

OHIO ETHICS COMMISSION

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November 19, 1999

Informal Opinion 1999-INF-1119-2

Michael Spino
Chief of Staff
Ohio Department of Education

Dear Mr. Spino:

You have asked the Ohio Ethics Commission whether the Ohio Ethics Law and related statutes prohibit an elected city official from serving as the Associate Superintendent for School Finance within the Ohio Department of Education (ODE).

As explained below, the Ohio Ethics Law and related statutes do not per se prohibit an elected city official from serving as the Associate Superintendent for School Finance within ODE. However, if a public contract exists between the city and ODE, then it may be impossible for the elected city official to hold both positions simultaneously.

The simultaneous occupation of a local elective office and state employment raises the question of whether such positions are "compatible." The factors for determining compatibility are further defined in the opinion. You should contact the law director for the City of Upper Arlington and the Office of the Attorney General to consider compatibility and any other issue outside the Ohio Ethics Law and related statutes.

Assuming that the proper legal authorities determine that the city council member is not prohibited from holding both positions because of an issue arising under either compatibility or any other restriction outside the Ohio Ethics Law and related statutes, the prohibitions imposed by the Ohio Ethics Law and related statutes restrict the actions that he may take in each public position. In light of the restrictions that are placed upon an individual who serves in two public positions, the city council member may find it difficult to properly perform both of the roles described in your question, to the ultimate detriment of the public interest.

Facts

You state that David Varda is an elected member of the Upper Arlington city council and has been selected by the city council to serve as the mayor. Mr. Varda is also currently employed as the treasurer of the Upper Arlington school district. The State Board of Education desires to hire Mr. Varda as the Associate Superintendent for School Finance within ODE.

Issues Outside the Ethics Commission's Jurisdiction—Compatibility

You have requested that the Ethics Commission "review all applicable Ohio Revised Code provisions" in addressing your question. The Ethics Commission is statutorily empowered to render advisory opinions interpreting Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. These are statutes that generally prohibit public officials and employees from using their public position for private gain and limit their actions in situations where they have a conflict of interest. The simultaneous occupation of a local elective office and state employment raises the question of whether such positions are "compatible." This opinion does not address the issue of compatibility.

You should be aware that the Office of the Attorney General utilizes seven criteria, which have been derived from case law over a period of time, to determine the "compatibility" of public positions. Ohio Op. Att'y Gen. No. 79-111. One of these criteria is whether there is a conflict of interest between the two public positions. The Ethics Commission has the unique authority to issue advisory opinions regarding conflicts of interest arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43. If the potential for a conflict of interest arising under the Ethics Law and related statutes exists in a compatibility question before the Attorney General, the issue is referred to the Ethics Commission. See Ohio Op. Att'y Gen. No. 98-017 (the policy of the Office of the Attorney General is to refrain from issuing opinions on questions that are within the Ethics Commission's exclusive jurisdiction). See also Ohio Op. Att'y Gen. No. 97-044 and Ohio Op. Att'y Gen. 87-025. However, an advisory opinion rendered by the Ethics Commission interpreting Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code is not the same as a determination of compatibility. Ohio Ethics Commission Advisory Opinion No. 91-002. See also Ohio Op. Att'y Gen. No. 90-037.

Another factor that is considered in determining compatibility is whether the empowering authority for one of the positions, such as a city charter, prohibits or conditions holding another public position. In this instance, you should contact the law director for the City of Upper Arlington and the Office of the Attorney General to consider compatibility and any other issue outside the Ohio Ethics Law and related statutes.

If the positions of elected city official and the Associate Superintendent for School Finance within ODE are determined to be compatible, so that Mr. Varda may properly serve simultaneously in both positions, several of the statutes over which the Ethics Commission has jurisdiction would pertain to the question you have raised.

Interest in a Public Contract—R.C. 2921.42(A)(4)

Your attention is directed to R.C. 2921.42(A)(4), which states that no public official shall knowingly:

Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

The term "public official" is defined, in R.C. 2921.01(A), for purposes of R.C. 2921.42, to include an elected or appointed officer, or employee, of the state and any political subdivision thereof.

An elected city official is a "public official" for purposes of R.C. 2921.42. Adv. Op. No. 89-008. In addition, an employee of the DOE is also a "public official" subject to R.C. 2921.42. Adv. Op. No. 95-005.

The term "public contract" is defined for purposes of R.C. 2921.42 in Division (G)(1)(a) to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any political subdivision, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either. In order to be prohibited under R.C. 2921.42(A)(4), an interest must be definite and direct and may either be pecuniary or fiduciary in nature. Adv. Ops. No. 78-005, 81-008, and 86-002.

