

**OPINION NO. 2010-031****Syllabus:**

2010-031

1. A person who holds within the same county the positions of member of a hearing board of a county board of revision and member of a city legislative authority is subject to impermissible conflicts of interest even though the hearing board does not hear complaints and render decisions as to the value of real property located in the city.
2. A person who is appointed by the county auditor to serve on a hearing board of a county board of revision serves in a public office for purposes of R.C. 731.02.
3. R.C. 5715.51 does not prohibit a person from serving simultaneously as a member of a hearing board of a county board of revision and member of a city legislative authority when the person has been appointed by the county auditor to the hearing board.

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**To: William D. Mason, Cuyahoga County Prosecuting Attorney, Cleveland, Ohio**

**By: Richard Cordray, Ohio Attorney General, November 23, 2010**

You have requested an opinion regarding the propriety of a member of a hearing board of a county board of revision serving simultaneously in another public position. Information you have provided us indicates that a county auditor employee who also serves as a member of a city legislative authority in the same county has been appointed by the county auditor to serve in the auditor's place on a hearing board of a county board of revision. Based on this information, you wish to know the following:

1. Is a person who holds within the same county the positions of member of a hearing board of a county board of revision and member of a city legislative authority subject to impermissible conflicts of interest when the hearing board does not hear complaints and render decisions as to the value of real property located in the city?

2. Does the term “public office,” as used in R.C. 731.02, include a position on a hearing board of a county board of revision that is filled by an appointee of a county auditor?
3. Does R.C. 5715.51 prohibit a person from serving simultaneously as a member of a hearing board of a county board of revision and member of a city legislative authority when the person has been appointed by the county auditor to the hearing board?

With respect to your first question, a member of a hearing board of a county board of revision may not hold another public position when the hearing board member is subject to impermissible conflicts of interest. *See* 2006 Op. Att’y Gen. No. 2006-034 at 2-309. Impermissible conflicts of interest occur when the hearing board member is unable to remove himself from situations in which he will be subject to influences that may prevent him from rendering completely objective and disinterested decisions. *See id.*; 1980 Op. Att’y Gen. No. 80-035 at 2-149.

A review of the duties and responsibilities of the positions of member of a hearing board of a county board of revision and member of a city legislative authority discloses that a person who holds these two positions simultaneously in the same county is subject to impermissible conflicts of interest. Pursuant to R.C. 5715.02, a person employed by a county auditor may be appointed to serve in the auditor’s place on a hearing board of a county board of revision. *See* 2006 Op. Att’y Gen. No. 2006-042. As a member of a hearing board of a county board of revision, the person may hear and decide complaints as to the value of real property located throughout the entire county, including real property situated in the county’s cities. R.C. 5715.02; *see* R.C. 5715.01(B); R.C. 5715.11; R.C. 5715.19; *see also* R.C. 5715.10 (a hearing board of a county board of revision may call persons before it and examine them under oath as to the valuation of real property).

Adjustments made by a hearing board of a county board of revision as to the value of real property located in a city directly affect the amount of money the city receives from taxes levied upon real property by the city. 2006 Op. Att’y Gen. No. 2006-034 at 2-315; *see* R.C. 319.28; R.C. 319.30; R.C. 5705.02; R.C. 5705.03; R.C. 5705.49; R.C. 5713.01; R.C. 5713.03; R.C. 5715.01; R.C. 5715.11-.13. If a member of a hearing board of a county board of revision who serves as a city legislator is required to hear complaints and render decisions as to the value of real property located in the city, the member may be predisposed toward increasing the value of the real property in the city so as to increase the amount of tax moneys the city legislative authority receives for the city budget. *See* 2006 Op. Att’y Gen. No. 2006-034 at 2-315. *See generally* R.C. 731.47 (“[t]he legislative authority [of a city] shall have the management and control of the finances and property of the [city], except as otherwise provided”); R.C. 5705.28 (the annual tax budget of a city is prepared by its legislative authority). Such a predisposition of loyalty toward the city might prevent the hearing board member from exercising his discretion in an objective and disinterested manner. *See* 2006 Op. Att’y Gen. No. 2006-034 at 2-315. Thus, a member of a hearing board of a county board of revision who serves as a city legislator within the same county is subject to influences that may prevent

him from rendering completely objective and disinterested decisions when determining the value of real property located in the city. *See id.*

