

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

September 10, 2003

Informal Opinion 2003-INF-0910-2

Robert R. Furnier
Furnier & Thomas, LLP

Dear Mr. Furnier:

In a letter that the Ethics Commission received on July 11, 2003, you ask whether the Ohio Ethics Commission and related statutes prohibit Todd Portune, a member of the Board of Commissioners (Board) of Hamilton County (County), from participating as a County Commissioner in the decision to appoint special counsel to evaluate the merits of the claims pending in a taxpayer's action that the Commissioner has brought against the Cincinnati Bengals, the NFL, and its other member teams. It appears, from your letter, that one outcome of the review will be the County assuming the Commissioner's role in the pending actions. Specifically, you ask:

If, after the Hamilton County Board of Commissioners as a body declines to pursue claims that solely benefit the county, one commissioner brings these claims on the county's behalf as a taxpayer action under Ohio Revised Code § 309.13. Does the commissioner have a conflict of interest that precludes him from deliberating or voting on any future motions relating to these claims?

Brief Answer

As explained below, the County Commissioner is prohibited from participating as a Board member in the decision to appoint special counsel to evaluate the merits of the claims pending in his taxpayer's action, and in any future motions related to the claims, because of the beneficial economic impact that will result for him if the Board decides to become a party to the litigation. The County Commissioner is also prohibited from soliciting any benefit related to the Board's decisions about the taxpayer's action and the claims within it.

Facts

You state that, at the end of last year, the Commissioner moved and sought passage of a resolution from the Board to pursue legal action against the Cincinnati Bengals, the NFL, and its other member teams to seek damages arising out of the County's involvement in the construction and lease of the Paul Brown Stadium (Stadium). The Commissioner was unsuccessful in his ability to persuade the other Commissioners to pursue this legal action and the measure was voted down.

You state that shortly after the Board declined to support his motion, the Commissioner asked the Office of the Hamilton County Prosecutor (Prosecutor) to bring the claims. The Commissioner took this action as a prerequisite to gain standing to pursue a taxpayer action under R.C. 309.13. You have stated that the Prosecutor declined to bring the claims and that, subsequently, the Commissioner filed a taxpayer action against the Cincinnati Bengals, the NFL, and its other member teams to seek damages arising out of the County's involvement in the construction and lease of the Stadium.

You state that in January, a new Board member replaced one of the Board members who had voted against the Commissioner's original motion. The new Board member requested that the Board consider whether it should appoint special counsel to evaluate the merits of the claims made by the Commissioner in his taxpayer suit.

The Board, however, will not take any action until a determination is made regarding the ability of the Commissioner to participate as a Board member in the decision to commit the County to pursue these claims in light of the fact that he has personally brought a taxpayer action to pursue the same claims against the same parties. You contend that, if the Commissioner is prohibited from deliberating or voting as a Board member on measures relating to this issue the Board member who voted against the issue last year will block County action by locking the Board in an unbreakable tie vote.

In addition to your request for an advisory opinion, the Ethics Commission received a letter on July 25, 2003 from Brian E. Hurley, First Assistant County Prosecutor, in which Mr. Hurley provided additional information.

Through its advisory opinion process, the Commission can provide prospective guidance to a public official or employee by objectively applying the Ethics Law and related statutes to the facts presented. The Ethics Commission does not sit as a fact-finding body when rendering advisory opinions. Ohio Ethics Commission Advisory Opinion No. 75-037. This advisory opinion is based on the information that you have presented to the Ethics Commission on behalf of the County Commissioner. The information that the Prosecutor's office provided was not required or used to answer the question you presented.

Taxpayer Lawsuits—R.C. 309.12 and 309.13

The taxpayer action was brought by the Commissioner under R.C. 309.13, which provides:

If the prosecuting attorney fails, upon the written request of a taxpayer of the county, to make the application or institute the civil action contemplated in section 309.12 of the Revised Code, the taxpayer may make such application or institute such civil action in the name of the state, or, in any case wherein the prosecuting attorney is authorized to make such application, such taxpayer may bring any suit or institute any such proceedings against any county officer or person who holds or has held a county office, for misconduct in office or neglect of his duty, to recover money illegally drawn or illegally withheld from the county treasury, and to recover damages resulting from the execution of such illegal contract.

If such prosecuting attorney fails upon the written request of a taxpayer of the county, to bring such suit or institute such proceedings, or if for any reason the prosecuting attorney cannot bring such action, or if he has received and unlawfully withheld moneys belonging to the county, or has received or drawn public moneys out of the county treasury which he is not lawfully entitled to demand and receive, a taxpayer, upon securing the costs, may bring such suit or institute such proceedings, in the name of the state. Such action shall be for the benefit of the county, as if brought by the prosecuting attorney.

If the court hearing such case is satisfied that such taxpayer is entitled to the relief prayed for in his petition, and judgment is ordered in his favor, he shall be allowed his costs, including a reasonable compensation to his attorney.

It is recognized that, in a taxpayer's lawsuit, a party in a private capacity seeks to enforce the right of the public by compelling the performance of a public duty, as distinguished from a purely private right of the taxpayer to the performance of a duty imposed upon a public servant. *State, ex rel. Nimon, v. Village of Springdale*, 6 Ohio St.2d 1 (1966) (construing R.C. 733.59, regarding taxpayer's suits in municipalities).

R.C. 309.13 provides that the taxpayer lawsuit shall be brought in the name of the state of Ohio for the benefit of the county. If the court hearing the taxpayer lawsuit is satisfied that the taxpayer is entitled to the relief prayed for in his petition, and judgment is ordered in his favor, he shall be allowed his costs, including a reasonable compensation to his attorney. Id.

Solicitation or Use of Authority to Secure Anything of Value—R.C. 102.03(D) and (E)

Divisions (D) and (E) of Section 102.03 of the Revised Code read as follows:

- (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.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office of any board, commission, or authority of a county. R.C. 102.01(B) and (C). A member of the board of county commissioners is a "public official or employee" as defined for purposes of R.C. 102.03. Adv. Op. No. 89-003.

R.C. 1.03 defines "anything of value" for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 102.01(G). A beneficial economic impact that results from a decision by a public agency is a thing of value for purposes of R.C. 102.03. Adv. Ops. No. 90-002 and 92-012.

R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his official position, formally or informally, to secure anything of value for himself, or parties with which he is closely connected by family, or business or economic relationships, by participating in any matter that would directly affect the personal, pecuniary interests of the official or employee, or the party with which he is connected. Adv. Op. No. 96-004. R.C. 102.03(E) prohibits a public official from merely soliciting anything of value that would directly affect his own personal pecuniary interests, or the interests of parties with whom he has close family, business, or economic relationships.

In the instant situation, by filing a taxpayer's lawsuit, the County Commissioner is acting in his private capacity to seek enforcement of the rights of all of the citizens of the County. However, under R.C. 309.13, a trial court has the discretion to allow the taxpayer that brings a taxpayer's lawsuit to recover his costs, including reasonable compensation for his attorney, only if the court is satisfied that such taxpayer is entitled to the relief prayed for in his petition, and judgment is ordered in his favor. If the suit is unsuccessful, then the taxpayer who has brought the suit cannot recover his costs or attorney's fees. See *City of Cincinnati ex rel. Riter v. Cincinnati Reds, L.L.C.* 2002-Ohio-7078 ("[I]f you do not win the game, you do not get the prize."). A taxpayer who brings a taxpayer's lawsuit under R.C. 309.13 incurs the risk that

he will fail and not recover either his costs or attorney's fees. A decision by a public agency that results in an economic benefit to an individual is a thing of value for purposes of R.C. 102.03(D) and (E).

If the County Commissioner continues to pursue the taxpayer's lawsuit, he would recover his costs, including reasonable attorney fees, only if the court determines that the County was entitled to the relief that he has sought in his taxpayer lawsuit. Further, if the County Commissioner continues to pursue the taxpayer's lawsuit, and ultimately loses the claim, he will not only be responsible for the costs and fees that have been incurred to date, but any additional fees or costs that are incurred. Every day that the County Commissioner's taxpayer lawsuit continues, the attorney fees and costs associated with the case increase.

You state that, if the Board assumes the County Commissioner's role in the pending lawsuit, the County Commissioner would lose his standing to pursue his taxpayer's lawsuit because "a taxpayer may pursue the action just when the county does not." If, as you assert, the County commissioner will be unable to continue to pursue the action because the Board votes to assume his role in the lawsuit, the County commissioner will receive a beneficial economic impact resulting from the decision of the Board in the form of the diminution or significant reduction of the fees and costs he would otherwise personally incur. This beneficial economic impact is within the definition of "anything of value" for purposes of R.C. 102.03(D) and (E).

If the County commissioner's taxpayer lawsuit were to end and the dispute become the subject of a legal action pursued by special counsel appointed by the Board, then the costs and attorney fees associated with the taxpayer lawsuit would stop accruing and the County commissioner will not have any increased liability. The avoidance of an increase in the County commissioner's personal liability is a beneficial economic impact that will result directly from a decision by the Board to appoint special counsel to pursue legal action against the same parties on the same claims.

Therefore, R.C. 102.03(D) prohibits the County commissioner from participating as a Board member in the decision to appoint special counsel to evaluate the merits of the claims pending in a taxpayer's action that the County commissioner has personally brought. It would also prohibit the County commissioner from voting, discussing, deliberating about, formally or informally lobbying, or taking any other official action, in his role as a County commissioner, with respect to any future motions on the claims.

R.C. 102.03(E) prohibits the County commissioner from soliciting, from the other County commissioners or County employees, any benefit to himself that could result from the Board's decision to appoint special counsel to evaluate the merits of the claims pending in a taxpayer's action the County commissioner has personally brought. This would include any advocacy, both formally and informally, to the other County commissioners, regarding the taxpayer's action and on any future motions on the claims underlying the action.

Conclusion

As explained above, the County Commissioner is prohibited from participating as a Board member in the decision to appoint special counsel to evaluate the merits of the claims pending in his taxpayer's action, and in any future motions related to the claims, because of the beneficial economic impact that will result for him if the Board decides to become a party to the litigation. The County Commissioner is also prohibited from soliciting any benefit related to the Board's decisions about the taxpayer's action and the claims within it.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 10, 2003. The Commission commends you and the County Commissioner for requesting guidance before taking any actions that could be prohibited by the Ethics 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 contact this Office again.

Sincerely,



John Rawski
Staff Attorney