

OHIO ETHICS COMMISSION

Dr. Herb Asher, *Chair*
Merom Brachman, *Vice Chair*



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.ohio.gov

David E. Freel, *Executive Director*

January 30, 2004

Informal Opinion 2004-INF-0130

Kathleen M. Fox, FASLA
Ohio Arts & Sports Facilities Commission



Dear Ms. Fox:

On December 10, 2003, the Ohio Ethics Commission received your request for an advisory opinion. In your request, you have explained that you are the Executive Director of the Ohio Arts & Sports Facilities Commission (Commission). You have also explained that you have been appointed to the Ohio Historical Site Preservation Advisory Board (Board). You have been elected, by the Board, to the position of Vice-Chair, and serve on the Board's Executive Committee.

You have asked whether the Ethics Law prohibits you from participating, as a member of the Board, in a matter that will also come before the Commission.

Brief Answer

As explained more fully below, the Ethics Law does not prohibit you, as a member of the Board or as the Executive Director of the Commission, from participating in the matter you have described. However, in order to avoid the appearance of impropriety that may be presented if you participate in this or any other matter under simultaneous consideration by both public agencies you serve, you could abstain from discussions, as a member of the Board, in the matter.

Facts

By way of history, the Commission is a state agency that oversees capital improvements funds appropriated by the General Assembly and Governor for planning, construction, renovation, and expansion projects at Ohio's non-profit theaters, museums, historical sites, and publicly owned professional sports venues. The Commission provides state capital improvements funding to the Ohio Historical Society (OHS) for state historical facilities when bond-funded appropriations are designated in biennial state capital improvements bills. The funds are provided pursuant to contracts between the Commission and OHS.

The Board is organized under R.C. 149.301, and was created to provide advice to the State Historical Preservation Officer and, in some circumstances, the OHS Board of Trustees. Members of the Board are appointed by the Governor to represent certain disciplines and areas of expertise. While R.C. 149.301 does not specifically require that a representative of the Commission serve on the Board, the language in the statute suggests that the expertise of a Commission staff person may be valuable to the Board. You have explained that the Board exists exclusively for advisory purposes, and does not exercise final decision-making authority. You have explained that the Board is staffed by the Historical Preservation Office, and does not expend any money. According to R.C. 149.301, members of the Board serve without compensation.

Both the Commission and the Board have been notified that OHS will undertake a review of its accessioning and deaccessioning policy. Simply put, that policy is to guide future acquisitions of state memorials and historical sites, and to guide OHS on the future removal of certain properties from the system of state memorials and historical sites. Under contracts between the Commission and OHS, OHS must consult with the Commission prior to seeking to deaccession state historical facilities for which bond-funded capital improvements have been made. The final decision on accessioning or deaccessioning state historical facilities lies with the Ohio General Assembly.

OHS will ask both the Commission and the Board to review and provide advice about the OHS accessioning and deaccessioning policy. You have asked whether there is a conflict of interest for you to participate, as a member of the Board, in discussions and recommendations involving the policy, because you will be addressing the issue in your capacity as Executive Director of the Commission.

Conflict of Interest—R.C. 102.03(D) and (E)

The conflict of interest laws are set forth in R.C. 102.03(D) and (E). These laws restrict any public official or employee from using her position to secure, or soliciting, anything of value that could have a substantial and improper influence upon the official or employee with respect to the performance of her duties.

The restrictions in R.C. 102.03(D) and (E) apply to any person who is a "public official or employee." The term "public official or employee" is defined in R.C. 102.01(B) 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 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.

Because the Board functions exclusively for advisory purposes and does not expend money, and Board members are not compensated, the Board is not a "public agency," and its members are not subject to the restrictions of R.C. 102.03(D) and (E). See Adv. Op. No. 96-002. For that reason, the conflict of interest restrictions set forth in R.C. 102.03(D) and (E) do not apply to you regarding your service on the Board. R.C. 102.03(D) and (E) do not prohibit you, as a member of the Board, from participating in discussions and recommendations involving the policy, even though you will be expected to participate in those matters as the Executive Director of the Commission.

However, the Commission is a public agency. See R.C. 3383.02 ("The Commission is a body corporate and politic, an agency of state government and an instrumentality of the state, performing essential governmental functions of the state."). As the Executive Director of the Commission, you are a "public official or employee" serving a "public agency," and subject to the restrictions set forth in R.C. Chapter 102., including the conflict of interest provisions contained in R.C. 102.03(D) and (E). See R.C. 102.01(B) and (C).

