



OHIO ETHICS COMMISSION

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COLUMBUS 43215

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Advisory Opinion No. 76-005

January 29, 1976

Syllabus by the Ohio Ethics Commission:

(1) A city councilman is a "public official or employee" as that term is defined in Section 102.01 (B) of the Revised Code.

(2) Section 102.03 (D) of the Revised Code prohibits a city councilman from voting affirmatively for the city's acquisition of a specific parcel of property if the councilman is aware at the time he votes that the seller of the property intends to invest a portion of the purchase price in the councilman's business enterprise.

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Your request for an advisory opinion asks whether a city councilman may vote on the city's acquisition of a parcel of property with the knowledge that the seller of the property will, with a portion of the money realized from the sale, invest in the councilman's newly formed business enterprise.

The city is interested in obtaining the property for a city park. The land has been on the market for some time, the price is approximately what the city would like to pay, \$25,000, and the location has been determined by the Parks and Recreation Department to be ideal. There is strong public support for the project because the current park space available for residents of the city is entirely inadequate.

You ask whether your participation, as a city councilman, by voting for the acquisition would be a violation of Section 102.03 (D) of the Revised Code since a portion of the \$25,000 the city will pay for the property will be invested by the seller in a fledgling business enterprise of which you are the sole owner and proprietor.

Section 102.03 (D) of the Revised Code states:

"No public official or employee shall use or attempt to use his official position to secure any valuable thing or valuable benefit for himself that would not ordinarily accrue to him in the performance of his official duties, which thing or benefit is of such character as to manifest a substantial and improper influence upon him with respect to his duties."
(Emphasis added)

Thus, for the prohibitions of Section 102.03 (D) of the Revised Code to apply, the person must be a "public official or employee." The term "public official or employee" is defined in Section 102.01 (B) of the Revised Code:

"Public official or employee' means any person who is elected or appointed to an elective office or employed by any public agency. 'Public official or employee' does not include a person elected or appointed to the office of precinct, ward, or district committee member under section 3517.03 of the Revised Code, any presidential elector, delegates to a national convention, members of school boards, village officials and employees, township trustees and officials and employees, and any member of a board, commission, or bureau of any county, or city who receives less than one thousand dollars per year for serving in such position."

A city councilman is a person elected or appointed to an elective office and not excluded from the definition of the term "public official or employee." Thus, a city councilman is a "public official or employee" and the prohibitions of Section 102.03 (D) of the Revised Code apply.

If a person is determined to be a "public official or employee" and thus within the purview of Section 102.03 (D) of the Revised Code, the prohibitions of that section are triggered when the public official or employee uses or attempts to use his official position to secure a "valuable thing or valuable benefit." The prohibition only applies to using or attempting to use those powers or duties prescribed to a city councilman by law to secure the valuable thing or benefit. There is no violation of this section if the public official or employee secures something of value, or benefits through activities which are private in nature and outside the scope of his official duties. The specific term "valuable thing or valuable benefit" is not defined in the Revised Code or by the courts.

Section 1.03 of the Revised Code does, however, define "anything of value":

"As used in any section of the Revised Code for the violation of which there is provided a penalty or forfeiture, unless the context otherwise requires, 'anything of value' includes:

(A) Money, bank bills or notes, United States treasury notes, and other bills, bonds, or notes issued by lawful authority and intended to pass and circulate as money;

(B) Goods and chattels;

(C) Promissory notes, bills of exchange, orders, drafts, warrants, checks, or bonds given for the payment of money;

(D) Receipts given for payment of money or other property;

(E) Rights in action;

(F) Things which savor of the realty and are, at the time they are taken, a part of the freehold, whether they are of the substance or produce thereof or affixed thereto, although there may be no interval between the severing and taking away; (G) Every other thing of value." (Emphasis added)

The Ohio Supreme Court, in Scott v. State, 107 Ohio St. 475, 486 (1923), defined "thing of value" as used in a criminal bribery statute by relying on the Webster's International Dictionary definition of value:

"The property or aggregate properties of a thing by which it is rendered useful or desirable."

