



OHIO ETHICS COMMISSION

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COLUMBUS 43215

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Advisory Opinion

No. 74-009

November 4, 1974

Syllabus by the Ohio Ethics Commission:

(1) A member of a municipal planning commission is not in violation of Section 102.04 (B) of the Revised Code when he receives a partnership distributive share of fees for services rendered by a partner in a case, proceeding, application or other matter which is before the commission on which he serves.

(2) A member of a municipal planning commission is not in violation of Section 102.04 (B) of the Revised Code when he receives a partnership distributive share of fees for services rendered by a partner in any case, proceeding, application or other matter which is before any agency, department, board, bureau, commission or other instrumentality, excluding the courts, of the entity of which he, the member, is an officer.

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Your request for an advisory opinion asks two questions. The first is whether Section 102.04 (B) of the Revised Code prohibits a member of a municipal planning commission, who is a lawyer, from receiving a partnership share from his law firm when some of the partnership revenue results from other members of his firm representing clients in matters which are before the municipal planning commission. The second question is whether Section 102.04 (B) of the Revised Code prohibits a member of a municipal planning commission, who is a lawyer, from receiving a partnership share from his law firm when some of the partnership revenue results from members of his law firm representing clients in matters which are before other agencies of the same municipality.

You state, by way of history, that you are a lawyer who practices in a partnership with other attorneys and you also serve as a member of a municipal planning commission created pursuant to Section 713.01 et seq. of the Revised Code.

The question you have directed to the Ohio Ethics Commission falls within the purview of Section 102.04 (B) of the Revised Code. Pertinent portions read as follows:

"No person who is elected or appointed to an office of or employed by a . . . municipal corporation . . . shall receive . . . compensation other than from the agency with which he serves for any service rendered . . . by him personally in any case, proceeding, application, or other matter which is before any agency . . . excluding the courts, of the entity of which he is an officer or employee."

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). "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 the public, assigned to him" he holds a "public office." State v. Brennan, 49 Ohio St. 33 (1892). "The tenure must be defined, affixed and certain and not arising out of a mere contract of employment." Muskingum County Democratic Committee v. Burrier, 31 Ohio Op. 570 (1945).

The indicia above are conditions of an office. No one condition is necessarily determinant of a public office. However, a combination of certain of the elements would indicate that a commission member is appointed to an office, and therefore falls within the prohibition set forth in Section 102.04 (B) of the Revised Code.

You related in a telephone conversation with the Executive Secretary of the Ohio Ethics Commission that, as a member of a municipal planning commission, you are (1) appointed, (2) have a title, (3) exercise functions of the city government concerning the public, and (4) have no contract of employment. The Ohio Ethics Commission determines that you are, therefore, appointed to an "office" for purposes of Section 102.04 (B) of the Revised Code.

As such, you are prohibited from receiving or agreeing to receive, directly or indirectly, compensation, other than from the agency with which you serve, for any service rendered or to be rendered by you personally in any case, proceeding, application or other matter which is before any agency, department, board, bureau, commission or other instrumentality, excluding the courts, of the entity of which you are an officer.

If the conditions of the prohibition contained in Section 102.04 (B) of the Revised Code were to be listed they would appear as follows:

- That persons elected, appointed or employed by a governmental entity must not:
- (1) receive or agree to receive, directly or indirectly, compensation, other than from the agency with which he serves,
 - (2) the compensation must be for services rendered or to be rendered personally,
 - (3) the services rendered personally must be in a case, proceeding, application, or other matter,
 - (4) the case, proceeding, application or other matter must be before any agency, and
 - (5) the agency which the case, proceeding, application or other matter is before must be an agency of the same entity of which the person is an officer or employee.

The pertinent condition in your questions concerns the rendering of services personally. Personally is defined in the Second College Edition of Websters New World Dictionary of American Language, the World Publishing Company, 1972, as something "done in person or by ones self without the use of another person or outside agency." Thus, the person in question, may receive, through partnership distribution, compensation for services not rendered by him personally but rather rendered by a partner personally, without violating the section, which prohibits the receipt of compensation for services personally rendered.

Since one of the conditions of Section 102.04 (B) of the Revised Code is not met, that is, you are not rendering the services personally, your partners are, the prohibition does not become operative. There is, therefore, nothing in Section 102.04 (B) of the Revised Code to prohibit the conduct described in both of your questions.

In the first question, as long as a member of the municipal planning commission does not render services personally for the client his partner is representing, there is no prohibition against the member receiving partnership revenue. Although the member may receive compensation from the municipal planning commission for serving on the commission, he is permitted to receive such compensation by virtue of the exclusion contained in Section 102.04 (B) of the Revised Code. That exclusion states that he may receive compensation "from the agency with which he serves."

In the second question, the same theory as in the first applies. If the services are rendered personally by a partner, and not by the member of the Commission, there is no prohibition on the receipt of compensation in the form of partnership revenues by the member of the municipal planning commission.

None of the above should be interpreted to prohibit the activities which are specifically exempted from the prohibitions, i.e., Section 102.04 (C) of the Revised Code which reads as follows:

"This section shall not be construed to prohibit the performance of ministerial functions including, but not limited to, the filing, or amendment of tax returns, applications for permits and licenses, incorporation papers, and other documents."

Nothing in this opinion should be construed to give an imprimatur to activity which by virtue of any other provision of Chapter 102 or' any other code of conduct, professional or otherwise, would be in violation of that code.

It is the opinion of the Ohio Ethics Commission, and you are so advised that as a member of a municipal planning commission, you are not in violation of Section 102.04 (B) of the Revised Code when you receive a partnership distributive share of fees for services rendered by a partner in a case, proceeding, application, or other matter which is before the commission on which you serve. Further, it is the opinion of the Ohio Ethics Commission, and you are so advised, that as a member of a municipal planning commission, you are not in violation of Section 102.04 (B) of the Revised Code when you receive a partnership distributive share of fees for services rendered by a partner, and not by you, in any case, proceeding, application, or other matter which is before any agency, department, board, bureau, commission or other instrumentality, excluding the courts, of the entity of which you are an officer.



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By (Mrs.) Barbara H. Rawson, Chairman