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September 8, 2010 Informal Opinion 2010-INF-0908-1

Sharon A. Ray

Dear Ms. Ray:

On June 17, 2010, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you are a Medina County (county) Commissioner and a part-time Community Services Coordinator for the Wadsworth Municipal Court (court). Your term as Commissioner will end in December 2010 and you are not running for reelection. You indicated that your position with the court is currently a volunteer, uncompensated position.

You stated that the county contributes two-fifths of the compensation for the court's judge, clerk, and bailiff from the county's annual operating budget. You explained that this allocation is required by statute and that the commissioners have no discretion in matter.

You asked if the county commissioner and court services coordinator positions would be compatible if you accepted compensation from the court for your services.

Brief Answer

As explained more fully below, if the appropriate authority determines that the positions are compatible, the Ohio Ethics Law and related statutes will not prohibit you from simultaneously serving as a county commissioner and a compensated court employee. If you become a compensated court employee, the law does not prohibit you from voting to approve the general court appropriation that you described. However, you are prohibited from participating, as a county commissioner, in matters where the court has a *definite* and *direct* interest. You are also prohibited from being paid to perform services for the court on matters that are pending before any county department and from representing the court during, and for one year after you leave, your county office, on any matter in which you participated as a county commissioner.

Matters Outside of the Commission Jurisdiction

Compatibility of Positions

You asked if the two positions you described are compatible. The issue of compatibility is not within the jurisdiction of the Ohio Ethics Commission. Seven criteria are used to determine “compatibility.” 1979 Ohio Op. Att’y Gen. No. 79-111. While one of the seven criteria is whether there is a conflict of interest between the two public positions in question that would preclude service in both public positions, such a determination is not the same as an application of the Ohio Ethics Law and related statutes. Ohio Ethics Commission Advisory Opinion No. 91-002. See also 1990 Ohio Op. Att’y Gen. No. 90-037. You may be able to seek guidance regarding the compatibility of the two positions you have described from the county prosecutor who can consult with the Attorney General’s Office. The Attorney General’s Office has a guide for compatibility of public opinions at this Web address: www.ohioattorneygeneral.gov/Legal/Opinions/Compatibility-of-Public-Offices-or-Positions.

As explained below, even in situations where the positions are compatible, several of the statutes over which the Ethics Commission has jurisdiction will determine whether there are additional restrictions upon the official’s or employee’s actions in both public positions. See Adv. Op. No. 91-006. (In some instances, the existence of such a contractual relationship—even if the positions are otherwise “compatible”—may create an insurmountable obstacle that will preclude an individual from serving both public agencies.)

Judicial Officers and Employees

The Ohio Ethics Commission can only examine the application of the Ohio Ethics Law within the scope of its statutory authority and can render advisory opinions only with respect to individuals for whom it is the appropriate ethics commission. The Ohio Ethics Law designates three state agencies with authority over Chapter 102. and R.C. 2921.42 and 2921.43. While the Ohio Ethics Commission is the appropriate ethics commission for matters related to most state and local officials and employees, including county commissioners, the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court is the appropriate ethics commission for matters relating to judicial officers and employees. R.C. 102.01(F). This opinion will consider the Ethics Law as it applies to you as a county commissioner. You should contact the Supreme Court for guidance on how the Ethics Law applies to your service as a court employee.

Conflict of Interest Prohibitions

As a county commissioner, you are subject to the restrictions of R.C. 102.03(D) and (E), which provide:

- (D) No public official or employee shall use or authorize the use of the authority or influence of his office to secure 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. 102.01(B) and (C). Adv. Op. No. 99-002. The term "anything of value" includes money and every other thing of value. See R.C. 102.01(G); R.C. 1.03. Compensation that a public official receives from public employment is within the definition of "anything of value," as is any beneficial or detrimental economic impact of a decision made by a public governing board. R.C. 1.03, 102.01(G). Adv. Ops. No. 89-003 and 90-012.

A thing of value is "of such a character as to manifest a substantial and improper influence" on a public official or employee if it could impair the official's objectivity and independence of judgment with respect to her public duties. Adv. Ops. No. 91-010 and 95-001. It is unnecessary that the thing of value actually has a substantial and improper influence on the official provided that it is of such a character that it could have an influence. *Id.*

Outside Employment

The prohibitions of the Ethics Law and related statutes apply to any public official who is also engaged in outside employment. The restrictions serve the public interest in effective, objective, and impartial government by preventing the creation of a conflict of interest that may impair the employee's objectivity and impartiality, and therefore, the effectiveness of the public agency with which she serves. Adv. Ops. No. 89-014, 90-012, and 90-002. However, in most cases, the Ethics Law and related statutes do not absolutely prohibit a public official from engaging in outside employment provided that she can comply with the restrictions in the Ethics Law.

The Ethics Law does not prohibit you from accepting compensation from the court for your services as Community Services Coordinator. However, the law will prohibit you from participating in some matters affecting the court should they come before the county commission.

