



OHIO ETHICS COMMISSION

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Advisory Opinion Number 92-011
July 10, 1992

Syllabus by the Commission:

A member of the Ohio Public Employees Deferred Compensation Board is subject to the restrictions of the Ohio Ethics Laws and related statutes.

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The Ethics Commission has been asked whether members of the Ohio Public Employees Deferred Compensation Board (Board) are subject to the restrictions of the Ohio Ethics Laws and related statutes.

The Board's statutorily prescribed powers and duties must be examined in order to address this question.

The Board is a statutorily created board within State government. See R.C. 145.72. It is comprised of a member of the House of Representatives, a member of the Senate, and the members of the Public Employees Retirement Board. Id. See also R.C. 145.04 (the Public Employees Retirement Board is comprised of the Attorney General, the Auditor of State, the Director of Administrative Services, five individuals who are employees of political subdivisions of the State, and one individual who is a former member of the Public Employees Retirement System who receives retirement or disability benefits).

The Ohio Public Employees Deferred Compensation Board has the statutory duty to initiate, plan, promulgate, offer, and thereafter administer a deferred compensation program for eligible public employees. See R.C. 145.73 (A). The Board is statutorily required to adopt rules to provide standards and conditions for the administration of its program, including limits on the portion of a participating employee's compensation that may be deferred. See R.C. 145.73 (D). Accordingly, the Board has promulgated Ohio Administrative Code Chapter 145:1-1 which provides standards and conditions for the administration of a deferred compensation program for eligible public employees. See Ohio Admin. Code 145:1-1-01 (A).

The Board is statutorily required to offer a reasonable number of investment options to eligible public employees in such a form as will assure the desired tax treatment of such funds. See 145.73 (A). These investment options include pooled investment funds managed by the Board, life insurance, annuities, variable annuities, regulated investment trusts, and other forms of investment which have been approved by the Board. Id. See also Ohio Admin. Code 145:1-1-01 (C)(5). The Board formulates and designs plan agreements for adoption by employers who offer a plan of deferred compensation to their employees. See Ohio Admin. Code No. 145:1-1-01

(C)(1). The Board is statutorily required to undertake to obtain the most favorable conditions of tax treatment possible in the investment options which it offers as to the terms of distribution, designation of beneficiaries, withdrawal upon disability, financial hardship, or termination of public employment. See R.C. 145.73 (C). In order to accomplish this statutory requirement, it may amend plan agreements offered under the deferred compensation program whenever it determines that it is necessary. See Ohio Admin. Code No. 145:1-1-01 (C)(2). The Board decides questions of fact necessary to determine a participant's rights under the deferred compensation program; the Board's decision is final and binding on the participant and any beneficiary thereof. See Ohio Admin. Code 145:1-1-01 (C)(10).

Also, in order to accomplish its duties, the Board is statutorily authorized to exercise the same powers granted to the Public Employees Retirement Board by R.C. 145.09. See R.C. 145.72. Thus, an examination of the Deferred Compensation Board's statutorily prescribed powers and duties must also include an examination of the powers of the Public Employees Retirement Board granted by R.C. 145.09. The Public Employees Retirement Board may sue and be sued, plead and be impleaded, and enter into contracts. See R.C. 145.09. Accordingly, the Deferred Compensation Board is empowered to contract with insurance companies, banks, and other financial institutions for the investment of moneys for the deferred compensation program. See Ohio Admin. Code 145:1-1-01 (C)(5).

The Ethics Commission is empowered to administer, interpret, and help enforce Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. See R.C. 102.02, 102.06, and 102.08. These provisions include Ohio's Financial Disclosure Law, and substantive prohibitions against public officials and employees misusing their official position for their own personal benefit or the benefit of their family members or business associates, or where there is otherwise a conflict of interest.

It is now necessary to turn to the statutory definitions found in R.C. Chapters 102. and 2921. which establish who is subject to the prohibitions imposed by these statutes.

R.C. 102.01 (B) defines the term "public official or employee" for purposes of Chapter 102. of the Revised Code 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. (Emphasis added.)

R.C. 2921.01 (A) defines the term "public official" for purposes of R.C. Chapter 2921. as:

[A]ny 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. (Emphasis added.)

R.C. 2921.42 imposes prohibitions upon "public officials" and R.C. 2921.43 imposes prohibitions upon "public servants." See R.C. 2921.01 (A) and (B)(1). However, the term "public servant" includes a person who is a "public official." Id. Therefore, a person who is subject to the prohibitions of R.C. 2921.42 will also be subject to the prohibitions of R.C. 2921.43.

The Ohio Public Employees Deferred Compensation Board is a board which is statutorily established within State government pursuant to R.C. 145.71 -.74. See generally Ohio Op. Att'y Gen. No. 74-102 and 91-005 (describing the Deferred Compensation Board as a "state agency" and a "governmental entity," respectively). The Deferred Compensation Board is, therefore, a "public agency" under the statutory definition provided by R.C. 102.01 (C) and a State entity for purposes of R.C. Chapter 2921.