In the same case the court went on to say that a thing of value need not be generally desirable, but only desirable to the person or persons in question. Thus, whether a valuable thing or valuable benefit is involved is a question of fact turning on the desirability of the thing or benefit in question to the public official or employee who may attempt to secure it.

Next, the valuable thing or benefit secured must not "ordinarily accrue" to the public official or employee in the performance of his official duties. Thus, the valuable thing or benefit must be something other than the regular salary, expenses and fringe benefits received by that public official or employee, and every other public official or employee in a similar position for the performance of his official duties.

The nature of the valuable thing or benefit is further modified by the language, "which thing or benefit is of such character as to manifest a substantial and improper influence upon him with respect to his duties." (Emphasis added) Thus, to determine whether a violation of Section 102.03 (D) of the Revised Code occurs it is necessary to define "which thing or benefit is of such character as to manifest a substantial and improper influence upon him (the public official or employee) with respect to his duties."

Breaking this phrase down into component parts, it is first necessary to determine the meaning of the phrase "of such character as to."

The term "character" is not defined in the Revised Code or by case law other than as a synonym for "reputation." Webster's Third New International Dictionary, G. and C. Merriam Co., Inc. (1963), at 376, defines "character" as the: ". . . main or essential nature especially . . . serving to distinguish; individual composite of salient traits, consequential characteristics, features giving distinctive tone. . ."

Thus, considering the common meaning of the term "character" within the phrase "of such character as to," the valuable thing or benefit received by the public official or employee must be of such a nature as to manifest a substantial and improper influence upon him with respect to his duties. The phrase "of such character as to" seems to remove from the prohibition the necessity of the valuable thing or benefit actually having a substantial and improper influence on the public official or employee and establishes the test, that the valuable thing or benefit must be of such a quality, nature or kind that it could have a substantial and improper influence on the public official or employee.

In order to determine which valuable things or benefits are of "such a character as to" "manifest a substantial and improper influence on the public official or employee a "reasonably prudent public official" test is necessary. Thus, the valuable thing or benefit must be of such a quality, nature or kind that it would have a substantial and improper influence on the "reasonably prudent public official" in a similar situation. This is a factual determination, which in each specific instance must be determined on the basis of the facts presented.

To apply the "reasonably prudent public official test" it is necessary to define the phrase "manifest a substantial and improper influence."

The first term of the phrase, "manifest," is defined in 55, C.J.S., Manifest, page 662, to mean:

" . . . to put beyond question of doubt; to show plainly or to make appear distinctly."

The next substantive terms of the phrase, "substantial" and "improper," are not clearly defined in the Revised Code or by the courts. As stated in Beyer v. Beyer, 9 Ohio N.P. (N.S.) 88 (1909), since the definition of such terms are factual determinations, the totality of the circumstances must be examined before a conclusion is reached. It is for this reason, also, that precise definitions of these terms are not only difficult, but extremely hazardous. 25 Am. Jur. 2d, Duress and Undue Influence, Section 35.

The term "substantial" as used in Section 102.03 (A) of the Revised Code was defined in Ohio Ethics Commission Advisory opinion No. 75-014 to mean it . . . of or having substance, real, actual, true; not imaginary; of considerable worth or value; important."

"Influence" is defined by Webster, supra, at 1160, as power exercised over others either calculatedly or unconsciously." 42, C.J.S., Improper, page 414 defines "improper influence" as:

"That dominion which one person acquires over the mind of another, sane for general purposes, and of sufficient soundness and discretion to regulate his affairs in general, and which prevents the exercise of the latter's discretion and destroys his free will; undue influence. . . ."

Since there is no other legal source useful in defining the term "improper," it is helpful to examine its common usage as defined by Webster, supra, at page 1137. The term "improper" means " . . . not accordant with truth, fact, or right procedure; not suited to the circumstances; not in accord with propriety." (Emphasis added)

Similarly there is a paucity of material on the phrase "improper influence." Thus, it is helpful to examine another term, "undue influenced Black's Law Dictionary (4th Ed. Rev. 1968), at 890, defines "improper influence" as "undue influence."

