



OHIO ETHICS COMMISSION

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Advisory Opinion Number 93-015
October 18, 1993

Syllabus by the Commission:

(1) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a city treasurer and tax administrator, who exercises the ultimate decision-making authority within the tax administrator's office to enforce the provisions of the city income tax code, and who is also a certified public accountant, from accepting, soliciting, or using the authority or influence of his office to secure any client fees for preparing or filing city tax returns;

(2) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a city treasurer and tax administrator, who exercises the ultimate decision-making authority within the tax administrator's office to enforce the provisions of the city income tax code, and who is also a certified public accountant, from providing tax preparation and accounting services on any matter for persons who are required to file city income tax returns.

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You have asked if the Ohio Ethics Law and related statutes prohibit a city treasurer and income tax administrator who is also a certified public accountant from preparing city tax returns for his private clients or from providing other kinds of financial advice for clients who must file income tax forms with the city.

By way of history, you have stated that a certified public accountant (CPA) has been elected to the position of city treasurer in a community where the city treasurer is also the city income tax administrator. He is required, as the city treasurer and income tax administrator (treasurer/tax administrator), to enforce the provisions of the city income tax code. The tax administrator is empowered to investigate possible violations, arrange for the payment of unpaid taxes, and subpoena taxpayer records. The tax administrator approves all income tax refunds processed by the office. The tax administrator also serves as the first level of appeal for dissatisfied taxpayers, who can later appeal his decision to a board of review.

The treasurer/tax administrator, as a CPA, also has private clients, both individuals and businesses, for whom he provides financial advice and accounting services. Many of the CPA's clients must file tax returns with the city, and the CPA prepares his clients' local, state, and federal income tax returns.

Your first question is whether the treasurer/tax administrator is prohibited from preparing city tax returns for his private clients. R.C. 102.03 (D) and (E) provide as follows:

(D) No public official or employee shall use or authorize the use of the authority or influence of his 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 him with respect to his 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 him with respect to his duties.

The term "public official or employee" is defined to include "any person who is elected or appointed to an office or is an employee of" a city. See R.C. 102.01 (B) and (C). An elected city treasurer who also serves as the tax administrator is clearly a public official as that term is defined in R.C. 102.01. For purposes of R.C. 102.03 (D) and (E) , the term "anything of value" is defined to include money, goods, promise of future employment, and every other thing of value. See R.C. 102.01 (G); 1.03. The Ethics Commission has stated that "anything of value" includes client fees. See Ohio Ethics Commission Advisory Op. No. 90-008.

In Advisory opinion No. 84-004, the commission was asked whether the Ohio Ethics Law and related statutes prohibited a city auditor who was also the tax commissioner in his city from preparing income tax returns in his private business. The Commission stated that R.C. 102.03 (D) prohibited the city auditor/tax commissioner from "reviewing the tax returns of a private client that were prepared by the city auditor/tax commissioner..... or by other members of his private firm." Advisory Op. No. 84-004. Further, the Commission stated that R.C. 102.03 (D) prohibited the city auditor/tax commissioner from supervising any city employees in the review of tax returns prepared by him or members of his private firm.

R.C. 102.03 (D) has been amended, by Am. Sub. H.B. 300 in 1986, since Advisory Opinion No. 84-004 was issued. However, the conclusions of Advisory Opinion No. 84-004, that a city tax official is prohibited from reviewing tax returns prepared by him or members of his private firm, and from supervising other city officials or employees in the review of such returns, are still applicable under the current version of R.C. 102.03 (D). See Advisory Op. No. 90-008. Thus, R.C. 102.03 (D) would prohibit the city treasurer/tax administrator in your question from reviewing any tax returns he prepared in his private business, and from supervising any other city officials or employees in the review of any tax returns he prepared in his private business.

However, in addition to amending Division (D) of R.C. 102.03, Am. Sub. H.B. 300 also enacted Division (E) of R.C. 102.03. Therefore, the issue remains how R.C. 102.03 (E) will affect the analysis of your question.

R.C. 102.03 (E) prohibits a public official or employee from accepting or soliciting anything of value, including client fees, that could have a substantial and improper influence upon him in the performance of his duties. The Commission has stated that R.C. 102.03 (E) prohibits a public official or employee from accepting or soliciting anything of value, including client fees, from a party that is interested in matters before, regulated by, or doing or seeking to do business with, the political subdivision with which he serves, or where there is otherwise a conflict of interest. See Advisory Op. No. 92-008. The Commission has also stated that a public official is required to perform his statutorily mandated duties in an objective and impartial manner. See Advisory Ops. No. 90-002 and 92-008.

As you have described the duties of the city treasurer/tax administrator, all persons who are required to file city income tax returns are subject to his regulation and authority. A city treasurer/tax administrator who, in the performance of his official duties, would be required to decide matters affecting filings he prepared for clients who paid him a fee would be subject to an inherent conflict such that his independence and objectivity of judgment in performing the duties of tax administrator could be impaired. See Advisory Ops. No. 90-008 and 92-008.

In some instances, the Commission has held that, in order to avoid violating the Ethics Law, a public official may withdraw from participating in a matter, and either delegate his authority to someone under his supervision, with review of the subordinate's action by an official or entity independent of, or superior to, the official or employee with the conflict of interest, or have someone who is independent of, or superior to, the official or employee with the conflict of interest approve the matter, if the transfer is permitted under relevant statutes or ordinances. See Advisory Opinion No. 92-004.

In this instance, however, you have stated that the treasurer/tax administrator is required to enforce the provisions of the city income tax code, and supervise his employees in the performance of their duties to assist him in enforcing the income tax code. He investigates possible violations, arranges for the payment of unpaid taxes, and may subpoena taxpayer records. He also serves as the first level of appeal for dissatisfied taxpayers, and must approve every refund that is issued by his office.

The treasurer/tax administrator, as an elected office holder, is the ultimate authority within the office of the treasurer. The treasurer/tax administrator is unable to withdraw from performing his job duties relative to city income tax return filings. When the official who exercises ultimate decision-making authority within an office would have a conflict of interest with respect to his own duties, and the conflict would prohibit him from performing his own duties and supervising members of his staff in the performance of their duties, the Ethics Commission has stated that the Ethics Law will effectively prohibit the officeholder who exercises the ultimate authority from participating in the activity that will give rise to the conflict of interest. See Advisory Ops. No. 89-015, 92-004, 92-008, and 92-009.

Therefore, a city treasurer/tax administrator who prepares city income tax returns as a CPA would be prohibited, by R.C. 102.03 (D), from performing his statutory duties regarding the tax returns he prepared in his private accounting practice, and would, because he is unable to withdraw from his job duties, be prohibited, by R.C. 102.03 (E), from accepting client fees for preparing city tax returns.

Your second question is whether the treasurer/tax administrator, in his private role as a CPA, is prohibited from providing other kinds of general financial advice for clients who must file income tax forms with the city. You have stated that the clients rely on the financial advice of the treasurer, as CPA, to make tax decisions even if he does not prepare the returns.

In Advisory Opinion No. 90-008, the Ethics Commission was asked whether a city council member was prohibited from acting on matters before council where a party to the matter was a client of the city council member's private law firm. The Commission stated that, if the council member himself was currently representing the client on other matters, even though those matters were not before council, the relationship between the council member and his

client was such that his objectivity and independence of judgment could be impaired with respect to matters affecting the client. Therefore, the Commission concluded that R.C. 102.03 (D) prohibits a public official who is currently representing a client from acting in his official capacity on any matter which could benefit his client, even though he is not representing the client on that matter in his private capacity.

Therefore, R.C. 102.03 (D) would prohibit the treasurer/tax administrator from performing any of his official duties, including reviewing the income tax returns, of persons who are presently his clients, and supervising his staff in the performance of any of their public duties regarding tax returns filed by his clients, even if he did not prepare the returns.

Further, as stated above, R.C. 102.03 (E) prohibits a public official or employee from merely accepting or soliciting anything of value that could have a substantial and improper influence upon him in the performance of his duties. In the situation you have described, as set forth more fully above, the city treasurer/tax administrator exercises ultimate decision-making authority over his office, and has numerous duties relative to the collection of income taxes within the city he serves.

