

Merom Brachman, *Chairman*
Megan C. Kelley, *Vice Chair*
Bruce E. Bailey
Julie A. Rutter
Elizabeth E. Tracy
Mark A. Vander Laan



OHIO ETHICS COMMISSION
William Green Building
30 West Spring Street, L3
Columbus, Ohio 43215-2256
Telephone: (614) 466-7090
Fax: (614) 466-8368

Paul M. Nick
Executive Director

www.ethics.ohio.gov

INFORMATION SHEET: ADVISORY OPINION NO. 2021-02
VOTING FOR ONESELF FOR PRESIDING OFFICER

What is the question in the opinion?

Can a member of a legislative body of a local governmental entity vote to elect himself or herself to serve as presiding officer of that entity if he or she will receive additional payments for the increased duties he or she will have in that leadership role?

What is the brief answer in this opinion?

Members of a legislative body of a local governmental entity are not prohibited from voting to elect himself or herself to serve as a presiding officer of that entity, provided that the amount of any additional payment for this service is set prior to the vote.

To whom do the conclusions in this opinion apply?

The conclusions apply to members of city and village council, township boards of trustees and county boards of commissioners electing a presiding officer from a member of the legislative body who will receive additional payments for performing this function. The conclusions do not apply to any other legislative body.

When did the conclusions in this opinion become effective?

The opinion became effective upon acceptance by the Ethics Commission.

For More Information, Please Contact:

Paul M. Nick, Executive Director; or
Christopher Woeste, Staff Advisory Attorney

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2021-02 IS ATTACHED.**

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Formal Advisory Opinion
Number 2021-02
November 10, 2021

Syllabus by the Commission:

- (1) Divisions (D) and (E) of Section 102.03 of the Revised Code generally prohibit a public official from participating, formally or informally, in his or her public agency's decisions that could result in a definite and direct financial benefit for the official. The pecuniary benefit received by a public official for serving as presiding officer in a legislative body is a thing of value for purposes of R.C. 102.03(D) and (E).
- (2) The pecuniary benefit received by a member of a legislative body of a local government entity for serving as the presiding officer is not "of such a character as to manifest a substantial and improper influence upon the public official," since certain legislative bodies are required to elect a presiding officer and all members of the legislative authority may participate in determining who is the presiding officer. The unique nature of the elections ensures that no external conflicts of interest influence the process.
- (3) R.C. 102.03(D) and (E) do not prohibit a member of a legislative body of a local governmental entity, if elected to the position, from accepting the additional pecuniary benefit for serving as the presiding officer, provided that the amount is determined prior to the vote. Therefore, a member of a legislative body of a local governmental entity is not prohibited from voting to elect him or herself to the position of presiding officer, even if he or she will receive additional payments for performing that leadership role.

* * *

The Commission has been asked if a member of a legislative body of a local governmental entity is prohibited from voting to elect himself or herself to serve as presiding officer if he or she will receive additional compensation for the increased duties he or she will perform in that leadership role.¹ The Commission has not previously addressed this issue in any Formal Advisory Opinion.²

Voting for Oneself for Presiding Officer

A member of a legislative body of a local governmental entity is subject to R.C. 102.03(D) and (E), which state:³

- (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.

The term "anything of value" is defined, for purposes of R.C. 102.03, to include money, goods and chattels, and every other thing of value.⁴ The Commission has determined that a pecuniary benefit received by an elected public official for performing his or her official duties falls within the definition of "anything of value."⁵

Generally, R.C. 102.03(D) and (E) prohibit a public official from using his or her authority or influence to secure or accept anything of value where the thing of value could have a substantial and improper influence on the official.⁶ However, the election of presiding officers by a legislative body is not "of such a character as to manifest a substantial and improper influence on the public official." The members of a legislative body are required by law or statute to select a member of their body to serve as presiding officer.⁷ The members must elect from a select group, the members of the legislative body itself, their presiding officer.⁸

The election of a presiding officer of a legislative body is a unique process that is devoid of outside interests. The unique election process is distinct to city councils, village councils, township boards of trustees, and county boards of commissioners.⁹ All of the potential candidates and all of the eligible voters are contained within a select group that is required by law to elect a member as presiding officer.¹⁰ This select group is not subject to the same outside pressures and interests that create the risk of substantial and improper influences upon the performance of an officials' public duties.

The process of selecting a presiding officer from within a legislative body also has additional protective factors that guard against improper conflicts of interest. The Ethics law was enacted, in part, to prevent the misuse of the authority or influence of office to secure a private benefit for a public official. An individual public official cannot misuse their public authority or influence when selecting a presiding officer because each of the officials share the same conflict of interest. The members already hold an elected, public position and are selecting amongst themselves in an open meeting that allows the electorate to examine their actions.¹¹ The amount of any additional payments that the presiding officer receives for performing this function is set prior to voting to elect officers. Any financial or pecuniary interest each member has in being

elected an officer is common to the other members of the organization.¹² If the legislative body behaves inappropriately in its selection of a presiding officer, then the electorate holds the remedy.