In a similar situation, 2006 Op. Att’y Gen. No. 2006-034, which considered the propriety of a city legislator serving within the same county as a chief deputy treasurer or deputy treasurer assigned to serve on a hearing board of a county board of revision, stated that the conflicts of interest faced by the legislator as a member of the hearing board when hearing complaints and rendering decisions as to the value of real property located in the city cannot be satisfactorily avoided or eliminated entirely. As explained in 2006 Op. Att’y Gen. No. 2006-034 at 2-316 and 2-317:

[a] person who serves as a member of a city legislative authority and chief deputy treasurer or deputy treasurer for the county treasurer is unable to abstain from the conflicts when the chief deputy treasurer or deputy treasurer is required to serve . . . in the county treasurer’s place on . . . a hearing board of the county board of revision. When the county treasurer delegates this authority to the chief deputy treasurer or a deputy treasurer, the chief deputy treasurer or deputy treasurer is required to serve in place of the county treasurer on the . . . hearing board . . . under the conditions prescribed by the county treasurer. In other words, the chief deputy treasurer or deputy treasurer may not decline to take the place of the county treasurer on the . . . hearing board . . . .

A chief deputy treasurer or deputy treasurer who serves in place of the county treasurer on . . . a hearing board of the county board of revision also may not continually abstain from participating in matters before the . . . board that may directly or indirectly affect the city. If this were permitted, a chief deputy treasurer or deputy treasurer could not discharge competently the duties bestowed upon the county treasurer by virtue of his membership on the . . . county board of revision.

. . . A person who serves simultaneously within the same county as a member of a city legislative authority and chief deputy treasurer or deputy treasurer for the county treasurer thus is unable to remove himself from the conflicts of interest that exist when the chief deputy treasurer or deputy treasurer is required in certain circumstances to serve in place of the county treasurer on . . . a hearing board of the county board of revision.

. . . Impermissible conflicts of interest thus prohibit a member of a city legislative authority from holding within the same county the position of chief deputy treasurer or deputy treasurer for the county treasurer when the chief deputy treasurer or deputy treasurer may serve in place of the county treasurer on . . . a hearing board of the county board of revision. (Citations omitted.)

Accordingly, on the basis of 2006 Op. Att’y Gen. No. 2006-034, a person

who holds within the same county the positions of member of a hearing board of a county board of revision and member of a city legislative authority is subject to impermissible conflicts of interest when the hearing board hears complaints and renders decisions as to the value of real property located in the city.

In your particular situation, however, you have stated that it is possible for a member of a hearing board of a county board of revision who serves as a city legislator to avoid hearing complaints and rendering decisions as to the value of real property located in the city. You have explained that in your county the board of revision has created “no fewer than five hearing boards.” Moreover, “[w]hile complaints are generally assigned to any of the various hearing boards at random,” potential conflicts of interest involving the valuation of city property “could be easily resolved by a [board of revision] rule requiring that any complaint involving [real] property” in the city be referred to a hearing board that does not include a member who serves on the city’s legislative authority.

It is clear that such a rule would permit a member of a hearing board of a county board of revision who serves as a city legislator to avoid hearing complaints and rendering decisions as to the value of real property located in the city. The rule would not, however, allow the hearing board member to eliminate conflicts of interest that arise when the hearing board member hears complaints and renders decisions as to the value of real property located outside the city.

