

OHIO ETHICS COMMISSION

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October 12, 2001

Informal Opinion 2001-INF-1012-3

Christopher L. Gibbon, Esq.
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Dear Mr. Gibbon:

You have asked whether the Ohio Ethics Law and related statutes prohibit the mayor of a municipality from also being employed as the municipality's planning director.

Facts

You state that the municipality operates under a charter. You state that the mayor of the municipality is elected every four years and that the municipal charter requires that the mayor "shall execute all contracts on behalf of the municipality." You also state that the mayor's position is considered to be part-time. You further state that the charter requires the mayor to serve as a member of the municipality's planning commission.

You state that the municipality's council intends to enact an ordinance that would create the new part-time position of planning director. You also state that the proposed ordinance would specify the duties and salary of the planning director. Under the proposed ordinance, the municipality's council would appoint the planning director and the planning director would report directly to the council.

Brief Answer

As explained below, the Ohio Ethics Law and related statutes prohibit the mayor from being hired as the planning director for the municipality. Because the mayor is required to execute all contracts on behalf of the municipality, if the mayor were to be selected by council to serve as the planning director, he would be required to execute an employment contract for himself in violation of R.C. 2921.42(A)(1) and (3). In addition, there would be significant conflicts of interest, under both the Ohio Ethics Law and the conflict of interest concepts incorporated into issues of compatibility, if the mayor, who is the elected head of the executive branch, were also to serve as an employee of the municipality reporting to the legislative branch. The same concerns also arise if the mayor were to serve as the planning director working with the planning commission, on which the charter requires him to serve.

Because the municipality in your question operates under a charter, your question could be resolved if the citizens in the community were to vote to approve a charter amendment which expanded the mayor's authority to include acting as planning director and increased the compensation for the mayor's position to reflect the additional service.

Authorizing a Public Contract—R.C. 2921.42(A)(1)

R.C. 2921.42(A)(1) provides that no public official shall knowingly:

Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

The pertinent elements of this provision are: (1) a public official; (2) is prohibited from authorizing, or employing the authority or influence of his office to secure authorization; (3) of any public contract; (4) in which he, a member of his family, or any of his business associates; (5) has an interest. Ohio Ethics Commission Advisory Opinions No. 78-002, 85-015, and 92-008.

The term "public official" is defined, in R.C. 2921.01(A), for purposes of R.C. 2921.42 to include both a person who serves a political subdivision in an elected position and a person who serves as an employee. The mayor of the municipality is a "public official" for purposes of R.C. 2921.42. Adv. Ops. No. 85-002.

The term "public contract" is defined for purposes of R.C. 2921.42, in Division (G)(1)(a) of that section, as:

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 of its political subdivisions, 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. (Emphasis added.)

Division (G)(1)(a) of R.C. 2921.42 does not limit the definition of the term "public contract" to a specific manner or means by which an individual is employed by the state or a political subdivision. Adv. Op. No. 90-010. Accordingly, contracts for full-time, part-time, temporary, or permanent employment are all "public contracts" for purposes of R.C. 2921.42. *Id.* The employment of a part-time planning director by a municipality is a public contract for purposes of R.C. 2921.42.

The exact actions prohibited by R.C. 2921.42(A)(1) turn on what actions constitute "authorizing" and "employing the authority or influence of his office." Adv. Op. No. 98-004. The Ethics Commission has interpreted this statutory language to mean that a public official will be deemed to have "authorized" a public contract, for purposes of R.C. 2921.42, where the contract could not have been awarded without the approval of the official or the public position in which the official serves. Adv. Ops. No. 87-004, 88-008, 90-010, and 92-012. Accordingly, R.C.

2921.42(A)(1) prohibits a public official from voting, discussing, deliberating, or otherwise participating in any part of his political subdivision's decision-making process with respect to the creation, or implementation, of a public contract in which he has an interest. Adv. Op. No. 92-003.

Therefore, R.C. 2921.42(A)(1) prohibits the mayor from taking any part in the authorization of a new form of compensated employment for himself as planning director with the municipality. In your letter, you state that the municipal charter requires that the mayor "shall execute all contracts on behalf of the municipality." Further, a mayor in a municipality may be required to participate actively in the adoption or approval of municipal ordinances. For example, the municipality's charter may require the mayor to either approve or disapprove ordinances after their adoption by council, or allow them to take effect as if the mayor had signed them by taking no action to either approve or disapprove them. In either case, by acting or by choosing not to act, the mayor has a role in the adoption of the ordinance. See generally Adv. Op. No. 91-008.

R.C. 2921.42(A)(1) prohibits the mayor from directly authorizing this contractual employment with the municipality, by executing the contract, and from approving a municipal ordinance that would: (1) create the new part-time position of planning director; (2) specify the duties and salary of the planning director; or (3) employ himself as planning director. Therefore, because the charter requires the mayor to execute all contracts of the municipality, and may require him to participate in the adoption of an ordinance creating, funding, and filling the position in question, R.C. 2921.42(A)(1) cannot be met, and the mayor cannot be employed as the municipality's planning director.

