



## OHIO ETHICS COMMISSION

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Advisory Opinion No. 75-037

January 29, 1976

Syllabus by the Ohio Ethics Commission:

- (1) The Ohio Ethics Commission renders advisory opinions only when the facts presented in a request are hypothetical or the conduct in question prospective.
- (2) A member of the Ohio Building Authority is not a public official or employee as that term is defined in Section 102.01 (B) of the Revised Code.
- (3) A member of the Ohio Building Authority is a person appointed to an office of an instrumentality of the state for purposes of Section 102.04 (A) of the Revised Code.
- (4) A member of the Ohio Building Authority, who is also an officer and shareholder of a corporation is not, merely by having those corporate relationships, in violation of Section 102.04 (A) of the Revised Code.

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Your request for an advisory opinion asks whether "a conflict of interest exists" for a member of the Ohio Building Authority when property, in which he has a personal interest, is the subject of a lease agreement entered into by the State of Ohio through the Department of Administrative Services. You state that the Department of Administrative Services has executed a lease through a real estate company with two Ohio corporations as lessors. The lease involves a building and a parking lot. You state that the member of the Ohio Building Authority owns shares in the one corporation, as well as owning one-half of the outstanding stock and serving as director and secretary of the other corporation. You state that the member of the Ohio Building Authority, however, did not negotiate the lease on behalf of either corporation; the negotiations were conducted by a real estate company in which the member had no interest; and, the member of the Ohio Building Authority will receive no compensation from any source in connection with the negotiation of the lease.

The "conflict of interest" provisions of Chapter 102 of the Revised Code are Sections 102.03 and 102.04. Thus, in order to determine whether the member of the Ohio Building Authority is involved in a "conflict of interest situation" the specific circumstances must be examined in light of the application of Section 102.03 and 102.04 of the Revised Code.

Section 102.01 (B) of the Revised Code defines "public official or employee" as:

"any person who is elected or appointed to an elective office or employed by any public agency."

The members of the Ohio Building Authority are appointed pursuant to Section 152.01 of the Revised Code:

"(A) There is hereby created the Ohio building authority, consisting of three persons, residents of the state, appointed by the governor with the advice and consent of the senate. The authority is a body both corporate and politic of this state, and it performs essential governmental functions of this state. It may, in its own name, sued and be sued, enter into contracts, and perform all the powers and duties given to it by Chapter 152. of the Revised Code.

(B) The members of the authority shall serve without compensation, but shall be reimbursed from funds of the authority for necessary expenses incurred in the conduct of authority business. Of the members first appointed, one shall serve for a term expiring December 31, 1969; one for a term expiring December 31, 1971; and one for a term expiring December 31, 1973. . ."

It is obvious from the above statutes that a person, who is appointed pursuant to Section 152.01 of the Revised Code, to the Ohio Building Authority is not elected or appointed to an elective office within the meaning of the term "public official or employee" contained in Section 102.01 (B) of the Revised Code.

In Advisory opinion No. 75-022, the Ohio Ethics Commission established four tests used in determining whether an employee-employer relationship exists for purposes of Section 102.01 (B) of the Revised Code. They are: (1) the selection and engagement of the employee; (2) the payment of salary or wages; (3) the power of dismissal; and, (4) the power of control of the employee's conduct. It was stated in that Advisory Opinion that these tests are applied in a balancing manner and no single test is determinative, although the test of control of the "employee's conduct" is essential.

Section 152.01 of the Revised Code, cited above, provides that members of the Ohio Building Authority shall serve without compensation and be reimbursed only for necessary expenses incurred in the conduct of authority business. The Section further provides that members are appointed for specified terms and are not subject to anyone's control, but rather act at their own discretion within the guidelines established in Chapter 152 of the Revised Code. Thus, members of the Ohio Building Authority are not employees of a public agency since they: (1) do not receive a salary or wages; (2) serve a specific term; (3) are not subject to dismissal by an employer; and (4) are not subject to control by an employer, but rather are free to act at their own discretion within the guidelines of Chapter 152 of the Revised Code. Therefore, a member of the Ohio Building Authority is not a person elected or appointed to an elective office, nor employed by a public agency, and thus, is not a "public official or employee" subject to Section 102.03 of the Revised Code.