Under R.C. Chapter 5705, each parcel of real property is subject to taxation by every taxing unit within which it is located. There are numerous taxing units, including, for example, townships, municipal corporations, counties, school districts, township police or fire districts, joint fire or ambulance districts, joint recreation districts, township waste disposal districts, community or technical college districts, joint-county alcohol, drug addiction, and mental health service districts, metropolitan park districts, sanitary districts, road districts, and other districts that are empowered to levy real property taxes. R.C. 5705.01(A) and (H); *see* 1993 Op. Att’y Gen. No. 93-019 at 2-103 (“[e]ach parcel of land in Ohio may be located in, and subject to taxation by, a variety of overlapping political subdivisions or other taxing units”).

Taxes levied by various taxing units include taxes within the 10-mill limitation (unvoted taxes or inside millage), which is established by Article XII, § 2 of the Ohio Constitution and R.C. 5705.02. In this regard, Article XII, § 2 of the Ohio Constitution provides, in pertinent part: “No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value,” except that laws may be passed to reduce taxes for certain homesteads on the basis of age or disability. R.C. 5705.02 states further that “[t]he aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit shall not in any one year exceed ten

mills on each dollar of tax valuation of such subdivision or other taxing unit, except for taxes specifically authorized to be levied in excess thereof.” Thus, under Ohio real property tax law, “up to 10 mills of property taxes may be levied without the approval of the voters, and this inside millage is allocated among various taxing authorities.” 2005 Op. Att’y Gen. No. 2005-024 at 2-246.

The procedure for annually allocating inside millage within a county is complex and requires the consideration of various factors, as provided by statute. See 2005 Op. Att’y Gen. No. 2005-043 at 2-468; see, e.g., R.C. 5705.31; R.C. 5705.311; R.C. 5705.312; R.C. 5705.313; R.C. 5705.314; R.C. 5705.315. These factors include, but are not limited to, the number and type of taxing units that are entitled to share in the inside millage and the nature and amount of the taxes they levy. 2005 Op. Att’y Gen. No. 2005-043 at 2-464; see R.C. 5705.31.

When the value of real property located outside of a city is increased, it is possible that inside millage not allocated to another taxing unit may be free millage, available to the city.<sup>1</sup> See 2005 Op. Att’y Gen. No. 2005-043 at 2-469. For example, real property located in a city is part of the city (which is a taxing unit) and also may be included in various other taxing units, such as a county, township, or school district. In such situations, the real property in the city is subject to taxation by the county and every other taxing unit within which the real property is located. See generally *id.* at 2-450 (“[t]he taxes levied upon a particular parcel depend upon the boundaries of each of the taxing units”).

Moreover, the county and other taxing units levying unvoted taxes upon the real property located in the city must share in the amount of inside millage available, which pursuant to Article XII, § 2 of the Ohio Constitution and R.C. 5705.02 cannot exceed 10 mills. See R.C. 5705.31; R.C. 5705.32; 2005 Op. Att’y Gen. No. 2005-043 at 2-464 and 2-465. See generally *Berea City Sch. Dist. v. Budget Comm’n of Cuyahoga County*, 60 Ohio St. 2d 50, 52, 396 N.E.2d 767 (1979) (“[w]here subdivisions overlap, . . . the total unvoted millage cannot exceed ten mills and the rate at which each particular subdivision taxes its property must be uniform throughout. Thus, R.C. 5705.31 requires the budget commission to reduce unvoted levies where necessary so that the ten-mill limit is not exceeded, particularly in the areas of subdivision overlap”). This means that the amount of inside millage available to each taxing unit may be reduced by the county budget commission in order to comply with the 10-mill limitation. See, e.g., R.C. 5705.31; R.C. 5705.32. See generally 2005 Op. Att’y Gen. No. 2005-043 at 2-465 and 2-466 (“if a municipality annexed territory that remained part of a township, both the municipality and the township might have their inside millage reduced”); 1993 Op. Att’y Gen. No. 93-019 at 2-105 (“[r]eduction of various levies may be necessary in the case of overlapping political subdivisions to assure that the ten-mill limitation is given effect throughout the state”). Consequently, the amount of inside millage available to a city is contingent upon the amount of inside millage sought by the county and other overlapping taxing units.

