



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 93-016
December 3, 1993

Syllabus by the Commission:

(1) Division (D) of Section 102.03 of the Revised Code does not prohibit a member of a county district board of health who has an ownership interest in a business which will be subject to a regulation imposed by his own board from participating in consideration of legislation which would regulate smoking in public places within the county;

(2) Division (D) of Section 102.03 of the Revised Code prohibits a member of a county district board of health who has an ownership interest in a business which will be subject to a regulation imposed by his own board from using the authority or influence of his office to secure a benefit or detriment for his business which is selective, differential, or in disproportion to the benefit or detriment realized by all other businesses within the county.

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You ask whether the Ohio Ethics Law and related statutes prohibit two members of a county district board of health from participating in consideration of legislation which would regulate smoking in public places within the county.

You state that five health districts in the county, including the county district board of health (board), are considering legislation which would regulate smoking in public places within the county. You state that one proposal would ban smoking in restaurants, possibly bars, and many other areas frequented by the public. You state that one board member is the general manager and owns an interest in a horse racetrack and entertainment facility where contractors operate restaurants, bars, and concession stands which sell cigarettes. You state that another board member owns and operates convenience stores in the county which sell cigarettes.

You state that some members of the public who advocate the regulation of smoking have raised the issue whether the Ohio Ethics Laws and related statutes prohibit these two board members from participating in the board's consideration of the proposed legislation to regulate smoking, contending that these businesses may lose revenue, or the owners may believe that the businesses could lose revenue, if the board imposes county-wide smoking regulations. This issue implicates the prohibition imposed by R.C. 102.03(D), which reads:

No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his duties.

A member of a county district board of health is a public official for purposes of R. C. 102.03 (D) . See R.C. 102.01(B) and (C); Ohio Ethics Commission Advisory Op. No. 86-007.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. See R.C. 102.03 (G). For example, the Ethics Commission has held that a decision by a board of health which affects the commercial or economic status of a person or his private business is a thing of value for purposes of R.C. 102.03(D). See Advisory Op. No. 86-007. See also Advisory Ops. No. 84-012, 84-013, 85-013, 85-014, 88-004, and 90-002.

The Ethics Commission has held that R.C. 102.03(D) prohibits a public official from participating in a matter before his own public agency which would result in either an economic benefit or detriment to a business in which he has a pecuniary or fiduciary interest, or to his private employer's business. See Advisory Ops. No. 86-007 and 89-008, respectively. See also Advisory Ops. No. 84-012, 84-013, 85-013, 85-014, and 90-002. It must be stressed, however, that in order for R.C. 102.03(D) to prohibit a public official from participating in a matter, the matter must result in a definite and direct pecuniary benefit or detriment and that pecuniary benefit or detriment must be of such a character as to manifest a substantial and improper influence upon him with respect to his duties. See Advisory Op. No. 90-004. Furthermore, the Ethics Commission has cautioned that each case must be examined on its own facts in order to determine whether a public official is prohibited from participating in a matter. See Advisory Op. No. 87-008.

The issue is whether the racetrack and convenience stores, and thus the two board members, due to their ownership interests in these businesses, would derive a definite and direct pecuniary benefit or suffer a definite and direct pecuniary detriment if the board were to enact legislation which would regulate smoking in public places.

As stated above, it has been contended that the businesses in which the board members have an ownership interest may lose revenue if the board imposes county-wide smoking regulations. It is apparent that the gist of such an assertion is the prediction that the smoking ban will induce persons who smoke tobacco to shun areas of public assembly such as the racetrack, and curtail their purchase of cigarettes within the county, thus diminishing the revenues realized by the racetrack and convenience stores.

However, as explained above, in order for R.C. 102-03(D) to prohibit the board members from participating in the proposed legislation, the board members must derive a definite and direct pecuniary benefit or suffer a definite and direct pecuniary detriment from the legislation. In Advisory Opinion No. 86-007, the Ethics Commission held that R.C. 102.03(D) prohibits a member of a district board of health from participating in a decision of the board which concerns the licensing or regulation of a business in which the board member has a pecuniary or fiduciary interest. However, in the instant situation, a decision of the board to regulate smoking will not definitely and directly result in the loss of revenue for the racetrack and convenience stores. Any

-diminution of revenue will depend upon the individual behavior of large numbers of persons who smoke tobacco. Therefore, it is merely speculative to assert that the businesses in which the board members have an ownership interest would suffer a pecuniary detriment if the board enacted smoking regulations, and nothing has been set forth which would otherwise suggest that the revenue of these businesses is definitely and directly dependent upon the board's enactment of this legislation.

