

OHIO ETHICS COMMISSION

Sarah M. Brown, *Chairman*
Robert Browning, *Vice Chairman*



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 24, 2006

Informal Opinion 2006-INF-0124-2

Brock A. Wanless, Esq.
Director of Government Affairs
Ohio Home Builders Association

Dear Mr. Wanless:

In a letter received by the Ohio Ethics Commission on September 1, 2005, you have asked whether the Ethics Law prohibits members of the Residential Construction Advisory Committee (RCAC), who also serve as members of the executive committee of the Ohio Home Builders Association (OHBA), from accepting pre-paid travel and hotel accommodations from the OHBA for an annual retreat.

Brief Answer

As explained more fully below, members of the RCAC are subject to the prohibitions of the Ethics Law (R.C. Chapter 102.). Because the OHBA is interested in matters pending before the RCAC, members of the RCAC are prohibited from soliciting or accepting anything of value, including pre-paid travel and hotel accommodations, from the OHBA.

Facts

In your letter to the Ethics Commission, you state that the RCAC is a nine-person committee created within the Department of Commerce. You further state that the RCAC is responsible for recommending a statewide residential building code for adoption by the Board of Building Standards. You explain that the RCAC also advises the Board of Building Standards on a variety of issues relevant to the residential building code adopted by the Board of Building Standards.

You explain that all members of the RCAC are appointed by the Director of the Department of Commerce for a term of three years. You state that five of the members of the RCAC are members of the OHBA. According to its Mission Statement, the OHBA is a 9,000-member trade association representing homebuilders and their associated vendors in a legislative and regulatory capacity on a statewide basis. The OHBA serves its membership by promoting proactive involvement on state issues and legislation impacting the residential building industry. The five RCAC members who are also members of OHBA serve in various capacities within the OHBA's leadership. Three of the members serve on the OHBA's executive committee, and have done so for many years pre-dating the existence of the RCAC.

You indicate that the committee meets at least six times per year. In particular, you state that the OHBA hosts an annual committee retreat for the OHBA's senior officers and invited executive committee members. You further state that the provision of travel and hotel accommodations for this meeting is a "reward and incentive" for service within the OHBA's leadership. You state that the practice of paying travel and hotel accommodations for this meeting pre-dated the existence of the RCAC.

You ask whether the Ethics Law prohibits members of the executive committee of the OHBA who also serve as members of the RCAC from accepting the pre-paid travel and hotel accommodations from the OHBA.

Statutory Authority and Duties of the OHBA—R.C. 4740.14

R.C. 102.03(D) and (E) are applicable to the question you have posed. As explained more fully below, R.C. 102.03(D) and (E) prohibit a "public official" from using his position to secure, and from soliciting and accepting, things of value that manifest a substantial and improper influence upon the public official with respect to his public duties. For purposes of these prohibitions, "public official" is defined, in pertinent part, as any person who is elected or appointed to an office of a public agency. The Ethics Commission has explained that a person who exercises the sovereign authority of the state or a political subdivision in the performance of his public duties is "appointed to an office." See Ohio Ethics Commission Advisory Opinion No. 92-001. Therefore, before addressing the application of R.C. 102.03(D) and (E) to the situation you have described, it is necessary to examine the statutory duties of the RCAC for purposes of determining whether members of the RCAC are subject to Chapter 102. of the Ohio Revised Code.

R.C. 4740.14(A) describes the composition of the RCAC. Specifically, the RCAC is composed of nine members who are appointed by the Director of the Department of Commerce based on their expertise in various areas or service in other positions.

R.C. 4740.14(C) describes the duties of the RCAC. The primary duty of the RCAC is to recommend to the Board of Building Standards a building code for residential buildings. However, R.C. 4740.14(C)(1) provides that, if the Board of Building Standards decides not to adopt a code the RCAC recommends, the RCAC “shall revise the code and resubmit it until the board adopts a code the RCAC recommends as the state residential building code.” R.C. 4740.14(C)(2) through (C)(5) describe various advisory and informational responsibilities of the RCAC.

Finally, R.C. 4740.14(E) states that members of the RCAC “shall receive no salary for the performance of their duties as members, but shall . . . receive a per diem for each day in attendance at an official meeting of the committee.” The Commission understands that members of the RCAC receive \$10.01 per hour for attendance at official meetings.