<sup>1</sup> Free millage is inside millage that has not been allocated to another taxing unit or otherwise restricted. See 2005 Op. Att’y Gen. No. 2005-043 at 2-468.

As explained previously, a hearing board of a county board of revision may hear complaints and render decisions as to the value of real property located throughout the entire county. This includes determining the value of real property located in the taxing units that overlap the city. A member of a hearing board of a county board of revision who serves as a city legislator within the same county thus will be required to hear complaints and render decisions as to the value of real property located in taxing units that overlap the city.

Adjustments made by the hearing board as to the value of such real property directly affect the amount of money the overlapping taxing units may receive from taxes levied within the 10-mill limitation. *See* R.C. 319.28; R.C. 319.30; R.C. 5705.02; R.C. 5705.03; R.C. 5705.49; R.C. 5713.01; R.C. 5713.03; R.C. 5715.01; R.C. 5715.11-.13; *see also* 2006 Op. Att’y Gen. No. 2006-034 at 2-315. An increase in the value of the real property located in the territory of taxing units that overlap the city may result in the taxing units needing less inside millage. This, in turn, may create free millage that may be allocated to the city. *See* R.C. 5705.31(D). *See generally* 2005 Op. Att’y Gen. No. 2005-043 at 2-469 (“[i]t is possible that millage not allocated to another taxing unit may be free millage, available to a school district in a given year”).

If a member of a hearing board of a county board of revision who serves as a city legislator hears complaints and renders decisions as to the value of real property located in taxing units that overlap the city, the member may be predisposed toward increasing the value of such real property so as to increase the availability of free millage that may be allocated to the city by the county budget commission. *See* R.C. 5705.31; *see also* 2005 Op. Att’y Gen. No. 2005-043 (syllabus, paragraph 3) (“[m]illage within the 10-mill limitation is allocated on an annual basis in accordance with R.C. 5705.31(D), and the county budget commission . . . is empowered to determine each year how to allocate any inside millage that is not required by law to be allocated to a particular taxing unit”). A member of a hearing board of a county board of revision who serves as a city legislator within the same county thus is subject to influences that may prevent him from rendering completely objective and disinterested decisions when determining the value of real property located in taxing units that overlap the city.

A review of the immediacy of the conflicts of interest indicates that the conflicts cannot be sufficiently avoided or eliminated entirely. A hearing board of a county board of revision that has a member who serves as a city legislator within the same county will hear complaints and render decisions as to the value of real property located in taxing units that overlap the city. Moreover, the hearing board member cannot continually abstain from participating in matters involving taxing units that overlap the city since all the matters the board considers will involve the county (which is a taxing unit) and, possibly, other taxing units that overlap the city. If this were permitted, the hearing board member could not perform the duties the law requires him to perform as a member of the hearing board.

Finally, 1969 Op. Att’y Gen. No. 69-059 determined that a member of a county board of revision may not participate in hearing a complaint when there is

an overriding natural inclination to prejudge the complaint. It is evident that a member of a county board of revision who serves as a city legislator within the same county will continually be subject to a natural inclination to consider the interests of the city when hearing complaints and rendering decisions as to the value of real property located in taxing units that overlap the city. Such a predisposition of loyalty in matters involving the valuation of real property for taxing purposes should not be countenanced or condoned lest the hearing board's integrity be questioned. *See generally State ex rel. Baden v. Gibbons*, 17 Ohio Law Abs. 341, 344 (Ct. App. Butler County 1934) (insofar as a city commissioner "assists in the budgeting of the municipal requisition made upon the county budget commission," the commissioner "as a member [of the county budget commission] . . . might purposely favor the municipality. It is therefore our judgment that the positions of [city commissioner and deputy county auditor who serves on the county budget commission] are incompatible"). Accordingly, a person who holds within the same county the positions of member of a hearing board of a county board of revision and member of a city legislative authority is subject to impermissible conflicts of interest even though the hearing board does not hear complaints and render decisions as to the value of real property located in the city.