Section 102.04 (A) of the Revised Code applies to "a person . . . appointed to an office of . . . any instrumentality . . . of the state." The Ohio Ethics Commission in Advisory Opinion No. 75-004, established several tests to determine whether someone has been "appointed to an office" for purposes of Section 102.04 (A) of the Revised Code: (1) was he appointed; (2) does he have

a title; (3) does he exercise functions of government concerning the public; (4) is he not subject to a contract of employment; and, (5) does he exercise sovereign power. Sovereign power is "a concept meant to imply the exercise of a duty entrusted by virtue of statute or some public authority. Those duties are not merely clerical, but involve some discretionary, decision-making qualities." That Advisory opinion held that finding facts, assisting in the formulation of plans, and the making of recommendations was not the exercise of sovereign power.

Section 152.01 of the Revised Code demonstrates that members of the Ohio Building Authority are: (1) appointed; (2) have a title of member of the Ohio Building Authority; (3) exercise "essential governmental functions of the state"; and, (4) are not subject to a contract of employment. Some examples of the essential governmental functions exercised by the Ohio Building Authority are set forth in Section 152.08 of the Revised Code;

"(A) The Ohio building authority may:

(1) Acquire, by gift, grant, or purchase, and hold and mortgage, real estate and interest therein, and personal property suitable for its purposes, provided that no land used by the authority pursuant to Section 152.05 of the Revised Code shall be mortgaged by the authority;

(2) Purchase, construct, reconstruct, equip, furnish, improve, alter, enlarge, maintain, repair, and operate buildings, facilities, and other properties for the purposes set forth in Section 152.04 of the Revised Code. The authority shall construct, operate, and maintain its buildings, facilities, and other properties in a healthy, safe, and sanitary manner;

(3) Issue revenue bonds, to secure funds, to accomplish its purposes, the principle of and interest on and all other payments required to be made by the trust agreement or indenture securing such bonds to be paid solely from revenues accruing to the authority through the operation of its buildings, facilities, and other property;

(4) Enter into contracts and execute all instruments necessary in the conduct of its business; . . ."

The above list of duties and responsibilities of the authority are just four items of fifteen listed in that section. It is evident that the members of the Ohio Building Authority perform functions that are not merely clerical, but involve a great deal of discretionary, decision-making qualities. Thus, members of the Ohio Building Authority exercise sovereign power. This conclusion, combined with the four tests listed above, establishes that members of the Ohio Building Authority are persons appointed to an office of an instrumentality of the state.

The term "instrumentality" was determined, in Advisory Opinion No. 75-004, to include within its breadth almost any agency or organizational unit of government. The Ohio Building Authority although operating under the title of an "authority" and thus not specifically included in the list of types of agencies contained in Section 102.04 (A) of the Revised Code, is certainly an instrumentality of the state. Thus, persons who are appointed to such an instrumentality, known as an authority, and who meet the above tests, are persons included within the purview of

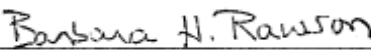
Section 102.04 (A) of the Revised Code and thus are subject to the substantive provisions of that section:

"No person . . . appointed to an office of . . . any . . . instrumentality . . . of the state, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts."

The conduct of the member, rather than his corporate relationships, is the essential factor in determining whether there is a violation of Section 102.04 (A) of the Revised Code. Holding a corporate position or being a stockholder of a corporation is not the type of "conduct" which is within the purview of Section 102.04 (A) of the Revised Code. In order for there to be a violation of Section 102.04 (A) of the Revised Code the member's conduct must constitute the rendering of " . . . services . . . personally by him. . . ." A mere fiduciary or financial interest in a corporation, which enters into a lease agreement with a state agency, does not constitute the rendering of services personally by the member about whom you have written.

However, whether in fact the member about whom you have written was or was not in violation of Section 102.04 (A) of the Revised Code would require a finding of fact, and the Ohio Ethics Commission does not, in advisory opinions, make findings of fact. Rather in an advisory opinion, the Commission accepts the facts presented to it when the facts are hypothetical or the conduct prospective. Since the facts contained in your request for an advisory opinion are neither hypothetical nor prospective the Commission, in this opinion, makes no finding in regard to whether the member about whom you have written was or was not in violation of Section 102.04 (A) of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised that: The Ohio Ethics Commission renders advisory opinions only when the facts presented in a request are hypothetical or the conduct in question prospective; a member of the Ohio Building Authority is not a public official or employee as that term is defined in Section 102.01 (B) of the Revised Code; a member of the Ohio Building Authority is a person appointed to an office of an instrumentality of the state for purposes of Section 102.04 (A) of the Revised Code; and, a member of the Ohio Building Authority, who is also an officer and shareholder of a corporation is not, merely by having those corporate relationships, in violation of Section 102.04 (A) of the Revised Code.

  
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(Mrs) Barbara H. Rawson, Chairman