

OHIO ETHICS COMMISSION

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February 23, 2001

Informal Opinion 2001-INF-0223-1

Robert J. Ulm

Dear Mr. Ulm:

In your letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes prohibit you from serving as president of the city council of Delphos, Ohio in light of the fact that you are the news director and advertising account executive for radio station WDOH F.M. in Delphos, Ohio. You state that you contemplate filing as a candidate for this position in the May 2001 primary election. You are concerned about the potential restrictions that the Ethics Law and related statutes impose on your ability to be involved, as news director, in stories pertaining to city government if you were to serve as president of council. Specifically, you ask whether you would be prohibited from reporting stories that you learn in your private employment and not in your public position.

Brief Answer

As explained below, you are not per se, prohibited from serving as president of council while you are employed by a local radio station. However, you are prohibited from using any public time, facilities, personnel, or resources while engaging in private outside employment and from using your official title or identification as president of council on private business cards when performing duties or conducting business for your employing radio station. In addition, you are prohibited from disclosing or using confidential information even if the disclosure or use of the information does not secure a thing of value for either yourself or your private employer.

General Conflict of Interest Prohibitions—R.C. 102.03(D)

When answering questions pertaining to the outside employment of public officials and employees, the Commission generally considers a provision within the conflict of interest law, set forth in R.C. 102.03(D). Your attention is directed to R.C. 102.03(D), which reads:

No public official or employee shall use or authorize the use of the authority or influence of 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 the public official or employee with respect to that person's duties.

R.C. 102.01(B) defines "public official or employee," as that term is used in R.C. Chapter 102., to include "any person who is elected or appointed to an office or is an employee of any public agency." "Public agency" is defined as "the general assembly, all courts, any department, division, institution, board, commission, authority, bureau, or other instrumentality of the state, a county, city, village, township, and the five state retirement systems, or any other governmental entity." R.C. 102.01(C). If you are elected to the position of president of the city council, then you will become a "public official or employee" for purposes of R.C. 102.03(D). Ohio Ethics Commission Advisory Opinion No. 93-012.

R.C. 1.03 defines "anything of value" for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 102.01(G). A definite and direct pecuniary benefit is considered to be a thing of value for purposes of R.C. 102.03(D). Adv. Ops. No. 79-008, 85-006, and 86-007.

General Outside Employment Restrictions—R.C. 102.03(D)

Generally, the Ethics Laws and related statutes do not prohibit a public official or employee from engaging in private employment or business activity so long as no conflict of interest exists between the public official's or employee's public position and private financial interests. Adv. Ops. No. 84-009, 84-012, and 92-009. However, as explained more fully below, the Ethics Law creates significant restrictions upon public officials and employees to prevent them from using the authority or influence of their public office to secure a definite and direct thing of value for themselves, and also for another person, business, or entity if the relationship between the official and that person, business, or entity is such that the official's objectivity or independence of judgment could be impaired with regard to matters that affect the interests of that party. Adv. Ops. No. 88-004, 89-015, and 90-007. Whenever such a relationship exists, the Commission has concluded that the thing of value that is secured for the other person, business, or entity will manifest a substantial and improper influence upon the official with respect to his duties. Adv. Op. No. 89-016, and 90-004.

In Advisory Opinion No. 93-003, the Commission identified some of the relationships that may manifest a substantial and improper influence upon the official:

R.C. 102.03(D) prohibits a public official or employee from using his authority or influence to secure anything of value, not only for himself, but for members of his family (see Advisory Opinion No. 92-012), for his business associates, (see Advisory Opinions No. 88-004 and 88-005), for a professional organization on which the public official or employee serves as a board member (see Advisory Opinion No. 90-012), [and] for his private outside employer (see Advisory Opinion No. 91-004). (Emphasis added.)

