

OPINION NO. 92-037**Syllabus:**

1. Pursuant to 7 Ohio Admin. Code 4701-11-03(A), professional services may not be offered or rendered by a certified public accountant or public accountant under an arrangement whereby no fee will be charged unless a specified finding or result is attained, or where the fee is otherwise contingent upon the findings or results of such services, unless such fee is not regarded as being contingent because it is fixed by a court or other public authority.
2. 7 Ohio Admin. Code 4701-11-03(B) may be interpreted as permitting fees under a contract between the Department of Human Services and a certified public accounting firm wherein the Department requires a percentage contingent fee as the method for calculating the amount of compensation to be paid the certified public accounting firm for the services it performs for the Department under the contract.

To: Timothy D. Haas, Executive Director, Accountancy Board, Columbus, Ohio

By: Lee Fisher, Attorney General, September 10, 1992

You have requested an opinion on behalf of the Accountancy Board regarding the interpretation and application of 7 Ohio Admin. Code 4701-11-03 in connection with a pending contract between the Department of Human Services (DHS) and a certified public accounting firm. Rule 4701-11-03, which has been promulgated by the Accountancy Board pursuant to R.C. 4701.03 ("[t]he board may promulgate, and amend from time to time, rules of professional conduct appropriate to establish and maintain a high standard of integrity and dignity in the profession of public accounting"), prohibits the offer or rendition of professional services under a contingent fee arrangement, and states as follows:

(A) Professional services shall not be offered or rendered under an arrangement whereby no fee will be charged unless a specified finding or result is attained, or where the fee is otherwise contingent upon the findings or results of such services. However, a certified public accountant or public accountant's fees may vary depending, for example, on the complexity of the service rendered.

(B) Fees are not regarded as being contingent if fixed by courts or other public authorities or, in tax matters, if determined based on the results of judicial proceedings or the findings of governmental agencies.

Factual Background

According to your letter, DHS occasionally makes Medicaid payments to medical care providers for the cost of their services even though another insurer bears primary responsibility for covering those costs. Under the proposed contract with DHS, the certified public accounting firm, using data collection and analysis, will undertake to identify each care provider claim paid by DHS with Medicaid funds,

and match that claim with the insurer that should have paid the claim initially.¹ This information will then be given to DHS, and DHS will contact the insurer to request reimbursement for the Medicaid amounts that DHS has paid on the claim. See generally R.C. 5101.571-.59 (recovery of medical support). For its services under the contract with DHS, the certified public accounting firm is to receive fifteen per cent of the total reimbursement DHS receives on all such claims so identified by the certified public accounting firm, subject to a maximum dollar amount set forth in the contract, even though use of the percentage calculation would entitle the firm to an amount of compensation greater than the maximum specified in the contract.

Questions Presented

Your letter states that there "seems to be little doubt" that the contract between DHS and the certified public accounting firm is, *inter alia*, a contingent fee arrangement. However, the Board questions whether the language of division (B) of rule 4701-11-03 that states that, "[f]ees are not regarded as being contingent if fixed by courts or other public authorities," applies to the contingent fee arrangement between DHS and the certified public accounting firm, thus removing that arrangement from the proscriptions of division (A) of the rule.²

Interpretation and Application of 7 Ohio Admin. Code 4701-11-03(B)

Initially, the Accountancy Board asks whether the language of rule 4701-11-03(B) may be read as applying to the contingent fee arrangement negotiated by DHS and the certified public accounting firm as part of the contract described above. As noted above, division (A) of rule 4701-11-03 states that, "[p]rofessional services shall not be offered or rendered under an arrangement whereby no fee will be charged unless a specified finding or result is attained, or where the fee is otherwise contingent upon the findings or results of such services." Nonetheless, division (A) does permit variations in the fees of a certified public accountant or public accountant "depending, for example, on the complexity of the service rendered." Division (B) of rule 4701-11-03 then provides that, "[f]ees are not

¹ The original request for proposal prepared by the Department of Human Services, and released in January 1992 for distribution to contractors wishing to submit bids in response thereto, formally designates this contract as one for "third party liability-recovery collections."

