



OHIO ETHICS COMMISSION

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COLUMBUS 43215
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Advisory Opinion No. 75-002

January 28, 1975

Syllabus by the Ohio Ethics Commission:

It is not a violation of Section 102.04 of the Revised Code per se for a person to serve as a member of the Board of Building Appeals of the Department of Industrial Relations of the State of Ohio and as City Engineer for a city.

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Your request for an advisory opinion asks whether an engineer, who is a member of the state Board of Building Appeals, would violate the ethics law while serving on that Board, if he simultaneously serves as a part-time consultant to a city.

By way of history, you state that you are a member of the Ohio Board of Building Appeals and City Engineer for a city. You state further that as city engineer you serve as a part-time consultant to the city council and approve all development plans for conformance with city engineering regulations for streets and storm drainage. You further relate that you do not review plans of buildings or houses and, in fact, the city which you serve as engineer has another engineer who serves as the Building Official and Plan Reviewer.

The question you have directed to the Ohio Ethics Commission falls within the purview of Division (A) of Section 102.04 of the Revised Code, since you have been "appointed to an office of . . . a board . . . of the state."

Section 3781.19 of the Revised Code establishes the Board of Building Appeals:

"There is hereby established in the department of industrial relations a board of building appeals consisting of three members who shall be appointed by the governor with the advice and consent of the Senate. Terms of office shall be for four years, commencing on the fourteenth day of October and ending on the thirteenth day of October. Each member shall hold office from the date of his appointment until the end of the term for which he was appointed. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall hold office for the remainder of such term. Any member shall continue in office subsequent to the expiration date of his term until his successor takes office, or until a period of sixty days has elapsed, whichever occurs first. one member shall be an attorney-at-law, admitted to the bar of this state and of the remaining members, one shall be a registered architect and one shall be a professional engineer, each of whom shall be duly licensed to practice their respective professions in this state. No member of the board of building standards shall be a member of the board of building appeals. Each member shall be paid an amount

fixed pursuant to Section 143.09 of the Revised Code per diem. The department of industrial relations shall provide and assign to the board such employees as are required by the board to perform its functions. The board may adopt its own rules of procedure not inconsistent with Section 3781.06 through 3781.18 and 3791.04 of the Revised Code, and may change them in its discretion. A full and complete record of all proceedings of the board shall be kept and be open to public inspection.

"In the enforcement by any department of the state or any political subdivision of Chapters 3781. and 3791., and sections 4101.083 [4101.08.3], 4101.084 [4101.08.4], 4104.02, 4104.06, 4105.011, [4105.01.1], and 4105.11 of the Revised Code and any rule or regulation made thereunder, such department is the agency referred to in sections 119.07, 119.08, and 119.10 of the Revised Code. The board of building appeals is the agency within the meaning of sections 119.09 to 119.13 of the Revised Code, which shall conduct the adjudication hearing referred to in such sections and required by section 3781.031 [3781.03.1] of the Revised Code.

"In addition to the provisions of Chapter 119. of the Revised Code, the board of building appeals, as the agency conducting the adjudication hearing, may reverse or modify the order of the enforcing agency if it finds that the order is contrary to, or to a fair interpretation or application of, Chapters 3781., 3791., and 4104., and sections 4101.083 [4101.08.3], and 4101.084 [4101.08.4], 4105.011 [4105.01.1], and 4105.11 of the Revised Code and any rule or regulation made thereunder, or that a variance from the provisions of such laws or any rule or regulation made thereunder, in the specific case, will not be contrary to the public interest where a literal enforcement of such provisions will result in unnecessary hardship."

The question is whether you as a "member" of a statutorily created state board fall within the purview of Division (A) of Section 102.02 of the Revised Code. Reference is made to the Ohio Ethics Commission Advisory Opinion No. 74-007 which discusses the issue of whether "members" of a board are officers within the meaning of Section 102.04 of the Revised Code.

