



OHIO ETHICS COMMISSION

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COLUMBUS 43215

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Advisory Opinion No. 75-006

June 10, 1975

Syllabus by the Ohio Ethics Commission:

1) A member of the Ohio Housing Development Board is a person appointed to an office of the state, and as such, is prohibited, by virtue of Section 102.04 (A) of the Revised Code, from receiving compensation, directly or indirectly, for services rendered or to be rendered 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.

2) Filing registrations and applications for exemption of securities with the Division of Securities of the Department of Commerce may be an activity which falls within the exception "ministerial functions" contained in Division (C) of Section 102.04 of the Revised Code.

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Your request for an advisory opinion asks if there is "any impropriety in my continuing to serve as a member of the Ohio Housing Development Board" since, as you describe, you are a lawyer and a partner in a law firm and the practice of both involves work before state agencies.

You relate that in your personal law practice, you have over a period of time been involved directly in dealings with agencies of the State of Ohio such as; filing Articles of Incorporation with the Secretary of State; filing registrations and applications for exemption of securities issued by client corporations with the Division of Securities; representing clients before the Ohio Board of Tax Appeals with respect to complaints as to the assessed values of real estate properties in Cuyahoga County. You state that you have represented one client before the Ohio Building Authority with respect to the securing of a building permit and that you practice before various Ohio courts. Your partners, you state, perform similar kinds of representation.

The Ohio Housing Development Board was created in 1973 pursuant to Section 128.21 of the Revised Code.

"There is hereby created the Ohio housing development board which shall consist of seven members appointed by the governor, with the advice and consent of the senate. At least three members shall be persons experienced in the housing finance business, and no more than four shall be of the same political party. of the members first appointed, one shall serve for a term of one year from the date of his appointment, one for a term of two

years, and one for a term of three years, one for a term of four years, one for a term of five years, and two for terms of six years

The board shall elect one of its members as chairman and such other officers as it deems necessary. The members of the board shall serve without compensation, but shall be reimbursed for their actual and necessary expenses incurred in the discharge of their official duties. . ."

The duties and authority of the Ohio Housing Development Board are set out in Sections 128.22 and 128.23 of the Revised Code. Section 128.22 of the Revised Code establishes the duties of the Board:

"The housing development board shall:

(A) Promulgate rules for the conduct of its business and the exercise of powers granted to it by sections 128.21 to 128.27 of the Revised Code;

(B) Employ an executive secretary and such other personnel as may be required to conduct the business of the board;

(C) Prepare an annual report covering the operations and accomplishments of the board, and submit copies thereof to the governor and members of the general assembly."

Additional authority is vested in the Board by Section 128.23 of the Revised Code:

"The Ohio housing development board may:

(A) Make non-interest-bearing advances solely from the housing development fund to any qualified nonprofit housing corporation for the planning and preparation of housing developments it will own;

(B) Guarantee the repayment of a loan of money to any qualified nonprofit housing corporation or limited profit housing entity, for a housing development it will own, and for this purpose the board may enter into contracts with any lender, upon such terms and conditions as it may agree upon with the lender, to provide for the administration by such lender of any loan or loan plan guaranteed by the board, including applications therefor and terms for repayment thereof. . . .

(C) Determine the market and economic feasibility of a proposed housing development prior to making or contracting to make payments or advances with respect thereto;

(D) Collect fees and charges in connection with its operation;

(E) Sue and be sued in its own name;

(F) Make and execute contracts and all other instruments necessary for convenient exercise of its powers, functions, and duties with public or private bodies, corporations, or individuals;

(G) Acquire, hold, and dispose of personal property;

(H) Acquire, hold, and dispose of real property, or an interest therein, where such acquisition is necessary for the accomplishment of the purposes of sections 128.21 and 128.27 of the Revised Code;

(I) Procure insurance against loss in connection with its real or personal property;

(J) Accept gifts, grants, or loans of funds or property, or financial or other aid from any federal or state agency or private fund;

(K) Survey and investigate housing conditions and needs, and recommend to the governor and the general assembly administrative and legislative actions necessary to meet such needs;

(L) Encourage and develop demonstration projects to develop improved methods for increasing the supply and improving the management of housing for low and moderate income persons;

(M) Employ consultants and procure technical assistance;

(N) Do all things necessary to carry out the provisions of sections 128.21 and 128.27 of the Revised Code."

The Ohio Housing Development Board also administers the Housing Development Fund as described by Section 128.24 of the Revised Code:

"The housing development fund is hereby created, consisting of moneys appropriated to it, interest earned on investments or deposits, grants and gifts made to the fund from public or private sources, and moneys repaid to the fund for advances made pursuant to section 128.23 of the Revised Code. The fund shall be administered by the Ohio housing development board. Moneys in the fund shall be used solely for the purposes authorized by Chapter 128. of the Revised Code." (Emphasis added)

The Board also is charged with the enforcement of a non-discrimination policy set forth in Section 128.27 of the Revised Code.

It is necessary to determine whether you, as a member of the Ohio Housing Development Board, have been "appointed to an office of" a board of the state, to determine whether Section 102.04 (A) applies. Section 102.04 (A) of the Revised Code provides that:

"No person . . . appointed to an office of . . . board . . . 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 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 Ohio Ethics Commission in Advisory Opinion No. 74-007, used several tests to determine whether someone has been appointed to an office of the state. They were: "(1) was he appointed; (2) does he have a title, (3) does he exercise functions of government concerning the public; and, (4) is he not subject to a contract of employment." It appears obvious from the material set forth above from Section 128.21 et. seg. of the Revised Code, that these conditions are met.

The Ohio Ethics Commission Advisory Opinion No. 75-004 added another test to the four listed above. The test is the exercise of "sovereign power" which is described therein to be ". . . a concept meant to imply the exercise of a duty entrusted to one by virtue of statute or some public authority. Those duties are not merely clerical but involve some discretionary, decision-making qualities." That opinion held that finding facts, assisting in the formulation of plans and the making of recommendations was not an exercise of sovereign power.

As provided in Section 128.23 of the Revised Code, members of the Ohio Housing Development Board, exercise powers which are beyond the type that could be described as, the formulation of plans and making of recommendations, and do indeed involve discretionary, decision-making qualities, such as, making non-interest-bearing advances from the Housing Development Fund, guaranteeing the repayment of loans, and acquiring, holding and disposing of real property.

Thus, as a member of the Ohio Housing Development Board, you are appointed to an office of the state for purposes of Section 102.04 (A) of the Revised Code. As such your private practice of law for compensation before "the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state" is limited. Receipt of compensation for rendering services personally in cases, proceedings, applications, or other matters which are before the courts is, however, not prohibited by Section 102.04 (A) of the Revised Code.

Section 102.04 (C) of the Revised Code provides additional exceptions from the general prohibition set forth in Divisions (A) and (B) of that section:

"(C) 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."

The filing of articles of incorporation with the Secretary of State is a ministerial function specifically excepted by Section 102.04 (C) of the Revised Code.

The activity which you describe as "filing registrations and applications for exemption of securities issued by client corporations with the Division of Securities" may fall within the term "ministerial" functions of Section 102.04 (C) of the Revised Code.

The concept of "ministerial," as gleaned from Ohio decisions, is generally described as having no discretionary factor, involving only things done according to specific direction or instruction. The Supreme Court in Trauger v. Nash, 66 Ohio St. 612 (1902), at page 618, discusses those acts of the governor which may be described as purely ministerial:

The "ministerial" functions of Section 102.04 (C) of the Revised Code, must be described in a similar fashion, as those to be performed without the exercise of discretion, in a prescribed manner. Therefore, if the filing of particular registrations and applications for exemption of securities is done in this manner, it would be a ministerial function.

The receipt of compensation for representing clients before the Ohio Board of Tax Appeals with respect to complaints as to assessed values of properties, however, may fall within the prohibitions of Section 102.04 (A) of the Revised Code. The determination of the issue requires a definition of the terms "case, proceeding, application or other matter" as used in Section 102.04 (A) of the Revised Code.

The Revised Code provides no specific definition of these terms. The terms have a specific judicial connotation, but matters which are before the courts are excluded in Section 102.04 (A) of the Revised Code. Hence it is logical to assume that the legislature intended a common usage definition of the terms.

In order to discern the proper common usage of the above terms it is helpful to examine law dictionary definitions:

- 1) Bouvier's Law Dictionary, defines a case as "a question contested before a court of justice in action or suit at law or in equity."
- 2) Bouvier's Law Dictionary, defines proceeding as "a general acceptance, the form in which actions are to be brought and defended, the matter of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments and of executing them . . . "
- 3) Bouvier's Law Dictionary, defines application as "the act of making a request for something. it need not be in writing."

Thus, from the context of Chapter 102 of the Revised Code and from the general definitions above, for purposes of Section 102.04 of the Revised Code, a "case" is a question, a set of facts or circumstances; a "proceeding" is the form of an action taken, the manner of doing something, of conducting something, a mode of deciding an issue; and, an "application" is the specific form of making a request for something.

The phrase "and other matters" is one to which the Latin term ejusdem generis must be applied. In discussing the term ejusdem generis, 50 Ohio Jur. 2d, Statutes, Section 220, states "where, in a statute, general words follow a designation and as including only things or persons of the same kind, class, or nature of those specifically enumerated unless there is a clear manifestation to the contrary purpose." Thus the doctrine of ejusdem generis requires that the phrase "and other matters" be interpreted to only include subjects of the same kind. The Ohio case of Rutherford v. Cincinnati & P.R. Company, 35 Ohio St. 559 (1880) establishes this rule of construction in Ohio.

Division (C) of Section 102.04 of the Revised Code, as discussed above, provides an exception for ministerial functions. "Cases, proceedings, applications and other matters" at the "court" or judicial level are specifically exempted in Section 102.04 (A) of the Revised Code.

Thus, those functions which fall between judicial and ministerial, namely quasi-judicial are the "cases, proceedings, applications and other matters" to which Division (A) of Section 102.04 of the Revised Code is directed. Black's Law Dictionary defines "quasi-judicial" as "a term applied to the action, discretion, etc., of public administrative officers, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their judicial action, and to exercise discretion of a judicial nature."

The performing of services such as advising, consulting, representing or the like which involve matters "before" the General Assembly or an agency, or a department, division, institution, instrumentality, board, commission, or bureau, would be "rendering services" in a quasi-judicial proceeding.

The term "before" as used in Section 102.04 of the Revised Code is defined as "being considered, judged, or decided by" in Websters New World Dictionary. Blacks defines "before" as "in the presence of; under the official purview of." Therefore, a "matter" which is being considered by, judged by, decided by, in the presence of, or under the official purview of, is "before" a governmental entity. The prohibition on receipt of compensation for personally rendering service in a case, proceeding, application or other matter does not apply until the matter is before an agency of a governmental entity.

Clearly, the representation of a client before the Ohio Board of Tax Appeals is the rendering of personal services in a quasi-judicial activity before a state agency.

If representing a client before the Ohio Building Authority with respect to the securing of a building permit is ministerial in nature as that term is defined above, then such act is within the exemption contained in Section 102.04 (C) of the Revised Code. However, if this representation cannot qualify as "ministerial," it is within the purview of Section 102.04 (A) of the Revised Code and receiving compensation for so rendering is prohibited.

The question of whether your partners fall within the prohibition of Section 102.04 (A) of the Revised Code since you are a member of the Ohio Housing Development Board is answered by the Ohio Ethics Commission in Advisory Opinion No. 74-009. Although that opinion was based on Section 102.04 (B) of the Revised Code, the appropriate language of Section 102.04

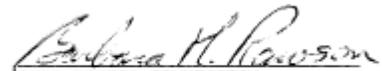
(A) of the Revised Code is identical. That Advisory Opinion speaks of the applicability of prohibitions to the law partners of a municipal officer, and states at page 3:

"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."

Therefore, the prohibitions of Section 102.04 (A) of the Revised Code which apply to you, do not by virtue of your membership on the Board, apply to your partners.

Therefore, it is the opinion of the Ohio Ethics Commission and you are so advised that, a member of the Ohio Housing Development Board is a person appointed to an office of a board of the state, and as such, is prohibited, by virtue of Section 102.04 (A) of the Revised Code from receiving or agreeing to receive compensation, directly or indirectly, for services 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.

Filing registrations and applications for exemption of securities with the Division of Securities, Department of Commerce, may be an activity which falls within the exception of "ministerial functions" contained in Division (C) of Section 102.04 of the Revised Code.



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(Mrs) Barbara H. Rawson, Chairman