



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

Advisory Opinion Number 93-005
April 2, 1993

Syllabus by the Commission:

- (1) A member of the Tax Credit Authority is subject to the provisions of the Ohio Ethics Law and related statutes, including the requirement to file a financial disclosure statement;
- (2) An individual who holds more than one public position or office for which a financial disclosure filing is required, is not required to file more than one statement for any one calendar year; however, all of the public positions and offices which the official holds, for which a financial disclosure statement is required, must be identified on the statement;
- (3) Although the financial disclosure statements of members of an uncompensated state board, commission, or authority are generally kept confidential, Division (B) of Section 102.02 of the Revised Code requires the Ethics Commission to notify a member of an uncompensated state board, commission, or authority if the Ethics Commission determines that the member's financial disclosure statement reveals a potential conflict of interest, and to make those portions that indicate a potential conflict of interest subject to public inspection. Such determination does not mean that the official has engaged in wrongdoing, but means that the interest represents the potential for a conflict for the official in the performance of his official duties, of which he should be aware in order to exercise care in observing the prohibitions imposed by the Ethics Law and related statutes;
- (4) The financial disclosure statement of a member of an uncompensated state board, commission, or authority, who also holds a public position or office for which he files a statement under Division (A) of Section 102.02 of the Revised Code, is not confidential and is subject to public inspection.

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The Ethics Commission has been asked whether members of the Tax Credit Authority (Authority) are subject to the provisions of the Ohio Ethics Laws and related statutes, including the requirement to file a financial disclosure statement. The Authority and its statutorily prescribed powers and duties must first be examined in order to address this question.

The Authority is a statutorily created entity within state government. See R.C. 122.17 (J). It is comprised of five members; the Director of Development, who serves as the Authority's Chairman, two members who are appointed by the Governor, one member who is appointed by

the President of the Senate, and one member who is appointed by the Speaker of the House of Representatives. Id. The members of the Authority receive no compensation; however, they are reimbursed for necessary expenses actually incurred in the conduct of their official business. Id.

The Authority is statutorily authorized to enter into agreements with taxpayers in order to foster job creation within the State. See R.C. 122.17 (B). Under such an agreement, the Authority makes a grant to a taxpayer in the form of a refundable tax credit against the State's corporate franchise tax and income tax. See R.C. 122.17 (B). In order to enter into an agreement, the Authority must determine that: (1) the taxpayer's proposed project will create new jobs within the State; (2) the taxpayer's proposed project is economically sound, will increase economic opportunities, and will strengthen the State's economy; and (3) the receipt of the tax credit is a major factor in the taxpayer's decision to go forward with the project. See R.C. 122.17 (C).

Also, the Authority is statutorily authorized to enter into an agreement with a county, municipality, or corporate entity that is an instrumentality of a county or municipality not subject the State's corporate franchise tax and income tax (Landlord), in order to attract federal jobs. See R.C. 122.18. Under the agreement, the Landlord rents real property or an interest in real property (Facility) to the United States or any department, agency, or instrumentality thereof (Tenant), and the Authority makes an annual payment to the Landlord from State moneys that were not raised by taxation; such moneys are credited by the Landlord to the rental due from the Tenant. See R.C. 122.18 (B). In order to enter into the agreement, the Authority must determine that: (1) the proposed project will create new jobs within the State; (2) the proposed project is economically sound, will increase economic opportunities, and will strengthen the State's economy; and (3) the receipt of the annual credit is a major factor in the decision of the Landlord and Tenant to go forward with the project. See R.C. 122.18 (C).

The Director of Development must verify the number of new employees which the taxpayer or Tenant has hired as a result of a project that is the subject of an agreement entered into by the Authority. See R.C. 122.17 (D)(6) and (7); 122.18 (D)(6) and (7). R.C. 122.17 (A)(2) defines the term "new employee" for purposes of the agreements entered into by the Authority as a full-time employee first employed in the project that is the subject of the agreement. However, the Authority may include as a "new employee," whenever it determines it is appropriate, an employee re-hired or called back from lay-off to work in a new facility or on a new product or service established or produced by the taxpayer after entering into the agreement with the Authority. See R.C. 122.17 (A)(2).

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 prohibitions against public officials and employees misusing their official positions, as well as Ohio's financial disclosure law.

The restrictions of R.C. Chapter 102. are generally applicable to any "public official or employee." 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 court, city, village, township, and the five state retirement systems, or any other governmental entity. (Emphasis added.)