The indefinite nature of the instant situation can be illustrated by a counter-assertion that many individuals who have a disdain for the use of tobacco may have avoided areas of public assembly in order to evade the presence of residual tobacco smoke and that a smoking ban in areas of public assembly may result in an upsurge of business for restaurants, bars, and other places of public assembly including the racetrack and entertainment complex in which the board member has an ownership interest. Also, while it is possible that a county-wide smoking ban in public areas may decrease the use of tobacco by individuals and thus impede sales, it is equally possible to speculate that a smoking ban may cause individuals to increase their use of tobacco in areas which are not affected by the ban and thus create no appreciable change in cigarette sales.

Furthermore, the Ethics Commission has recognized that, in many instances, general legislation enacted by a local governmental body will affect the public officials making the decision in the same manner as all of the citizens within the jurisdiction or a large portion of the citizens. See Advisory Op. No. 85-006. In such a situation, the Commission has held that since the general legislation affects the public officials in the same manner as their constituents, any benefit or detriment which the officials would derive would not be of such character as to manifest a substantial and improper influence on them with respect to their duties. See Advisory Ops. No. 85-006 and 88-004.

For example, in Advisory Opinion No. 88-004, the Commission held that R.C. 102.03(D) does not prohibit a city council member from participating in the enactment of a general zoning code for his city which would affect him as a property owner only in a general or indefinite manner and in a manner similar to other property owners, but would prohibit him from participating in a decision to approve a zoning change or variance which would definitely and directly affect property in which he has an interest. However, the Commission has held that even if the enactment of general legislation affects an entire political subdivision, or a large portion thereof, R.C. 102.03(D) prohibits a public official from using the authority or influence of his office in order to secure a benefit or detriment which is selective, differential, or in disproportion to the benefit or detriment realized by others in the political subdivision or the affected portion thereof. See Advisory Ops. No. 92-013 and 92-019.

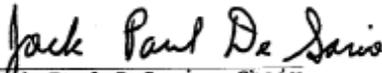
A county-wide smoking regulation, including a ban on smoking in restaurants, bars, and areas frequented by the public, is general legislation which, if enacted, will uniformly affect all vendors, restaurants, bars, and public places within the county. In the instant situation, nothing has been set forth which would suggest that the businesses in which the board members have an ownership interest would be affected in a manner that is not uniform with all similar businesses in the county. You have stated that two board members have voiced opinions about the scope of the proposed smoking regulation; however, there has been nothing set forth to suggest that the two board members, by voicing their opinions regarding the proposed legislation which would

regulate smoking in public places within the county, constitutes the use of their authority or influence to secure a benefit or detriment for the businesses in which they have an ownership interest which is selective, differential, or in disproportion to any benefit or detriment which may be realized by other businesses within the county.

Therefore, in the instant situation, the fact that two members of the county district board of health have an ownership interest in businesses which will be subject to a regulation imposed by their own board is insufficient to hold that R.C. 102.03(D) prohibits them from participating in consideration of general legislation which would impose a county-wide smoking regulation, including a ban on smoking in restaurants, bars, and areas frequented by the public, since such legislation will uniformly affect all vendors, restaurants, bars, and public places within the county. Accordingly, R.C. 102.03(D) does not prohibit the two board members from participating in consideration of legislation which would regulate smoking in public places within the county. However, R.C. 102.03(D) prohibits the two board members from using the authority or influence of their office to secure a benefit or detriment for the businesses in which they have an ownership interest which is selective, differential, or in disproportion to the benefit or detriment realized by all other businesses within the county.

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) Division (D) of Section 102.03 of the Revised Code does not prohibit a member of a county district board of health who has an ownership interest in a business which will be subject to a regulation imposed by his own board from participating in consideration of legislation which would regulate -smoking in public places within the county; and (2) Division (D) of Section 102.03 of the Revised Code prohibits a member of a county district board of health who has an ownership interest in a business which will be subject to a regulation imposed by his own board from using the authority or influence of his office to secure a benefit or detriment for his business which is selective, differential, or in disproportion to the benefit or detriment realized by all other businesses within the county.


Jack Paul DeSario, Chair
Ohio Ethics Commission