

OHIO ETHICS COMMISSION

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February 23, 2001

Informal Opinion 2001-INF-0223-3

Craig B. Paynter
Buckingham, Doolittle & Burroughs, LLP

Dear Mr. Paynter:

In a letter received by the Ethics Commission on October 15, 1999, you ask whether the Ohio Ethics Law prohibits a village official from maintaining a lawsuit against the village that he serves or imposes any limitations on the actions of the official with respect to the lawsuit. Specifically, you ask for guidance regarding a village council member who was recently elected to the office of village mayor.

As explained below, the Ethics Law and related statutes do not prohibit a village official from continuing a lawsuit against the village that he serves. However, because the ongoing lawsuit creates a clear conflict of interest for the village official, R.C. 102.03(D) prohibits the village official from voting, participating in discussions and deliberations of village officials, formally or informally lobbying village officials, or otherwise using his official position in matters regarding the lawsuit or the subject matter of the lawsuit. These matters include, but are not limited to, the selection and compensation of the attorney representing the village, settlement discussions, and retention of and access to records that are directly related to the lawsuit. R.C. 102.03(D) does not prohibit the village official from participating in general matters, unrelated to the lawsuit, that affect the village or village employees.

In order for the individual in your question to serve as village mayor while he pursues the lawsuit, it must be possible for him to withdraw from all matters before the village specifically regarding the lawsuit, such as actions related to discovery or settlement of the lawsuit, or the pursuit of related lawsuits. The withdrawal of the Mayor from matters regarding the lawsuit must not impede him in the performance of his assigned or statutory duties.

Facts

You state that you represent the Village of Cardington in Morrow County, Ohio. You have stated that a village resident and his spouse, individually and as the representatives of an estate, have brought a wrongful death suit against the village following the death of a relative during a chase by village police officers. You have explained that subsequent to filing the lawsuit, the plaintiff in the lawsuit was appointed to village council. He was elected to the office of Mayor in November 1999. You have stated that the case will be proceeding to trial this

winter or next spring. You have explained that the village is represented in the lawsuit by insurance defense counsel. You have stated that it is possible that the lawsuit might have a negative financial impact on the village.

You stated that you have advised the village officials involved, pursuant to Ohio Ethics Commission Advisory Opinion No. 90-013, that a council member is not absolutely prohibited from pursuing a legal action against the village while serving as a member of council. You have stated that you also advised the individual that he would be prohibited from participating in village deliberations, discussions, and actions on matters that might impact the lawsuit. Your opinion concluded:

As a result of a joint application of all of the preceding authorities, it is clear that the member of Council in question is not automatically disqualified from his seat as a member of Council. However, it is equally clear that a member should refrain from discussions, deliberations, voting, or exerting his influence, formally or informally, in any manner over Village operations which might be impacted by, or which might impact, the lawsuit in question. Those operations include, but are not limited to, Village law enforcement and firefighting operations, all Village financial matters by which monies are expended, appropriated or allocated, all matters, meetings or discussions in which the lawsuit and potential resolution of the lawsuit are discussed by the Village and its legal representatives, and discussions regarding Village construction, operation and maintenance of utility infrastructure, insurance coverage, etc. Candidly, it would be hard to imagine how the Council member in question might, as a practical matter, be able to serve without discussing any of these issues.

You have stated that the village council has ongoing concerns about the propriety of one of its members suing the village. You have stated that the council has asked that you seek this advisory opinion, particularly since the council member has now been elected to the position of Mayor.

The Commission has also received, on October 20, 1999, a letter from Richard Cesner, who is counsel for the Mayor. In his letter, Mr. Cesner states that the lawsuit has been pending for nearly nine years. Mr. Cesner also states that the village received legal advice about this matter on February 17, 1992, from the village solicitor at that time. In that letter, which was attached to Mr. Cesner's correspondence, the village solicitor reviewed R.C. 102.03(D) and Ohio Ethics Commission Advisory Opinion No. 90-013. The village solicitor concluded:

It may be a conflict of interest for a village council member to be a party to a lawsuit filed against the village. The Village has two (2) options that it may pursue:

- (1) Commence an action to remove the council member from his position alleging a conflict and see if Section 705.25 O.R.C. applies to this situation; or
- (2) Allow the council member to retain his position, but exclude him on any discussion or vote pertaining to the lawsuit against the village.

We recommend that the second alternative be followed in view of the Ethics Commission decision on a similar matter involving a member of a port authority.

In his letter, Mr. Cesner asserts that his client has "faithfully adhered to both the letter and the spirit of [the February 17, 1992] Opinion."

It appears that the village and the official have been advised, by current and former village solicitors, with respect to the responsibilities of the individual while he serves as a village council member. Further, there is no suggestion that the official has not adhered to the advice given by the village solicitors. The official has since been elected to the position of village mayor. For these reasons, the opinion will not consider the application of the Ethics Law to a village council member, except to reiterate that the Commission has given general advice in this area in Advisory Opinion No. 90-013. This opinion will focus on the application of R.C. 102.03(D) to a newly elected village mayor who is engaged in ongoing litigation against the village.

Prohibition Imposed by R.C. 102.03(D)

The instant situation implicates the prohibition imposed by R.C. 102.03(D), which reads:

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.

A village mayor falls within the definition of "public official or employee" for purposes of R.C. 102.03 and is subject to the prohibition imposed by Division (D) of that section. R.C. 102.01(B) and (C); R.C. 733.24. Ohio Ethics Commission Advisory Opinion No. 93-006.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 102.03(G). The Ethics Commission has held that the proceeds of a lawsuit, which result in a beneficial financial impact upon a party to the lawsuit, is a thing of value for purposes of R.C. 102.03(D). Adv. Op. No. 90-013. In the instant situation, a decision in a lawsuit in favor of the plaintiff, which could include the award of money damages, could result in a financial benefit to the plaintiff, and is a thing of value for purposes of R.C. 102.03(D).

In Advisory Opinion No. 90-013, the Ethics Commission held that R.C. 102.03(D) does not, per se, prohibit a public official or employee from serving as an official or employee of a political subdivision on the basis that he is pursuing a lawsuit against the political subdivision. However, the Commission also held that R.C. 102.03(D) prohibits a public official or employee, who is pursuing a lawsuit against the public agency, from participating in discussions, deliberations, or otherwise using his official position, formally or informally, with regard to the lawsuit or the subject of a lawsuit between the political subdivision that he serves and himself. In Advisory Opinion No. 90-013, the Commission held:

[A]ny action or decision of the [public body] with regard to the . . . lawsuit or the property which is the subject of the lawsuit, could directly affect the [official's] private financial interests.

(Copy of Adv. Op. No. 90-013 enclosed.)

In the instant situation, the council member would be prohibited from participating in any matter pending before village council that could affect the pending lawsuit or the subject matter of the lawsuit. While this conclusion is consistent with the Commission's determination in Advisory Opinion No. 90-013 and with the advice the village solicitors rendered for the village council, the implications of the restriction may be different for a village mayor than for a member of village council.

The Commission's decision in Advisory Opinion No. 90-013 concerned a member of a port authority's board of trustees. The advice rendered by the village solicitors regarding the instant situation, as described above, concerned a member of a village council. Generally, a member of a port authority or village council is able to abstain, in the event of a conflict of interest, from the proceedings of the governing board he serves without impairing the effectiveness of the governing board. In most instances, a governing board can act on behalf of the political subdivision if one member is unable to participate. By contrast, a mayor is the executive head of the village and does not serve as a member of a board.

In order to determine whether a village mayor would be able to abstain from participating in matters that affect his interests without impairing his ability to serve in the position, it is necessary to examine the duties of the village mayor.

