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December 16, 2011 Informal Opinion 2011-INF-1216

Jeanine Hummer
City Attorney
City of Upper Arlington

Dear Ms. Hummer:

On October 18, 2011, the Ohio Ethics Commission received your request for an advisory opinion. In your request, you explained that:

- The City of Upper Arlington (city) offers health insurance coverage to its officials and employees, including council members, providing a choice of a low deductible plan (traditional plan) without a health saving account or a high deductible plan (new plan) with a health savings account;
- There is a general perception that the new plan saves the city money because if covered individuals are required to pay for certain medical services from their health savings account, they will carefully consider seeking the services; and
- City council is considering an ordinance mandating that non-bargaining unit employees and council members be covered only by the new plan.

You have asked eight specific questions, some of which raise issues under provisions other than the Ethics Law. This opinion answers the central question raised by your letter, under a variety of different facts described in your other questions.

Central Question and Brief Answer

Question: Can city council enact an ordinance mandating that non-bargaining unit employees and council members will be covered by the new plan if: (1) individual council members are unable to determine whether they will personally benefit from the ordinance; or (2) some council members are already voluntarily covered by the new health plan?

Yes. Because the ordinance would apply to all individuals in a class of city officials and employees in a uniform manner and it is speculative to assert that the financial interests of any council member would be affected either positively or negatively by the enactment of the ordinance, the council members are not prohibited from participating in the city's discussion or decision to enact the ordinance. All council members can participate, regardless of whether they are already voluntarily covered by the new plan.

Brief Health Care Plan Comparison

You have provided detailed information about both health plans, including comparisons about various costs to the covered employee. That information is included in this opinion as if restated here. Briefly, you have explained that:

- The premium paid by covered persons is the same under the traditional and new plans;
- The key elements of the two plans are:

Plan	Deductible	Co-pay	Co-insurance	Out-of-Pocket
Traditional	None	Required	20% coinsurance	\$500 (single) \$1000 (family)
New	\$2000 (single) \$4000 (family)	Not Required	None	\$2000 (single) \$4000 (family)

- The city encourages employees to select the new plan by contributing \$1250(single)/\$2,500(family) to the health savings plan, although the city's contribution is not mandated by federal law and may change in the future.

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

A city council member is a public official¹ subject to the conflict of interest prohibitions of R.C. 102.03 (D) and (E), which 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.

“Anything of value” includes money, goods, any interest in realty, and every other thing of value.² A financial benefit or detriment that results from a decision by a political subdivision is a thing of value.³

R.C. 102.03(D) prohibits a public official from participating in a public agency’s decision on a matter if the official would receive a definite and direct benefit or detriment of a substantial nature from the decision because the benefit or detriment could have an improper influence upon the official with respect to his or her duties by impairing his or her objectivity and independence of judgment.⁴ R.C. 102.03(E) prohibits a public official from merely soliciting or accepting anything of value that could have an improper influence upon him or her with respect to his or her duties. Unlike R.C. 102.03(D), the prohibition in R.C. 102.03(E) applies to a public official even if he or she does not use his or her official authority or influence to secure the thing of value.⁵

The application of R.C. 102.03(D) and (E) is dependent upon the facts and circumstances of each individual situation.⁶

In-term Increases in Compensation

In your letter, you discuss the Ohio Ethics Commission’s previous advisory opinions on in-term increases in compensation.⁷ “Compensation” is not limited to salary alone. The Ohio Supreme Court has stated that while fringe benefits to an employee, such as health insurance, are not “salary,” they are “compensation” to the employee.⁸

In its previous opinions, the Commission concluded that the conflict of interest law, R.C. 102.03(D) and (E), prohibit city council members from enacting an ordinance granting an in-term increase in compensation for the current members of council and from accepting an in-term increase in compensation enacted by council while they were members of the council. In Advisory Opinion No. 91-007, the Commission specifically concluded that an increase in compensation “would provide a definite and particular financial [benefit] to the council member such that his independence of judgment or objectivity in deciding, as a council member, whether the [increase] is in the best interests of the city, could be biased or impaired.”