² In supplemental correspondence you have inquired whether the term "[p]rofessional services," as used in 7 Ohio Admin. Code 4701-11-03(A), may be construed as referring only to activities and services that constitute the practice of accounting, the lawful performance of which requires certification by or registration with the Accountancy Board under R.C. 4701.06 and R.C. 4701.07 respectively, but excluding activities and services that do not constitute the practice of accounting because their rendition does not involve the application of recognized accounting principles or standards, or the exercise of professional discretion and judgment. If such is the case, you have asked whether an accounting firm may offer those "nonprofessional" services to a client on a contingent fee basis and remain in compliance with rule 4701-11-03(A) by having those services performed by employees who are not licensed by the Board to practice accounting. The discussion that follows in response to the Board's initial inquiry renders unnecessary further consideration of the characterization of the certified public accounting firm's activities under the proposed contract with the Department of Human Services (DHS) as something other than "professional services" for purposes of rule 4701-11-03(A).

regarded as being contingent if fixed by courts or other public authorities or, in tax matters, if determined based on the results of judicial proceedings or the findings of governmental agencies."

Thus, division (B) of rule 4701-11-03 exempts certain contingent fee arrangements from the proscription otherwise imposed by division (A) of the rule by declaring that such fees "are not regarded as being contingent." In this instance the Board asks whether the contingent fee agreed upon and to be paid to the certified public accounting firm for the services it performs under its contract with DHS is, in the language of rule 4701-11-03(B), "fixed" by a "public authority."³

Defining the Terms "[F]ixed" and "[P]ublic [A]uthorities," for Purposes of 7 Ohio Admin. Code 4701-11-03(B)

Resolution of the Board's inquiry depends, in part, upon the meanings to be accorded the terms "fixed" and "public authorities," as used in rule 4701-11-03(B). Insofar as validly adopted administrative rules or regulations have the same force and effect as legislative enactments, *see, e.g., Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St. 3d 46, 554 N.E.2d 97 (1990) (syllabus, paragraph one) ("[a]dministrative rules enacted pursuant to a specific grant of legislative authority are to be given the force and effect of law"), such rules or regulations are subject to the principles of construction ordinarily applicable to statutory provisions. *See, e.g., State ex rel. Miller Plumbing Co. v. Industrial Commission*, 149 Ohio St. 493,

³ 7 Ohio Admin. Code 4701-11-03 tracks closely language that appears in rule 302 of the Rules of Conduct promulgated as part of the American Institute of Certified Public Accountants (AICPA) Professional Standards (1991). Rule 302 reads as follows:

A member in public practice shall not:

- (1) Perform for a contingent fee any professional services for, or receive such a fee from a client for whom the member or the member's firm performs:
 - (a) an audit or review of a financial statement; or,
 - (b) a compilation of a financial statement when the member expects, or reasonably might expect, that a third party will use the financial statement and the member's compilation report does not disclose a lack of independence; or,
 - (c) an examination of prospective financial information; or
- (2) Prepare an original or amended tax return or claim for a tax refund for a contingent fee for any client.

The prohibition in (1) above applies during the period in which the member or the member's firm is engaged to perform any of the services listed above and the period covered by any historical financial statements involved in any such listed services.

Except as stated in the next sentence, a contingent fee is a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service. Solely for purposes of this rule, fees are not regarded as being contingent if fixed by courts or other public authorities, or, in tax matters, if determined based on the results of judicial proceedings or the findings of governmental agencies.

A member's fees may vary depending, for example, on the complexity of services rendered.

496-97, 79 N.E.2d 553, 555 (1948) ("[t]he orders of the Industrial Commission formulating rules for specific safety requirements have the effect of legislative enactments and are, therefore, subject to the ordinary rules of statutory construction"). In this instance, the Board has not expressly promulgated definitions for either of these terms. Terms thus left undefined are to be "read in context and construed according to the rules of grammar and common usage." R.C. 1.42. See *State v. Dorso*, 4 Ohio St. 3d 60, 62, 446 N.E.2d 449, 451 (1983) ("any term left undefined by statute is to be accorded its common, everyday meaning").

