



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

October 13, 1988

Informal Opinion 1988-INF-1013

C. Douglas Chamberlain
Logan County Prosecuting Attorney
[REDACTED]

Dear Mr. Chamberlain:

In your letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes prohibit a municipal council member or township trustee from serving on a merger commission created pursuant to R.C. 709.45, where the council member and trustee serve with the political subdivisions contemplating merger.

Divisions (D) and (E) of Section 102.03 of the Revised Code provide:

- (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 for purposes of R.C. Chapter 102. as any person who is elected or appointed to an office of a city, village, township, or other governmental entity. See R.C. 102.01(B) and (C). Thus, municipal council members and township trustees are "public officials or employees" for purposes of R.C. 102.03(D) and (E) and are subject to the statutory prohibitions of those sections. See Ohio Ethics Commission Advisory Opinions No. 80-003, 80-007, 86-002, and 87-009.

In addressing the question whether a municipal council member or township trustee is prohibited by R.C. 102.03 from accepting a position as member of a merger commission, it is helpful to examine the statutes which establish and define the functions of a merger commission. R.C. 709.44 enables the unincorporated area of a township to be merged with a municipal corporation located adjacent to, or wholly or partially within, the township. The merger is initiated by a petition signed by the electors of the municipal corporation and the township and presented to the appropriate county board of elections. See R.C. 709.45. The petition shall contain the names of not less than five electors of the municipality and the names of not less than five electors of the unincorporated area of the township, to be nominated to serve as commissioners to draw up a statement of conditions for merger of the political subdivisions. Upon finding that the petition is sufficient, the board of elections shall place the question whether a merger commission shall be chosen, on the ballot at the next general election. *Id.* The ballot must provide for the election of five electors from the municipality and five electors from the township to constitute the commission to draw up the statement of conditions for merger. *Id.*

If the majority of those voting in both the township and municipality approve the question of merging, then the ten candidates shall be elected to the merger commission to formulate the merger conditions. See R.C. 709.46. When the conditions of merger have been agreed upon by a majority of the members of the merger commission from each political subdivision, the proposed conditions of merger are submitted to the electorate of the township and municipality involved for their approval or rejection. *Id.* Regardless of whether the merger commission succeeds in reaching an agreement, it shall cease to exist on the seventy-fifth day prior to the next general election after the commission is elected. *Id.*

R.C. 102.03(D) and (E) would prohibit a municipal council member or township trustee from accepting, soliciting, or using his authority or influence to secure a position as a member of a merger commission if such membership constitutes "anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties" as a municipal or township official. The term "anything of value" is defined for purposes of R.C. 102.03 to include money and every other thing of value. See R.C. 1.03 and 102.01(G). The statutes which enable a municipality and township to merge and which establish and define the functions of a merger commission do not provide for the compensation or reimbursement of expenses for merger commission members. The issue becomes whether service on a merger commission, which does not provide for compensation for its members, is within the definition of "anything of value" for purposes of R.C. 102.03. The Ohio Ethics Commission has held that R.C. 102.03(D) and (E) do not apply to prohibit a public official or employee from holding another position where he receives no compensation or other benefits except expenses for performing the duties of that other position. See Advisory Opinion No. 88-002. Therefore, membership on a merger commission, which does not provide for compensation or even reimbursement of expenses for its members is not within the definition of "anything of value" for purposes of R.C. 102.03 and a municipal council member or township trustee would not be prohibited by R.C. 102.03(D) and (E) from serving as a member of a merger commission.

However, in addressing your question it is also necessary to determine whether a member of a merger commission is a "public official or employee" for purposes of R.C. 102.03, and if so, whether Divisions (D) and (E) of Section 102.03 would prohibit a member of a merger commission from serving as a municipal council member or township trustee.

As discussed above, the term "public official or employee" is defined for purposes of R.C. 102.03 as any person who is elected or appointed to an office of a city, village, township, or other governmental entity. See R.C. 102.01(B) and (C). A merger commission possesses indicia of a governmental entity in that it is established and empowered pursuant to statute to exercise a governmental function within a definite geographical area, and its members are elected by the electors of a defined geographical area. See Advisory Opinion No. 75-020.