Your question, however, is not about a change in compensation or benefits that would affect only council members. Rather, your question involves a change in the form of benefits that will affect council members and other city officials and employees. Further, you have noted that it is not possible to determine whether or to what extent the council members would benefit from the change. In these ways, your questions raise an issue that is clearly distinct from in-term increases in compensation. For that reason, the Commission’s earlier advisory opinions on in-term increases in compensation do not apply to your question.

Speculative and Indirect Economic Impact

As noted above, the prohibitions in R.C. 102.03(D) and (E) apply to a public official whenever a matter before his or her public agency will receive a definite and direct economic

impact that is substantial in nature as the result of the agency's decision on the matter.⁹ If the economic impact is speculative and indirect rather than definite and direct, the prohibitions in R.C. 102.03(D) and (E) do not apply to the official.¹⁰

For example, in Advisory Opinion No. 93-016, the Ethics Commission was asked whether members of a county district board of health, with ownership interests in businesses that would be subject to a public smoking regulation imposed by their board, were prohibited from participating in the enactment of the legislation imposing the regulation. In that opinion the Commission held that R.C. 102.03(D) does not prohibit the board members from participating in the enactment of the regulation because it was merely speculative to assert that their financial interests will be affected by the decision.

General and Uniform Benefit

Further, the Commission has held that R.C. 102.03(D) does not prohibit a public official from participating in a matter before the political subdivision if the matter would affect the official in the same manner that it affects others in the jurisdiction.¹¹ The Commission has cautioned that, in such situations, a public official is prohibited from misusing the authority or influence of his or her office to secure a benefit that is selective, differential, or in disproportion to the benefit realized by others who are affected by the decision.¹²

Council members are prohibited from enacting an ordinance mandating that non-bargaining unit employees and council members be covered only by the new plan if the benefit to the council members is selective, differential or in disproportion to the benefit provided to other city officials and employees who are subject to the ordinance's mandate. Also, R.C. 102.03(E) prohibits a council member from merely soliciting or accepting benefits that are selective, differential, or in disproportion to the benefit provided to other city officials and employees who are subject to the ordinance's mandate, even if he or she abstains from voting or otherwise participating in council's decision to provide the coverage.

Application to Specific Facts

You have explained that, in this situation:

- The actual out-of-pocket cost to a council member under either plan depends on the relative health of and usage by the council member; and
- It is impossible to determine in advance whether changing their health insurance to the high deductible plan results in an increase or decrease in the actual financial benefits received by a council member; and
- The ordinance will change the insurance offered to an entire class of city officials and employees, including the council members, in a uniform manner.

Because it is not possible to determine whether this proposed change in health insurance will result in a definite and direct, substantial benefit or detriment to council members, and will apply to a class of city officials or employees, including council members, in a uniform manner, R.C. 102.03(D) and (E) do not prohibit the council members from participating in council's discussions or decision-making on this matter. All council members can vote on the ordinance regardless of the timing of the ordinance, when any particular council member's term ends, and whether that council member is running unopposed in the next election.

Other Questions

You have asked several questions that involve the timing of the ordinance. In response to these questions, as explained above, the Ethics Law does not prohibit the council members from participating in council's actions on the ordinance you have described. Whether there are issues under other state laws or under Upper Arlington's charter provisions that govern this change, and whether this would be considered an in-term increase in compensation governed by the other laws, rules, or ordinances mentioned in your letter are questions for you, as the city Law Director, to answer.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on December 16, 2011. The opinion is based on the facts presented. It 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 need additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney

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

¹ R.C. 102.01(B) and (C); Ohio Ethics Commission Advisory Opinion No. 89-008.

² R.C. 1.03; 102.01(G).

³ Adv. Ops. No. 85-012, 90-002, and 90-012.

⁴ Adv. Op. No. 91-004.

⁵ Adv. Op. No. 90-004.

⁶ Adv. Ops. No. 87-007 and 89-003.

⁷ Adv. Op. No. 91-007.

⁸ *State ex rel. Parsons v. Ferguson* (1976), 46 Ohio St. 2d 389, 391.

⁹ Adv. Ops. No. 86-011 and 93-016.

¹⁰ Adv. Op. No. 93-016.

¹¹ Adv. Ops. No. 85-006 and 88-004.

¹² Adv. Op. No. 92-013.