Duties of a Mayor in a Statutory Village

R.C. 733.23 vests the executive power of villages in a mayor, clerk, treasurer, marshal, street commissioner, and such other officers and departments thereof as are created by law. A village mayor is an elected officer of the executive branch of the municipal corporation. R.C. 733.24. However, a village mayor does not have veto power that is afforded to a city mayor. See R.C. 731.27.

A village mayor is required to perform the duties prescribed by the bylaws and ordinances of the municipal corporation, and to see that all ordinances, bylaws, and resolutions of the legislative authority are faithfully obeyed and enforced. R.C. 733.30. A village mayor has general supervision over each department and the officers provided for in Revised Code Title 7. R.C. 733.35. The village mayor has the authority to supervise the conduct of all the village officers, inquire into and examine the grounds of all reasonable complaints against the officers, and cause their violations or neglect of duty to be promptly punished or reported to the proper authority for correction. R.C. 733.34.

A village mayor is the president of the legislative authority and he presides at all regular and special meetings of the authority. R.C. 733.24. The village mayor has no vote as a member of the legislative authority except in the case of a tie. *Id.* These last two duties of the village mayor are closely comparable to the authority of the president of a city council. *See* R.C. 733.09 (a city council president presides over council meetings, and has no vote as a member of council except in the case of a tie). As the presiding officer of the village council, the village mayor is required to sign all village ordinances, resolutions, and bylaws. The village mayor also communicates a statement of the village finances and any other information relating to the finances and general condition of the affairs of the village as he deems appropriate or as required by the village council. R.C. 733.32.

Application of R.C. 102.03(D) Prohibitions

Because of the statutory duties of the Mayor, there are instances involving the lawsuit in which the Mayor would be faced with a conflict of interest from which he must withdraw in order to comply with R.C. 102.03(D). For example, the statutory duties of Mayor would require the Mayor to act in matters regarding the lawsuit and the public officials and employees who are connected with the lawsuit. For example, under R.C. 733.32, as the presiding officer of the village council, the Mayor is generally required to preside at all regular and special meetings of the council. This would involve meetings in which the lawsuit would be discussed. The Mayor would be required to withdraw from his role as the presiding officer during the portion of the meeting when the lawsuit was to be discussed.

Also, the Mayor has the power to break a tie vote in council. It is possible that a tie vote could occur with regard to issues before council regarding the lawsuit, such as whether to offer an out-of-court settlement or risk litigation, which, if unsuccessful, would result in the village paying court-ordered damages. Once again, as stated above, the Mayor would be required to abstain from casting a tie-breaking vote in these matters.

In addition, the Mayor is generally required to sign village ordinances or resolutions, which could include ordinances and resolutions on matters affecting the lawsuit such as payment of damages or authorization to seek an out-of court settlement. Furthermore, the progression of a lawsuit of this nature could disclose a pattern of misconduct and inefficiency by village law enforcement officers that would require the Mayor to fulfill his duty of general supervision over each department and inquire into the behavior of the same officials whose alleged violation of

law or neglect of duty led to the death that triggered the lawsuit. Once again, R.C. 102.03(D) prohibits the Mayor from acting in matters regarding specific activity, connected to the lawsuit, of village officials and employees.

The Requirement of Withdrawal

In order for the individual in your question to comply with the Ethics Law while serving as the Mayor, and also continue to pursue the pending litigation, it must be possible for him to withdraw from all matters before the village regarding the lawsuit, such as actions related to discovery or settlement of the lawsuit, or the pursuit of related lawsuits.

In your letter, you state that you have advised the village official that he should refrain from:

Those operations include, but are not limited to, Village law enforcement and firefighting operations, all Village financial matters by which monies are expended, appropriated or allocated, all matters, meetings or discussions in which the lawsuit and potential resolution of the lawsuit are discussed by the Village and its legal representatives, and discussions regarding Village construction, operation and maintenance of utility infrastructure, insurance coverage, etc.

While your advice may rightfully attempt to protect against the appearance of improper action by the Mayor, R.C. 102.03(D) would not require the Mayor to withdraw from such a broad spectrum of matters pending before the Village. For example, the Mayor would not be prohibited from participating in matters affecting all Village law enforcement and firefighting operations and all Village financial matters. Rather, the Mayor is required by law to withdrawal from actions regarding the activities of Village officials and employees that specifically relate to the lawsuit. This would include, for example, discussions relevant to discovery or settlement of the lawsuit, the pursuit of related lawsuits, or the specific potential discipline of village officials or employees directly related to litigated issues.

The Ethics Commission has stated that a public official's withdrawal from matters where he has a conflict of interest may be accomplished only when such a withdrawal does not impede the public official in the performance of his assigned or statutory duties. Adv. Ops. No. 96-004 and 99-002. The public official must be able to refer those matters to an individual who holds a public position that is equal or superior to, and acts as a check upon, his authority. Adv. Op. No. 90-010.

For example, the Mayor cannot refer matters in which he has a conflict of interest to city officials or employees who are subordinate to him, or who report to him within the executive branch, because those officials or employees do not exercise authority that is a check upon the authority of the Mayor. Id. 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.

The issue becomes whether a city official with authority that is independent of the Mayor may be able to exercise the duties of the Mayor if the Mayor withdraws from performing his duties in matters regarding the lawsuit.

R.C. 731.10—Duties of the President Pro Tempore

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 city's 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."

It may be possible for the president pro tempore, whose authority is set forth in R.C. 731.10, to perform the duties of the Mayor when the Mayor has a conflict of interest. However, R.C. 731.10 is not within the advisory jurisdiction of the Ohio Ethics Commission. R.C. 102.08. The village solicitor is the appropriate person to determine whether, under R.C. 731.10, the Mayor's authority is transferred to the President Pro Tempore of village council when the Mayor is unable to perform his duties because of a conflict of interest.

Disclosure of Confidential Information—R.C. 102.03(B)

You should also be aware of Division (B) of Section 102.03 of the Revised Code, which reads as follows:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions, or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

Division (B) of Section 102.03 prohibits a present or former public official from disclosing or using, without appropriate authorization, any confidential information acquired by him in the course of his official duties. No time limitation exists for this prohibition, and it is effective while a person serves in a public position and after he leaves public service. Adv. Op. No. 88-009.

R.C. 102.03(B) prohibits the Mayor from releasing confidential information that he acquired during his service as a village official to the attorney that is pursuing the lawsuit against the village or any other party.

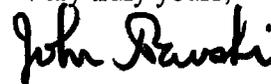
Conclusion

As explained above, the Ethics Law and related statutes do not prohibit a village official from continuing a lawsuit against the village that he serves. However, because the ongoing lawsuit creates a clear conflict of interest for the village official, R.C. 102.03(D) prohibits the village official from voting, participating in discussions and deliberations of village officials, formally or informally lobbying village officials, or otherwise using his official position in matters regarding the lawsuit or the subject matter of the lawsuit. These matters include, but are not limited to, the selection and compensation of the attorney representing the village, settlement discussions, and retention of and access to records that are directly related to the lawsuit. R.C. 102.03(D) does not prohibit the village official from participating in general matters, unrelated to the lawsuit, that affect the village or village employees.

In order for the individual in your question to serve as village mayor while he pursues the lawsuit, it must be possible for him to withdraw from all matters before the village specifically regarding the lawsuit, such as actions related to discovery or settlement of the lawsuit, or the pursuit of related lawsuits. The withdrawal of the Mayor from matters regarding the lawsuit must not impede him in the performance of his assigned or statutory duties.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on February 23, 2001. 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. I apologize for the delay in responding to your request and any inconvenience this delay may have caused. If you have any questions or desire additional information, please contact this Office again.

Very truly yours,



John Rawski
Staff Attorney

Enclosure

Advisory Opinion No. 90-013