

OHIO ETHICS COMMISSION

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INFORMATION SHEET: OPINION NO. 2004-02 **COUNTY TREASURER SERVING WITH DEPOSITORY BANK**

What is the question addressed in the opinion?

Can a county treasurer serve on the board of trustees of a bank that is a depository of county funds?

What is the answer in the opinion?

No. The Ethics Law would prohibit a county treasurer, who is a member of the board of trustees of a bank, from authorizing investments of public funds to the bank. If the bank were a depository of the county, the treasurer would be unable to perform the statutorily mandated duties of his public office. Therefore, a county treasurer is effectively prohibited from serving on the board of trustees of a depository bank.

Because R.C. 102.03(D) has been amended and R.C. 102.03(E) was enacted after the Commission issued Advisory Opinion No. 85-007, the Commission expressly overrules its conclusions in Advisory Opinion No. 85-007. Because this Advisory Opinion overrules a previous advisory opinion, the Commission recommends that this opinion be applied prospectively and that the conclusions of this opinion would not apply to a treasurer under facts demonstrating the application of, and prior reliance upon, Advisory Opinion No. 85-007.

To whom does this opinion apply?

This opinion applies to county treasurers, and to any other person who serves as a "treasurer," for purposes of the Uniform Depository Act, of a public agency. Any person who serves as treasurer of a public agency is effectively prohibited from serving as an officer, director, trustee, or employee of a bank that is a depository of the agency's funds.

When will the conclusions of the opinion become effective?

The opinion will become effective upon acceptance by the Commission.

For More Information, Please Contact:

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IT IS NOT AN ETHICS COMMISSION ADVISORY OPINION.
ADVISORY OPINION NO. 2004-02 IS ATTACHED.**

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Advisory Opinion
Number 2004-02
July 1, 2004

Syllabus by the Commission:

- (1) This Advisory Opinion expressly overrules the holding of Advisory Opinion No. 85-007 that a county treasurer is not, *per se*, prohibited from serving on the board of directors of a bank that is a depository of county funds because exceptions to the Ethics Law set forth in Sections 135.11 and 135.38 of the Revised Code;
- (2) Because a county treasurer is prohibited from authorizing investments of public funds to a depository if he is a member of the board of trustees of that depository, a county treasurer who is a member of the board of trustees of a depository bank would be unable to perform the statutorily mandated duties of his office. Therefore, a county treasurer is effectively prohibited from serving on the board of trustees of a depository bank; and
- (3) The conclusions of this opinion apply to any public official or employee who serves as the “treasurer” of a public agency, for purposes of the Uniform Depository Act.

* * *

You have asked whether the Ohio Ethics Law and related statutes prohibit a county treasurer from serving on the board of trustees of a bank that is a depository of county funds.

Facts

By way of history, you have explained that you are the elected treasurer in the county. In that role, you are responsible for performing all of the duties that are statutorily mandated for that position. According to R.C. 135.31(F), the county treasurer is the “treasurer” for purposes of the Uniform Depository Act, and is required to perform the duties statutorily mandated for that office. The duties are set forth in R.C. 135.31 to 135.40 of the Revised Code.

For example, R.C. 135.33(A) requires that, every four years, the county treasurer shall make an estimate of the aggregate amount of public moneys that might be available for deposit as active moneys at any one time during the next four-year period to the board of county commissioners. The county treasurer shall make a recommendation to the county commissioners regarding the board's designation of one or more eligible institutions as public depositories for active moneys. R.C. 135.33(C). The treasurer is responsible for depositing money necessary to pay principal and interest on bonds and notes. R.C. 135.33(E). Any bank with whom the treasurer deposits money pursuant to R.C. 135.33(E) must deliver a monthly accounting of all activity in the account during the preceding month to the treasurer. Id.

The treasurer is required to serve on the county investment advisory committee. R.C. 135.341. The committee is required to meet once every three months, and is charged with establishing written county investment policies to ensure the best and safest return of funds available to the county. R.C. 135.40 permits the county treasurer to keep cash reserves, in the vaults of his office, to transact the business of his office. However, the treasurer is required to deposit all remaining money in his possession in public depositories. R.C. 135.40.