R.C. 102.04 does not use the term "public official or employee," but Divisions (A) and (B) of R.C. 102.04 apply to any "person" who is "elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts." See Ohio Ethics Commission Advisory Opinion No. 74-004.

The restrictions of R.C. 2921.42 apply to any "public official." 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, whether in a temporary or permanent capacity, and including without limitation legislators, judges, and law enforcement officers. (Emphasis added.)

R.C. 2921.43 imposes prohibitions upon "public servants." See R.C. 2921.01 (A) and (B)(1). The term "public servant" includes a person who is a "public official"; therefore, anyone who is subject to the prohibitions of R.C. 2921.42 is also subject to the prohibitions of R.C. 2921.43. See Advisory Opinion No. 92-011. Additionally, the term "public servant" includes a candidate for public office, and "[a]ny person performing ad hoc a governmental function, including without limitation a juror, member of a temporary commission, master, arbitrator, advisor, or consultant." See Advisory Opinions No. 92-001 and 92-007.

The Tax Credit Authority is an authority statutorily established within state government. See R.C. 122.17 (J). Therefore, it is a "public agency" under the statutory definition provided by R.C. 102.01 (C), a board or instrumentality of the State for purposes of R.C. 102.04, and a state entity for purposes of R.C. Chapter 2921.

The issue becomes whether a member of the Authority is "appointed to an office" of a public agency or State board or instrumentality for purposes of Chapter 102., including R.C. 102.04, 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 Advisory Opinions No. 74-007, 85-005, 92-001, 92-007, and 92-011. The Ethics Commission has held that in order for an individual to be deemed to be "appointed to an office," it is essential that he exercise the "sovereign power" of government. See Advisory Opinions No. 75-004, 85-005, 92-001, 92-007, and 92-011. In Advisory Opinion No. 92-011, the Ethics Commission explained:

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 exercises "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.

See also Advisory Opinion No. 92-001 (members of a public agency which functions exclusively for advisory purposes are not deemed to exercise the sovereign power of government). The Commission has held that combinations of other factors may also be considered in determining whether an individual is deemed to hold an "office," such as 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 Opinion No. 92-011. See also Advisory Opinions No. 74-007, 75-004, 77-004, 85-005 and 92-001.

The issue becomes whether the Tax Credit Authority 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 does not merely perform clerical functions or provide non-binding advice.

As explained above, the Authority has the statutory authority to determine that a proposed project will foster job creation within the State and to award grants to taxpayers and payments to local public entities which will support the development of the project. Also, the Authority has the statutory authority to determine whether it is appropriate to include an employee re-hired or called back from lay-off to work in a new facility, or on a new product or service, established or produced by the taxpayer after entering into the agreement with the Authority, as a "new employee" for purposes of its report to the Director of Development. It is apparent that these functions are not merely clerical or advisory but involve the exercise of final decision-making authority. Also, by awarding grants to taxpayers in the form of a refundable tax credit and by making annual payments to local public entities from State moneys that were not raised by taxation, the Authority is empowered to incur a financial obligation on the part of the State. Furthermore, the members of the Authority are appointed to their position for a specific term, have a title, and are not subject to a contract of employment.

Therefore, the Tax Credit Authority exercises the "sovereign power" of government, and a member of the Authority is "appointed to an office" of a public agency or State board or instrumentality for purposes of R.C. Chapter 102., including R.C. 102.04, and is an "appointed officer . . . of the state" for purposes of R.C. 2921.42 and 2921.43. The members are thus subject to the restrictions of Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.

You have also asked whether members of the Authority are required to file a financial disclosure statement with the Ethics Commission.

R.C. 102.02 (A) requires individuals who are elected to state, county, and city office, candidates and appointees for these elective offices, the director and high ranking employees of state administrative departments, and state employees who are paid according to Schedule "C" of R.C. Section 124.15 to file annual financial disclosure statements with the Ohio Ethics Commission. The Director of Development, who as explained above, serves as the Authority's Chairman, is required by R.C. 102.02 (A) to file a financial disclosure statement due to his position as the director of an administrative department of the state. However, the members of the Authority who are appointed by the Governor, President of the Senate, and Speaker of the House do not fall within the group of officials required to file a financial disclosure statement under R.C. 102.02 (A).

R.C. 102.02 (B) 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 a financial disclosure filing is required from officials of state boards, commissions, and authorities, if the officials exercise such substantial and material discretion.

