

OHIO ETHICS COMMISSION

Merom Brachman
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.state.oh.us

January 17, 2003

Informal Opinion 2003-INF-0117-2

Jeanine A. Amid
Law Director
City of Upper Arlington

Dear Ms. Amid:

The Ohio Ethics Commission received your request for an advisory opinion on January 3, 2003. In your letter, you have asked whether the Ohio Ethics Law and related statutes prohibit David Varda from serving simultaneously as Deputy Auditor of State (Deputy Auditor) and City Council President (council president) for the City of Upper Arlington (city).

Brief Answer

As explained more fully below, this opinion is not a compatibility determination. However, in a compatibility opinion issued in 1989, the Attorney General determined that the Deputy Auditor of State is prohibited from concurrently serving as a public official of any entity subject to audit, because the deputy may be authorized to perform all of the duties of the auditor. 1989 Op. Att'y Gen. No. 89-022.

If Ohio Attorney General Opinion No. 89-022 does not resolve the question of the compatibility of the two positions you have described, the Ohio Ethics Law prohibits a city council president from serving simultaneously as Deputy Auditor of State.

Facts

By way of history, you have explained that Mr. Varda is currently serving as a city council member, in the position of council president, for the city of Upper Arlington. You have explained that the Auditor of State has appointed Mr. Varda as Deputy Auditor of State.

As city council president, Mr. Varda has the same voting and other privileges as other council members. In addition, the city charter provides that council president also serves as the mayor of the city, who is the official head of the city for civil process and ceremonial purposes, and exercises all judicial powers granted to mayors by state general law. Mr. Varda's current term on council ends in December 2003. In a telephone conversation with Commission staff, you have explained that, because of a term limitation provision in the city charter, Mr. Varda will not be able to run for office in 2003.

Section 117.04 of the Revised Code provides that the Auditor of State shall appoint a Deputy Auditor. According to the position description you provided for Chief Deputy Auditor of State (which you explain is the same position as the Deputy Auditor of State described in R.C. 117.04), the significant responsibilities of the Chief Deputy Auditor include developing and implementing policies and procedures that assist the Auditor of State in performing the duties and responsibilities set forth in R.C. Chapter 117. and that effectively manage the resources and direct the operations of the Audit Division of the Auditor's Office. R.C. 117.06 provides: "During the absence or disability of the auditor of state, or when so directed by him, the deputy auditor of state may perform all the duties of auditor of state." The Chief Deputy Auditor also contributes to the development of the Auditor of State's strategic plan, and develops audit division goals and objectives to support the objectives of the Auditor of State, and establishes and maintains a management information system that effectively enables senior management to monitor and control the operation of the Division. The Chief Deputy Auditor is also responsible for establishing and maintaining an organizational climate in the Auditor's Office that emphasizes professionalism, integrity, and ethical behavior on the part of all employees.

Finally, you have noted that Mr. Varda has stated in writing that he will abstain from: (1) issuing or supervising the issuance of warrants payable to the city; (2) conducting or supervising audits of the city or private institutions that receive public funding from the city; and (3) determinations concerning the existence of a local fiscal emergency in the city. Mr. Varda has also agreed to resign his council position in the event the Auditor is unable to perform her job due to extended absence or disability.

"Compatibility of Public Positions"

Whenever a public official or employee desires to occupy another public position, the question arises whether the positions are "compatible"—that is, whether a person may simultaneously hold the two public positions. The Ohio Ethics Commission has no authority to make a determination of "compatibility."

You have stated that your office, in conjunction with the Attorney General's Office, has conducted a compatibility analysis and has determined that the position of Deputy Auditor of State could be compatible with the position of council president. You may wish to note Ohio Attorney General Opinion No. 89-022, in which the Attorney General concluded:

[I]t is evident that the office of auditor of state acts as a check upon all public officials [any officer, employee, or duly authorized representative or agent of a public office] whose duties include matters subject to examination in the course of an audit and that the functions of the auditor and such officials are inherently inconsistent. The auditor of state is therefore prohibited from concurrently serving as a public official of any entity subject to audit. The deputy auditor of state is subject to the same limitations as the auditor of state, because the deputy may be authorized to perform all of the duties of the auditor. R.C. 117.06 ("[d]uring the absence or disability of the auditor of state, or when so directed by him, the deputy auditor of state may perform all the duties of auditor of state"). See also R.C. 3.06(A) ("[a] deputy, when duly qualified, may perform any duties of his principal"). (Emphasis added.)

It is for the city, and not the Ethics Commission, to determine whether Attorney General Opinion No. 89-022 is applicable to the situation you have described. However, the Ethics Commission can consider the application of the Ohio Ethics Law to the same question.

Conflict of Interest—R.C. 102.03(D) and (E)

The Ethics Law and related statutes generally prohibit public officials or employees from participating in matters in which they have a conflict of interest and from misusing the authority or influence of their public position for private gain. These statutes do not, per se, prohibit a public official or employee from simultaneously serving in more than one public position, unless there is an insurmountable conflict of interest that will preclude the official from effectively fulfilling both public roles.

The general conflict of interest prohibitions of the Ethics Law, Divisions (D) and (E) of Section 102.03 read as follows:

- (D) 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.
- (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 the public official or employee with respect to that person's duties.

R.C. 102.03(D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his public position to secure anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. A public official or employee who serves in two public positions is prohibited from using

his authority or influence in one position to benefit either himself or the interests he serves in his other capacity. See Adv. Ops. No. 99-002 (a county commissioner who is employed by a county hospital within the same county is required to withdraw from all matters before the board of county commission that affect the hospital) and 91-006 (a city council who is employed by a school district which includes the city cannot participate in matters before city council that affect the school district). Therefore, a public official or employee who serves with two public agencies is prohibited from participating, in either public position, with respect to matters that affect the other agency.

As the Deputy Auditor and as city council president, Mr. Varda is a "public official" subject to R.C. 102.03(D) and (E). R.C. 102.01(B) and (C). Therefore, Mr. Varda is prohibited from participating, as city council president, in any matters before the city that involve the Office of the Auditor of State. Mr. Varda is also prohibited from participating, as Deputy Auditor of State, in any matters that involve the city of Upper Arlington.

R.C. 117.06 provides: "During the absence or disability of the auditor of state, or when so directed by him, the deputy auditor of state may perform all the duties of auditor of state." The position description for Chief Deputy Auditor contains essentially the same provision. Therefore, it is likely that Mr. Varda will be required to perform the duties of the Auditor in the event of her absence or disability.

Performing the Duties of the Auditor

Pursuant to the Revised Code, the Auditor is the chief inspector of public offices and shall audit all public offices. R.C. 117.09 and 117.10. R.C. 117.11(A) provides that the Auditor shall audit each public office in the state at least once every two years. The term "public officie" is defined in R.C. 117.01(D) to include "any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." In addition to the required biennial audit, R.C. 117.11(B) provides that the Auditor shall conduct additional audits upon the request of a public agency or on the Auditor's own initiative if the audit is in the public interest.

If the Auditor determines that she will be unable to conduct an audit of a public agency, and within the parameters authorized by the Auditor, the governing board or legislative authority of a public agency may engage an independent public accountant to conduct the required audit. R.C. 117.11(C)(1)-(3). Even where a public accountant conducts the audit, the Auditor's office retains significant authority. For example, R.C. 117.12 provides that the Auditor shall establish the procedures for any audits conducted by a public accountant. The Auditor shall have access to all work papers, documents, and materials prepared by a public accountant in the course of an audit of a public office. R.C. 117.21. R.C. 117.18(B) provides that the Auditor may issue and serve subpoenas on behalf of any public accountant conducting an audit. See also R.C. 177.22.

A public accountant who conducts an audit pursuant to R.C. 117.11(C) shall file, with the Auditor, a report of the audit. R.C. 117.23. The Auditor is required to analyze the report to determine whether any public money has been illegally expended, any public money collected has not been accounted for, any public money due has not been collected, or any public property has been converted or misappropriated. R.C. 117.24. The Auditor is also required to analyze the report to determine whether there has been any malfeasance or gross neglect of duty on the part of any officer or employee of the public agency. Id. The public accountant who conducts an audit pursuant to R.C. 117.11(C) has no authority to make formal findings of illegality, malfeasance, or gross neglect. R.C. 117.12.

The Auditor has the sole authority to issue the audit report for a public agency that engages a public accountant, and can incorporate the report of the public accountant into the audit report. R.C. 117.25 and 117.26. The audit report can lead to both civil and criminal actions against public official of the audited public agency. R.C. 117.28 and 117.29.

It is clear, therefore, that the Auditor has ultimate and significant authority with respect to audits of political subdivisions. Because the Deputy Auditor may be authorized, in her absence or disability, to perform all of the duties of the Auditor, he would be placed in an insurmountable conflict of interest from which he could not withdraw if he were also the council president, or a council member, in a city subject to audit.

Further, the city may be involved in contracts, joint undertakings, or cooperative service agreements with municipalities, townships, public universities, and other public agencies, and with private non-profit entities, in order to provide services to the city or its citizens. If the Deputy Auditor were authorized to perform all of the duties of the Auditor, he would also be placed in an insurmountable conflict of interest from which he could not withdraw with respect to public agencies and private entities that have these kinds of agreements with the city he is serving as council president or council member.

Mr. Varda has stated that he will abstain from conducting or supervising audits by state auditors or private accountants for the city or private institutes that receives public money from the city. He would also be required to abstain from conducting or supervising audits by state auditors or private accountants for any public agencies with which the city has the kinds of relationships describe above.

In addition, Mr. Varda has stated that he will resign his council position in the event the Auditor is unable to perform her job due to extended absence or disability. However, even though it is clear that Mr. Varda is acting with the best intentions, neither Mr. Varda nor the Auditor can foresee when, for what reason, or for what duration the Deputy Auditor may be called upon to perform the duties of the Auditor because of an absence or disability of the Auditor. It is impossible for the Deputy Auditor to assure that he will not be required to perform those duties at the time a matter involving the city, or a public or private entity with which the city has the relationships described above, is pending before the Auditor's office.

Therefore, because of the scope of Auditor's authority with respect to audits of all public offices, including the city and other public offices with which the city may have contracts, joint undertakings, or cooperative agreements, and because a matter involving these entities could arise at any time, the Ohio Ethics Law prohibits Mr. Varda from holding both positions simultaneously.

Conclusion

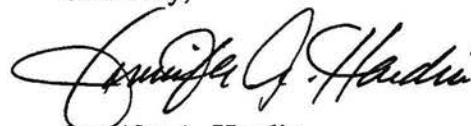
As explained more fully above, this opinion is not a compatibility determination. However, in a compatibility opinion issued in 1989, the Attorney General determined that the Deputy Auditor of State is prohibited from concurrently serving as a public official of any entity subject to audit, because the deputy may be authorized to perform all of the duties of the auditor. 1989 Op. Att'y Gen. No. 89-022.

If Ohio Attorney General Opinion No. 89-022 does not resolve the question of the compatibility of the two positions you have described, the Ohio Ethics Law prohibits a city council president from serving simultaneously as Deputy Auditor of State.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 17, 2003. The Commission commends the city and Mr. Varda for requesting guidance before any actions were taken that could be prohibited by law.

This 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 and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

Enclosure: Attorney General Advisory Opinion No. 89-022