

OHIO ETHICS COMMISSION

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June 22, 2001

Informal Opinion 2001-INF-0622

John A. Burke
Medina County Treasurer



Dear Mr. Burke:

In a letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes prohibit you, while you serve as the Medina County Treasurer, from receiving compensation from individual residents and taxpayers of Medina County for performing any of a variety of private professional services that require the licensure and certification set forth below:

- NASD Series 7 General Securities License
- Ohio Life Accident and Health Insurance License
- Ohio Variable Life and Variable Annuity License
- Ohio Real Estate Sales License
- Ohio Foreign Real Estate License
- Certified Public Accountant
- Certified Financial Planner
- Ohio Registered Investment Advisor

You state that you will not seek to earn compensation for performing services or selling products to any Medina County office or department, or political subdivision within Medina County for which the treasurer's office collects or dispenses tax money. Many of the private professional services that you propose to offer, such as sales of insurance or annuities, accounting, financial planning, and rendering investment advice, are activities that may result in a durable and continuing practitioner-client relationship.

Brief Answer

As explained below, R.C. 102.03(D) and (E) prohibit you from receiving compensation from individual residents and taxpayers of Medina County for performing private professional services. Such compensation paid to you by individuals who are subject to your authority as county treasurer would have a substantial and improper influence upon you in the performance of the discretionary decisions you are charged with making as county treasurer. However, these limitations would not prohibit you from merely holding a professional license or certificate or from performing services for compensation outside of your jurisdiction.

General Restrictions on Private Outside Employment

The Ethics Commission has consistently held that the Ohio Ethics Law and related statutes do not prohibit public officials from engaging in private outside employment or the practice of a profession as long as no conflict of interest exists between the official's private interests and public duties. Ohio Ethics Commission Advisory Opinion No. 96-004. However, the Ethics Commission has explained that the Ethics Law and related statutes restrict public officials and employees with regard to their ability to engage in private outside employment or the practice of a profession in order to serve the public interest in effective, objective, and impartial government by preventing the creation of a situation that may impair the objectivity and impartiality, and therefore, the effectiveness, of a public official or employee, or the public agency with which he serves. Adv. Ops. No. 89-014 and 90-002.

Outside Employment—R.C. 102.03(D) and (E)

Your attention is directed to R.C. 102.03(D) and (E), which read as follows:

- (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.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office of a political subdivision. R.C. 102.01(B) and (C). A county treasurer is a "public official or employee" and subject to the prohibitions of R.C. 102.03(D) and (E). Adv. Op. No. 83-001. See also Adv. Ops. No. 79-002 and 82-001.

R.C. 102.03 defines "anything of value" for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 102.01(G). A definite pecuniary benefit to a person is considered to be a thing of value under R.C. 102.03(D) and (E). Adv. Ops. No. 79-010, 85-006, and 89-008. Thus, if a county treasurer were to receive payments from a client for performing private financial consulting services, then the payments would fall within the definition of "anything of value." Adv. Op. No. 82-001.

R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting or accepting, or using the authority or influence of his position to secure, anything of value for himself, or any other party, if the thing of value is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. Adv. Ops. No. 87-006, 88-004, and 93-014. The Ethics Commission has held that a thing of value is of such a character as to manifest a substantial and improper influence upon a public official or employee with respect to his duties where the thing of value could impair the official's or employee's independence of judgment in the

performance of his duties and affect his decisions in matters involving the donor of the thing of value. Adv. Op. No. 84-010. See also Adv. Op. No. 93-014.

The prohibition that is imposed upon a public official or employee engaging in private business activity where he provides professional services directly to a client is determined by the relationship that the private client has with the public official or employee in his public capacity. Thus, the Commission has held that a public official or employee who engages in a private outside business or the practice of a profession is prohibited from accepting, soliciting, or using his authority or influence to secure commissions, fees, or other payments from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the official's or employee's public agency because such payments are of such a character as to improperly influence the official or employee with respect to the performance of his duties regarding those parties. See, e.g., Advisory Ops. No. 83-007 (an employee of the Board of Cosmetology is prohibited from selling products to regulated salons), 84-009 (an MRDD employee is prohibited from selling consulting services to a corporation that operates group homes under contract to MRDD), 84-014 (a city fire chief is prohibited from soliciting or receiving a commission on the city's purchase of fire equipment), 87-006 (an official or employee of a county MRDD board is prohibited from being employed by a residential service provider), and 93-014 (a member of a board of education is prohibited from selling annuities to school district employees).