Your second question asks whether the term "public office," as used in R.C. 731.02, includes a position on a hearing board of a county board of revision that is filled by an appointee of a county auditor. R.C. 731.02 provides, in part, that a member of a city legislative authority "shall not hold any other public office, except that of notary public or member of the state militia." Further, "[a] member who ceases to possess . . . such qualification[] . . . shall forthwith forfeit the member's office." R.C. 731.02.

The Ohio Supreme Court has established the following general criteria for determining whether a public position is a public office: "[D]urability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him." *State ex rel. Landis v. Bd. of Comm'rs of Butler County*, 95 Ohio St. 157, 159, 115 N.E. 919 (1917). In addition, the court has long held that "[i]f official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office," even if the position is filled by appointment, rather than election. *Id.*; accord *State ex rel. Attorney General v. Jennings*, 57 Ohio St. 415, 49 N.E. 404 (1898) (syllabus, paragraph 2); *State ex rel. Attorney General v. Brennan*, 49 Ohio St. 33, 38, 29 N.E. 593 (1892).

In light of the foregoing Ohio Supreme Court pronouncements, a member of a hearing board of a county board of revision who is appointed by a county auditor holds a public office. Pursuant to R.C. 5715.02, the person is appointed to the hearing board by the county auditor. As a member of the hearing board, the person serves in place of the county auditor and has the same authority as the county auditor to hear complaints and render decisions as to the value of real property. R.C. 5715.02.

The person also is not subject to the direction and control of the county

auditor or another person when performing his duties as a member of a hearing board. *See generally* R.C. 5715.48 (no “member of a county board of revision . . . shall willfully and fraudulently value any real property for taxation except at its taxable value as provided by law”). Instead, the person serves as a member of an independent county board that exercises a portion of the sovereign power of the state when hearing complaints and rendering decisions as to the value of real property. *See* R.C. 5715.02; R.C. 5715.08-.20; R.C. 5715.48.

Furthermore, a hearing board of a county board of revision “has the same authority to hear and decide complaints and sign the journal as the board of revision, and shall proceed in the manner provided for the board of revision by [R.C. 5715.08-.20]. Any decision by a hearing board shall be the decision of the board of revision.” R.C. 5715.02. A hearing board of a county board of revision thus, in essence, serves as the county board of revision when hearing complaints and rendering decisions as to the value of real property.

With respect to the status of members of a county board of revision as public officers, the Ohio Supreme Court has determined that such members hold a public office:

A county board of revision is appointed by a board whose members are county officers. It acts in an independent capacity, with authority to do and perform official acts for the whole county. It is clothed with some part of the sovereign power of the state, to be exercised in the interest of the public as required by law. It is designated by statute as “The County Board of Revision.” Its official authority is coextensive with the territorial limits of the county. The salaries of its members are paid from county funds.

These facts bring the members of the county board of revision clearly within the doctrine announced by this court in the case of *State, ex rel. Armstrong, v. Halliday*, 61 Ohio St., 171; *State, ex rel., v. Brennan*, 49 Ohio St., 33, and *State, ex rel. Guilbert, v. Yates*, 66 Ohio St., 546, 550.

*State ex rel. Godfrey v. O’Brien*, 95 Ohio St. 166, 172-73, 115 N.E. 25 (1917).<sup>2</sup>

Accordingly, insofar as a person who is appointed by the county auditor to serve on a hearing board of a county board of revision is vested by statute with duties that require the independent exercise of a portion of the sovereign power of the state, the person holds a public office for purposes of R.C. 731.02.

