



## OHIO ETHICS COMMISSION

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Advisory Opinion

No. 75-021

August 19, 1975

Syllabus by the Ohio Ethics Commission:

- 1) The Miami Valley Regional Transit Authority is a "governmental entity" as the term is used in Section 102.04 (B) of the Revised Code.
- 2) Section 102.04 (B) of the Revised Code does not prohibit a trustee and vice-president of the Miami Valley Regional Transit Authority from receiving compensation from clients for personally rendering any service to them in any matter before any state agency.
- 3) Section 102.04 (B) of the Revised Code does not prohibit a trustee and vice-president of the Miami Valley Regional Transit Authority from receiving partnership distributive revenue resulting from the rendering of services to clients by his law firm partners and associates in any matter before any agency of the state.

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Your request for an advisory opinion asks whether a board member of a regional transit authority who is also an attorney would violate either Division (A) or (B) of Section 102.04 of the Revised Code if he personally, or his partners or associates, continue to represent their clients before state administrative agencies.

You also request an advisory opinion defining the word "personally" as used in Divisions (A) and (B) of the statute.

You state the attorney was appointed to the Board of Trustees of the Miami Valley Regional Transit Authority (hereinafter "Authority") on July 6, 1971, and reappointed to the Authority on February 22, 1972. He was elected vice-president of the Authority on January 8, 1974. The board member is a practicing attorney and has occasion to represent clients before state administrative agencies. His partners and associates also represent clients before state agencies.

Section 102.04 (A) and (B) of the Revised Code state:

"(A) No person 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, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him

personally in any case, proceeding, application or other matter which is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

(B) No person who is elected or appointed to an office of or employed by a county, township, municipal corporation, or any other governmental entity, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts of the entity of which he is an officer or employee."

A cursory reading of Section 102.04 of the Revised Code reveals that Division (A) is directed to the state level and Division (B) to the local level. Section 102.04 (A) of the Revised Code clearly uses the phrase "of the state" to describe the governmental level of the position held by the person elected or appointed. "[O]f the state" also describes the level at which the statute is aimed regarding the receiving of compensation for the rendering of services personally.

In contrast, Section 102.04 (B) of the Revised Code is clearly directed to governmental levels within the state. Any person who is elected or appointed to an office or employed by a ". . . county, township, municipal corporation, or any other governmental entity. . . ." is within the purview of Division (B). The prohibition against receiving compensation for services personally rendered is limited to any matter which is before any instrumentality of the entity of which the person is an officer or employee.

Thus, it is not necessary to rely solely on legislative intent when ascertaining the purview of either Division (A) or (B) of Section 102.04 of the Revised Code, for each states in clear language the governmental level to which it is directed.

The first issue is to determine which Division of Section 102.04 of the Revised Code controls with regard to the Authority. As noted in Ohio Ethics Commission Advisory Opinion No. 74-001:

" . . . Division (A) comprehends specifically a person elected or appointed to an office of or employed by the general assembly, any department, division, institution, instrumentality, board, commission, or bureau of the state . . . " (Emphasis in original)

Specifically, the question is whether the Authority is the General Assembly, any department, division, institution, instrumentality, board, commission, or bureau of the state.

Relying on the definitions of the General Assembly, department, division, institution, board, commission and bureau of the state as set forth in Ohio Ethics Commission Advisory Opinion No. 75-004, it is apparent that the Authority does not fall within any of these classifications. That Advisory Opinion also states that Ohio case law does not offer a definition of instrumentality, but 12 O. Jur. 2d, Corporations, Section 344 describes it as "a quality or state of being instrumental" and appears to be applicable to almost any agency or governmental unit. It is important to note that the state legislature did not create the Authority. Section 306.32 of the Revised Code provides for the creation of regional transit authorities by any county, municipal corporation, township, or combination thereof. It follows that since this enabling section of the statute gives counties, municipalities, and townships the option of creating or of not creating such regional transit authorities, the state legislature has delegated such power of creation, and thus the Authority is not an instrumentality of the state.