R.C. 2921.42(A)(3) would also apply in this situation. R.C. 2921.42(A)(3) prohibits a public official from occupying a position of profit in the prosecution of a public contract authorized by the official unless the contract is let by competitive bidding to the lowest and best bidder. Employment is a public contract for purposes of R.C. 2921.42(A)(3). The employee paid pursuant to his employment contract occupies a position of profit with respect to the contract. Contracts for employment are not competitively bid contracts. As stated above, the mayor is required by charter to execute all contracts on behalf of the municipality. Therefore, R.C. 2921.42(A)(3) also prohibits the mayor from being employed as the planning director in the municipality.

Conflicts of Interest

While R.C. 2921.42(A)(1) and (3) prohibit the mayor from being employed as the municipal planning director, the conflict of interest law set forth in R.C. 102.03(D) and (E), as well as conflict of interest considerations incorporated as part of the common law analysis of compatibility of public positions, would apply even if the mayor were not prohibited from serving.

R.C. 102.03(D) and (E) provide 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. R.C. 102.01(B) and (C). A mayor of a municipality is, therefore, subject to the prohibitions of R.C. 102.03(D) and (E). Adv. Op. No. 85-002.

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 offer of employment from the municipality to the mayor is within the definition of "anything of value" for purposes of R.C. 102.03(D) and (E). The Ethics Commission has also 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. In this instance, the passage of the proposed ordinance by council that creates the position of planning director and establishes the position's compensation is a thing of value to any person who desires employment in that position. If the mayor were to be selected by council to serve as planning director, then the enactment of the proposed ordinance that creates the position of planning director is a thing of value for purposes of R.C. 102.03(D) and (E).

Therefore, R.C. 102.03(D) and (E) bar the mayor from participating in the enactment or approval of a municipal ordinance that would: (1) create the new part-time position of planning director; (2) specify the duties and salary of the planning director; or (3) employ the mayor as planning director. This prohibition includes, but is not limited to, discussing, recommending, or otherwise using the authority or influence of his position as mayor, either formally or informally, in order to persuade municipal council members to enact such ordinances. See also R.C. 2921.42(A)(1), set forth above. If the municipality's charter requires the mayor to either approve or disapprove ordinances after their adoption by council, or allow them to take effect as if the mayor had signed them by taking no action to either approve or disapprove them, then the requirement of R.C. 102.03(D) and (E), as well as 2921.42(A)(1), could not be met and the mayor could not be employed as the municipality's planning director. Adv. Op. No. 91-008.

Issues Outside the Commission's Jurisdiction—Common Law Compatibility Analysis

The Ethics Commission's advisory authority is limited to interpreting R.C. Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code. R.C. 102.08. Your question also raises the issue of "compatibility" of public positions—that is, whether one person may simultaneously hold two public positions. This opinion does not address the issue of compatibility. As the municipality's legal authority, you are the appropriate person to consider the issue of the compatibility of these public positions.

Of particular note in that analysis is the question of whether there is a conflict of interest between the positions. In Advisory Opinion No. 89-037, the Attorney General explained:

A public servant may not simultaneously hold an additional position which would subject him or her to divided loyalties and conflicting duties or to the temptation to act other than in the best interests of the public.

In the situation you have set forth, the Mayor is the elected head of the executive branch of the municipality. Council is the legislative branch of the municipal government. Further, the mayor is required by charter to serve on the planning commission. If one person were to serve as mayor, to hold employment as planning director of the municipality, selected by and subject to the authority of council, and to serve as a member of the planning commission, it could well lead to divided loyalties and conflicting duties for the person holding all three positions.

You may also wish to determine whether there are any charter restriction upon the mayor holding any other public office, being interested in any contract with the municipality, or holding employment with his municipality. Such a charter provision may be comparable to R.C. 705.78, which prohibits mayors of statutory municipalities from holding any other federal, state, county, or municipal office and employment in any such office, except that of notary public or member of the state militia.

Finally, if the charter can be amended to expand the mayor's authority, the questions you raise may be resolved by a charter amendment. The Ethics Law would not restrict the mayor from performing the duties of planning director as a part of his duties as mayor, rather than as an employee reporting to the council. Consistent with provisions of the Ethics Law, the citizens in the municipality could vote to approve a charter amendment that expanded the mayor's authority to include acting as planning director and concomitantly increase the compensation for the mayor's position to reflect the additional service. See Adv. Op. No. 96-001.

Conclusion

As explained above, the Ohio Ethics Law and related statutes prohibit the mayor from being hired as the planning director for the municipality. Because the mayor is required to execute all contracts on behalf of the municipality, if the mayor were to be selected by council to serve as the planning director, he would be required to execute an employment contract for himself in violation

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of R.C. 2921.42(A)(1) and (3). In addition, there would be significant conflicts of interest, under both the Ohio Ethics Law and the conflict of interest concepts incorporated into issues of compatibility, if the mayor, who is the elected head of the executive branch, were also to serve as an employee of the municipality reporting to the legislative branch. The same concerns also arise if the mayor were to serve as the planning director working with the planning commission, on which the charter requires him to serve.

Because the municipality in your question operates under a charter, your question could be resolved if the citizens in the community were to vote to approve a charter amendment which expanded the mayor's authority to include acting as planning director and increased the compensation for the mayor's position to reflect the additional service.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 12, 2001. The Commission commends you for seeking advisory guidance, on behalf of the municipality, before any action that could be prohibited by law was taken.

The opinion is based on the facts presented and 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