The unique nature of electing a presiding officer from within a small subset of a legislative body means not voting for oneself may produce irrational results. If members of a three-person board are selecting a presiding officer and two of the members are nominated for the position, then one vote would decide the election.¹³ This would also prevent members of a legislative body from expressing their passion and interest in the position. It would also prevent a robust debate on an important selection process. These results are further compounded if all the members of a small legislative body are nominated for the position. Therefore, due to the unique nature of electing a presiding officer from a small subset of potential candidates, a member must be able to vote for himself or herself or the results would be irrational.¹⁴

Other Areas of Consideration

The Ethics Commission has issued several formal advisory opinions on the subject of in-term pay increases for public officials.¹⁵ Generally, the Commission has concluded that R.C. 102.03(D) and (E) prohibit a council member from voting on or receiving an in-term increase in compensation for the office he or she currently holds.¹⁶

In this case, the public official is not receiving an in-term pay increase because the pecuniary benefit is determined prior to their election to the position of presiding officer. Therefore, R.C. 102.03(D) and (E) do not prohibit the public official, if elected to the position, from accepting the higher rate of pay for serving in the new position of presiding officer.

The Ethics Commission has determined that an increase in a public officeholder's salary is not a public contract for purposes of R.C. 2921.42.¹⁷ Under Ohio Law, a public office is conferred by law and not by contract.¹⁸ The public officeholder's salary is incident to the public office and is a creature of law, not contract.¹⁹ Therefore, the public contract provisions under R.C. 2921.42 do not apply to a councilperson voting for himself or herself to become the presiding officer.

Conclusion

Limited to questions arising under Chapter 102 and Sections 2921.42 and 2921.43 of the Revised Code, it is the opinion of the Commission and the Commission advises that (1) Divisions (D) and (E) of Section 102.03 of the Revised Code generally prohibit a public official from participating, formally or informally, in his or her public agency's decisions that could result in a definite and direct financial benefit for the official. The pecuniary benefit received by a public official for serving as the presiding officer in a legislative body is a thing of value for purposes of R.C. 102.03(D) and (E); (2) The pecuniary benefit received by a member of a legislative body of a local government entity for serving as the presiding officer is not "of such a character as to manifest a substantial and improper influence upon the public official," since certain legislative bodies are required to elect a presiding officer and all members of the legislative authority may participate in determining who is the presiding officer. The unique nature of the elections ensures that no external conflicts of interest influence the process; and (3) R.C. 102.03(D) and (E) do not prohibit a member of a legislative body of a local governmental entity, if elected to the position,

from accepting the additional pecuniary benefit for serving as the presiding officer, provided that the amount is determined prior to the vote. Therefore, a member of a legislative body of a local governmental entity is not prohibited from voting to elect himself or herself to the position of presiding officer, even if he or she will receive additional payments for performing that leadership role.



Merom Brachman, Chairman
Ohio Ethics Commission

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's Web site: www.ethics.ohio.gov

¹ The Commission recognizes that some jurisdictions also vote to elect persons to other leadership roles during these organizational meetings, such as Vice President or Vice Chair. The analysis and conclusions of this opinion would apply equally to persons voting for themselves for these leadership roles.

² The Commission recognizes that previous staff guidance has viewed this issue as an in-term pay increase. However, as discussed in this opinion, the Commission has determined that this is not an in-term pay increase, but rather a new position with additional pecuniary benefits to perform additional duties.

³ See R.C. 102.01(B) and (C).

⁴ R.C. 1.03; R.C. 102.01(G).

⁵ Ohio Ethics Commission Advisory Opinions No. 88-002, 86-003, 91-007, 91-008, 92-016, and 93-006.

⁶ Adv. Ops. No. 87-006, 89-006, and 90-013; see, e.g., Adv. Op. No. 96-004 (prohibiting a public official or employee from using his or her public position or authority, in any way, to secure a benefit for him or herself or private business.)

⁷ See R.C. 733.09, which states, "[e]xcept as otherwise provided in division (B) of this section, the president of the legislative authority of a city shall be elected for a term of two years, commencing on the first day of January next after election." Notably, this statute does not apply to all municipalities, many of which have their own method to determine a presiding officer as set by the municipality's charter. See R.C. 731.41.

⁸ *Id.*

⁹ See Adv. Op. No. 2010-INF-0629-1 (Lodermeier) (preventing local school board members from voting for oneself for membership on Joint Vocational School District boards).

¹⁰ See R.C. 733.09; see also 731.41 (rules for chartered municipalities).

¹¹ R.C. 121.22.

¹² See 1998 Op. Att'y Gen. No. 1998-007.

¹³ See *Gitlin v. Berea*, 8th Dist. Cuyahoga No. 58062, 1990 Ohio App. LEXIS 542 (Feb. 15, 1990) ("Generally where a member of a legislative body is disqualified due to interest, the disqualification is treated as a vacancy because the member is not qualified to act.").

¹⁴ See Gen. H. Robert, *Robert's Rules of Order, Newly Revised* (10th ed. 2000), 394 at line 30 ("The rule on abstaining from voting on a question of direct personal interest does not mean that a member should not vote for himself for an office or other position to which members generally are eligible, or should not vote when other members are included with him in a motion").

¹⁵ See Adv. Op. No. 93-006. See also Adv. Ops. No. 91-007, 91-008, and 96-001.

¹⁶ Adv. Op. No. 93-006. Subsequent to the Commission's opinion issued in 1996 involving the City of Canton, several City officials sued regarding the application of the Ethics Law to post-election, pre-term pay increases. The Fifth District Court of Appeals ultimately concluded that the Ethics Law did not prohibit post-election, pre-term increases in compensation. *Coleman v. Canton*, Stark App. No. 1997-CA-00303, *discretionary appeal not allowed*, 83 Ohio St. 3d 1436 (1998).

¹⁷ Adv. Op. No. 83-008.

¹⁸ *Id.*; see also *State ex rel. Gordon v. Barthallow*, 150 Ohio St. 499 (1948).

¹⁹ *Id.*