

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*

March 23, 2007

Informal Opinion 2007-INF-0323-1

Heather Hissom, Executive Secretary
The Ohio Veterinary Licensing Board

Dear Ms. Hissom:

On September 28, 2006, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that the Ohio Veterinary Licensing Board (Board) has two Board members who also serve with professional associations comprised of individuals who are regulated by the Board.

You stated that one Board member is running unopposed for the Vice-presidency of the Ohio Association of Veterinary Technicians (OAVT). You also stated that another Board member is a district representative of the Board of Trustees of the Ohio Veterinary Medical Association (OVMA).

You explained that the election for one of the Board members was scheduled for October 8, 2006, and requested guidance from the Ethics Commission prior to that date. In response to your request, Commission staff sent a letter, dated October 3, 2006, generally explaining the restrictions on the Board members if they served with professional organizations whose members are regulated by the Board. That letter referenced and included a copy of a formal advisory opinion issued in 1990 that further explains the restrictions.

The letter also noted that the Commission would be happy to issue a more specific response if the Board members needed guidance beyond that provided in the 1990 opinion. On October 18, 2006, the Commission received your responding letter, asking for an opinion.

Brief Answer

As explained below, a Board member is not *per se* prohibited from serving as the Vice-president of the OAVT or as the district representative of the OVMA. However, the Ethics Law and related statutes prohibit either Board member from receiving, from an improper source, such as the association he or she serves, anything of value that would have a substantial influence on the Board member. Examples of things of value that could have a substantial influence on a Board member would include compensation for services and reimbursement for expenses incurred while attending meetings as an official of the professional association.

In addition, to protect against conflicts of interest to their public role, each Board member is prohibited from participating, as a Board member, in any matter on which the professional association he or she serves has taken a position or that would directly benefit the interests of the association. Furthermore, other ethics restrictions contained in R.C. 102.04(A) and R.C. 102.03(A) limit each Board member with respect to representing the professional association he or she serves before the Board and any other public agency. Finally, R.C. 102.03(B) prohibits the Board members from disclosing or using confidential information that they acquired as Board members, without appropriate authorization.

Facts

The Board is created by law with the duty to regulate the practice of veterinary medicine within the state. R.C. 4741.03. The Board is comprised of seven individuals appointed by the Governor with the advice and consent of the Senate. R.C. 4741.02. The law requires that five members of the Board are veterinarian professionals, one member is a veterinarian technician, and one member represents the public. Id.

The Board is charged with the duty to issue licenses and temporary permits to practice veterinary medicine. R.C. 4741.13 and 4741.14. The Board is also responsible for the discipline of persons engaged in the unauthorized, negligent, incompetent, or unethical practice of veterinary medicine, or engaged in conduct or activity prohibited by statute, or orders and rules of the Board. See generally R.C. 4741.18 - 4741.26.

You stated that the two professional associations promote the interests of veterinary care professionals by adopting standards for the practice of the profession and lobbying for the introduction of legislation or support of pending legislation that the organizations determine is beneficial to the profession. You stated that the OAVT board makes policy decisions and takes legislative positions that are, in some instances, opposite to those of the Board. You also stated that the OVMA often opposes or supports legislation and comments upon issues during the Board's rule process.

Receipt of Anything of Value—R.C. 102.03(D) and (E)

The conflict of interest provisions, set forth in R.C. 102.03(D) and (E), read:

- (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.

The term “public official or employee” is defined to include any person who is appointed to a public agency, which includes any board of the state. R.C. 102.01(B) and (C). A member of the Board is a “public official or employee” and subject to R.C. 102.03(D) and (E).

R.C. 1.03 defines “anything of value” to include money and every other thing of value. R.C. 102.01(G). Compensation for serving a professional association, and reimbursement for travel, meal, and lodging expenses incurred while performing duties for an association, are things of value for purposes of R.C. 102.03(D) and (E).