The cited opinions discuss situations where a definite and direct thing of value accrues, as a result of the public official's or employee's action, to a party that has a close family, economic, or fiduciary relationship with the public servant. With regard to matters affecting a public official's or employee's private outside employer, the Ethics Commission also held in Advisory Opinion No. 89-008:

An employer holds a position of power and authority over the hiring, compensation, discipline, and termination of its employees. A city council member who is in the position of making an official decision regarding the pecuniary interests of his private employer would have an inherent conflict of interest impairing the council member's objectivity and independence of judgment. See Advisory Opinions No. 80-003 and 88-005.

The Ethics Commission has held that R.C. 102.03(D) prohibits a public official from using the authority or influence of his public position to secure either an economic benefit or detriment to his private employer's business. Adv. Ops. No. 89-008 and 93-016. See also Adv. Ops. No. 84-012, 84-013, 85-013, 85-014, and 90-002. It must be stressed, however, that in order for R.C. 102.03(D) to prohibit a public official from acting, the action of the official must result in a definite and direct pecuniary benefit or detriment and that pecuniary benefit or detriment must be of such a character as to manifest a substantial and improper influence upon him with respect to his duties. Adv. Ops. No. 90-004 and 93-016. Furthermore, the Ethics Commission has cautioned that each situation must be examined on its own facts. Adv. Op. No. 87-008.

The specific issue that you have questioned is whether your involvement, as news director, in stories pertaining to city government would secure a definite and direct thing of value to your employing radio station.

A contention could be made that a radio station that has a news director who serves as president of council would have a competitive advantage over other local media. Such a contention could be based upon the belief that listeners would be attracted to news reporting where there is a perception that the news contains, or is based upon, insider knowledge that is not available to other media because the listeners have knowledge that the news director serves as president of council. The contention could conclude that the added number of radio listeners increases the radio station's market-share and the value of its commercial air-time to advertisers and thus, the news director was using his elected public position to secure a pecuniary benefit for his employer, and possibly himself if the radio station would raise his compensation to reflect the added number of radio listeners.

Such a contention, however, does not meet the statutory burden of creating a financial benefit to your employer that is definite and direct; rather, it is speculative. Even if it were possible to correlate an increased number of listeners of your employing radio station to your position as president of council, it would be difficult, if not impossible to attribute the increase to

an attraction by listeners to news reporting where there is a perception that the news contains, or is based upon, insider knowledge that is not available to other media. Any increase in listeners could be also attributable to an increased desire by the public to hear the selection of music chosen for broadcast or other programming.

Accordingly, R.C. 102.03(D) would not, *per se*, prohibit you from serving as president of council while you are employed by a local radio station. However, as explained below, Division (B) of Revised Code Section 102.03 prohibits you from disclosing or using confidential information even if the disclosure or use of the information does not secure a thing of value for either yourself or your private employer.

Even if you would not be prohibited from being involved, as news director, in stories pertaining to city government, the Ethics Commission has imposed strict restrictions that apply to all public officials and employees who engage in private outside employment or business activity. The Commission held, in Advisory Opinion No. 96-004, that R.C. 102.03(D) prohibits a public official or employee who engages in private outside employment or business activity from:

- (1) using public time, facilities, personnel, or resources in conducting a private business or while engaging in private outside employment including conducting demonstrations for clients using public equipment.
- (2) using his official title or identification on private business cards or other written materials or appearing in uniform while soliciting business or conducting demonstrations for clients;
- (3) using his relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding his private interests;
- (4) discussing, deliberating, or voting on any matter involving his private business, including recommending his outside employer's or business's services to his own public agency;
- (5) receiving fees for providing services rendered on projects that he has recommended in his official capacity;
- (6) participating in decisions or recommendations regarding his competitors;
and,
- (7) using his public position or authority in any other way to secure a benefit for his outside employer or private business.

The application of the above prohibitions are dependent on the facts and circumstances of each individual situation. See generally Adv. Ops. No. 77-003, 86-007, and 92-009. Advisory Opinion No. 96-004 provides detailed explanations of these prohibitions and a copy of that opinion has been enclosed for your reference. Because your question specifically concerns your ability to be involved, as news director, in stories pertaining to city government if you were to serve as president of council and not in regulatory matters that affect your employer's interests, some of the above prohibitions are inapplicable and need not be addressed.