It is apparent that the members of the Authority exercise a substantial and material exercise of administrative discretion in the formulation of public policy, and the expenditure of public funds, since the Authority is authorized to enter into agreements with taxpayers to provide grants in the form of refundable tax credits, and with local public entities to provide an annual payment from State moneys, if it determines that the proposed projects will foster job creation within the State. Also, the Authority's ability to determine whether a project will foster job creation and that it is appropriate to include re-hired employees as "new employees" for purposes of reports made to the Director of Development is a "substantial and material exercise of administrative discretion in the formulation of public policy." Therefore, the members of the Authority are required to file an annual financial disclosure statement with the Ohio Ethics Commission.

The Director of Development is not required to file an additional financial disclosure statement because he serves on the Authority. See R.C. 102.02 (A) (no person is required to file more than one statement for any one calendar year). However, the Ethics Commission has held that since the 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, 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, commissions, and authorities upon which he serves for which a financial disclosure statement is required, in order to achieve these purposes. See Advisory Opinion No. 92-011. Therefore, the Director of Development must also identify himself as a member of the Tax Credit Authority on the financial disclosure statement which he files with the Ethics Commission.

You have also asked whether the financial disclosure statements filed by the members of the Authority are confidential.

R.C. 102.02 (B) requires that the Ethics Commission keep confidential the financial disclosure statements filed by members of boards, commissions, and authorities for which no compensation is received other than reasonable and necessary expenses. These filings are not retained in the public files of the Ohio Ethics Commission, as are the financial disclosure statements of compensated state board, commission, and authority members. However, R.C. 102.02 (B) also requires the Ethics Commission to review the statements filed by uncompensated board, commission, and authority members to determine whether any interest listed by an official poses a potential conflict of interest which might interfere with the official's public interests or duties that he is required to perform.

R.C. 102.02 (B) requires the Ethics Commission to notify the official if it determines that a potential conflict of interest exists and to make the portions of the official's financial disclosure statement that indicate a potential conflict of interest subject to public inspection in the same manner as is provided for other financial disclosure statements. The fact that the Ethics Commission finds an interest is a "potential conflict of interest," for purposes of the financial disclosure law, does not mean that the official has engaged in any actual conflict of interest or wrongdoing, but simply means that the particular interest represents the potential for a conflict for the official in the performance of his official duties, of which he should be aware in order to exercise care in observing the prohibitions imposed by R.C. Chapter 102. and R.C. 2921.42 and R.C. 2921.43. The portions of the official's financial disclosure statement which do not indicate a potential conflict of interest are returned to the official.

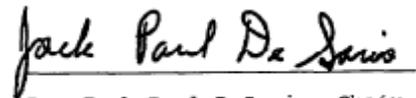
As stated above, the members of the Authority receive no compensation other than reimbursement for necessary expenses actually incurred in the conduct of their official business. R.C. 122.17 (J). Therefore, the financial disclosure statements filed by the members of the Authority, except the Director of Development, will be confidential, except for information which the Ethics Commission determines poses a potential conflict of interest which might interfere with the public interests or duties that the members of the Authority are required to perform. This information will be subject to public inspection. All information which the Ethics Commission deems not to pose a conflict of interest will be returned to the Authority member. The Director of Development's financial disclosure statement will not be kept confidential since the statement which he files under the requirement imposed by R.C. 102.02 (A) is subject to public inspection.

This advisory 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.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that:

- (1) A member of the Tax Credit Authority is subject to the provisions of the Ohio Ethics Law and related statutes, including the requirement to file a financial disclosure statement;
- (2) An individual who holds more than one public position or office for which a financial disclosure filing is required, is not required to file more than one statement for any one calendar year; however, all of the public positions and offices which the official holds, for which a financial disclosure statement is required, must be identified on the statement;
- (3) Although the financial disclosure statements of members of an uncompensated state board, commission, or authority are

generally kept confidential, Division (B) of Section 102.02 of the Revised Code requires the Ethics Commission to notify a member of an uncompensated state board, commission, or authority if the Ethics Commission determines that the member's financial disclosure statement reveals a potential conflict of interest, and to make those portions that indicate a potential conflict of interest subject to public inspection. Such determination does not mean that the official has engaged in wrongdoing, but means that the interest represents the potential for a conflict for the official in the performance of his official duties, of which he should be aware in order to exercise care in observing the prohibitions imposed by the Ethics Law and related statutes; and (4) The financial disclosure statement of a member of an uncompensated state board, commission, or authority, who also holds a public position or office for which he files a statement under Division (A) of Section 102.02 of the Revised Code, is not confidential and is subject to public inspection.

A handwritten signature in cursive script that reads "Jack Paul DeSario". The signature is written in black ink and is positioned above a horizontal line.

Dr. Jack Paul DeSario, Chair
Ohio Ethics Commission