The issue becomes whether a member of the Board is "appointed to an office . . . of any public agency" for purposes of Chapter 102. or is an "appointed officer . . . of the state" for purposes of R.C. 2921.42 and 2921.43. (Emphasis added.)

Under Ohio law, a person who holds an "office" is an "officer." See Muskingum County Democratic Executive Committee v. Burrier, 31 Ohio Op. 570, 572 (C.P. Muskingum County 1945) (the terms "officer" and "office" are to be regarded as strictly correlative). See also Ohio Ethics Commission Advisory Opinions No. 74-007, 85-005, 92-001, and 92-007. The Ethics Commission has explained that the essential criterion which determines whether an individual holds an "office" is whether he is empowered to exercise the "sovereign power" of government. See Advisory Opinions No. 75-004, 85-005, 92-001, and 92-007. The Commission has relied upon the Ohio Supreme Court's holding in State ex rel. Landis v. Butler, 95 Ohio St. 157 (1917) that a public agency will be deemed to exercise "sovereign power" when it is created by some public authority, such as executive order, the Constitution, or statute and, in order to perform its prescribed duties, is invested with decision-making authority which is not merely clerical but is final and discretionary, including the authority to determine the disposition of public property or incur financial obligations upon the part of the State or its political subdivisions. See Advisory Opinions No. 75-004, 77-004, 85-005, and 92-001. Accordingly, the Commission has held that members of a public agency which functions exclusively for advisory purposes are not deemed to exercise the sovereign power of government. See Advisory Opinions No. 75-004, 85-005, and 92-001. Additional factors which may be considered to determine that an individual holds an "office" are whether the person: (1) is appointed; (2) has a title; (3) exercises a function of government concerning the public; and (4) is not subject to a contract of employment. See Advisory Opinions No. 74-007, 75-004, and 77-004. See also Advisory Opinions No. 85-005 and 92-001.

The issue becomes whether the Ohio Public Employees Deferred Compensation Board exercises "sovereign power." As explained above, a determination whether a public agency exercises "sovereign power" depends on whether the public agency is empowered to exercise final, discretionary decision-making authority and not merely perform clerical functions or provide non-binding advice.

As explained above, the Board has the statutory duty to administer a deferred compensation program for eligible public employees. In order to accomplish this duty the Board

designs plans which employers offer to their employees and may amend such plans when it determines it is necessary to assure the desired tax treatment. Also, the Board is empowered to select and contract with financial institutions to invest moneys under the deferred compensation program. Furthermore, the Board makes final and binding decisions regarding a participant's rights under the deferred compensation program. It is apparent that these activities are not merely clerical or advisory but involve the Board's exercise of final discretionary, decision-making authority.

As stated above, other indicia of sovereign power are whether a public agency has statutory and independent duties with regard to the disposition of public property or the ability to incur financial obligations upon the part of the State or political subdivisions. See Advisory Opinion No. 85-005. The Deferred Compensation Board has promulgated an administrative rule which states that the assets of the plans administered by the Board as part of the public employees deferred compensation program are held by the Board on behalf of the public employer and are considered to be the assets of the public employer. See Ohio Admin. Code 145:1-1-01 (C)(6). But see R.C. 145.73 (A) (the Board administers a program of deferred compensation "on behalf of all participating employees"). Under the deferred compensation program, public employers contract with eligible employees to participate in the program; the applicable public retirement system serving an eligible employee collects and accounts for the compensation to be deferred and delivers the sums to the Board. See R.C. 145.73 (B). The Attorney General has held that, from the view of an employee participating in the deferred compensation program, deferred compensation funds are "funds of the state [or a political subdivision] as opposed to his own because he has no right to them." Ohio Op. Att'y Gen. No. 74-102. It is apparent that the Board, which then selects financial institutions and contracts with them to invest funds of the State and political subdivisions, exercises statutory and independent authority to control the disposition of public funds. See Ohio Admin. Code 145:1-1-01 (C)(5).

Therefore, the Ohio Public Employees Deferred Compensation Board exercises "sovereign power" since it performs discretionary, decision-making duties and has statutory and independent duties with regard to the ability to control the disposition of funds of the State and political subdivisions. Also, as explained above, members of the Board are appointed to their position, have a title, and are not subject to a contract of employment. Therefore, a member of the Ohio Public Employees Deferred Compensation Board (Board) is "appointed to an office . . . of . . . [a] public agency" for purposes of Chapter 102. and is an "appointed officer . . . of the state" for purposes of R.C. 2921.42 and 2921.43 and is subject to the restrictions of Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.