In Advisory Opinion No. 90-012, the Ethics Commission was asked whether a member of the Respiratory Care Board was prohibited from serving either as an officer or board member of a professional respiratory care organization. The Respiratory Care Board regulates, and stands in a position of authority over, practitioners of respiratory care within the state. The state and national professional respiratory care organizations that represent such practitioners are interested, on an ongoing basis, in matters that the Respiratory Care Board has the statutory responsibility to regulate. See Ohio Ethics Commission Advisory Opinion No. 90-012.

In Advisory Opinion No. 90-012, the Commission concluded that the Ethics Law and related statutes do not *per se* prohibit the board member from serving as an officer of the association. However, the board member is subject to conditions on his conduct. Adv. Op. No. 85-012. For example, R.C. 102.03(D) and (E) prohibit a public official from soliciting, accepting, or using the authority or influence of his or her public office to secure anything of value if the thing of value could have a substantial and improper influence upon the official with respect to the performance of his or her job duties.

When a thing of value is provided to a public official or employee by a party that interested in matters before, regulated by, or doing or seeking to do business with, the official’s public agency, it is of such a character as to have an “improper” influence on the official or employee. See Adv. Op. No. 2001-03 and 2001-04. When a thing of value is substantial in character or value, it is of such a character as to have a “substantial” influence on the official or employee. Id. Whenever a substantial thing of value is offered or given to a public official or employee by a party that is interested in matters before, regulated by, or doing or seeking to do business with, the official’s public agency, the thing of substantial value could impair the official’s objectivity and independence of judgment with respect to his or her official actions and decisions for the public agency. Adv. Ops. No. 86-011 and 87-009. R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting or accepting, and from using his or her position to secure, anything of substantial value from any person or entity has these kinds of relationships with his or her public agency.

In Advisory Opinion No. 90-012, the Commission stated that R.C. 102.03(E) prohibits a regulatory board member from receiving compensation, a fee, expenses, or anything else of substantial value for his service to an organization that is interested, on an ongoing basis, in matters pending before the board and whose members are regulated by the board. Adv. Op. No. 92-012. These items, of substantial value and from an improper source, would have a substantial

and improper influence on the regulatory board member. R.C. 102.03(D) prohibits the board member from using his official authority or influence to secure compensation or anything else of substantial value for service as an officer or board member of such an association, which is an improper source of a thing of substantial value. Id.

The conclusions in Advisory Opinion No. 90-012 applied to the Board members. Individual members of the OAVT and OVMA are regulated by the Board.¹ These associations represent their members and are interested in matters pending before the Board. Accordingly, R.C. 102.03(D) and (E) prohibit each of the Board members from soliciting, accepting, or using the authority or influence of his or her public office to secure anything of substantial value from the professional association that he or she serves. Each Board member is prohibited from soliciting or accepting, from these improper sources, such items of substantial value as: (1) compensation for serving in any position with the association²; (2) reimbursement for the costs of travel, meal, and lodging expenses while performing services for the association; (3) significant gifts; (4) honoraria; or (5) significant discounts.

The Board member would not be prohibited from accepting things from the association he or she serves as an officer or district representative that are not substantial in value (such as promotional items or materials) or that are provided to all members, including the Board members, who belong to the association. For example, if each person who is a member of the association is entitled, as a benefit of membership, to receive a discount on conference registration fees or complementary copies of publications that would ordinarily be sold by the association, the Ethics Law would not prohibit the Board member from also receiving items of this nature.