The dictionary assigns many meanings to the term "fix," when used as a transitive or intransitive verb. See *Webster's New World Dictionary* 528 (2d college ed. 1978) ("fix" means, *inter alia*, "to make firm, stable, or secure"; "to fasten or attach firmly"; "to direct steadily"; "to make permanent or lasting"; "to become fixed, firm, or stable"). The term "fixed," when used as an adjective, also can convey a variety of meanings: "firmly placed or attached; not movable"; "established; settled; set [a fixed price]"; "steady; unmoving; resolute [a fixed purpose]." *Id.* See also *Black's Law Dictionary* 637 (6th ed. 1990) ("[f]ix" means to "[a]djust or regulate; determine; settle; make permanent. Term imports finality; stability; certainty; definiteness"). Considering the available meanings from which to choose, and given the context in which it appears in rule 4701-11-03(B), it seems both appropriate and reasonable to view the term "fixed" as referring to action by a public authority, taken on its own initiative, to "establish," "determine upon," or "select" a contingent fee as the method for calculating a certified public accountant's or public accountant's compensation for services rendered. Thus, rule 4701-11-03(B) may reasonably be interpreted to permit the receipt of a contingent fee by an accountant when such method of payment is established or selected as the preferred method by a public authority, presumably a public authority for whom the accountant renders the services in question.

The dictionary definition of "authority" includes the following meaning for its use in the plural: "persons, esp. in government, having the power or right to enforce orders, laws, etc." *Webster's New World Dictionary* at 94. In the singular it is defined as "a government agency that administers a project." *Id.* Two of the entries provided for the term "public," when used as an adjective, state that it can mean either "for the use or benefit of all; esp., supported by government funds [a public park]," or "acting in an official capacity on behalf of the people as a whole [a public prosecutor]." *Id.* at 1148. Thus, the term "public authorities," as used in rule 4701-11-03(B), denotes, *inter alia*, individuals authorized to act for and on behalf of state, local, or federal governments, as well as those entities responsible by law for carrying out specific governmental functions and duties.

Application of 7 Ohio Admin. Code 4701-11-03(B) to the Contingent Fee Arrangement Between the Department of Human Services and the Certified Public Accounting Firm

Construing the language of rule 4701-11-03(B) in the manner just described, the contingent fee that is to be paid to the certified public accounting firm in accordance with its contract with the Department of Human Services may reasonably be viewed as having been "fixed" by a "public authority." The Department of Human Services is a party to that contract, and awarded the contract to the firm that, in response to the Department's request for proposal, *see note 1, supra*, submitted the bid deemed most favorable by the Department. The contract has, in turn, been executed and signed by the Director of Human Services on behalf of the Department. The Department of Human Services and its Director are "public authorities" for purposes of rule 4701-11-03(B). The Department of Human Services has been created by the General Assembly as an administrative department within the executive branch of state government, R.C. 121.02(I); R.C. 5101.01, and the Department's powers, duties, and responsibilities are set forth in R.C. Chapters 5101 through 5113. The Director of Human Services is the executive head of the

Department, and "[a]ll duties conferred on the various divisions and institutions of the department by law or by order of the director shall be performed under such rules as he prescribes, and shall be under his control." R.C. 5101.02 As an administrative department of state government, the Department receives state funds by way of General Assembly appropriation for the purpose of carrying out its duties and responsibilities. *See, e.g.*, Am. Sub. H.B. 298, 119th Gen. A. (1991) (eff., in part, July 26, 1991) (section 74, uncodified) (appropriating approximately 11.3 billion dollars to DHS out of the general revenue fund for fiscal years 1992 and 1993). Thus, by all measures, the Department of Human Services and its Director qualify as "public authorities."

