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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on July 27, 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.

Very truly yours,

A handwritten signature in black ink that reads "John Rawski". The signature is written in a cursive style with a large, prominent initial "J".

John Rawski
Staff Attorney