Participating in Matters Affecting Organization—R.C. 102.03(D) and (E)

R.C. 102.03(D) and (E) also limit the actions of the Board members when matters before the Board affect the interests of the organizations they serve. In Advisory Opinion No. 90-012, the Ethics Commission stated that R.C. 102.03(D) prohibited a member of the Respiratory Care Board from securing anything of value for a professional organization that he serves in a fiduciary capacity. The economic impact of a favorable decision from a state regulatory board is

¹ In your October 8, 2006, letter, the Board asked for clarification of the Commission's 1985 opinion dealing with the application of the law to Board members who are also members of a professional association. Specifically, the Board asked whether a "member" of a professional organization includes any member or only those members who are actively involved in decision-making on a particular matter. When the Commission referred to members of the professional organization, in Advisory Opinion No. 85-012, it included all members, not merely those with specific authority in the organization. However, it is only those members who are also officers or fiduciaries of the organization, or have taken a particular role in the organization on a specific matter, that are bound by limits on participation discussed herein. Mere members qualify for an exception in the law that was enacted after 1985, and is discussed more fully later in this opinion. R.C. 102.03(J).

² R.C. 102.04(A) also prohibits a state board member from receiving compensation. Specifically, a board member is prohibited from receiving compensation to represent any party before any agency of the state, including the General Assembly. While there is an exception to the restriction, set forth in R.C. 102.04(D), it is unnecessary to consider the exception because R.C. 102.03(D) and (E) prohibit the board members from receiving any kind of compensation from the organizations.

a thing of value for purposes of R.C. 102.03. Adv. Ops. No. 85-012 and 90-002. The Commission stated, in Advisory Opinion No. 90-012:

It is possible that a professional organization and the Board may take different positions regarding the development of policies and standards for the profession, the introduction or support of legislation, the enactment, interpretation, or application of orders or rules adopted by the Board, or a determination made by the Board in a particular case regarding a member of the professional organization. . . . The relationship between such a Board member and the professional organization could affect his objectivity and independence of judgment in making recommendations or decision with regard to the interests of the professional organization and the members which it represents. Therefore, R.C. 102.03(D) prohibits a Board member who serves as an officer or board member of a professional organization from participating in any matter on which the organization has taken a position or which would directly benefit the interests of the organization.

Adv. Op. No. 90-012. See also Adv. Op. No. 92-004.

This conclusion would apply to the two Board members in your letter. Each Board member is prohibited from participating in any matter before the Board that would directly benefit the interests of the organization or in which the organization has taken a position.

Exception in R.C. 102.03(J)

There is an exception to the conflict of interest restrictions contained in R.C. 102.03(D) and (E), set forth in R.C. 102.03(J):

For purposes of divisions (D), (E), and (F) of this section, the membership of a public official or employee in an organization shall not be considered, in and of itself, to be of such a character as to manifest a substantial and improper influence on the public official or employee with respect to that person's duties. As used in this division, "organization" means a church or a religious, benevolent, fraternal, or professional organization that is tax exempt under subsection 501(a) and described in subsection 501(c) (3), (4), (8), (10), or (19) of the "Internal Revenue Code of 1986." This division does not apply to a public official or employee who is an employee of an organization, serves as a trustee, director, or officer of an organization, or otherwise holds a fiduciary relationship with an organization. This division does not allow a public official or employee who is a member of an organization to participate, formally or informally, in deliberations, discussions, or voting on a matter or to use his official position with regard to the interests of the organization on the matter if the public official or employee has assumed a particular responsibility in the organization with respect to the matter or if the matter would affect that person's personal, pecuniary interests.

The exception is limited, and, as it states, does not apply to any person who is an employee or officer of, or has any fiduciary relationship with, the organization. R.C. 102.03(J). The Board member who is a Vice-president of OAVT does not qualify for the exception in R.C. 102.03(J). See Adv. Op. No. 90-012.

It is unclear from your letter whether a district representative of the OVMA would be considered an officer or a fiduciary of the organization. In order to determine whether a “district representative” is a fiduciary of OVMA, and whether the exception in R.C. 102.03(J) applies, the Commission will need more information from the Board member. If the Board member would like further guidance on this issue, he or she can submit additional information about the duties and authority of a district representative in OVMA. If it is submitted before April 6, 2007, the Commission will review the information as soon as possible and no later than the next Commission meeting (May 4, 2007).

