

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

April 7, 2003

Informal Opinion 2003-INF-0407-2

Fred L. Dailey
Director, Ohio Department of Agriculture

Dear Mr. Dailey:

In a letter that the Ethics Commission received on February 18, 2003, you ask whether members of the Farmland Preservation Advisory Board (Board) are subject to the Ohio Ethics Law and related statutes.

Brief Answer

As explained below, because of their limited statutory authority, Board members are not subject to most of the restrictions in the Ohio Ethics Law, including the revolving door, conflict of interest, financial disclosure, and public contract prohibitions set forth in R.C. Chapter 102. and R.C. 2921.42. However, Board members fall within the more inclusive definition of "public servants," for purposes of R.C. 2921.43, and are subject to the supplemental compensation provisions therein.

The Ohio Ethics Law and Related Statutes—Purpose and Definitions

The Ohio Ethics Law and related statutes consist of Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. See R.C. 102.06 and 102.08. These statutes generally prohibit public officers and employees from misusing the authority or influence with which they are entrusted for their personal benefit or for the personal benefit of family members, business associates, and other individuals or entities with which the officers or employees have a close relationship.

R.C. 102.01(B) defines the term "public official or employee" for purposes of R.C. Chapter 102. as "any person who is elected or appointed to an office or is an employee of any public agency." In effect, the restrictions in R.C. Chapter 102., regarding ethics or public officers, apply to any elected, appointed, or employed person serving a municipality, county, state agency, or other public agency.

R.C. Chapter 2921. sets forth offenses against justice and public administration, which apply to "public officials" (such as unlawful interest in a public contract, dereliction of duty, and theft in office) or "public servants" (such as supplemental compensation, bribery, and interfering with civil rights). As noted above, two of the provisions in R.C. Chapter 2921. are within the jurisdiction of the Ohio Ethics Commission—R.C. 2921.42 (unlawful interest in a public contract) and 2921.43 (supplemental compensation). The definition of "public official," for purposes of R.C. 2921.42, is broader than the definition of "public official or employee," for purposes of Chapter 102. R.C. 2921.01(a) defines the term "public official" for purposes of R.C. 2921.42 as "any 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."

Farmland Preservation Advisory Board

The Board is statutorily created and is comprised of twelve members who are appointed by the Director of the Department of Agriculture (Director). R.C. 901.23(A). The twelve members are selected on the basis of statutorily mandated conditions. One member must be a county commissioner or a representative of a statewide organization that represents county commissioners. One member must be a township trustee or a representative of a statewide organization that represents township trustees. One member must represent each of the following: (1) The Ohio State University; (2) a national nonprofit organization dedicated to the preservation of farmland; (3) the United States Department of Agriculture Natural Resources Conservation Service; (4) development interests; (5) environmental interests; and (6) planning interests. The other four members of the Board must be farmers. R.C. 901.23(A)(1)-(7).

The Board is charged with the statutory duty to provide advice to the Director regarding: (1) the design and implementation of an agricultural easement purchase program; (2) the selection of applications that will be awarded matching grants for the purchase of agricultural easements; and (3) the design and implementation of any other statewide farmland protection measures that the Director considers appropriate. R.C. 901.23(B)(1)-(3). The Board has the statutory authority to adopt bylaws to govern its operation and meets whenever the Director or his designee considers it appropriate in order to secure advice from the Board. R.C. 901.23(A)(7). Board members are reimbursed for actual and necessary expenses that they incur in performing their duties. R.C. 901.23(D).

Of central importance to your question is R.C. 901.23(C), which reads:

Serving as a member of the board does not constitute holding a public office or position of employment under the laws of this state and does not constitute grounds for removal of public officers or employees from their offices or positions of employment.

The Ethics Commission has consistently adhered to the well-established rule of statutory construction that the legislature has used the language contained in a statute advisedly and intelligently and has expressed its intent by the use of the words found in the statute. Ohio Ethics Commission Advisory Opinions No. 74-001 and 89-003. In the instant situation, the General Assembly has expressed, in unambiguous terms, its intent that membership on the Board does not constitute "holding a public office or position of employment under the laws of this state." Therefore, Board members are not "officers" or "employees" for purposes of the Ohio Ethics Law and related statutes.

Even without the express terms of R.C. 901.23(C), the Board members would not be considered to be appointed to an "office" of the state because the Board functions exclusively for advisory purposes. The Board has no independent power with regard to the disposition of public property, the ability to incur financial obligations on behalf of the state or any other public agency, or the performance of other sovereign powers. In addition, it is apparent that the Board members do not hold an employment relationship with the Department of Agriculture (Department) because there is no statutory provision for Board members to receive compensation for their services or to serve pursuant to an employment contract. Adv. Op. No. 85-005 (the role of Technical Advisory Committee to the Coal Development Office is merely advisory and does not involve the exercise of the sovereign power of the state, and therefore, its members are not public officers or employees for purpose of R.C. Chapter 102.) See also Adv. Op. No. 75-022.