The question is since the Authority may be created by counties, municipal corporations, and townships, can it be classified, for purposes of Section 102.04 (B) of the Revised Code, as an entity similar to those which created it, and specifically, can the Authority be defined as "any other governmental entity." It is thus necessary to examine the characteristics of these entities.

Section 306.35 of the Revised Code sets forth the powers and duties of the regional transit authorities and although some of the powers, such as taxation, bond issuance, and eminent domain, are similar to those of counties, townships, and municipal corporations, the main factor which distinguishes a regional transit authority from any of the above is the purpose for which it was created. Section 306.31 of the Revised Code describes the purpose for creating a regional transit authority. This section provides a regional transit authority may be created for any of the following purposes, ". . . acquiring, constructing, operating, maintaining, . . . and extending transit facilities; . . ." These purposes are specific. All are directed to the narrow goal of improved means of transportation for a geographic area.

However, the purposes of creating a county, township, or municipal corporation are not so limited. 14 O. Jur. 2d, Counties, Section 4, states:

"A county is a subdivision of the state, organized for judicial and political purposes . . . [I]t is a mere political organization of certain territory within the state. . . ."

The functions and powers of a township are described at 52 O. Jur. 2d, Townships, Section 6. "The general function of the township is to serve as an agency or instrumentality of the state for purposes of political organization and local administration." 38 O. Jur. 2d, Municipal Corporations, Section 3 describes a municipal corporation as an instrumentality of the government and a body politic and corporate with certain legislative and discretionary powers.

From these definitions it is apparent that counties, townships, and municipal corporations are organized for general political and governmental purposes. In addition, the power of creating regional transit authorities is specifically delegated to the counties, townships, and municipal corporations. This, by itself, implies that a regional transit authority is something other than a county, township, or municipal corporation.

Since a regional transit authority cannot be classified as a county, township, or municipal corporation the question remains whether it is "any other governmental entity." Section 306.31 of the Revised Code states that: "[A] regional transit authority so created is a political subdivision of the state and a body corporate with all the powers of a corporation. . . ." "Political subdivision" is defined at Section 5713.081 of the Revised Code to mean ". . . townships, municipalities, counties, . . ." and at Section 3501.01 (P) of the Revised Code to mean ". . . county, township, city, village. . . ." Section 167.01 of the Revised Code provides that regional councils of government may be established by ". . . the governing bodies of any two or more counties, municipal corporations, townships . . . or other political subdivisions. . . ." When the wording of these statutes is compared with the phrase ". . . county, township, municipal corporation, or any other governmental entity. . . ." in Section 102.04 (B) of the Revised Code it seems apparent that the state legislature intended for political subdivisions to come under that section and that the phrase "any other governmental entity" should include political subdivisions other than counties, townships, or municipal corporations.

However, in this case a more precise analysis is necessary to determine whether regional transit authorities are within the purview of Section 102.04 (B) of the Revised Code. This can be done by applying the rule of ejusdem generis to the term "any other governmental entity." It is necessary to determine what entities are of the same kind, class, or nature as a county, township, or municipal corporation. A list of common characteristics possessed by these levels of government has been compiled. The possession of most or all of these characteristics would tend to make another entity of the same "kind, class, or nature" as those specified in Section 102.04 (B) of the Revised Code. The entity need not possess all the characteristics to be classified as being of the same kind. All that is required is that a number of characteristics out of the total are possessed so that the entity as a whole can be so classified as being similar.

The characteristics which will be considered as determinative of whether an entity is "any other governmental entity" for the purposes of Section 102.04 (B) of the Revised Code are:

1. was the entity established by statute,
2. to exercise a government function,
3. within a definite geographical area,
4. with the establishment of a governing board or body elected by the electors of the defined geographical area or appointed by elected officials of the geographical area,
5. with the power to initiate taxes or assess property,
6. issue bonds,
7. possess and transfer real property in its own name,
8. contract and,
9. sue or be sued in its own name.