The exception also does not apply to any public official or employee who, as a member of the organization, has assumed a “particular responsibility” on a matter that is before his or her public agency. If a Board member is not an officer or fiduciary of OVMA and has not assumed a particular responsibility with respect to any matter that is before that Board, the exception would apply. In that case, the Board member is not prohibited from participating in matters before the Board that affect the organization or its members. The Board member would have to exercise extreme caution to be certain that any matter pending before the Board is not one in which he or she has assumed a particular responsibility for the OVMA.

Revolving Door Provisions—R.C. 102.03(A)

R.C. 102.03(A)(1) also applies to the Board members:

No present or former public official or employee shall, during his public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion. (Emphasis added).

While R.C. 102.03(A)(1) is called the “post-employment” law, it also applies to an official during his or her public service. A Board member is a “public official,” for purposes of this restriction.

The term “represent” includes “any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person.” The term “person” includes “an individual, corporation, business trust, estate, trust, partnership, and association.” R.C. 1.59. The Ethics Commission, in explaining the types of activities that would encompass the term “represent,” stated:

[T]his would include activities ranging from an appearance on behalf of a private client in a formal proceeding or meeting to informal “lobbying” of agency personnel by telephone or in person. It also includes written communications ranging from formal documents and filings to informal letters and notes. Even if the attorney or consultant does not sign the documents, letters, or notes, the prohibition would apply if she prepared the communication. If she merely consulted with the attorneys or other personnel who prepared the documents, letters, or notes, the prohibition would not apply.

Adv. Op. No. 86-001. See also Adv. Ops. No. 91-003, 91-009, and 92-005.

R.C. 102.03(A) prohibits each Board member, during his or her service on the Board from representing the Association before any public agency, including the Board, on any matter in which he or she had personally participated as a Board member. Adv. Ops. No. 79-007 and 90-012. This restriction will also apply to each Board member for one year after he or she leaves the Board position.

Release of Confidential Information—R.C. 102.03(B)

Your attention is directed to Division (B) of R.C. 102.03, which reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

R.C. 102.03(B) prohibits the Board members from disclosing confidential information to any party, including the professional associations they serve and any member of the organizations, and from using confidential information without appropriate authorization. Because R.C. 102.03(B) prohibits the Board member from using, in addition to disclosing, confidential information, the Board members cannot take any action in their capacity with the associations that they serve if they will base their action on confidential information acquired in their official capacity as Board members. Adv. Op. No. 90-012. No time limit exists for this prohibition and it is effective while the Board members serve and after they leave the Board. Adv. Ops. No. 88-009 and 90-012.

On one final note, the Ethics Commission must stress that a member of a state regulatory board who serves as an officer or fiduciary of a professional organization comprised of individuals who are regulated by the state board is placed in an inherently difficult situation due to the potential conflicts of interest between the board and the professional association. The Commission previously expressed this concern in Advisory Opinion No. 90-012:

The Commission is aware that members of state boards are appointed due to their professional expertise and that knowledgeable individuals who are dedicated to serving or promoting the interests of their profession may be involved in various activities concerning that profession. However, a public official or employee owes his first responsibility to the exercise of the public trust; this responsibility must not be impaired by the official's concern for a professional organization which he serves in some capacity. . . . All public officials and employees must accept necessary restrictions to avoid any possible interference with the responsibilities of public office.

Conclusion

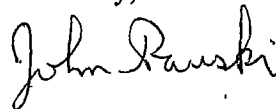
As explained above, a Board member is not *per se* prohibited from serving as the Vice-president of the OAVT or as the district representative of the OVMA. However, the Ethics Law and related statutes prohibit either Board member from receiving, from an improper source, such as the association he or she serves, anything of value that would have a substantial influence on the Board member. Examples of things of value that could have a substantial influence on a Board member would include compensation for services and reimbursement for expenses incurred while attending meetings as an official of the professional association.

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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on March 23, 2007. The Commission commends the Board members 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,



John Rawski
Advisory Staff Attorney