If a public contract exists between DOE and the City of Upper Arlington, then the prohibitions of R.C. 2921.42(A)(4) may be implicated and may prohibit Mr. Varda from serving as the Associate Superintendent for School Finance within ODE or limit his actions with regard to matters that affect both the City of Upper Arlington and ODE. If such a public contract exists, then you should contact this office again with the details of the contractual relationship in order for the Ethics Commission to render an appropriate response.

Use of Authority to Secure a Thing of Value—R.C. 102.03(D) and (E)

R.C. 102.03(D) and (E) 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.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is an elected officer of a political subdivision or an employee of a state department. R.C. 102.01(B) and (C). An elected city official is a "public official or employee" for purposes of R.C. 102.03. Adv. Op. No. 89-008. In addition, an employee of the ODE is also a "public official or employee" for purposes of R.C. 2921.42. Adv. Op. No. 95-005.

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 Ethics Commission has stated that the benefit or detriment that results from a decision by a public agency is within the definition of anything of value. Adv. Ops. No. 86-007 and 93-016.

Thus, if Mr. Varda serves simultaneously as an employee of ODE and as an elected city official, R.C. 102.03(D) and (E) would prohibit him, as either an employee of the ODE or as an elected city official, from soliciting, accepting, or using the authority or influence of either 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 as an official or employee of either governmental entity. Mr. Varda would be prohibited, for example, from using the authority or influence of one public position to benefit either himself in his other public position or the other public agency that he serves. He is prohibited from participating as a public official or employee of one public agency in any matter that would affect the interests or operation of the other public agency. See generally Adv. Op. No. 88-002.

Representation Before Public Agencies—R.C. 102.04(A) and (C)

Division (A) of Section 102.04 of the Revised Code reads:

Except as provided in division (D) of this section, no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter that is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

Therefore, R.C. 102.04(A) would prohibit Mr. Varda from receiving, directly or indirectly, compensation from the City of Upper Arlington or any other party for any service rendered personally by him in any matter that is before any department, division, institution, instrumentality, board, commission, or bureau of the state.

In a similar fashion, Division (C) of Section 102.04 prohibits a municipal official from receiving "directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before the agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which he is an officer or employee." Therefore, if Mr. Varda served in both public positions, he could not represent ODE on any case, proceeding, application, or other matter before any agency, department, board, or commission of the City of Upper Arlington.

There is an exemption to both R.C. 102.04(A) and (C), set forth in R.C. 102.04(D). However, the exemption of R.C. 102.094(D) does not apply to elected officials and would not be available to Mr. Varda because of his status as an elected city official. Adv. Op. No. 89-016.

The Revolving Door—R.C. 102.03(A)

As stated above, in addition to holding an elected city position, Mr. Varda is currently employed as the treasurer of the Upper Arlington school district. If the State Board of Education hires Mr. Varda as the Associate Superintendent for School Finance, then the "Revolving Door" prohibition of the Ohio Ethics Law, set forth in R.C. 102.03(A), will have an impact upon his service with ODE.

R.C. 102.03(A) imposes restrictions upon the ability of present and former public officials and employees to represent a client or act in a representative capacity for any person during their public service and for one year after leaving their public position. R.C. 102.03(A)(1) provides:

No present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

The pertinent elements of the "Revolving Door" prohibition are: (1) a present or former public official or employee; (2) is prohibited from representing a client or acting in a representative capacity for any person; (3) before any public agency; (4) on any matter in which he personally participated as a public official or employee; (5) during government service and for one year thereafter. Adv. Op. No. 99-001. The Ethics Commission has held that a "person," for purposes of R.C. 102.03(A)(1), includes governmental agencies, individuals, corporations, business trusts, estates, trusts, partnerships, and associations. See R.C. 1.59(C) and Adv. Ops. No. 82-002 and 89-003. In the instant situation, Mr. Varda's potential new employer, ODE, is a "person" for purposes of R.C. 102.03(A).

R.C. 102.03(A)(5) defines the term "represent" to include "any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person." In Advisory Opinion No. 86-001, the Ethics Commission described examples of activities that are considered to fall within the definition of the term "represent," for purposes of this section:

[T]his would include activities ranging from an appearance on behalf of a private client in a formal proceeding or meeting to informal "lobbying" of agency personnel by telephone or in person. It also includes written communications ranging from formal documents and filings to informal letters and notes. Even if the attorney or consultant does not sign the documents, letters, or notes, the prohibition would apply if she prepared the communication. If she merely consulted with the attorneys or other personnel who prepared the documents, letters, or notes, the prohibition would not apply.