Participating in Matters Affecting Employer

R.C. 102.03(D) prohibits a public official from using her position to secure a definite and direct benefit or avoid a definite and direct detriment for her employer's organization, business, or governmental entity if such a benefit or detriment could have a substantial and improper influence upon the official by impairing her objectivity or independence of judgment in the performance of her public duties. Adv. Op. No. 2007-01 and 96-004. R.C. 102.03(E) prohibits a public official from soliciting or accepting anything of value for her employer. The purpose of these restrictions is to ensure that, when making a decision in her public role, a public official is not substantially and improperly influenced by the impact of the decision on the interests of her employer. *Id.*

An employer holds a position of power and authority over the hiring, compensation, discipline, and termination of its employees. Adv. Ops. No. 89-008 and 91-006. As a result, the relationship between a public official and her outside employer is such that the official could be substantially and improperly influenced if a decision on a matter before the official's agency resulted in a definite and direct thing of value for her employer. A public employer has the same, or essentially the same, power and authority over its employees as a private employer. Adv. Op. No. 2007-01 and 91-006. Therefore, R.C. 102.03(D) and (E) prohibit a public official from soliciting, or using her position to secure, a definite and direct benefit for any *public* or private employer. *Id.*

As applied to your situation, whenever the court will receive a definite and direct benefit or suffer a definite and direct detriment as a result of the board of commissioners' decisions, you are prohibited from using your county position in any improper way, including lobbying other county official and employees, to secure a particular outcome on the matter. Adv. Op. No. 97-002. For example, you are prohibited from participating in the board's consideration of: land-use or development matters that definitely and directly affect court-owned property, grants or contracts awarded to the court; legislation that would definitely and directly affect the court's services or programs; and regulatory matters affecting the court, such as code enforcement inspections conducted by county.

However, the Commission has explained that there are some circumstances where a benefit or detriment that results from a public agency's decision or action is not of "such a character as to manifest a substantial and improper influence" on the official because it is not of a nature or value that could impair the official's objectivity and independence of judgment. Adv. Op. No. 2001-03.

For example, in Advisory Opinion No. 2007-01, the Ethics Commission stated that R.C. 102.03(D) does not prohibit a public official from participating in matters from which the official's employer has some indirect or indefinite interest, such as matters involving general legislation that provides a uniform benefit or detriment to all citizens in the jurisdiction, like sewer or water rates. In Advisory Opinions No. 91-002 and 2001-01, the Commission explained that a governing board member who serves as an uncompensated volunteer firefighter is not prohibited from participating in matters before the governing board that affect the fire department as a whole, or that affect its personnel in a uniform manner, such as decisions involving appropriations, equipment, facilities, and training.

You have explained that, as part of its annual operating budget, the county makes an appropriation to the court for two-fifths of the compensation of the judge, clerk, and bailiff. R.C. 1901.11(C); 1901.31(C)(3); and 1901.32(A)(1). It is apparent that the court receives a definite and direct pecuniary benefit from the receipt of the appropriation from the county. However, as you stated, this appropriation is required by statute and the county commissioners have no discretion in the decision of how much funding to provide to the court. Because the appropriation and the share payable by the county is statutorily established and the board of commissioners has no discretionary authority regarding this appropriation, the appropriation is not of such a character as to manifest a substantial and improper influence on you or impair

your objectivity and independence of judgment. Therefore, you are not prohibited from participating, as a county commissioner, in matters regarding this particular appropriation to the court.

Revolving Door Restriction

R.C. 102.03(A)(1) prohibits a public official from representing any person on any matter in which the official has personally participated. The restriction applies regardless of whether the official is paid to represent the person and is in effect both during, and for one year after she leaves her public position. A "person" includes an individual, corporation, partnership, association, public agency, or similar entity. R.C. 1.59; Adv. Ops. No. 89-003 and 99-001.

An official is "representing" a person when the official makes any formal or informal appearance before, or has any kind of written or oral communication with, any public agency, on behalf of that person. R.C. 102.03(A)(5). R.C. 102.03(A)(1) prohibits an official who occupies more than one public position, from representing one public agency before the other public agency or any other public agency on any matter in which the official has personally participated in her position with the other public agency.

An official has "personally participated" in a matter if she has engaged in the substantial exercise of administrative discretion regarding the matter such as decision, approval, disapproval, recommendation, or the rendering of advice. A "matter" includes any case, proceeding, application, determination, issue, or question. R.C. 102.03(A)(5). A matter can include concrete items, like an application or a problem. It can also include more abstract items, like a dispute or a policy decision. A matter is the underlying issue or question, regardless of whether it involves the same parties. Matter does not mean the same thing as subject matter. Adv. Op. No. 99-001.

Therefore, R.C. 102.03(A)(1) prohibits you from representing any person, including the court, before the county or any other public agency, on any matter in which you participated as a county commissioner. For example, you would be prohibited from contacting a county department, or any other state of local public agency, on behalf of the court, regarding matters related to a resolution that you voted on while you were a county commissioner. As stated above, this restriction applies while you are a county commissioner and for one year after your term ends. I have attached a copy of the Commission's information sheet on the revolving door law, which will provide you with additional information on these restrictions.

Compensation for Rendering Services before a Public Agency

R.C. 102.04(C) prohibits a local official who is employed by or serves another public agency from receiving compensation from one agency for any services rendered personally in any case, proceeding, application, or other matter before any agency, department, board, or commission of the other agency, excluding the courts.

R.C. 102.04(C) would prohibit you from receiving compensation for personally rendering services on behalf of the court on any matter pending before the county. Adv. Op. No. 91-006. For example, you would be prohibited from being paid by the court to meet with county officials regarding community service opportunities with county agencies for the individuals sentenced to community service by the court. There is an exception to this prohibition but it does not apply to elected officials. See R.C. 102.04(D).

Conclusion

As explained more fully above, if the appropriate authority determines that the positions are compatible, the Ohio Ethics Law and related statutes will not prohibit you from simultaneously serving as a county commissioner and a compensated court employee. If you become a compensated court employee, the law does not prohibit you from voting to approve the general court appropriation that you described. However, you are prohibited from participating, as a county commissioner, in matters where the court has a *definite* and *direct* interest. You are also prohibited from being paid to perform services for the court on matters that are pending before any county department and from representing the court during, and for one year after you leave your county office, on any matter in which you participated as a county commissioner.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on September 8, 2010. The opinion is based on the facts presented. It 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 feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney