



OHIO ETHICS COMMISSION

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Advisory Opinion

No. 74-007

October 22, 1974

Syllabus by the Ohio Ethics Commission:

- (1) Members of county boards of election are state officers and Section 102.04 of the Revised Code does not prohibit a member of a county board of elections from receiving or agreeing to receive, directly or indirectly, compensation for services rendered or to be rendered by him personally in any case, proceeding, application or other matter which is before any agency of any governmental entity other than the State of Ohio.
- (2) It is not a violation of Section 102.04 of the Revised Code for a member of a county board of elections to be compensated as an employee of an office or agency of county government, provided that in such position he does not receive or agree to receive directly or indirectly, compensation for services rendered or to be rendered by him personally in any case, proceeding, application or other matter which is before any agency of the state, excluding the courts.

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Your request for an advisory opinion asked whether Section 102.04 of the Revised Code prohibits a member of a county board of elections from receiving compensation for services personally rendered by him in any case, proceeding, application or other matter which is before any agency, board, bureau or commission of any governmental entity, other than the board member's own county government. You ask further, if it is a violation of Section 102.04 (B) of the Revised Code, for a member of a county board of elections to be compensated as an employee of another office or agency of the same county government.

In order to address the question properly, a preliminary question must be asked as to whether or not "members" of county boards of elections are covered by the prohibitions placed on certain officials and employees by Section 102.04 of the Revised Code. That section, in its Divisions (A) and (B), places prohibitions upon persons "elected or appointed to an office of or employed by." (Emphasis added.) The question becomes whether or not "members" are comprehended within that language.

The Ohio Revised Code does not define the term "office." A general definition gleaned from various cases is that one who holds an office is an "individual who takes an oath of office and becomes responsible to the public for his own official acts and those of his subordinates." Theobald v. State, 10. O.C.C. (n.s.) 175 (1907).

Other tests arise from Ohio Supreme Court decisions. "Where an individual has been appointed or elected in a manner prescribed by law, or has a title given him by law and exercises functions of government concerning public, assigned to him" he holds a public 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 Executive 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, (4) is he not subject to a contract of employment. It should be emphasized that the Ohio Ethics Commission considers these among some of the tests that may be applied to determine whether members of various entities of government are officers of that entity. No one indicium is determinant all of the time. Generally, there exists a combination of these factors. Sometimes the inclusion of others not listed is the basis for determination of holding an "office."

It is the determination of the Ohio Ethics Commission that since members of the county boards of elections are; appointed by virtue of Section 3501.05 of the Revised Code, they exercise functions of government concerning the public, that they do not have a contract of employment, and they do have the title of member of the board of elections of a county, they are, therefore, appointed to an "office" for purposes of Section 102.04 of the Revised Code.

The next question which arises is, under which Division, (A) or (B), of Section 102.04 of the Revised Code, do members as officers of county boards of elections fall? Division (A) of Section 102.04 of the Revised Code is directed to persons elected or appointed to state offices or employed by state agencies.

"No person elected or appointed to an office
of . . . the state . . ."

Division (B) of Section 102.04 of the Revised Code on the other hand is directed to persons elected or appointed to, or employed by, other governmental entities;

"No person who is elected or appointed to an
office of or employed by a county, township,
municipal corporation, or any other govern-
mental entity . . ."

Even though members of county boards of elections may appear to be county officers by virtue of their title and the geographical extent of their authority (they operate only within their county), a review of statutory and

case law draws one to the conclusion that they are in fact state officers and therefore would fall within the prohibitions set forth in Division (A) of Section 102.04 of the Revised Code.

Section 3501.05 of the Revised Code indicates that the Secretary of State appoints members of county boards of elections and advises them as to their duties.

"The Secretary of State shall:

- (A) Appoint all members of boards of elections;
- (B) Advise members of such boards as to the proper methods of conducting elections;
- (C) Prepare rules, regulations, and instructions for the conduct of elections; . . .
- (I) Certify to the several boards the forms of ballots and names of candidates for state offices, and the form and wording of the state referendum questions and issues, as they shall appear on the ballot; . . .
- (K) Require such reports from the several boards as are provided by law, or as he deems necessary;
- (L) Compel the observance by election officers in the several counties of the requirements of the election laws; . . ."

The theory that members of boards of elections as state officers are actually representatives of the Secretary of State on local levels is supported by Section 3501.06 of the Revised Code wherein it states:

"There shall be in each county of the state a board of elections consisting of four qualified electors of the county, who shall be appointed by the Secretary of State, as his representatives, to serve for the term of four years." (Emphasis added.)

In Section 3501.11 of the Revised Code, the Secretary of State is given the "tie-breaking" authority on the county level:

"In all cases of a tie vote or a disagreement of a board, if no decision can be arrived at, the clerk shall submit the matter in controversy to the secretary of state, who shall summarily decide the question and his decision shall be final."