Therefore, in light of the provisions of R.C. 901.23(C) and the fact that the Board does not exercise sovereign power, Board members do not hold a public office or public employment for purposes of R.C. Chapter 102. or Section 2921.42. Board members are not subject to the revolving door, conflict of interest, and confidentiality prohibitions set forth in R.C. Chapter 102. Further, Board members are not required to file the financial disclosure statement described in R.C. 102.02. Of course, a Board member must file a statement if the member is required to file because of service or employment in another public position that is subject to the requirements of R.C.102.02(A) or (B). For example, if a county commissioner serves on the Board, he would be required to file a financial disclosure statement.

"Agent" of the State—R.C. 2921.01(A)

Despite the fact that the Board members do not hold a public office or public employment, "agents" of the state, as well as officers and employees, are also subject to R.C. 2921.42. The issue remains, therefore, whether Board members can be considered to be "agents" of the Department for purposes of R.C. 2921.42.

Because the word "agent" is not statutorily defined for purposes of R.C. 2921.42, the Ethics Commission has relied upon judicial interpretation of the word "agent." The Commission has held that an individual is an "agent" of the state when the state has empowered him, or the board that he serves, to act on the state's behalf and to bind the state. Adv. Ops. No. 85-005, 92-001, and 92-007. In Advisory Opinion No. 92-001, the Ethics Commission stated:

A person is an "agent of the state," and thus, a "public official" as defined in Division (A) of Section R.C. 2921.01 of the Revised Code, when: (a) the person has the power to act on behalf of and bind the state by his actions; (b) the state has the right to control the actions of the person; and (c) the actions of the person are directed toward the attainment of an objective sought by the state.

An agreement creating the agency relationship may be express or implied. Ross v. Burgan, 163 OS 211 (1955). See State v. Cooper, Cuyahoga App. No. 72655, unreported, 1997 Ohio App. LEXIS 5319 (November 26, 1997) (an employee of a private company that conducts statutorily mandated vehicle emission tests under a state contract acts as an "agent of the state" and is therefore subject to R.C. 2921.02, the state bribery statute).

As described above, the Board's only statutorily defined duty is to provide advice to the Director regarding the agricultural easement purchase program. Therefore, because the Board is not empowered to act on behalf of either the Director or Department, the Board members are not "agents" for purposes of the public contract provisions set forth in R.C. 2921.42.

"Public Servant" Definition of R.C. 2921.01—Performing Ad Hoc Governmental Functions

R.C. 2921.43 also falls within the jurisdiction of the Ethics Commission. R.C. 2921.43(A) prohibits a "public servant" from accepting compensation, other than allowed by law, to perform his official duties. R.C. 2921.43(A) also prohibits a "person," which is defined in R.C. 1.59 to include an individual, corporation, partnership, association, or other similar entity, from promising or giving to a public servant any compensation, other than as allowed by law, to perform any act in his public capacity or generally perform the duties of his public position. Adv. Ops. No. 89-012, 89-013, and 90-001.

R.C. 2921.01(B) defines the term "public servant," as used in R.C. 2921.43, to include: any public official as defined in R.C. 2921.01(A); any 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."

In the instant situation, the Board members are performing a governmental function by acting as advisors to the Director regarding the agricultural easement purchase program. As noted above, the Board is charged with the statutory duty to provide advice to the Director regarding: (1) the design and implementation of an agricultural easement purchase program; (2) the selection of applications that will be awarded matching grants for the purchase of agricultural easements; and (3) the design and implementation of any other statewide farmland protection measures that the Director considers appropriate. Therefore, because the Board members are performing a governmental function, they are "public servants" 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 his 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

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promising or giving to a public servant any compensation, other than allowed by law, to perform any act in his public capacity or generally perform the duties of his public position. Adv. Ops. No. 89-012, 89-013, and 90-001. In the instant situation, Board members are prohibited from accepting any compensation that is provided to them for performing their duties as members of the Farmland Preservation Advisory Board, and any payments for expenses, except as provided by law. 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 public position, or other kind of action material to any aspect of a public position.

Conclusion

As explained above, Board members are not subject to the revolving door, conflict of interest, financial disclosure, and public contract prohibitions set forth in R.C. Chapter 102. and R.C. 2921.42. However, Board members are "public servants" for purposes of R.C. 2921.43, and are subject to the supplemental compensation provisions therein.

It is apparent that some individuals who serve on the Board, such as those members who are farmers, or the representatives of county, township, and development interests, may be faced with issues that affect themselves, their family members, business associates, and other individuals or entities with which they have a close relationship. However, as explained above, the Board's statutory duty is to provide advice to the Director regarding the agricultural easement purchase program. In order to receive expert advice, the Director needs to communicate with people who are active in the fields of agriculture, development, and land-use planning. Accordingly, the statute that establishes the Board requires that representatives of these interests serve on the Board. The public's interest is protected because the Board does not exercise final decision-making authority, but the Director, who has final decision-making authority regarding the agricultural easement purchase program, is subject to the Ethics Law and related statutes.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 4, 2003. The Commission commends you and the Board for seeking guidance in this matter.

This opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 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,



John Rawski
Staff Attorney