As noted above, R.C. 102.03(D) and (E) restrict any public official or employee from using her position to secure, or soliciting, anything of value that could have a substantial and improper influence upon the official or employee with respect to the performance of her duties. The official or employee is prohibited from securing or soliciting the thing of value for herself, and also for any other person with whom she has a close business, family, economic, or fiduciary relationship. Adv. Op. No. 97-002. For example, the official or employee is prohibited from securing or soliciting anything of value for her employer or a nonprofit organization for which she is a board member, trustee, or officer. Adv. Ops. No. 91-006 and 96-005.

For purposes of R.C. 102.03(D) and (E), "anything of value" is defined in R.C. 102.01(G) to include the economic impact of a decision by a public entity is a thing of value. Adv. Ops. No. 85-012, 90-002, and 90-012. Therefore, the economic impact of a decision you make as the Executive Director of the Commission is within the definition of "anything of value" for purposes of R.C. 102.03(D) and (E). The question, then, is whether your participation in the Commission's review of the OHS policy will result in a thing of value for the Board such that you are prohibited from participating the Commission's review.

Dual Service

In situations where a person is serving simultaneously in two public positions, the Ethics Law generally prohibits the person from participating, in either position, in matters that will result in a definite and direct benefit or detriment to the interests of the other public agency. Adv. Op. No. 91-006 (the law prohibits a member of city council who is also a school district principal from participating in matters before city council that affect the interests of the school district). In situations where a public official or employee also serves as a trustee, board member, officer, or employee of a nonprofit organization, the law prohibits the public official or employee from participating in matters that result in a definite and direct benefit or detriment to the interests of the nonprofit organization, unless the official or employee serves with the organization in his official capacity as a representative of the public agency.¹ R.C. 102.03(J); Adv. Op. No. 96-005.

However, as noted above, the Board is not a public agency for purposes of the Ethics Law. Therefore, the conflict of interest restrictions related to service in two public positions do not apply to you in the situation you have set forth. Further, it appears from the statutory provision that creates the Board that the Board is not a nonprofit organization. Therefore, the conflict of interest restrictions related to a public official or employee who serves with a nonprofit organization also do not apply to you in the situation you have set forth.

Further, while the Board and Commission are both being asked to review the same matter, a policy established by OHS, neither the Board nor the Commission has a definite and direct interest in the matter. You have explained that, pursuant to master management contracts between OHS and the Commission, OHS must consult with the Commission before seeking to deaccession state historical facilities where state bond funds are involved. You have also explained that any changes to the OHS policy on accession and deaccession of state historical facilities will not delete these contractual requirements. Therefore, the Board's and the Commission's review and advice regarding OHS's policy will not result in a definite and direct benefit or detriment to the interests of either the Board or the Commission.

¹ If there are contracts between a public agency and a nonprofit entity, the Ethics Law imposes additional restrictions on an official or employee of the agency who also serves as in a fiduciary position with the nonprofit entity, and may prohibit the official from serving in both positions.

Because the Board is neither a public agency nor a nonprofit organization, and because the review of the OHS policy on accessioning and deaccessioning state historical properties does not definitely and directly affect the interests of either the Board or Commission, R.C. 102.03(D) and (E) do not prohibit you from participating, as the Executive Director of the Commission, in the Commission's review of the OHS policy. You are not prohibited from participating in the matter even though you have also reviewed the policy as a member of the Board's Executive Committee.

However, in order to avoid the appearance of impropriety that may be presented if you participate in this or any other matter under simultaneous consideration by both public agencies you serve, you could abstain from discussions, as a member of the Board, in the matter. Further, the potential for conflict would be enhanced in the future if a matter comes before the Commission that definitely and directly affects the interests of the Board. In such as situation, because you are a member of the Board, you would be barred from participating in the matter as the Executive Director of the Commission.

Conclusion

As explained more fully above, the Ethics Law does not prohibit you, as a member of the Board, from participating in the matter you have described that will also come before the Commission. Further, the Law does not prohibit you from participating, as Executive Director of the Commission, in the matter you have described on which you have participated as a member of the Board.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 23, 2004. The Ethics Commission commends you for requesting guidance before taking any actions that could be prohibited by law.

The 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 feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney