



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 86-010
October 9, 1986

Syllabus by the Commission:

Division (A)(1) of Section 2921.42 of the Revised Code prohibits a city treasurer from authorizing or otherwise using the authority or influence of her office to secure approval of the employment of her sister as the city income tax director.

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You asked whether Division (A)(1) of Section 2921.42 of the Revised Code prohibits a city treasurer from appointing her sister as city income tax director.

You stated, by way of history, that you were elected to the position of city treasurer in 1985, and that your four-year term commenced on January 1, 1986. You stated further that the city treasurer is required by Section 181.08 of the City Codified Ordinances to appoint an income tax director who serves as the administrative head of the income tax division in the treasurer's office. You indicated that you are considering appointing your sister to this position, and asked whether such an appointment would be prohibited by the Ohio Ethics Law and related statutes.

Section 2921.42 of the Revised Code provides, in pertinent part:

(A) No public official shall knowingly do any of the following:

(1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

A city treasurer is a "public official" as defined in Division (A) of Section 2921.01 of the Revised Code, since she is an elected officer of a political subdivision of the state. A sister is a "family member" for purposes of the prohibition (See: Ohio Ethics Commission Advisory Opinion No. 80-001). The exercise of the power of appointment by a city treasurer involves "authorizing, or otherwise using the authority or influence of his office." Thus, the crucial issue is whether the relationship between the city income tax director and the city is a "public contract" for purposes of Section 2921.42 of the Revised Code.

Section 2921.42 of the Revised Code provides, in pertinent part:

(E) As used in this section, "public contract" means any of the following:

(1) the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state or any of its political subdivisions, or any agency or instrumentality of either.

In Ohio Ethics Commission Advisory Opinions No. 85-003 and 85-015, the Commission held that the relationship between a governmental entity and an employee is a "public contract" for purposes of Section 2921.42 of the Revised Code, since it is the purchase or acquisition of services by and for the use of the governmental entity. Thus, it must be established that the income tax director is an employee of the city, as opposed to an officer (See: Advisory Opinion No. 83-003).

In Advisory Opinion No. 74-007, the Commission applied certain tests to determine whether a person was an officer, including whether he: (1) was appointed; (2) has a title; (3) exercises functions of government concerning the public; and (4) is not subject to a contract of employment. Under the facts presented, it appears that a city income tax director meets these criteria. However, these factors, while relevant, are not determinative of the question. The crucial question is whether the city income tax director independently exercises "sovereign power." In State ex rel. Herbert v. Ferguson, 142 Ohio St. 496 (1944), the Ohio Supreme Court held that "a public office of a civil nature, as defined by Ohio cases, is a charge or trust conferred by public authority for a public purpose, with independent and continuing duties involving in their performance the exercise of sovereign power." Similarly, in State ex rel. Landis v. Butler, 95 Ohio St. 157 (1917), the Ohio Supreme Court stated:

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him. But it has been held by this court while an oath, bond, and compensation are usually elements in determining whether a position is public office, they are not always necessary The chief and most decisive characteristic of a public office is determined by the quality of the duties with which the employee is invested, and by the fact that such duties are conferred upon the appointee by law. If the official duties are described by statute, and their performance involves the exercise of continuing, independent, political, or governmental functions, then the position is a public office and not an employment. Id at 159.

The duties conferred upon the city income tax director are established by Section 181.08 of the City Codified Ordinances, which provide:

(A) The city treasurer shall demand and receive all taxes due to the city and shall make a written report to council each quarter of all monies collected during the preceding quarter.

(B) The income tax operation shall be a division of the city treasurer's department. The city treasurer shall appoint the income tax director and all other personnel of the income tax division.

(C) The tax shall be administered by the income tax director who shall be administrative head of the income tax division and shall further be administered by such officers, deputy

clerks, cashiers, investigators, collectors, and other employees as authorized by a personnel ordinance.

(D) The director shall maintain accurate records showing the amounts received from each taxpayer and the date of such receipt. He shall also be responsible for the re-examination and correction of the returns. The income tax director shall further fix the amount of tax due from a taxpayer who fails to file a return or who has filed a return which does not show the proper amount of tax due after he has established the same from an audit or examination of the taxpayer's income and shall send to the taxpayer by certified mail a written statement showing the amount of tax so fixed together with the interest and penalties thereon, if any.

The city treasurer has the power to demand and receive taxes. These duties involve the exercise of an independent, continuing political or governmental function, or "sovereign power." The city income tax director merely administers the tax and has no continuing, independent authority; these duties are administrative in nature, subject to the oversight and review of the city treasurer. Therefore, the duties of the city income tax director do not involve the exercise of sovereign power, and the position is that of an employee, and not an officer, of the city.

Finally, the case of State ex rel Gordon v. Barthelow, 150 Ohio State 499 (1948) held that "a public officer or public general employee holds his position neither by grant or by contract, nor has any such officer or employee a vested interest or private right in property in his office or employment." The Commission cited this holding in Advisory Opinions No. 83-008 and 85-015 for the proposition that officers do not serve as a matter of contract. However, the plain language of the statute requires that the employment relationship be classified as a "public contract" for purposes of Section 2921.42 of the Revised Code. Thus, the prohibition would apply.

The conclusions of this opinion are based on the facts presented and are limited to questions arising under Chapter 102., Section 2921.42, and Section 2921.43 of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that Division (A)(1) of Section 2921.42 of the Revised Code prohibits a city treasurer from authorizing or otherwise using the authority or influence of her office to secure approval of the employment of her sister as the income tax director.


Merom Brachman, Chairman
Ohio Ethics Commission