Application of the Ethics Law to Members of the RCAC—R.C. 102.01(B) and (C)

R.C. 102.01(B) defines the term “public official” as a person who is elected or appointed to an office is an employee of any “public agency.” R.C. 102.01(C) defines the term “public agency” as follows:

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

An individual is appointed to an office if the individual is appointed to a board of a public body that exercises sovereign authority. See Adv. Op. No. 92-001.

As you have noted, the duties of the RCAC are largely advisory in nature. However, the Ethics Commission engages in a careful review of the statutory duties of the board when determining whether the board exercises advisory or sovereign authority. See Adv. Ops. No. 85-005, 92-001, and 93-005. In this case, R.C. 4740.14 provides that if the Board of Building Standards does not adopt the building code that the RCAC recommends, the RCAC must revise the code and resubmit it until the Board *does* adopt a code the RCAC recommends as the state residential building code. It is important to note that the Board does not have the authority to reject the recommendations of the RCAC and replace the recommendations with provisions that are agreeable to the Board. Instead, the RCAC has the ability to revise the code and resubmit it to the Board. This interplay between the Board and the RCAC gives the RCAC a higher level of authority than the word “advisory” in the name of the committee would suggest. In addition, the

provisions of the building code that the RCAC prepare have a substantial impact on private interests in the construction and real estate industries.

Based on the role of the RCAC in developing a building code for residential buildings, as described in R.C. 4740.14(C)(1), the RCAC exercises sovereign authority for purposes of R.C. 102.01(B). Therefore, members of the RCAC are appointed to a public office. The next question is whether the RCAC is a "public agency" for purposes of R.C. 102.01(C).

The RCAC, an instrumentality created within state government, is a "public agency" unless it functions solely for an advisory, research, or educational purpose, expends ten thousand dollars per year or less, and does not compensate its members. R.C. 102.01(B). In order to be exempted from the definition of public agency, an instrumentality must meet all three of these requirements. In this case, as explained above, the RCAC does not function solely for advisory purposes, as it exercises sovereign authority related to the adoption of a state residential building code. Further, while R.C. 4740.14(E) states that members of the RCAC are uncompensated, the statute also provides for a per diem of 10.01 per hour for service at meetings. Therefore, RCAC members are compensated. Even though the Commission does not know how much money the RCAC will expend each year, two of the other elements of the exception in R.C. 102.01(B) cannot be met. The Commission concludes that members of the RCAC are appointed to an office of a public agency and are subject to the prohibitions of Chapter 102.

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

The conflict of interest provisions set forth in R.C. 102.03(D) and (E) are applicable to the situation you have described. R.C. 102.03(D) and (E) provide the following:

- (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.

As stated above, members of the RCAC are "public officials" subject to the prohibitions of R.C. 102.03(D) and (E).

Soliciting or Accepting Travel Expenses from the OHBA—R.C. 102.03(E)

R.C. 102.03(E) prohibits a “public official” from soliciting and accepting any things of value that manifest a substantial and improper influence upon the public official with respect to his public duties. In the situation you have described, the travel and hotel expenses are within the definition of “anything of value.” R.C. 102.01(G); 1.03.

The Ethics Commission has stated that, in some cases, a thing of a substantial nature could have a “substantial” influence on a public official. Adv. Op. No. 89-013 and 2001-03. In Advisory Opinion No. 2001-03, the Commission stated that an item was substantial if it is “of or having substance, real, actual, true; not imaginary; of *considerable* worth or value; important.” (Emphasis added.) Further, the Commission has generally found that some items are nominal or de minimis in value and, as a result, will not have a *substantial* influence on a public official or employee. See, e.g., Adv. Ops. No. 86-003, 89-014, and 92-015. For that reason, a public official or employee is not prohibited from accepting a thing of a nominal or de minimis value, regardless of the source. However, hotel accommodations and travel expenses are of considerable worth and, therefore, are of such a nature as to have a substantial influence on a public official. Adv. Op. No. 89-013.

A thing of value is capable of having an improper influence upon a public official if the source of the thing of value is doing or seeking to do business with, regulated by, or interested in matters before, the public official’s public agency. Adv. Op. No. 86-011. In this case, the source of the thing of value, the OHBA, is interested in matters before the RCAC. Therefore, travel expenses provided by OHBA could have an improper influence upon the members of the RCAC with respect to their duties with the RCAC.