Application to County Treasurer

A county treasurer is required by statute to perform a myriad of official duties. Many of these duties are found in R.C. Title 3. and others are found throughout the Revised Code. See, e.g., R.C. 323.25 (enforcement of a tax lien by civil action brought by the county treasurer in his official capacity); R.C. 323.33 (certifying that delinquent taxes on real property are most likely uncollectible except through foreclosure and forfeiture); R.C. 323.49 (acting as receiver ex officio of rents and income of real property to satisfy the delinquent taxes, penalties, interest, and costs charged upon such property); R.C. 5719.05 (collecting the taxes and penalties on the tax duplicate delivered to him by the auditor); and R.C. 5715.11 (serving with the county auditor and the president of the board of county commissioners on a County Board of Revision, if the county has not created a hearing board pursuant to R.C. 5715.02, which acts as a quasi-judicial tribunal to determine the valuation of property for purposes of taxation whenever a property owner files a complaint that challenges the assessed value of his property). These and other statutes demonstrate that the county treasurer exercises significant authority with respect to taxpayers in the county.

This advisory opinion will not attempt to provide a detailed and exhaustive review of these and other duties imposed by statute upon a county treasurer in order to determine whether the performance of a specific act of private consulting or sale of services would create the possibility of impaired objectivity and independence of judgment in the performance of your official duties. Rather, the opinion will focus on one specific example to illustrate the conflict of interest that would be created under R.C. 102.03(D) and (E) if you received compensation for providing the professional services you describe to a private party and also, in your official capacity as county treasurer, were required to make decisions on matters concerning the financial interests of the private party.

A county treasurer is required to assist the county auditor with the collection of property taxes. See R.C. 5719.04 and 5721.03 (specifying the auditor's duties regarding delinquent taxes). The treasurer is charged with collecting the taxes and penalties on the tax duplicate delivered to him by the auditor. R.C. 5719.05. If the treasurer finds that he is unable to collect the full amount of delinquent taxes, the treasurer has the authority to enter into a written delinquent tax contract with the taxpayer for payment of the full amount in installments. R.C. 5719.05.

Thus, it is apparent that taxpayers within a county are regulated by and interested in matters that can be the subject of discretionary decision-making authority of the county treasurer. If the taxpayer were a private client of the treasurer, the treasurer would be required to make decisions, in his official capacity, on matters concerning the financial interests of his private client. Therefore, in such a situation, the compensation that you would receive from a taxpayer who is your private client would be a thing of value that could impair your objectivity and independence of judgment in the performance of your duties and affect your decisions on any matters that come before you as county treasurer involving that taxpayer. Adv. Op No. 84-010, 93-014, and 93-015.

Withdrawal From Official Duties

The Ethics Commission has stated that, in some circumstances, a public official or employee is not prohibited from engaging in a private business or holding outside employment provided that he is able to withdraw, as a public official, from consideration of matters that would pose a conflict of interest. Adv. Ops. No. 89-006 (Ohio Department of Mental Health officials and employees accepting employment from colleges or universities which receive grants from ODMH), 89-010 (a Department of Agriculture employee selling services to a state institution which is regulated by the Department of Agriculture), and 90-002 (a Department of Agriculture employee owning and operating a plant which is regulated by the Department of Agriculture). However, the Ethics Commission has stated that some high-level public officials and employees may discharge crucial and unique authority for their public agencies from which they cannot withdraw without interfering with the performance of their duties. Adv. Op. No. 92-009. Because they cannot withdraw from the performance of their official duties, it is impossible for those officials and employees to pursue certain kinds of outside business activity.

In the instant situation, the county treasurer is the appointing authority for deputies in the county treasurer's office and has the discretion to determine the need for their employment. R.C. 321.04. As the appointing authority of employees within his office, the county treasurer is required to supervise the employees' work and is in a position to control their work product. Also, the county treasurer would be required to evaluate the performance of his employees in accomplishing their tasks. It is apparent that there is no one to whom employees in the county treasurer's office could report, other than the county treasurer, with respect to duties that are statutorily assigned to the treasurer's office, such as the review and approval of the establishment of a delinquent tax contract.

