



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

December 15, 1998

CC:EBEO:Br2

UILC: 1402.03-00

Number: **199918009**

Release Date: 5/7/1999

INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

SENIOR ATTORNEY

FROM: JERRY E. HOLMES, CHIEF, BRANCH 2, CC:EBEO

SUBJECT:

This Field Service Advice responds to your memorandum dated October 15, 1998, in which you requested advice regarding whether certain individuals were fee-based public officials. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

STATE =

BOARD OF BAR EXAMINERS =

ISSUE(S):

Are individuals paid by a state or local government agency fee-based public officials

?

CONCLUSION:

The individuals are not fee-based public officials.

FACTS:

Members of the Board of Bar Examiners are appointed by the State Supreme Court. By rule of the State Supreme Court, the Chairman of the Board is paid \$ _____ per year and the remaining members are paid \$ _____ per year; however, under State statute,

The Board members are paid from a government fund and do not receive any remuneration directly from bar applicants.

LAW AND ANALYSIS:

Section 1402(a) of the Code defines the term “net earnings from self-employment,” in pertinent part, as the gross income of an individual from any trade or business carried on by such individual, less the allowable income tax deductions attributable to such trade or business.

Section 1402(c)(1) of the Code provides, in part, that the term “trade or business,” when used with reference to self-employment income or net earnings from self-employment, shall not include the performance of functions of a public office, other than the functions of a public office of a State or political subdivision thereof with respect to fees received in any period in which the functions are performed in a position compensated solely on a fee basis and in which such functions are not covered under an agreement pursuant to section 218 of the Social Security Act as referenced above.

Section 1.1402(c)-2 of the Income Tax Regulations provides, in part, that the term “public office” includes any elective or appointive office of a State or its political subdivisions or of a wholly owned instrumentality of any one or more of the foregoing. The members of the Board of Bar Examiners are appointed by the State Supreme Court; therefore, the members are public officials.

Revenue Ruling 74-608, 1974-2 C.B. 275, provides that when a public official receives remuneration in the form of fees directly from the members of the public with whom the public official does business, such remuneration is “fees” within the meaning of section 1402(c)(1). When, however, a public official receives remuneration or salary from a government fund and no portion of the monies collected by such official belongs to or can be retained by such official as compensation, the remuneration is not “fees” under section 1402(c)(1).

The members of the Board of Bar Examiners are compensated entirely from a government fund. The Board members do not receive any remuneration directly from bar applicants. Therefore, the Board members are not fee-based public officials under section 1402(c)(1).

does not cause the remuneration to be fee-based.

We hope the foregoing information is helpful to you. If you have any further questions, please call John Richards of this office at (202) 622-6040.

Sincerely yours,

JERRY E. HOLMES
Chief, Branch 2
Office of the Associate
Chief Counsel
(Employee Benefits and
Exempt Organizations)