

OHIO ETHICS COMMISSION

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May 20, 2004

Informal Opinion 2004-INF-0520

The Honorable Nick A. Selvaggio
Prosecuting Attorney of Champaign County



Dear Prosecutor Selvaggio:

In a letter received by the Ohio Ethics Commission on March 29, 2004, you have asked whether the Ohio Ethics Law and related statutes prohibit you from accepting a position on the board of directors of a bank located in the county you serve as the elected county prosecutor.

Brief Answer

As explained more fully below, the Ethics Law and related statutes prohibit you from serving as a member of the board of directors of a bank located in the county you serve as an elected county prosecutor. A bank director has a fiduciary duty to serve the financial interests of the bank. The responsibility of a county prosecutor with regard to tax foreclosure proceedings would create an irreconcilable conflict between your public duties as prosecutor and your private fiduciary relationship to the bank. As prosecutor, you are unable to delegate the authority of your office to avoid this conflict because the county prosecutor is required to participate in some aspects of tax foreclosure sales.

Facts

You state that a bank in Champaign County (county) has asked you to serve on its board of directors. The bank has also asked the county treasurer to serve on its board of directors. You state that you believe that the county treasurer has deposited county funds with the bank.

You explain that you believe a conflict of interest may exist in the area of tax foreclosures where the bank holds a mortgage on real estate subject to foreclosure proceedings. However, you believe that the procedures used by the county auditor and the county treasurer for the past seven years remove the prosecutor's office from any potential conflict of interest. You state that the auditor and treasurer follow these procedures regardless of who owns the mortgage on the real estate subject to foreclosure. You explain the procedure for selecting properties for foreclosures as:

1. The county auditor certifies the tax delinquency;
2. The county treasurer identifies properties where the delinquency is over \$3,000.00 or where a delinquency has existed over a two-year period;
3. The county treasurer sends a letter to the taxpayer, giving notice to the taxpayer that taxes are due, that a referral to the county prosecutor for collection by foreclosure could occur, and that the taxpayer needs to either make payment in full or arrange a "payment plan" to fulfill the tax obligation;
4. The county treasurer meets with the county prosecutor and reviews a listing of those who have failed to either: (a) respond to the treasurer's letter; (b) make full payment; (c) set up a payment plan; or (d) make timely payments under a previously existing payment plan, thereby voiding the terms of the payment plan. The identity of the mortgage holder is generally unknown to either officeholder during this review process;
5. The county treasurer and county prosecutor determine how many cases the attorney retained or employed to carry out the foreclosures on behalf of the county treasurer will be able to handle at one time. Eligible cases are then selected (usually ten to twenty). With the exception of properties in bankruptcy, selection preference is usually given to properties that either have the largest delinquent amounts or have been delinquent for the longest periods of time. On some occasions, the tax foreclosure process is used as a means to assist a local community in abating a public nuisance that has absentee or deceased landowners and tax delinquency on the property;
6. The county prosecutor sends a letter to the delinquent taxpayer, notifying the taxpayer that the taxpayer's failure to comply with the county treasurer's request to resolve the tax delinquency now requires full payment. The taxpayer is also advised that failure to meet this obligation within thirty days will result in the commencement of a tax foreclosure complaint against the real estate;
7. The county prosecutor or his attorney representative review the status of payment compliance after the thirty-day period has expired and act accordingly; and
8. The county prosecutor dismisses any complaint of foreclosure where the taxes are paid in full before the equity of redemption period has expired.

You further explain that the county prosecutor generally employs different attorneys, both in the capacity of assistant prosecutors and independent contractors, to perform the duties of the tax foreclosure once the selection of the properties has been made. When an independent contractor is engaged, the attorney is paid from the Delinquent Tax and Foreclosure Fund, created pursuant to R.C. 321.261. Another assistant county prosecutor is responsible for filing an answer on behalf of the county treasurer when the county treasurer is joined as a defendant on a mortgagor's complaint for foreclosure.

Finally, you have stated that you spoke with the president of the bank about your office's statutory role in the foreclosure process. You have stated that the bank president has suggested, should a conflict arise, that he would instruct the bank's legal counsel to initiate and file a bank foreclosure, thereby rendering it unnecessary for your office to follow the guidelines set forth above. In this instance, your office's role would be to file the standard answer of the treasurer acknowledging the existence of delinquent taxes and that the treasurer's lien is the first and best lien on the real estate.