The Ohio Ethics Commission has held that the tests of whether a position constitutes a public office include whether the position is filled by appointment or election in a manner prescribed by law; has a title given by law; exercises functions of government concerning the public; and whether the term is defined, affixed, and certain. See Advisory Opinion No. 74-007. Also, in Advisory Opinion No. 75-004 the Ethics Commission added that a public office involves the exercise of sovereign power, holding that:

The concept of sovereign power originates with the idea that the office is created by public authority, be it executive order, or the Constitution or some statute. Furthermore, it has been held that "if a man is placed in a position which is continuous and permanent and has certain powers which, under the law, only he can exercise; then he has some sovereign power delegated to him." Shaw v. Jones, 40 O.N.P 372 (1897). A further example of the exercise of sovereign power is contained in the case of State ex rel Milburn et al v. Pethel, 153 Ohio St. 1 (1950), which held that "if a person is empowered to act in those multitudinous cases involving business or political dealings with individuals in the public, wherein the latter must necessarily act through an official agency then such functions are a part of the sovereignty of the state." (Emphasis added.) It has been held that the acts which constitute sovereign power are more than mere clerical acts. State ex rel Landis v. Board of Commissioners of Butler County et al, 95 Ohio St. 157 (1917). As the various cases are reviewed, it becomes apparent that "sovereign power" is a concept meant to imply the exercise of duty entrusted to one by virtue of statute or some other public authority. Those duties are not merely clerical but involve some discretionary, decision-making qualities.

In the instant situation, a merger commission is created pursuant to procedures established by statute and the members thereof are chosen by the vote of the electorate of a definite geographical area. See R.C. 709.45. The members of a merger commission exercise independent prerogatives and are not subject to the control of any superior authority in formulating the conditions of merger but are free to act at their own discretion within the statutory guidelines. The position of merger commission member is not a continuous, permanent position; however, the members of a merger commission are provided by statute with a defined, affixed, and certain tenure of office, since the commission ceases to exist on the seventy-fifth day prior to the next general election after the commission is elected. See R.C. 709.46. The electors of a township and municipality which are contemplating merger are required by statute to nominate and elect the merger commission to formulate the conditions of merger. The formulation of these conditions of merger is clearly a sovereign function which is entrusted to the commission members by the electorate of the political subdivisions contemplating merger, and involves discretionary, decision-making qualities rather than the performance of mere clerical tasks. While a merger commission may not possess all of the characteristics of a sovereign power body, such as the ability to incur financial obligations, see Advisory Opinion No. 85-005, the Ethics Commission has held that in applying the tests to determine whether an individual holds a public office that no one indicium is determinant, and that generally there exists a combination of these factors. See Advisory Opinions No. 74-007 and 75-002.

In Attorney General Opinion No. 1971-017, the Ohio Attorney General addressed the issue whether a member of a municipal charter commission, which is charged with framing a municipal charter, holds a public office. The Attorney General held that a member of a municipal charter commission occupied a "public office of trust" quoting State, ex rel. Bricker v. Gessner, 129 Ohio St 290, 295 (1935) which had determined that a member of a county charter commission occupied "a public office of trust," as follows:

"He is chosen by vote of the people. He exercises independent prerogatives and is not amenable to superior authority. His tenure is reasonably definite in that his duties must be fully accomplished within ten

months after election. His participation in framing or amending a charter is in the performance of sovereign powers. The nature of his work possesses legislative qualities. His acts are in the public service. While he is not required to take an oath of office, gives no bond, and receives no compensation, these are lesser indicia of public office and lose significance when compared with the other more important criteria which have been noted."

The character of a municipal charter commission is analogous to that of a merger commission. In both instances, each commission is created by statute and members are chosen by the vote of the electorate. Also, in both instances, the tenure of each commission is defined and certain, being affixed by statute, and both commissions are dissolved upon completion of their tasks. The functions exercised by both commissions are similar in that they consist of work that possesses legislative qualities involving duties which require discretionary decision-making, although the formulations of both commissions are subject to approval or rejection by the electorate. An examination of the statutory functions exercised by a merger commission and its analogous character to a municipal charter commission reveals that a merger commission exercises sovereign power. Therefore, a member of a merger commission holds public office and falls within the definition of a "public official or employee" for purposes of R.C. 102.03.

R.C. 102.03(D) and (E) prohibit a member of a merger commission from accepting, soliciting or securing anything of value for himself that is of such character as to manifest a substantial and improper influence upon him with respect to his duties. Municipal council members and township trustees are compensated for their services as elected officials of their political subdivisions. See generally R.C. 731.08 and 505.24 respectively. The compensation derived from such services would fall within the definition of "anything of value" for purposes of R.C. 102.03. The issue is whether this compensation is of such character as to manifest a substantial and improper influence upon a member of a merger commission with respect to his duties.