Brief Answer

As explained more fully below, if you were to serve on the board of trustees of a bank that is a depository of county funds, R.C. 102.03(D) and (E), and R.C. 2921.42(A)(1), would prohibit you from performing the statutorily mandated duties of your public office. Therefore, the Ethics Law effectively prohibits you from holding a position on the board of trustees of a depository of public funds while you are the county treasurer.

Advisory Opinion No. 85-007

In your request, you note Advisory Opinion No. 85-007. The syllabus paragraphs of that opinion summarize the Commission's conclusions:

- (1) A county treasurer is not, per se, prohibited from serving on the board of directors of a bank that is a depository of county funds, because Sections 135.11 and 135.38 of the Revised Code, part of the Uniform Depository Act, provide an exemption from the prohibition of Division (A)(4) of Section 2921.42 of the Revised Code.
- (2) Division (D) of Section 102.03 of the Revised Code prohibits a county treasurer from participating in a decision or authorizing a transaction involving the bank if he has a personal, financial stake in the decision or transaction.

Based on the Ethics Law in effect in 1985, and the exceptions in the Uniform Depository Act, the Commission concluded that a county treasurer was not prohibited from serving on the board of directors of a depository bank.

At the time that Advisory Opinion No. 85-007 was rendered, R.C. 102.03(D) prohibited a public official or employee from using his official position to secure anything of value for himself if the thing of value were of such character as to manifest a substantial and improper influence upon him with respect to his duties. Thus, Advisory Opinion No. 85-007 held that a county treasurer who also served as a bank director was prohibited from participating in a particular decision or transaction concerning the bank if he had “a personal, financial stake” in the outcome of the decision or transaction.

Amendments to R.C. 102.03(D) and Enactment of R.C. 102.03(E)

However, since the issuance of Advisory Opinion No. 85-007, the prohibitions of R.C. 102.03 have been amended by the enactment of Am. Sub. H.B. 300, 116th Gen. A. (1986). The bill resulted in the current version of R.C. 102.03(D), and the enactment of R.C. 102.03(E), which provide:

- (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.

The amendment deleted the requirement, in the preceding version of R.C. 102.03(D), that the thing of value secured by the public official or employee is for the official or employee himself, thereby broadening the prohibition. See Ohio Ethics Commission Advisory Opinion No. 88-004. Therefore, a public official or employee is prohibited from securing anything of value for himself, or for another person or entity, if the thing of value is of such a character as to manifest a substantial and improper influence upon the official. Id.

Am. Sub. H.B. 300 also enacted R.C. 102.03(E), which prohibits a public official from soliciting or accepting anything of value if the thing of value is of such a character as to substantially and improperly influence the public official’s or employee’s decision-making. While Division (D) prohibits a public official from using his authority or influence to secure anything of value that is of a substantial and improper character, Division (E) prohibits an

official from merely accepting anything of value that is of an improper and substantial character. See Adv. Ops. No. 89-016 and 90-007.

The current version of R.C. 102.03(D) prohibits a public official from using the authority or influence of his office to secure anything of value for himself, or for another person or entity if the relationship between the official and that person or entity could have an improper influence on the official by impairing his objectivity and independence of judgment with regard to matters that affect the other person or entity. See Adv. Ops. No. 88-004, 89-005, and 91-004. For example, because of the fiduciary relationship between a board member and the entity on whose board he serves, R.C. 102.03(D) prohibits a public official from participating in deliberations, voting, or otherwise using his position with regard to the interests of an organization if he is a board member of the organization. See Adv. Op. No. 89-005.

As a member of the board of trustees of a bank, you would have a fiduciary relationship with the bank. See generally R.C. 1105.03 (each director of a bank must take an oath to diligently and honestly perform his duties), and R.C. 1105.11 (providing for the personal and individual liability of bank directors for any knowing violations of the banking law). Therefore, R.C. 102.03(D) would prohibit you from voting, recommending, discussing, deliberating, formally or informally lobbying, or otherwise using the authority or influence of your public office in any way with regard to the interests of the bank of which you would be a director. R.C. 102.03(E) would prohibit you from soliciting things of value, including county deposits, for a bank with which you have a fiduciary responsibility.