Securing or Soliciting a Thing of Value for the Bank—R.C. 102.03(D) and (E)

As the county prosecutor, there may be instances where you would be in a position to secure things of value for, or protect against financial harm to, a bank you would serve as a director. You have identified one of those instances—tax foreclosures. In those instances, you must adhere to the restrictions imposed by R.C. 102.03(D) and (E), which provide the following:

- (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 Chapter 102. in R.C. 102.01(B) and (C) to include any person who is elected to an office of a county. A county prosecutor is a "public official or employee" for purposes of R.C. 102.03. See R.C. 309.01; Ohio Ethics Commission Advisory Opinion No. 90-007. The term "anything of value" is defined, for purposes of R.C. 102.03(D) and (E), to include money and every other thing of value. See R.C. 102.01(G) and 1.03.

In your letter to the Ethics Commission, you explain that you reviewed Ethics Commission precedent regarding a public official serving on the board of directors of a bank, including Advisory Opinion No. 85-007. Advisory Opinion No. 85-007 involved the service of a county treasurer as a

The Honorable Nick A. Selvaggio

May 20, 2004

Page 4

director of a depository. For the most part, Advisory Opinion No. 85-007 considered the public contract law (R.C. 2921.42) and two exceptions to that law set forth in the Uniform Depository Act. However, that opinion also discussed whether R.C. 102.03(D) prohibited the treasurer from making decisions about deposits that affect the interests of a 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.

However, R.C. 102.03 has been substantially broadened since the issuance of Advisory Opinion No. 85-007. Advisory Opinion No. 85-007 was rendered prior to the enactment of Am. Sub. H.B. 300, 116th Gen. A. (1986), which resulted in the current version of R.C. 102.03(D), and the addition of R.C. 102.03(E), as set forth above. Am. Sub. H.B. 300 amended R.C. 102.03(D) by deleting the requirement that the thing of value be for the public official or employee himself, thereby broadening the prohibition. See Adv. Op. No. 88-004. Therefore, R.C. 102.03 no longer requires a demonstration that the thing of value is secured for the public official himself, although the thing of value must still be of such character as to manifest a substantial and improper influence upon the official. See Adv. Op. No. 88-004.

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

The Ethics Commission has consistently held that the current versions of R.C. 102.03(D) and (E) prohibit a public official from soliciting, accepting, or 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 impair the official's objectivity and independence of judgment with regard to matters that affect that party. See Adv. Ops. No. 88-004, 89-005, and 91-004. In particular, the Ethics Commission has stated that 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 where he is an officer or board member of the organization and, accordingly, has a fiduciary relationship with the organization. See Adv. Op. No. 89-005.

In the situation you have presented, as a member of the board of directors of a bank, you have a fiduciary relationship to that 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) prohibits 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) prohibits you from soliciting things of value, including county deposits, for a bank with which you have a fiduciary responsibility.

As explained above, the county prosecutor has responsibilities with respect to tax foreclosure proceedings. The county prosecutor and county treasurer have developed a system that determines whether tax foreclosure proceedings will be instituted against a certain property. Obviously, a bank that holds a mortgage on a property subject to foreclosure proceedings has a financial interest in the foreclosure proceedings involving that property. You state that the county prosecutor is involved only in the selection of properties that will be subject to tax foreclosure proceedings. Once it is determined that foreclosure proceedings will be instituted against a certain property, the litigation is handled by a private attorney and, where the county auditor is named as a defendant, by an assistant prosecuting attorney.

The county and the bank will often have conflicting interests during several stages of the foreclosure proceedings. Most foreclosure proceedings require that the property be appraised by three disinterested persons prior to the sale of the property. R.C. 2329.17. The bidding begins at two-thirds of the appraised value of the property. However, appraisals are not required in tax foreclosure proceedings. In tax foreclosure proceedings, the property is sold pursuant to Chapter 5723. of the Revised Code, without appraisal, for not less than the fair market value as determined by the auditor, or the aggregate taxes, assessments, and costs. R.C. 5721.16. The proceeds of a foreclosure sale are used to satisfy court costs and real estate taxes before lienholders receive any share. Therefore, the bank may receive less in a tax foreclosure proceeding than the bank would receive in other foreclosure proceedings.

If the county brings foreclosure proceedings, the bank that is the lender will be named as a party in the action. If the bank brings the action, the county will be named as a party. Further, it may be financially advantageous for a bank to not want foreclosure proceedings to be instituted against a debtor who is behind on tax payments, but current on mortgage payments.