The Secretary of State also has the right, by virtue of Section 3501.16 of the Revised Code, to remove a member of the board of elections:

"The Secretary of State may summarily remove any member of a board of elections, or the clerk, deputy clerk, or any other employee of the board, for neglect of duty, malfeasance, misfeasance, or nonfeasance in office, or any willful violation of Title XXXV [35] of the Revised Code, or for any other good and sufficient cause."

Thus, the Secretary of State has not only the power to appoint, but also the power to remove members and employees of county boards of elections.

A ruling of the Secretary of State issued in January, 1930 indicates that the members of county boards of elections are considered state officers under the provision of the act establishing Section 3501.06 of the Revised Code.

Several reported cases support the theory that members of boards of elections are state officers. In State v. Houck, 11 O.C.C. (n.s.) 414 (1908), it was held that members of county boards of elections are officers of the state; the duties imposed upon them are not to be performed in lieu of some other officer. In State ex rel Devitt v. Kennedy, 133 Ohio St. 619 (1938), it was determined that under provisions of the General Code similar to Chapter 3501 of the Revised Code, members of the board of elections are representatives of the Secretary of State. In the case of State ex rel The Columbus Blank Book Manufacturing Company v. Ayers, Auditor, 142 Ohio St. 216 (1943), it was determined that "members of the boards of elections act under the direct control and are answerable only to the Secretary of State in his capacity as chief election officer of the state. They perform no county functions and are not county officers." (Emphasis added.)

The fact that the members of county boards of elections are compensated through the county auditors' offices, as provided in Section 3501.12 of the Revised Code, is not sufficient basis to outweigh all of the statutory and case language which indicates that members of county boards of elections are state officers.

The duties of county boards of elections, which are fulfilled by them without the interference of the Secretary of State, seem not to create the autonomy needed to make them county rather than state officers. For example, Section 3501.10 of the Revised Code authorizes the boards to rent suitable offices:

"The board of elections shall, as an expense of the board, provide suitable rooms for its offices and records and the necessary and proper furniture and supplies for such rooms."

This responsibility is subject to the scrutiny by the county commissioner as stated later in Section 3501.10 of the Revised Code:

" . . . county commissioners by a majority vote within sixty days after the board of county commissioners has been notified in writing of the execution of the lease (may) void the actions of the boards of elections."

Furthermore, the expenses of the board are paid by the county, as set out in Section 3501.17 of the Revised Code, "The expenses of the board of elections shall be paid from the county treasury, in pursuance of appropriations by the board of county commissioners, in the same manner as other county expenses are paid."

These factors, however, payment of salaries and expenses, and the review authority of county commissioners of office rental, do not establish, in light of the weight of the authority to the contrary, that county boards of elections are county rather than state offices.

As state officers, members of county boards of elections fall within the prohibitions placed upon them by Section 102.04 (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."

Therefore, members of county boards of elections are prohibited from receiving or agreeing to receive, directly or indirectly, compensation, other than from the agency with which they serve, for any service rendered or to be rendered by them personally in any case, proceeding, application or other matter which is before any agency of the state.

The issue of whether a member of a county board of elections, as a state officer, is prohibited from being compensated as an employee of an office or agency of the county government is answered by the Ohio Ethics Commission in

Advisory Opinion No. 74-001. That opinion states, among other things, that what is intended to be prohibited in Section 102.04 of the Revised Code is the receipt of, or agreement to receive, compensation for services rendered or to be rendered personally in any case, proceeding, application, or other matter which is before any agency of the same governmental entity of which a person is an officer or by which he is employed.

Since a member of a county board of elections is a state officer, he is, therefore, prohibited from receiving or agreeing 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 another agency, excluding the courts, of the state. As a state officer, there is no similar prohibition which applies to him at the county level. That is, county officers and persons employed by the county, not state officers, are prohibited from receiving or agreeing to receive, directly or indirectly, compensation, other than from the agency with which they serve, for any service rendered or to be rendered by them personally in any case, proceeding, application or other matter which is before another agency of the county.

It is the opinion of the Ohio Ethics Commission, and you are so advised, that Section 102.04 of the Revised Code does not prohibit a member of a county board of elections from receiving or agreeing to receive compensation, directly or indirectly, for services rendered by him personally in any case, proceeding, application, or other matter which is before any agency of any governmental entity, other than the State of Ohio. It is the further 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 for a member of a county board of elections to be compensated as an employee of an office or agency of the county government, provided that in such position he does not receive or agree to receive directly or indirectly, compensation for services rendered or to be rendered by him personally in any case, proceeding, application or other matter which is before any agency of the state, excluding the courts.



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