

OHIO ETHICS COMMISSION

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August 6, 1999

Informal Opinion 1999-INF-0806-1

The Honorable Janet E. Jackson
City Attorney, City of Columbus

Dear Attorney Jackson:

In your letter, received by the Ethics Commission on June 25, 1999, you have asked for guidance, on behalf of the Mayor of Columbus, who will be taking a job with Nationwide Insurance Company (Nationwide) in January, 2000, after his term of office expires. Specifically, you have asked about restrictions that the Ohio Ethics Law and related statutes impose upon the Mayor during the time remaining in his term of office. You also ask whether the Mayor would be considered under a "temporary disability," because of his conflict of interest, for purposes of the Columbus City Charter. Your request is made upon the Mayor's full disclosure of his future employment to you, and after he sought the guidance of your office and the Ethics Commission regarding potential conflicts of interest that may exist.

As set forth more fully below, the Ethics Law and related statutes impose significant restrictions upon the Mayor, as they do on any other public official or employee, in situations where the official or employee is seeking or has accepted employment with a private party that is interested in matters before the public entity. The Mayor and his subordinates are required, during the Mayor's remaining term of office, to refrain from participating in matters that affect Nationwide and its subsidiaries. So long as the Mayor and his subordinates are able to withdraw from matters that affect Nationwide and its subsidiaries, however, the law does not prohibit him from taking the position with Nationwide after he leaves office. If the Mayor were unable to fully withdraw from matters that affect Nationwide, during the remaining portion of his term, the Mayor would be prohibited from taking the position.

Absent any conflict between provisions of the Columbus City Charter and the Ethics Law, your question about the application of the Charter is outside the scope of the Commission's responsibilities, as is discussed at the conclusion of this opinion.

Facts

By way of history, you have explained that the Mayor and Nationwide have announced that the Mayor will join Nationwide's senior management team in January, 2000. You have explained that an entity that is affiliated with Nationwide is a party to an agreement with the City of Columbus for development and construction of the Nationwide Arena and adjacent Arena District improvements. You have explained that the development is ongoing, and will require

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city council to consider, prior to the end of the Mayor's term of office, several additional ordinances to implement various aspects of the development. In addition, city council will be required to consider the expenditure of funds for public improvements benefiting the project.

You have also explained that no award of any contract or expenditure of city funds can be exercised except pursuant to the passage of ordinances by city council and certification of the availability of funds by the city auditor. You noted that members of city council and the city auditor are elected office holders, independent of the authority of the Mayor.

You have explained that, pursuant to City Charter, the Mayor is required to approve or disapprove ordinances and resolutions passed or adopted by City Council, including those related to the expenditure of city funds. However, you have further explained that ordinances can become effective without the Mayor's signature after the lapse of a certain time period.

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

Your question falls under the conflict of interest provisions of the Ohio Ethics Law, set forth in R.C. 102.03(D) and (E). Those sections provide:

- (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 "public official and employee" is defined to include any person who is elected to an office of a city. R.C. 102.01(B) and (C). An elected city mayor is a public official for purposes of the prohibitions set forth in R.C. 102.03(D) and (E). Ohio Ethics Commission Advisory Opinion No. 91-008.

The term "anything of value" is defined in R.C. 1.03 to include money, goods and chattels, any promise of future employment, and every other thing of value. R.C. 102.01(G). The promise of employment from Nationwide to the mayor is, therefore, within the definition of "anything of value" for purposes of R.C. 102.03(D) and (E). In addition, a licensing or regulatory decision by a public agency that financially benefits a private corporation, with whom a conflict of interest may otherwise exist, falls within the definition of anything of value. Adv. Ops. No. 86-007 and 93-016. Finally, the award of a contract, and payments under a contract, are within the definition of anything of value. Adv. Op. No. 90-003.

Conflict of Interest—Application of Restrictions to Future Employment

R.C. 102.03(D) and (E) prohibit a public official from soliciting, accepting, or using his position to secure employment with a private corporation that is regulated by, doing or seeking to do business with, or interested in matters pending before his agency. Adv. Op. No. 82-002. However, the Ethics Commission has recognized that R.C. 102.03(D) and (E) do not prohibit a public official from soliciting or accepting employment from a private corporation that is doing business with the public agency, if the official or employee discloses his relationship where required and is able to withdraw from matters that affect that private corporation. Adv. Op. No. 96-004.

Once a public official or employee has accepted the promise of future employment from a private entity, R.C. 102.03(D) continues to prohibit the official from using the authority or influence of his position with his public agency to secure anything of value for that private entity. Adv. Op. No. 91-009. As stated above, the Ethics Commission has concluded that a regulatory decision that provides a financial benefit to a private corporation, and the award of a contract and payments under a contract, are within the definition of anything of value. Adv. Ops. No. 86-007, 90-003, and 93-016.

The Mayor, therefore, is not prohibited from soliciting or accepting employment from a corporation that is doing business with and regulated by the City, so long as the Mayor is able to withdraw from all matters that affect the corporation, for the remainder of his public service.

It must be noted that the Ethics Commission's function in rendering advisory opinions is not a fact-finding process. This opinion cannot determine whether the requirements of the Ethics Law have been factually established to date and as a matter of law. However, an advisory opinion of the Commission provides the standards that must be met by the Mayor in the remainder of his term after having accepted employment that will commence when his term of office expires.

Withdrawal

The Commission has stated that a public official's withdrawal from consideration of issues concerning a party from whom the official has accepted employment may be accomplished only when such a withdrawal does not impede the public servant's performance of his assigned or statutory duties. Adv. Op. No. 96-004. The official must be able to withdraw from decisions that affect the interests of the party from whom he has accepted employment, and refer those matters to an official who holds a public position that is equal or superior to, and acts as a check upon, his authority.

As set forth above, the City Charter requires the Mayor to approve or disapprove ordinances and resolutions passed or adopted by City Council, including those related to the authority or expenditure of city funds. However, the Charter also provides that ordinances that are presented to the Mayor, and not signed within 10 days, become effective without the Mayor's signature.

The Mayor has stated that he will have no further contact with any Nationwide officials, or City officials, as Mayor, with respect to any City matters that definitely and directly affect Nationwide or its related entities. In addition, the Mayor must refrain from discussing, recommending, or signing any ordinances that affect the interests of Nationwide.

As stated above, in order to effectively withdraw from a matter, a public official who has a conflict of interest must be able to refer the matter to a public official or employee whose public position is superior to, and acts as a check upon, the authority of the official with the conflict. In this instance, the Mayor is the head of the executive branch of the City of Columbus. The Mayor's authority is inclusive, and affects all aspects of the operation of the City's executive branch. The Mayor could not effectively withdraw from matters involving Nationwide by referring them to subordinate officials or employees within the executive branch, because those employees do not exercise authority that is a check upon the authority of the Mayor. Adv. Op. No. 90-010. In addition, even if the Mayor delegates the authority of his office to another individual, the authority remains in his sole discretion, and he can revoke the delegation at any time.

From the facts you have described, it appears that elected city officials with authority that is independent of the Mayor may be able to handle the matters that affect Nationwide. As long as the Mayor is able to fully withdraw, for the remainder of his term, from all matters pending before the City that affect Nationwide, and those matters are handled by officials who are not subordinate to the Mayor, the Ethics Law does not prohibit the Mayor from accepting the employment offer from Nationwide. However, if a situation affecting Nationwide's interests should arise that requires the Mayor, or one of his subordinates, to participate, the Mayor would not be able to accept the employment offer from Nationwide.

Columbus City Charter

You have stated that there is a section of the Columbus City Charter that provides for someone to act in the place of the Mayor if he is absent or temporarily disabled. You have asked whether, under the circumstances and state ethics laws, the Mayor may be deemed to be under a temporary disability so as to remove himself from considering all matters related to Nationwide, but may continue to perform all other powers and duties of the Office of Mayor during the remainder of his term.

In Advisory Opinion No. 90-010, the Commission was asked whether the fire department of a non-chartered city could hire the child of the safety director. The Commission concluded that, because the Ohio Revised Code requires the safety director to approve all hires by the fire department, the city could not employ his son. However, the Commission went on to state that, if it were possible, under the Ohio Revised Code, for the Mayor, who is a superior of and acts as a check upon the authority of the safety director, to act in the place of the safety director, then employment of the safety director's son would not be prohibited. The Commission stated: "The determination of whether a mayor of a non-charter city may, instead of the service and safety director, independently review a recommendation for employment made by the fire chief, and appoint an employee to the city fire department, is for the determination of the city law director."

Absent a conflict between provisions of the Columbus City Charter and provisions of Ohio's Ethics Law and related statutes, which are general laws, the Commission cannot answer your question about the application of the Charter. The determination of whether the Mayor can legally be considered to be acting under a temporary disability because of his conflict of interest is a question for the city attorney.

Other Provisions of the Ohio Ethics Law

For the further guidance of your office, the mayor, and public officials and employees in similar situations, there are other provisions of the Ohio Ethics Law that apply to a public official or employee, during the remainder of his term or employment, who has accepted private employment that will commence after he completes his public service. First, R.C. 102.03(A) prohibits the Mayor from representing his future employer, or any other party, before any public agency, on any matter in which he has participated during his public service. For purposes of R.C. 102.03(A), "represent" includes formal or informal appearance before, or written or oral communication with, any public agency, on behalf of any person. R.C. 102.03(A)(5). The term "matter" is defined as any case, proceeding, application, determination, issue, or question. *Id.* A "matter" can include, but is not limited to, a specific occurrence or problem requiring discussion, decision, research, or investigation, a lawsuit or legal proceedings, an oral or written application, a settlement of a dispute or question, a dispute of special or public importance, and a controversy submitted for consideration. Adv. Op. No. 99-001. This section prohibits the Mayor from advocating the interests of his future employer before the City, or any other public agency, with respect to matters in which he participated as Mayor. The restriction in R.C. 102.03(A) applies to the Mayor during the remainder of his public service, and for one year after he leaves his position with the City.

Second, R.C. 102.03(B) provides that the Mayor shall not disclose or use any confidential information without appropriate authorization. This section applies to the Mayor during the remainder of his public service and for one year thereafter.

Finally, R.C. 2921.42(A)(3) prohibits a public official, during his term of office and for one year after his term, from occupying a position of profit in the prosecution of a public contract authorized by him, or by a board of which he was a member at the time of authorization, unless the contract was competitively bid and let to the lowest and best bidder. This section would prohibit the Mayor from profiting from any non-competitive contract between the City and Nationwide, during his remaining term and for a year after he leaves his position with the City, if the Mayor authorized the contract. For purposes of R.C. 2921.42(A)(3), the Mayor will be deemed to have "authorized" a public contract if the contract could not have been awarded without the approval of the Mayor, or the office of Mayor, or any board on which the Mayor sits. See Adv. Ops. No. 88-008, 91-009, and 92-017.

Conclusion

As set forth more fully above, the Ethics Law and related statutes impose significant restrictions upon the Mayor, as they do on any other public official or employee, in situations

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where the official or employee is seeking or has accepted employment with a private party that is interested in matters before the public entity. The Mayor and his subordinates are required, during the Mayor's remaining term of office, to refrain from participating in matters that affect Nationwide and its subsidiaries. So long as the Mayor and his subordinates are able to withdraw from matters that affect Nationwide and its subsidiaries, however, the law does not prohibit him from taking the position with Nationwide after he leaves office. If the Mayor were unable to fully withdraw from matters that affect Nationwide, during the remaining portion of his term, the Mayor would be prohibited from taking the position.

Absent any conflict between provisions of the Columbus City Charter and the Ethics Law, your question about the application of the Charter is outside the scope of the Commission's responsibilities.

Finally, there are post-employment provisions of the Ethics Law that will apply to the Mayor's actions upon leaving his position with the City and assuming employment with Nationwide. The Commission understands that the Mayor will seek further information from the Commission about those restrictions in the future.

This informal advisory opinion was approved by the Ethics Commission at its meeting on August 6, 1999. 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, please feel free to contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer A. Hardin", written in a cursive style.

Jennifer A. Hardin
Chief Advisory Attorney