Because the payment of the travel and hotel expenses is a substantial thing of value from a party that is interested in matters before the RCAC, R.C. 102.03(E) will prohibit the RCAC members who are also members of the OHBA executive committee from accepting the payment of the travel and hotel expenses from the OHBA. In Advisory Opinion No. 90-012, the Ohio Ethics Commission considered the application of R.C. 102.03(E) to a situation similar to the one you have presented. In that opinion, the Commission was asked whether a member of the state Respiratory Care Board was prohibited from serving as an officer or board member of a professional, respiratory care organization. The Commission concluded: “Therefore, a Board member is prohibited by R.C. 102.03(E) from serving as an officer or board member of a professional, respiratory care organization if he would receive compensation, a fee, or anything else of value for such service.”

The same conclusion would apply to the situation you have described. R.C. 102.03(E) would prohibit the members of the RCAC from serving as officers or executive committee members of OHBA if they would receive anything of value, including compensation, a fee, or travel or accommodation expenses, for that service.

While you have asked about the restrictions on members of the RCAC, you should also be aware of R.C. 102.03(F), which applies to the OHBA. R.C. 102.03(F) prohibits any person, which would include an organization, from promising or giving a public official or employee anything of value if the thing from value is of such a character as to manifest a substantial and improper influence upon the official or employee with respect to the performance of his or her public duties. R.C. 102.03(F) would prohibit the OHBA from promising or giving travel expense payments to members of the RCAC. Adv. Op. No. 90-001.

Participating in Matters Affecting OHBA—R.C. 102.03(D)

There is another question raised by the facts you have described: Whether the members of the RCAC who are members of the executive committee of the OHBA are limited from participating in matters that affect the interests of the OHBA.

In Advisory Opinion No. 90-012, the Commission concluded that R.C. 102.03(D) prohibits a public official from using the authority or influence of his position to secure anything of value, including decisions from a state regulatory body, for an organization which he serves in a fiduciary capacity. A professional organization and the members it represents have a definite and direct interest in the decisions, whether favorable or unfavorable to the organization and its members, of a state board that regulates or governs the profession.

The authority of the RCAC, to set a residential building code, involves an area that is of direct interest to the OHBA and its members. The OHBA and its members have a definite and direct interest in the decisions of the RCAC regarding the residential building code. A member of the RCAC who serves in OHBA leadership or as a member of the OHBA executive committee would be in a position where his official actions could have a direct result on the professional organization's interests. Adv. Op. No. 92-012. The relationship between the OHBA and an RCAC member who serves in OHBA leadership or on the OHBA executive committee is such that anything of value for the OHBA that would result from decisions of the RCAC would have a substantial and improper influence upon him or her in making recommendations or decisions with regard to the interests of OHBA and the employees. Therefore, R.C. 102.03(D) prohibits an RCAC member who serves in a leadership position with the OHBA or as a member of the OHBA executive committee from participating in any matter if the OHBA has taken a position on the matter or the matter would directly affect OHBA's interests, even though he receives no compensation or other thing of value for serving with OHBA. See also R.C. 102.03(J).

The Commission notes that, while R.C. 4140.14(A) requires that three members of the RCAC shall be general contractors with ability and experience in the construction of residential buildings, and one shall be a residential contractor with ability and experience in remodeling and construction of residential buildings, there is nothing in the statute requiring that these individuals shall be officers or executives of a professional home builders association. Further, if these individuals were merely members of the OHBA, rather than officers or members of the

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executive committee, R.C. 102.03(D) would not prohibit the RCAC members from fully participating in matters that affect the interests of the OHBA or its members. See R.C. 102.03(J).

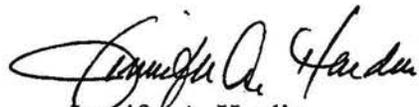
Conclusion

As explained above, members of the RCAC are subject to the prohibitions of the Ethics Law (R.C. Chapter 102.). Because the OHBA is interested in matters pending before the RCAC, members of the RCAC are prohibited from soliciting or accepting anything of value, including pre-paid travel and hotel accommodations, from the OHBA.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 13, 2006. The 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

Enclosure: Advisory Opinion No. 90-012