To apply these tests it is necessary to examine the statutes creating and empowering regional transit authorities. Section 306.32 of the Revised Code provides for the creation of a regional transit authority by resolution of specified governmental subdivisions. Section 306.35 of the Revised Code provides the Authority with the powers to acquire, construct, improve, extend, repair, lease, operate, maintain and manage transit facilities along with other supplemental powers necessary to operate public transit facilities, which is a function of government. Section 306.31 of the Revised Code provides that a regional transit authority is " . . . comprised of the territory of one, or two or more counties, municipal corporations, townships, or any combination thereof . . . " Section 306.32 of the Revised Code draws specific attention to the territorial boundaries of regional transit authorities by providing that the counties, municipal corporations, and townships creating the authority must be specified in the resolution creating the authority. Also Section 306.32 of the Revised Code provides that:

"The territorial boundaries of a regional transit authority shall be coextensive with the territorial boundaries of the counties, municipal corporations, and townships included within the regional transit authority . . . "

Section 306.33 of the Revised Code provides that members of the board of trustees of regional transit authorities shall be appointed by the county commissioners of each county within the regional transit authority's territory. Section 306.35 (H) of the Revised Code gives the regional transit authority power to levy and collect taxes. Sections 306.35 (I) and 306.37 et. seq. of the Revised Code permit the issuing of bonds. Section 306.35 (J) of the Revised Code allows the regional transit authority to ". . . hold, encumber, control, acquire . . . lease . . . use, and sell real and personal property . . . " Section 306.35 (B) of the Revised Code provides for the making of contracts in the exercise of the powers conferred. Section 306.35 (A) of the Revised Code allows the regional transit authority to sue or be sued in its corporate name.

The regional transit authority meets all of the above prescribed tests and thus, being a governmental entity of the "same kind, class or nature" as those specified in Section 102.04 (B) of the Revised Code, may be classified as "any other governmental entity" as used in Section 102.04 (B) of the Revised Code.

"Personal services" was defined in Ohio Ethics Commission Advisory Opinion No. 74-009, at page 3. In that opinion the term was defined ". . . as something 'done in person or by one's self without use of another person or outside agency.'" That opinion interpreted the word "personally" as used in Section 102.04 (B) of the Revised Code. The opinion concluded, in part:

"Thus, the person in question, may receive, through partnership distribution, compensation for services not rendered by him personally but rather rendered by a partner personally, without violating the section, which prohibits the receipt of compensation for services personally rendered." (Emphasis in original)

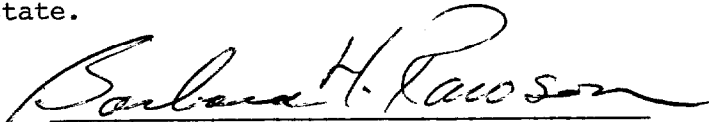
The above conclusion pertains to law firm associates as well, since there is no personal rendering of services by the Authority member in that instance.

Thus, the trustee and vice-president of the Authority may receive partnership distributive revenue for services rendered by law firm partners and associates in matters before state agencies.

The restriction of Section 102.04 (B) of the Revised Code applies to an official receiving compensation for services, personally rendered, from a source other than the agency with which he serves in a matter which is before an instrumentality of that same governmental entity.

In the facts you state that the board member is receiving compensation for services rendered personally in matters which are before state agencies. Since the trustee is a member of the board of the Authority, a local governmental entity, within the purview of Section 102.04 (B) of the Revised Code, there is no prohibition against rendering services personally for compensation at the state level while serving as trustee and vice-president of the Authority. Thus the trustee of the Authority may continue to receive compensation from his clients for services rendered to them before state agencies while he is trustee and vice-president of the Authority.

Therefore, it is the opinion of the Ohio Ethics Commission and you are so advised that the Miami Valley Regional Transit Authority is a "governmental entity" as the term is used in Section 102.04 (B) of the Revised Code; Section 102.04 (B) of the Revised Code does not prohibit a trustee and vice-president of the Miami Valley Regional Transit Authority from receiving compensation from clients for personally rendering any service to them in any matter before any state agency; and, that Section 102.04 (B) of the Revised Code does not prohibit a trustee and vice-president of the Miami Valley Regional Transit Authority from receiving partnership distributive revenue resulting from the rendering of services to clients by his law firm partners and associates in any matter before any agency of the state.

  
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(Mrs) Barbara H. Rawson, Chairman