The merger commission is composed of five electors of the municipality and five electors of the township contemplating merger. The fact that the members are chosen by, and from among the electors of each of the component subdivisions and that a majority of the members from each political subdivision must agree upon the merger conditions, indicates that the merger commission members are chosen and entrusted to represent the interests of their respective component subdivisions from which they were elected in formulating the conditions of merger. Likewise, a municipal council member and a township trustee have the duty to represent the interests of their respective political subdivisions. Therefore, an individual who served as a member of a merger commission representing the municipality in the merger process, would have no conflict of interest if he also served as a municipal council member, since a council member is also charged with representing the interests of the municipality. The same would be true for a member of a merger commission representing the township who also served as a township trustee. The objectivity and independence of judgment of merger commission members serving in such dual capacities, in the absence of additional facts to the contrary, would not be impaired. Therefore, the thing of value, the compensation which the merger commission members would receive as a municipal council member or township trustee, would not, as a general matter, be of such character as to manifest a substantial and improper influence upon them with respect to their merger commission duties.

The possibility that a township trustee also serving on a merger commission could use his position on the merger commission to draft merger conditions designed to favor himself in his trustee position would not exist due to the statutory requirement that if the merger conditions are approved by the electorate, the corporate existence and the offices of the township proposed to be merged terminate on the effective date of the merger. See R.C. 709.47. R.C. 709.46 states that "the conditions of merger may provide for the election, prior to the merger, of new officers to govern the municipal corporation with which merger is proposed after the merger is complete," provided this does not conflict with the municipality's charter. If no provision for the election of new officers is made, and it is intended that the municipality's current officers be retained, a member of the merger commission who also served as a municipal council member would be prohibited by R.C. 102.03(D) and (E) from accepting, soliciting, or using his authority or influence as a merger commission member to secure any benefit or thing of value for himself as a council member. A member of a merger commission may not use his authority or influence on the commission to benefit himself in his other public capacity or in his private capacity.

In a merger between a township and a municipality, the municipality will succeed to all interests of the township including all money, taxes, and special assessments whether in the treasury or in the process of collection, all property and interests in property, real or personal, all rights and interests in contracts or in securities, bonds, notes, and other instruments, all accounts receivable and rights of action, and all other matters. See R.C. 709.47. These interests fall within the definition of "anything of value" set forth in R.C. 102.01(G) and R.C. 1.03. Due to the fact that all interests of the township will accrue to the municipality as a result of a merger between the two political subdivisions, a merger commission member, by acting to formulate conditions of merger acceptable to the electors of the township and municipality, would be soliciting or using the influence or authority of his position to secure a thing of value for the municipality to which merger is proposed.

Prior to the enactment of Am. Sub. H.B. 300, 116th Gen. A. (eff. Sept. 17, 1986), Division (D) of Section 102.03 prohibited a public official or employee from using his official position to secure anything of value for himself if the thing of value were of such character as to manifest a substantial and improper influence upon him with respect to his duties. Am. Sub. H.B. 300 amended Division (D), however, to delete the requirement that the thing of value be for the public official or employee himself. Similarly, R.C. 102.03(E) prohibits a public official or employee from soliciting anything of value for himself or for any other party if the thing is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. Therefore, the issue arises whether merger commission members who also serve as a council member or township trustee would be prohibited from soliciting or using the authority or influence of his position as a merger commission member to secure, in the formulation of merger conditions, those things of value from the township listed above, for the municipality.

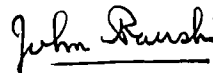
As discussed above, a township trustee who also represents his township on a merger commission or a municipal council member who also represents his municipality on a merger commission would have no conflict of interest in serving in both capacities. In formulating the conditions of merger, which would eventually lead to the municipality succeeding to the township's interests, the township electors on the merger commission will be representing the township's interests, and the municipality electors on the commission will be representing the municipality's interests. The fact that an elector from the township is also a township trustee, or that an elector from the municipality is

also a municipal council member does not, as discussed above, represent a conflict of interest for the individual in his capacity as a member of the merger commission. The members of the merger commission can objectively determine that merger is in the best interests of their respective subdivisions and formulate the conditions of such merger even though they may serve as elected officers of their respective subdivisions and even though the interests of the township will pass to the municipality upon merger.

As a final matter, there are other statutory restrictions which prohibit village and city council members from holding other public office. See R.C. 731.12 and 731.02 respectively. The Ohio Ethics Commission does not have advisory jurisdiction over these statutes. However, the Attorney General, as discussed above, held that R.C. 731.02 prohibited a city council member from serving upon a municipal charter commission due to the prohibitions of Section 731.02. See Opinions of the Attorney General 1971-017. We suggest you consult the Attorney General's Office or the law director of the municipality involved for an interpretation of R.C. 731.12 or R.C. 731.02 in this instance, and for a determination whether the positions in question are "compatible."

This informal advisory opinion was approved by the Ethics Commission at its meeting on October 11, 1988. The opinion is based on the facts presented, and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. If you have any questions please contact me.

Very truly yours,



John Rawski
Staff Attorney

JR/pg