This discussion merely highlights some of the conflicts between the county and a bank that may arise during the course of foreclosure proceedings. These potential conflicts exist before and after a complaint for foreclosure would be filed on behalf of the county.

While you have indicated that the county has developed a standard process that is followed in all potential foreclosure matters, this process cannot completely isolate you from conflicts of interest. (Obviously, as the county prosecutor you are free to, and may be required to, review and reconsider any of those criteria.) There are many facts and circumstances that determine whether the county would proceed against a property with a tax delinquency. These facts and circumstances would vary on a case-by-case basis and involve the exercise of your administrative discretion. The financial interests of a bank you served as a director would definitely be affected by the county's involvement in an action to foreclose on a property on which the bank has a mortgage.

Therefore, if you were to serve as a member the board of directors of a bank that is affected by your decisions made as prosecutor related to tax foreclosure sales, you must abstain, as prosecutor, from participating in all stages of the foreclosure process. This would include the initial stages where the decision to pursue collection efforts against properties with tax delinquencies is made. Even if, as the bank president has proposed, the bank would initiate a bank foreclosure in the event that a mortgage holder's property is subject to tax foreclosure, the prosecutor would still have a necessary, albeit more limited, role in the proceedings. In order for you to hold a position on the bank's board of directors, R.C. 102.03(D) and (E) would require you to abstain as prosecutor from performing any role related to the tax foreclosures.¹

In some instances, the Commission has held that, in order to avoid violating R.C. 102.03(D), a public official may withdraw from participating in a matter, and the matter may be handled by an official or entity independent of, or superior to, the official with the conflict of interest, if such transfer of authority is permitted under relevant statutes. See Adv. Ops. No. 83-001, 85-002, and 90-010. However, it is not possible for an independently elected officer, with ultimate responsibility for the operation of his office, to withdraw from performing duties that are required of his office. See Adv. Op. No. 92-004 (the withdrawal of a public official or employee may not interfere with the performance of his official duties).

As the county prosecuting attorney, you are required to perform the duties of the office of prosecuting attorney. Serving on the board of directors of a bank is a discretionary, personal choice that must be balanced against your public responsibilities. You are unable to delegate the authority of your office in order to avoid conflicts of interest. The county prosecuting attorney is required to participate in some aspects of tax foreclosure sales. Therefore, it is impossible for you to serve on the board of directors of a bank that is definitely and directly financially affected by your decisions as prosecuting attorney. This prohibition applies even if the bank is not a county depository.

Stockholding in a Bank

Finally, you have asked whether the Ethics Law prohibits you from holding stock in a bank in the county. Because of exceptions to the public contract law contained within the Uniform

¹ There may also be other instances, unrelated to foreclosures, where the bank will be a party, or a witness, in cases to which the county is a party represented by the county prosecutor. This opinion does not consider, but does mention, that possibility.

Depository Law, in R.C. 135.11 and 135.38, R.C. 2921.42(A)(4) would not prohibit you from owning stock in a bank that is a depository of the county.²

If the bank is not a depository of the county, R.C. 2921.42 does not apply to your question. In either case, as long as your stockholding interest in the bank is minimal, R.C. 102.03(D) and (E) do not prohibit you from exercising the authority of your office relative to a bank in the county of which you are a stockholder, as long as you would not realize a substantial pecuniary benefit as a result of your decisions and you have no other relationship, such as officer, director, or employee, to the bank. Adv. Op. No. 93-001. Therefore, as long as you own a minimal stockholding in a bank within the county, R.C. 102.03(D) and (E) do not prohibit you from performing the duties of your office related to tax foreclosures and other matters that involve that bank.

Conclusion

As explained more fully above, the Ethics Law and related statutes prohibit you from serving as a member of the board of directors of a bank located in the county you serve as an elected county prosecutor. A bank director has a fiduciary duty to serve the financial interests of the bank. The responsibility of a county prosecutor with regard to tax foreclosure proceedings would create an irreconcilable conflict between your public duties as prosecutor and your private fiduciary relationship to the bank. As prosecutor, you are unable to delegate the authority of your office to avoid this conflict because the county prosecutor is required to participate in some aspects of tax foreclosure sales.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on May 18, 2004. The Commission commends you for requesting guidance before taking any actions that could be prohibited by law.

The 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. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

² If the depository contract awarded to the bank could not have been awarded without your approval, then R.C. 2921.42(A)(3) would prohibit you from owning stock in the bank, unless the contract was competitively bid and was the lowest and best bidder. However, a county prosecutor does not appear to participate in the award of county depository contracts.