Your final question asks whether R.C. 5715.51 prohibits a person from

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<sup>2</sup> In *State ex rel. Godfrey v. O’Brien*, 95 Ohio St. 166, 115 N.E. 25 (1917), the Ohio Supreme Court considered the provisions of law originally establishing county boards of revision. *See generally* 1914-1915 Ohio Laws 246, 254-257 (H.B. 29, filed May 11, 1915) (enacting G.C. 5580, G.C. 5595, and G.C. 5586, the predecessors to current R.C. 5715.02); 1914-1915 Ohio Laws 433 (Am. S.B. 317, filed June 1, 1915) (amending G.C. 5580).



holding simultaneously the positions of member of a hearing board of a county board of revision and member of a city legislative authority when the person has been appointed to the hearing board by a county auditor. R.C. 5715.51 states:

No assistant, expert, clerk, or *other employee* of a county board of revision . . . shall hold any position on or under any committee of a political party, or subscribe or pay any money or other thing of value to any person or organization for the purpose of promoting, defeating, or otherwise influencing any legislation, or circulate any initiative or referendum petition. Whoever violates this section shall be removed from his office or employment. (Emphasis added.)

R.C. 5715.51's use of the general term "other employee" in conjunction with the words assistant, expert, and clerk indicates that the legislative intent was to prohibit only the public employees of a county board of revision from performing the specific acts listed in R.C. 5715.51. *See generally Myers v. Seaberger*, 45 Ohio St. 232, 236, 12 N.E. 796 (1887) ("the meaning of a word may be ascertained by reference to the meaning of words associated with it; and again, according to a similar rule, the coupling of words together shows that they are to be understood in the same sense"); 1965 Op. Att'y Gen. No. 65-95 at 2-206 (the word "other" "when preceded by a specific enumeration, [is] commonly given a restricted meaning, and limited to articles, things, or matters of the same nature as those previously described"). As explained in 1968 Op. Att'y Gen. No. 68-062 at 2-73, R.C. 5715.51 was not intended to apply to persons holding a public office with a county board of revision:<sup>3</sup>

A county auditor is a public [officer] and it is my opinion that although he may perform services for the Department of Taxation for the purpose of [R.C. 5715.51], he is not an employee of the Department of Taxation and therefore the services he performs for the Department of Taxation do not disqualify him from being committeeman for a political party. Further, the county auditor is a member of the county board of revision but according to the distinction made between public [officer] and employee in [*State ex rel. Milburn v. Pethtel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950)], he is not an employee of the county board of revision.

. . . The legislature clearly indicated its intention that members of boards of revision are among the officials who were to be allowed to serve on a political committee while at the same time holding public office.

Because we determined earlier that a person appointed by a county auditor

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<sup>3</sup> In *State ex rel. Milburn v. Pethtel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950), the Ohio Supreme Court held that a person is a public officer, rather than a public employee, when the person is authorized by law to exercise a portion of the sovereignty of the state in the carrying out of functions that are executive, legislative, or judicial in nature.

to a hearing board of a county board of revision holds a public office, it follows that R.C. 5715.51's prohibitions do not apply to such a person. *Compare* R.C. 5715.02 (appointments to a hearing board of a county board of revision) *with* R.C. 5715.04 *and* R.C. 5715.06 (authorizing a county board of revision to employ experts, clerks, and other employees). Therefore, in response to your last question, R.C. 5715.51 does not prohibit a person from serving simultaneously as a member of a hearing board of a county board of revision and member of a city legislative authority when the person has been appointed by the county auditor to the hearing board.

In conclusion, it is my opinion, and you are hereby advised as follows:

1. A person who holds within the same county the positions of member of a hearing board of a county board of revision and member of a city legislative authority is subject to impermissible conflicts of interest even though the hearing board does not hear complaints and render decisions as to the value of real property located in the city.
2. A person who is appointed by the county auditor to serve on a hearing board of a county board of revision serves in a public office for purposes of R.C. 731.02.
3. R.C. 5715.51 does not prohibit a person from serving simultaneously as a member of a hearing board of a county board of revision and member of a city legislative authority when the person has been appointed by the county auditor to the hearing board.