If the county treasurer were to be in a practitioner-client relationship and attempt to withdraw from the consideration of matters that would pose a conflict of interest for him, then the employees over whom the county treasurer is the appointing authority would be required to perform the duties that would otherwise fall to the county treasurer. This would result in an untenable situation for the employees of the county treasurer's office. Adv. Ops. No. 89-015 (if the law firm of a city law director were to represent clients in actions against the city, then an assistant city law director, who reports to the law director, could not objectively fulfill his duties to represent the city in those actions) and 92-009 (if the Executive Director of the Barber Board were to own a barber shop, then an employee of the Barber Board, who reports to the Executive Director, could not objectively determine whether the Executive Director's barber shop meets requirements established by statute and rules adopted by the Barber Board).

In the example provided above, the county treasurer is the county official who would enter into a delinquent tax contract with a taxpayer and he is the sole hiring authority for the employees who aid him in the performance of his duties. It would be impossible for the county treasurer to withdraw from performing a duty that is statutorily imposed upon him by transferring that authority to an employee in his office who is subordinate to him. See Adv. Op. No. 92-008 (it is impossible for a township clerk to withdraw from performing the actions and decisions statutorily imposed upon her office and transfer that authority to another party). See also Adv. Ops. No. 89-015, 92-004, and 92-009. Therefore, the withdrawal by the county treasurer from an official matter involving a private party for which he is required to exercise his discretionary decision-making judgment would interfere with his duties as county treasurer.

The instant situation is similar to the one that the Ethics Commission addressed in Advisory Opinion No. 93-015 in which the Commission held that R.C. 102.03(D) and (E) prohibit a city treasurer and tax administrator from receiving client fees for providing financial advice for clients who must file income tax forms with the city. See also Adv. Ops. No. 78-004, 82-001 and 83-001 (describing similar limitations imposed upon municipal and county engineers from receiving compensation for performing private engineering work); In the Matter of: The Appeal of Frederick Carr, No. CA-81-22, April 2, 1982 (Muskingum County) (affirming a city civil service commission decision, based upon the prohibition of R.C. 102.03(D) and Ohio Ethics Commission precedent, to terminate a city code enforcement officer who was real estate broker for attempting to sell a property that he had inspected in his official capacity. A memorandum from the city safety director included as an appendix to the court's decision states, "[t]he Safety Director found that the members of the general public held such activity in contempt; was distrustful of code enforcement office.").

As the county treasurer, you are unable to withdraw from the duties statutorily assigned to the office you hold. Therefore, R.C 102.03 (D) and (E) prohibit you, while you serve as county treasurer, from receiving compensation for professional services performed for clients who are taxpayers in the county. As explained below, however, this prohibition would not extend to clients who are not taxpayers within the county.

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Compensation From Clients Outside of the County

In Advisory Opinion No. 84-012, the Ethics Commission held that a service forester employed by the Division of Forestry of the Department of Natural Resources was prohibited from soliciting or receiving fees for services rendered on a project on which he provides, or is required to provide, technical assistance or advice in his official capacity. But in that opinion, the Ethics Commission also held that:

Division (D) of Section 102.03 of the Revised Code does not, per se, prohibit the service forester from operating a private tree service company. For example, a service forester may operate his private business outside his district, and there may be projects within his district that are not within his jurisdiction. However, Division (D) of Section 102.03 of the Revised Code conditions or restricts his activities, as described above. (Emphasis added.)

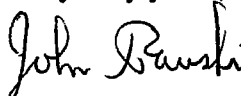
In Advisory Opinion No 90-002, the Commission held that a Department of Agriculture meat inspector was not prohibited by R.C. 102.03(D) and (E) from owning and operating a meat processing plant that was located in an inspection district other than his own despite the fact that his employing state agency would regulate the plant. Therefore, in the instant situation, you are not prohibited from receiving compensation from clients located outside of Medina County provided that the party that is the source of the compensation is not also interested in matters before or regulated by the county treasurer's office.

Conclusion

As explained above, R.C. 102.03(D) and (E) prohibit you from receiving compensation from individual residents and taxpayers of Medina County for performing private professional services. Such compensation paid to you by individuals who are subject to your authority as county treasurer would have a substantial and improper influence upon you in the performance of the discretionary decisions you are charged with making as county treasurer. However, these limitations would not prohibit you from merely holding a professional license or certificate or from performing services for compensation outside of your jurisdiction.

This informal advisory opinion was approved by the Ethics Commission at its meeting on June 22, 2001. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any further questions, please feel free to contact this Office again.

Very truly yours,



John Rawski
Staff Attorney