However, you are prohibited from using your official title or identification as president of council, on private business cards or orally when performing duties, conducting business, or advertising in your public capacity for your employing radio station. In addition, you are prohibited from using any public time, facilities, personnel, or resources while engaging in private outside employment.

Finally, it must be stressed that as an elected city official you would be charged with the duty to represent the interests of your constituents and the city. An individual who holds an elected office occupies a highly visible position. It is paramount that this duty not be influenced by any outside interest. For example, if your employing radio station should direct you to take an editorial posture on a controversial issue that may conflict with the interests of your constituents and the city, then your employment with, and compensation from, the radio station could manifest a substantial and improper influence upon you with respect to your public duties. Please contact this office for further guidance if either this, or other issues, arise that affect the above prohibitions.

Disclosure or Use of Confidential Information—R.C. 102.03(B)

Your attention is also directed to R.C. 102.03(B), which reads:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

R.C. 102.03(B) prohibits you from disclosing or using confidential information even without an intention to secure a thing of value for either yourself or your private employer.

If you are elected to the position of president of the city council, then you will be a "public official or employee" for purposes of R.C. 102.03(B) and subject to the statute's prohibitions. Adv. Op. No. 93-012. Thus, R.C. 102.03(B) prohibits you from disclosing or using, without proper authorization, information acquired by you in the course of your official

duties that either is confidential by statutory provision or has been clearly designated to you as confidential when such designation is warranted and necessary for the proper conduct of government business.

In Advisory Opinion No. 93-012, the Commission stated, in the Syllabus

- (1) Division (B) of Section 102.03 of the Revised Code does not prohibit a public official or employee from disclosing information which is a "public record" as defined in Division (A)(1) of Section 149.43 of the Revised Code;
- (2) Division (B) of Section 102.03 of the Revised Code prohibits a public official or employee from disclosing information which is not a "public record" as defined in Division (A)(1) of Section 149.43 of the Revised Code only if a statute affirmatively makes the information confidential or if the information has been clearly designated as confidential when such designation is warranted and necessary for the proper conduct of government business.

The Ethics Commission's advisory authority includes only Chapter 102., and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code; it cannot determine whether particular information is a "public record" for purposes of R.C. 149.43. See R.C. 102.08.

The city may designate information as confidential where such designation is warranted and necessary for the proper conduct of government business, and thus bind its public officials and employees to the prohibition imposed by R.C. 102.03(B). Adv. Op. No. 93-012. Such an issue is for the determination of the city law director. Id. The city law director must follow the standard of R.C. 102.03(B) in making a determination of confidentiality for purposes of that section. Id. A determination of confidentiality for purposes of R.C. 102.03(B) needs to be made only if the information is found not to be a public record as defined in R.C. 149.43. Id.

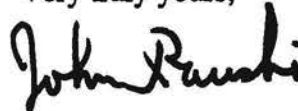
If you are elected as president of council, depending upon the content of the information you wish to disclose, you should contact the city law director when you wish to report on, or be involved with, stories pertaining to city government for a determination of whether the particular information you have regarding the story is a public record subject to disclosure under R.C. 149.43. If the information that you desire to report on are based on information that is found to be a public record, then R.C. 102.03(B) would not prohibit you from disclosing the information since such records would be required to be made available to the public pursuant to R.C. 149.43, and could not be considered "confidential" for purposes of R.C. 102.03(B) provided that the city has not designated the information as "confidential" where such designation is warranted and necessary for the proper conduct of government business

Conclusion

As explained above, you are not per se, prohibited from serving as president of council while you are employed by a local radio station. However, you are prohibited from using any public time, facilities, personnel, or resources while engaging in private outside employment and from using your official title or identification as president of council on private business cards when performing duties or conducting business for your employing radio station. In addition, you are prohibited from disclosing or using confidential information even if the disclosure or use of the information does not secure a thing of value for either yourself or your private employer.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on February 23, 2001. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please contact this Office again.

Very truly yours,



John Rawski
Staff Attorney

Enclosure

Advisory Opinion No. 96-004