If you were to serve on the board of trustees of a bank that is a depository of county funds, R.C. 102.03(D) and (E) would prohibit you from performing the statutorily mandated duties of your public office regarding that bank. Therefore, the Ethics Law effectively prohibits you from holding a position on the board of trustees of a depository of public funds while you are the county treasurer.

Authorizing a Public Contract—R.C. 2921.42(A)(1)

You should also be aware of the provisions of R.C. 2921.42(A)(1), which the Commission did not discuss in Advisory Opinion No. 85-007. That section provides that no public official shall knowingly:

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 county treasurer is a “public official” and the deposit of public money is a “public contract” for purposes of R.C. 2921.42(A). See R.C. 2921.01(A) and 2921.42(G)(1). See also Adv. Ops. No. 85-007 and 92-008.

In Advisory Opinion No. 92-008, the Ethics Commission concluded that a bank is the “business associate” of its board members. Therefore, the Commission concluded that a public official who serves on the board of trustees of a bank that is a depository for the funds of the public agency is prohibited from participating in any way, formally or informally, to authorize or secure authorization of public funds with the depository.

As noted above, a county treasurer has statutorily mandated duties regarding investments of county funds. If you were to serve as a director of a depository bank, you would be prohibited from performing the statutorily mandated duties of your public office regarding that bank. Therefore, R.C. 2921.42(A)(1) also effectively prohibits you from holding a position on the board of trustees of a depository of public funds while you are the county treasurer.

Application of Opinion

You are a county treasurer, and this opinion applies the law to you in that position. However, the conclusions in this opinion would also apply to any other public official or employee who serves as the “treasurer” of a public agency, for purposes of the Uniform Depository Act and, in that role, is statutorily mandated to perform certain duties related to the deposits of the public agency. Any individual who serves as treasurer of a public agency is effectively prohibited from serving as an officer, director, trustee, or employee of a bank that is a depository of the public agency’s funds. See also Adv. Op. No. 92-008 (A township clerk, who is required to serve as treasurer for the township for purposes of the Uniform Depository Act, is prohibited from holding employment with a bank that is a depository of township funds.).

However, a treasurer of a public agency may not prohibited from holding stock in a depository bank as long as: (1) the treasurer’s stock ownership represents a nominal ownership interest in the bank; and (2) the depository offers the public agency the highest rate of return as determined in an open and fair competitive process. See Adv. Op. No. 93-001. If a treasurer of a public agency wishes to own stock in a depository bank, or a bank in which he owns stock wishes to compete for deposits of the public agency, he should contact the Commission for specific guidance.

Finally, this Advisory Opinion overrules Advisory Opinion No. 85-007 because R.C. 102.03(D) was amended, and R.C. 102.03(E) was enacted, after the Commission issued Advisory Opinion No. 85-007. As a result, the Commission recommends that this opinion be applied prospectively and that the conclusions of this opinion not apply to a treasurer under facts demonstrating the application of, and prior reliance upon, Advisory Opinion No. 85-007.

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 opinion of the Ohio Ethics Commission, and you are so advised, that: (1) This Advisory Opinion expressly overrules the holding of Advisory Opinion No. 85-007 that a county treasurer is not, per se, prohibited from serving on the board of directors of a bank that is a depository of county funds because exceptions to the Ethics Law set forth in Sections 135.11 and 135.38 of the Revised Code; (2) Because a county treasurer is prohibited from authorizing investments of public funds to a depository if he is a member of the board of trustees of that depository, a county treasurer who is a member of the board of trustees of a depository bank would be unable to perform the statutorily mandated duties of his office. Therefore, a county treasurer is effectively prohibited from serving on the board of trustees of a depository bank; and (3) The conclusions of this opinion apply to any public official or employee who serves as the “treasurer” of a public agency, for purposes of the Uniform Depository Act.

Merom Brachman

Merom Brachman, Chair
Ohio Ethics Commission