That opinion sets forth various tests which have arisen from Supreme Court decisions. "Where an individual has been appointed or elected in a manner described by law, or has a title given him by law, or exercises functions of government concerning public, assigned to him," he holds office. State v. Brennan, 49 Ohio St. 33, (1892). "The term must be defined, affixed and certain and not arising out of a mere contract of employment." Muskingum County Democratic Committee v. Burrier, 31 Ohio Ops. 570 (1945.) Therefore, some of the tests as to whether or not a "member" is an "officer," are (1) was he appointed, (2) does he have a title, (3) does he exercise functions of government concerning the public, and (4) is he subject to a contract of employment.

It should be emphasized that the Ohio Ethics Commission considers these among some of the tests that are applied to determine whether members of organizational units of a governmental entity are officers of that entity. No one indicium is determinant all the time. Generally, there exists a combination of these factors. Sometimes the inclusion of others not listed, is the basis for the determination that one "holds an office." From Section 3781.19 above,

it becomes evident that you serve by appointment, you have a title as the member of the Board of Building Appeals, that you exercise functions of government concerning the public, that you are not serving by virtue of a contract and that your term is defined, affixed and certain. It is the determination of the Ohio Ethics Commission, therefore, that you are an officer of the state of Ohio.

Thus, as one who holds an office of the state of Ohio, you are prohibited by Division (A) of Section 102.04 of the Revised Code from receiving or agreeing to receive compensation, directly or indirectly, other than from the agency with which you serve, for services rendered by you personally in a 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 position you hold with the city as the city engineer falls within the purview of Division (B) of Section 102.04 of the Revised Code:

"No person who is elected or appointed to an office of or employed by a . . . municipal corporation . . ."

You do not state in your request whether you were elected, appointed or employed by the city, however, the Ohio Ethics Commission assumes that you fall within one of those categories. Thus, as city engineer for a city, you are prohibited by Division (B) of Section 102.04 of the Revised Code from receiving or agreeing to receive compensation, directly or indirectly, other than from the agency of the municipal corporation with which you serve for services personally rendered by you in any case, proceeding, application or other matter which is before any agency of that municipal corporation.

Reference is made to Ohio Ethics Commission Advisory Opinion No. 74-001, wherein Section 102.04 of the Revised Code is analyzed:

"Section 102.04 of the Revised Code is thus divided into three divisions. 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, excluding the courts. That person may not receive or agree to receive directly or indirectly compensation, other than from the agency with which he serves, for any service which he personally renders or will render in any case, proceeding, application, or other matter which is before any agency of the state.

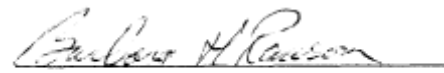
"Section 102.04 (B) of the Revised Code prohibits any person who is elected or appointed to an office of or employed by a county, township, municipal corporation, or any other governmental entity, excluding the courts, from receiving or agreeing to receive compensation, other than from the agency with which he serves, for services rendered or to be rendered by him personally in any case, proceeding, application or other matter which is before an instrumentality, excluding the courts of the governmental entity of which he is an officer or employee.

"Division (C) of Section 102.04 of the Revised Code excludes from the general prohibitions of (A) and (B) the performance of ministerial functions."

The intent of the legislature, as described in the above cited material, was to prohibit activity within the entity with which one serves. Since your positions as member of the Ohio Board of Building Appeals and as a city engineer are with different entities, Section 102.04 of the Revised Code, per se, does not prohibit you from simultaneously holding those positions.

The Ohio Attorney General offers opinions on the comparability of various offices. Nothing contained herein should serve to grant an imprimatur to the holding of two positions when an opinion of the Attorney General has been issued to the contrary or with respect to laws other than Chapter 102 of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that it is not a violation of Section 102.04 of the Revised Code, per se, for a person to serve as a member of the Board of Building Appeals of the Department of Industrial Relations of the State of Ohio and as City Engineer for a city.



THE OHIO ETHICS COMMISSION
by (Mrs.) Barbara H. Rawson, Chairman