As noted previously, DHS prepared and circulated a formal request for proposal that solicited bids from contractors to perform various services for DHS in effecting third party liability – recovery collections, which resulted in the contract in question. Section 7.1 of the request for proposal describes its purpose and scope as follows:

The purpose of this RFP is to select a contractor to perform third party recoveries on a contingency fee basis. Any contract awarded as a result of this RFP will be in effect for two years subject to renewal provisions identified in Section 4.19, commencing with the date the contract is signed by the Director of the Department of Human Services. Third party recoveries will only be performed during the first year. The second year's sole purpose is to allow for contingency fee payments to the contractor for refunds received by ODHS.

The scope of work as defined in this RFP includes all expressed or implied functions and tasks necessary to complete the activities identified in this chapter.

Attachment 5 to the request for proposal is a separate form that asks the bidding contractor to specify the percentage rate the contractor will accept for calculating the contingent fee to be paid the contractor by DHS.⁴

The foregoing provisions of the request for proposal indicate that DHS has selected and required a percentage contingent fee as the method for compensating the contractor chosen to perform third party liability–recovery collections services. Thus, DHS, a "public authority," has "fixed" the contingent fee that will be paid to the certified public accounting firm for the services it performs under its contract with DHS. It follows, therefore, that the contingent fee arrangement between DHS and the certified public accounting firm is permitted by rule 4701–11–03(B) as an exception to rule 4701–11–03(A)'s prohibition against contingent fees.

⁴ That form reads and is styled as follows:

COST PROPOSAL FORM

Contractor reimbursement for the services provided under the scope of the resulting contract will be a contingency fee based on actual TPL recovery collections. The Contractor must specify the percentage rate to be used to calculate the contingency fee on this cost proposal form.

One copy of the cost proposal form must be submitted in a separate sealed envelope as indicated in Section 5.7. The cost proposal form must be signed by the same individual who signed the transmittal letter.

The Accountancy Board Has Authority to Interpret its Rules in Any Reasonable Manner that Advances its Regulatory Goals and Objectives

The analyses and conclusions in this opinion are not intended to foreclose the Accountancy Board, in the reasonable exercise of its discretion, from arriving at an interpretation of rule 4701-11-03(B) that differs from the one adopted herein. In that regard, the Board may adopt any reasonable interpretation of its rule that it believes will advance the Board's regulatory goals and objectives. *See generally United States v. City of Painesville, Ohio*, 644 F.2d 1186, 1190 (6th Cir.), *cert. denied*, 454 U.S. 894 (1981) ("[a]n agency's interpretation of its own regulations is controlling unless plainly erroneous" (citations omitted)); *Hocking Valley Railway Co. v. Public Utilities Commission*, 92 Ohio St. 362, 110 N.E. 952 (1915) (a court will not substitute its judgment for that of an administrative body, but determinations made by such body are subject to judicial review for abuse of discretion). Moreover, if the Board determines that a result different from the one recommended by this opinion would be preferable, the Board may, in the reasonable exercise of its discretion, amend its rule to achieve that result. 1989 Op. Att'y Gen. No. 89-008 at 2-33.

Conclusion

It is, therefore, my opinion, and you are advised that:

1. Pursuant to 7 Ohio Admin. Code 4701-11-03(A), professional services may not be offered or rendered by a certified public accountant or public accountant under an arrangement whereby no fee will be charged unless a specified finding or result is attained, or where the fee is otherwise contingent upon the findings or results of such services, unless such fee is not regarded as being contingent because it is fixed by a court or other public authority.
2. 7 Ohio Admin. Code 4701-11-03(B) may be interpreted as permitting fees under a contract between the Department of Human Services and a certified public accounting firm wherein the Department requires a percentage contingent fee as the method for calculating the amount of compensation to be paid the certified public accounting firm for the services it performs for the Department under the contract.

PROPOSED PERCENTAGE RATE _____%

Authorizing Signature/Title

Contractor Name