Due to their service with the Public Employees Retirement Board and the General Assembly, all members of the Deferred Compensation Board are otherwise "public officials or employees" for purposes of R.C. Chapter 102. and "public officials" for purposes of R.C. Chapter 2921. See R.C. 102.01 (B) and (C); R.C. 2921.01. Also, as explained above, all but one of the members of the Public Employees Retirement Board are required to hold other public office or employment in order to serve on the Public Employees Retirement Board. However, it must be emphasized that the members of the Deferred Compensation Board, by virtue of their position on that Board, are subject to the substantive prohibitions imposed by the Ohio Ethics

Laws and related statutes, and their conduct is thereby affected in relation to the duties which they exercise as members of the Deferred Compensation Board.

You did not ask that any specific situation be addressed; however, the following examples have been provided for general guidance. A Board member is prohibited from accepting, soliciting, or using his official authority or influence to secure anything of substantial value from a party that is interested in matters before, regulated by, or doing or seeking to do business with the Board. See R.C. 102.03 (D) and (E). See generally Advisory Opinions No. 89-013 and 89-014. See also R.C. 102.03 (F) and Advisory Opinion No. 90-001 (a party that is doing business or seeking to do business with, interested in matters before, or regulated by, a public agency is prohibited from promising or giving anything of substantial value to an officer or employee of that agency). A Board member is prohibited from selling goods and services to the Board unless certain requirements are met. See R.C. 2921.42 (A)(4) and (C), 2921.42 (A)(3), and R.C. 102.04 (B). See also R.C. 2921.42 (A)(1). A Board member is prohibited from receiving compensation from any party for personally rendering any service in any matter that is before the Board. See R.C. 102.04 (A). A Board member is prohibited from accepting or soliciting any compensation, other than allowed by law, for the performance of his official duties. See R.C. 2921.43. While serving on the Board and for one year after leaving office, a Board member is prohibited from representing a party before any public agency on any matter in which he personally participated as a Board member. See R.C. 102.03 (A). A Board member is prohibited, during his public service and thereafter, from disclosing or using without appropriate authorization, any confidential information he acquired as a Board member. See R.C. R.C. 102.03 (B). You should contact the Ethics Commission for specific advice, prior to any action being taken, if issues arise concerning a Board member's ability to act in light of these or other restrictions imposed by the Ethics Law and related statutes.

The issue remains whether members of the Board are subject to Ohio's Financial Disclosure Law. R.C. 102.02, which contains the Financial Disclosure Law, does not use the term "public official or employee" as defined in R.C. 102.01 (B) and (C) to determine the scope of its applicability, but rather uses different standards in setting forth who is subject to its requirements. See Advisory Opinion No. 92-001.

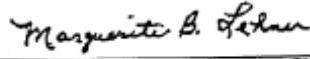
R.C. 102.02 (A) requires individuals who are elected to state, county, and city office, candidates and appointees for these elective offices, specified upper level state officials, and state employees who are paid according to Schedule "C" of R.C. Section 124.15 to file a financial disclosure statement. The members of the Board do not fall within the group of officials who are required to file a financial disclosure statement under Division (A) of R.C. 102.02.

However, Division (B) of R.C. 102.02 provides that other public officials or employees may be required to file financial disclosure statements if they hold positions that involve a "substantial and material exercise of administrative discretion in the formulation of public policy, expenditure of public funds, enforcement of laws and rules of the state . . . or the execution of other public trusts." (Emphasis added.) The Ethics Commission has held that members of State boards and commissions are required to file financial disclosure statements if the members exercise such substantial and material discretion.

As explained above, the Board performs discretionary, decision-making duties and has statutory and independent duties with regard to controlling the disposition of public funds. These duties involve a "substantial and material" exercise of administrative discretion in the formulation of public policy, the enforcement of laws and rules of the State, and the execution of a public trust. Therefore, Board member are required to file a financial disclosure statement with the Ohio Ethics Commission.

However, all Board members file a statement because of their position as members of the Public Employees Retirement Board, the General Assembly, or other public position. See R.C. 102.02. No person is required to file more than one statement for any one calendar year. R.C. 102.02 (A). Therefore, it is unnecessary for Board members to file an additional statement. However, the Ethics Commission has held that "[t]he financial disclosure requirement of R.C. 102.02 reminds public officials and employees of their responsibility to avoid conflicts of interest and assists the Ethics Commission in monitoring areas of potential conflicts of interest." Advisory Opinion No. 89-001. In order to help achieve these purposes it is necessary that a public official or employee filing a financial disclosure statement identify all of the public offices or positions he holds and all of the boards and commissions upon which he serves for which a financial disclosure statement is required. Therefore, when Board members file a financial disclosure statement because of their position as members of the Public Employees Retirement Board or other public office or employment, it is necessary that they also identify themselves as members of the Ohio Public Employees Deferred Compensation Board.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that a member of the Ohio Public Employees Deferred Compensation Board is subject to the restrictions of the Ohio Ethics Laws and related statutes.



Marguerite B. Lehner, Chair
Ohio Ethics Commission