R.C. 102.03(A) prohibits a former public official or employee from "representing" a client, new employer, or any other party before any public agency on a matter in which he personally participated, and not just before his former public agency. Adv. Ops. No. 86-001, 87-001, and 92-005. A "public agency" is defined in R.C. 102.01(C) to include "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. 102.03(A) includes representation before the courts, in contrast to R.C. 102.04, which specifically excludes the courts from the prohibition.

R.C. 102.03(A) defines the term "matter" to include "any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments." (Emphasis added.) The term "matter" is broadly defined under R.C. 102.03(A) and includes any issue or question, as well as particular cases, proceedings, applications, and determinations. See Adv. Ops. No. 91-009 and 92-005.

The Ethics Commission has held that the term "matter" is broadly defined and includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, or investigation, a lawsuit or legal proceedings, an oral or written application, and a settlement of a dispute or question. Adv. Op. 99-001. "Matter" also includes such abstract items as a dispute of special or public importance and a controversy submitted for consideration. Id. The Commission however, has held that the term "matter" cannot be interpreted so broadly as to include a general subject matter. Id.

R.C. 102.03(A) defines "personal participation" to include "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion." In Advisory Opinion No. 91-009, the Ethics Commission held that "personal participation" in a matter also includes the exercise of "supervision or general oversight" over other personnel in their work on that matter, since supervision of a public official's or employee's activities involves decision-making, approval or disapproval, recommendation or advice, and other exercises of administrative discretion, by the supervisor, regarding that matter. See also Adv. Ops. No. 86-001 and 99-001.

Accordingly, if Mr. Varda leaves his position with the Upper Arlington school district to become employed as the Associate Superintendent for School Finance within ODE, then R.C. 102.03(A) will prohibit him, for a period of one year from the date he leaves his local school district employment, from representing ODE, or any other party, before his former employer or any public agency, on any matter in which he personally participated while he was employed by the local school district regardless of when such personal participation occurred during their public service. See Adv. Ops. No. 91-009, 92-005, and 99-001.

R.C. 102.03(A) also prohibits a public official or employee, during his public service, from representing a client, employer, or any other person before any public agency on any matter in which he has personally participated as a public official or employee. In the instant situation, if Mr. Varda becomes an employee of ODE, then he would be subject to the prohibitions imposed by R.C. 102.03(A) in both of his public capacities. In such an instance, R.C. 102.03(A) would prohibit him, as an employee of ODE, from representing ODE before the City of Upper Arlington, or another public agency, on any matter in which he personally participated as an elected city official. This section would also prohibit Mr. Varda, as an elected city official, from representing the city before ODE, or other public agency, on any matter in which he personally participated as an ODE employee.

Conclusion

As explained above, the Ohio Ethics Law and related statutes do not per se prohibit an elected city official from serving as the Associate Superintendent for School Finance within ODE. However, if a public contract exists between the city and ODE, then it may be impossible for the elected city official to hold both positions simultaneously.

The simultaneous occupation of a local elective office and state employment raises the question of whether such positions are "compatible." The factors for determining compatibility are further defined in the opinion. You should contact the law director for the City of Upper Arlington and the Office of the Attorney General to consider compatibility and any other issue outside the Ohio Ethics Law and related statutes.

Assuming that the proper legal authorities determine that the city council member is not prohibited from holding both positions because of an issue arising under either compatibility or any other restriction outside the Ohio Ethics Law and related statutes, the prohibitions imposed by the Ohio Ethics Law and related statutes restrict the actions that he may take in each public position. In light of the restrictions that are placed upon an individual who serves in two public positions, the city council member may find it difficult to properly perform both of the roles described in your question, to the ultimate detriment of the public interest.

In addition, although the Ethics Law and related statutes do not absolutely prohibit an elected city official from accepting employment with a state agency, so long as he meets the requirements of the Ohio Ethics Law and related statutes, such employment may create the appearance of impropriety. This opinion makes no conclusion with regard to the appearance or advisability of the proposed employment. The creation of a detrimental effect upon the functioning of a public agency or an appearance of impropriety should be factors that an elected public official considers when he contemplates an offer of employment with another public agency.

Michael Spino
November 19, 1999
Page 8

This informal advisory opinion was approved by the Ethics Commission at its meeting on November 19, 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 further questions, please feel free to contact this Office again.

Sincerely,

A handwritten signature in black ink that reads "John Rawski". The signature is written in a cursive style with a prominent initial "J" and a distinct "R".

John Rawski
Staff Attorney