If the city treasurer/tax administrator had private clients who filed tax returns with the city, he would be accepting private client fees from individuals for whom he must enforce the tax laws. The receipt of client fees by the treasurer/tax administrator from his private clients could impair the treasurer/tax administrator's independence of judgment with respect to their tax returns, even where he did not prepare the returns. For example, you stated in your letter that even where a CPA does not prepare city tax returns, his clients may rely on his financial advice to make tax decisions. It would be unrealistic to expect the CPA who was paid to provide financial advice to a private client, whether or not the client relied on the advice, to make an objective decision, in his official position, about the client's tax return. This is also true if the treasurer/tax administrator is required to take any kind of enforcement action against a taxpayer who is also his private client. Clearly, the receipt of client fees from citizens or businesses over whom the treasurer/tax administrator has official responsibility could result in a conflict of interest.

The Commission has stated that a public official is not prohibited from receiving client fees from a party that is regulated by or interested in matters pending before him or his office, if he can withdraw from all matters that affect that party's interests. See Advisory Op. No. 89-006. However, as stated above, the person who exercises the ultimate authority of an office cannot withdraw from the official business of his office. See Advisory Ops. No. 92-004, 92-008, and 92-009. Therefore, R.C. 102.03 (E) would prohibit the treasurer/tax administrator from accepting anything of value, including client fees, from anyone who is required to file city income tax returns.

Advisory Opinion No. 84-004 was issued prior to the passage of Am. Sub. H.B. 300 in 1986, which added R.C. 102.03 (E) to the Ethics Law. The opinion, therefore, does not consider the issues that arise pursuant to R.C. 102.03 (E). Accordingly, any suggestion in Advisory Opinion No. 84-004 that a city auditor-tax administrator is not prohibited from performing tax services, other than city income tax services, for clients whose tax returns he is required to review, is superseded by this opinion's conclusion that R.C. 102.03 (E) prohibits a treasurer/tax

administrator from accepting client fees for accounting services from any parties over whom he must enforce the city's tax laws.

As a final matter, you should be aware of Division (C) of R.C. 102.04. R.C. 102.04 (C) prohibits a city officer or employee, including a treasurer/tax administrator, from accepting any compensation, other than from the city, for services rendered in cases or other proceedings pending before any entity of the city, excluding the courts. Advisory opinion No. 84-004 stated that R.C. 102.04 (C) prohibits a city tax administrator from receiving compensation from his clients for providing services to them in matters pending before any city entity. This holding applies to your question as well. Therefore, the treasurer/tax administrator in your question would be prohibited from accepting any compensation to represent his clients on any case or other matter pending before a city body, including appeals of tax decisions before the board of review. The exemption to R.C. 102.04 (C) , set forth in Division (D) , is not available to elected city officials, and therefore does not apply to your question. See R.C. 102.04 (D). See also R.C. 102.03 (A) (a public official, during his term of office and for one year thereafter, is prohibited from representing any person, before any public agency, on matters in which he personally participated as a public official).

Division (F) of Section 102.04 provides that the prohibition of R.C. 102.04 (C) does not prohibit a public official from performing ministerial functions, such as filing and amending tax returns, for his clients. Therefore, R.C. 102.04 (C) does not prohibit the treasurer/ tax commissioner in your question from receiving compensation from clients for filing or amending their city tax returns. See Advisory Op. No. 84-004. However, as stated above, R.C. 102.03 (D) and (E) do prohibit the treasurer/tax commissioner from receiving compensation from clients for performing these services. See Advisory opinion No. 89-010.

This advisory 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.

Therefore, it is opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a city treasurer and tax administrator, who exercises the ultimate decision-making authority within the tax administrator's office to enforce the provisions of the city income tax code, and who is also a certified public accountant, from accepting, soliciting, or using the authority or influence of his office to secure any client fees for preparing or filing city tax returns; and (2) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a city treasurer and tax administrator, who exercises the ultimate decision-making authority within the tax administrator's office to enforce the provisions of the city income tax code, and who is also a certified public accountant, from providing tax preparation and accounting services on any matter for persons who are required to file city income tax returns.


Jack Paul Desario, Chair
Ohio Ethics Commission