



OHIO ETHICS COMMISSION

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COLUMBUS 43215

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Advisory Opinion

No. 76-004

January 29, 1976

Syllabus by the Ohio Ethics Commission:

A member of the Board of Tax Appeals of the State of Ohio is not prohibited by Section 102.04 (A) of the Revised Code from receiving compensation from other state agencies for services rendered or to be rendered by him.

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Your request for an advisory opinion asks whether a member of the Board of Tax Appeals of the State of Ohio, appointed pursuant to Section 5703.03 of the Revised Code, who is also engaged by the Ohio Building Authority as an attorney, violates Section 102.04 (A) of the Revised Code. You state that you have been employed as an attorney for the Ohio Building Authority, created pursuant to Sections 152.01 et seq of the Revised Code, and that you are an independent contractor in that capacity. You further state that you represent no private clients' interests before any board, department, commission, or agency of the state of Ohio.

The first issue is whether you as a member of the Board of Tax Appeals are a person who has been "appointed to an office of . . . any . . . board . . . of the state, . . ." and thus fall within the purview of Section 102.04 (A) of the Revised Code. The Board of Tax Appeals is created by Section 5703.01 of the Revised Code:

"There is hereby created the department of taxation which shall be composed of the tax commissioner and the board of tax appeals, and their employees, agents, and representatives. Such commissioner and board shall perform such functions, exercise such powers, and discharge such duties as are assigned to them respectively by law." (Emphasis added)

Section 5703.03 provides for the appointment of members of the Board of Tax Appeals:

"The board of tax appeals shall be composed of three members, not more than two of whom shall be affiliated with the same political party. The governor, with the advice and consent of the senate, shall appoint three members of the board of tax appeals.

Terms of office shall be for six years, commencing on the ninth day of February and ending on the eighth day of February, except that upon expiration of the term ending February 12, 1979, the new term which succeeds it shall commence on February 13, 1979, . . . "

The powers and duties of the Board of Tax Appeals are set forth in Section 5703.02 of the Revised Code:

"The board of tax appeals shall exercise the following powers and perform the following duties of the department of taxation:

(A) Exercise the authority provided by law relative to consenting to the exempting of property from taxation, and revising the list of exempted property in any county except as provided in sections 5709.20 to 5709.26, inclusive, of the Revised Code;

(B) Exercise the authority provided by law relative to determining the date as of which the taxable deposits and financial institutions shall be listed and assessed;

(C) Exercise the authority provided by the law relative to determining whether the real property, and the various classes thereof, in the counties, municipal corporations, and taxing districts have been assessed by uniform rule at the percent of the true value thereof in money established by the board of tax appeals as taxable value pursuant to section 5715.01 of the Revised Code, relative to correcting discriminatory valuations, and relative to increasing or decreasing the aggregate value of real property in the various classes thereof in the counties, municipal corporations, and taxing districts;

(D) Exercise the authority provided by law relative to the action of local taxing authorities in levying taxes, collecting and receiving payment of taxes, borrowing money, refunding indebtedness, appropriating money, or expending money;

(E) Exercise the authority provided by law to hear and determine all appeals including appeals from the actions of county budget commissions, decisions of county boards of revision, and actions of any assessing officer or other public officials, including appeals from any tax assessments, valuations, determinations, findings, computations, or orders made by the tax commissioner or any correction or redetermination made by him; and herein determine applications for review of rules of the department of taxation adopted and promulgated by the tax commissioner;

(F) Appoint a secretary of the board of tax appeals, who shall serve in the unclassified civil service at the pleasure of the board and such other employees as are necessary in the

exercise of the powers and the performance of the duties and functions which the board is by law authorized and required to exercise, and prescribe the duties of all such employees, and to fix their compensation as provided by law; . . .

(H) Adopt and promulgate in the manner provided in section 5703.14 of the Revised Code all rules of the department of taxation relating to the procedure of the board in administering the laws which it has the authority or duty to administer, . . .

(I) Exercise the authority provided by section 5715.39 of the Revised Code relative to remitting taxes and penalties against real property found to have been illegally assessed or to have been assessed in consequence of the negligence or error of an officer required to perform a duty relating to the assessment of such property for taxation, or the levy or collection of such taxes; . . . "

Section 5703.04 of the Revised Code sets forth additional powers, duties and immunities of the Board of Tax Appeals and the tax commissioner:

"The board of tax appeals and the tax commissioner shall have the following powers, duties, privileges, and immunities of the department of taxation:

(A) All powers whatsoever of an inquisitorial nature as provided by law, including, the right to inspect books, accounts, records, and memorandums, to examine persons under oath, to issue orders, or subpoenas for the production of books, accounts, papers, records, documents, and testimony, to take depositions, to apply to a court for attachment proceedings as for contempt, to approve vouchers for the fees of officers and witnesses, and to administer oaths; . . .

(B) Appoint agents and prescribe their powers and duties as provided by section 5703.17 of the Revised Code; . . . "

The Ohio Ethics Commission in Advisory Opinion No. 75-004, applied certain tests to determine if a member of a board is "appointed to an office." They were (1) was he appointed; (2) does he have a title; (3) does he exercise functions of government concerning the public; (4) is he not subject to a contract of employment; (5) does he exercise sovereign power. From the above cited statutes, it is evident that a member of the Board of Tax Appeals is (1) appointed, (2) does have a title of member of the Board of Tax Appeals, (3) does exercise functions of government concerning the public, and (4) is not subject to a contract of employment. Furthermore, it is apparent from a review of the powers, duties and immunities of the Board of Tax Appeals that the members exercise sovereign power. The duties and powers which they exercise can be described as "not merely clerical but involve

some discretionary, decision-making qualities" and, moreover, they are entrusted to the members of the Board of Tax Appeals by a statute and thus demonstrate an exercise of "sovereign power" as that term is described in Ohio Ethics Commission Advisory Opinion No. 75-004.

A member of the Board of Tax Appeals of the State of Ohio is a person who is "appointed to an office of . . . any . . . board . . . of the state" for purposes of Section 102.04 (A) of the Revised Code. Therefore, a member of the Board of Tax Appeals is prohibited from receiving or agreeing to receive compensation, other than from the agency with which he serves, for services 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.

The next issue, therefore, is whether a member of the Board of Tax Appeals can receive compensation as an attorney engaged under separate contract or as an employee of another state agency. As set out in Ohio Ethics Commission, Advisory Opinion No. 75-011, an independent contractor with a state agency is not within the purview of Section 102.04 (A) of the Revised Code since "employed by" as used in that section does not include independent contractors. Thus, if you are an independent contractor, you would not be included, by virtue of serving in that capacity, within the purview of Section 102.04 (A) of the Revised Code.

Ohio Ethics Commission Advisory Opinion No. 75-010 concluded that the phrase "other than from the agency with which he serves" does not prohibit a member of the Board of Building Standards, who is an architect, from receiving compensation from more than one state agency for services personally rendered. The rationale was that "agency" as used in that phrase may be read in the plural, as well as the singular. Therefore, compensation received from more than one state agency is not prohibited.

Thus, it is not a violation of Section 102.04 (A) of the Revised Code, for a member of the Board of Tax Appeals to receive compensation as an attorney engaged by another agency of the state as counsel, either as an independent contractor for that agency, or as an employee of the agency.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised that a member of the Board of Tax Appeals of the State of Ohio is not prohibited by Section 102.04 (A) of the Revised Code from receiving compensation from other state agencies for services rendered or to be rendered by him.

*Barbara H. Rawson*

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OHIO ETHICS COMMISSION  
(Mrs) Barbara H. Rawson