43, C.J.S., Influence, page 379, defines "undue influence" as:

"All that can be said in the way of formulating a general rule on this subject, is that whatever destroys free agency and constrains the person whose act is brought in judgment to do what is against his will and what he would have done if left to himself is 'undue influence'. . . ."

In West v. Henry, 173 Ohio St. 498 (1962), the court set out three criteria necessary for undue influence to exist: (1) a susceptible person, (2) an opportunity for the influence to be exerted, (3) the fact of improper influence exerted or attempted, and result showing the effect of such influence. The court concluded that mere existence of undue influence and opportunity to exert it, although coupled with an interest or motive, is not sufficient. Such influence must be actually exerted on the mind of the person with respect to the matter in question. It must be shown that such influence, whether exerted at the time of the transaction or prior thereto, was operative at the time of the transaction or was directly connected therewith.

For the purposes of this opinion the definitions of "manifest" and "substantial" and the criteria established in West v. Henry, supra must be incorporated into the "reasonably prudent public official test." Thus, to be "of such a character as to manifest a substantial and improper influence" as used in Section 102.03 (D) of the Revised Code: (1) the reasonably prudent public official must be susceptible to influence; (2) there must exist an opportunity to exert influence on the reasonably prudent public official; and, (3) the result of such influence must have either a calculated or unconscious effect upon the reasonably prudent public official, resulting in the apparent destruction of his discretion with regard to the performance of his official duties.

It is necessary, therefore, to examine the facts of the particular situation and apply the "reasonably prudent public official test" to these facts to determine if the valuable thing or benefit in question "of such character as to manifest a substantial and improper influence upon him with request to his duties."

As stated in your request for this advisory opinion, the valuable thing or valuable benefit in question is the \$10,000 which will be invested in your (the city councilman's) new business. The \$10,000 is a portion of the proceeds which the seller will receive from the sale of his property to the city. Whether the city will purchase the property will be determined by a vote of the city council, and you, as a councilman, have one vote.

Applying the definitions established in this Advisory Opinion to the terms of the statute and the facts in question it may be determined:

- 1) The \$10,000 investment in the councilman's new business would be a desired benefit to the councilman and, thus, a valuable thing or valuable benefit as that term is defined in this Advisory Opinion.
- 2) The \$10,000 investment in the councilman's business is a valuable thing or valuable benefit which would not ordinarily accrue to the councilman in the performance of his official council duties. It is not a salary or compensation received by the councilman, and every other councilman from the city, for serving as city councilman.
- 3) Casting a vote, as a city councilman, in favor of the city's acquisition of the property, knowing at the time that he (the councilman) would receive a \$10,000 investment in his business as a result of the city's acquisition of the land, would be using or attempting to use his official position as councilman, his vote, to obtain something of value or benefit for himself.

To determine whether the \$10,000 investment in the councilman's business would be "of such character as to manifest a substantial and improper influence on him" (the councilman), the "reasonably prudent public official test" must be applied.

The reasonably prudent public official in the same fact situation must:

- 1) be susceptible to being influenced -- here the reasonably prudent public official would be susceptible to influence since he is trying to establish a new business, could use the capital, and council's vote on the acquisition of the property for the park is discretionary and not within any stringent standards or guidelines,

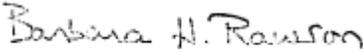
2) there must be an opportunity to exert influence on the reasonably prudent public official in the same situation here, as in any elected public office, constituents have access to the reasonably prudent public official in order to express their opinions, the reasonably prudent public official would make himself available to hear any issue before council; and,

3) the result of influence must have either a calculated or unconscious effect upon the reasonably prudent public official, resulting in the apparent destruction of his unbiased discretion with regard to the performance of his official duties -- here, the official duty involved is the reasonably prudent councilman's vote and it may be determined that the investment of \$10,000 in the reasonably prudent councilman's business would unconsciously, if not calculatedly, have an affect on the reasonably prudent councilman's discretion resulting in an affirmative vote for the city to acquire the property.

Thus, the anticipated receipt of a \$10,000 investment in the reasonably prudent councilman's business would be a valuable thing or valuable benefit of such a character as to manifest a substantial and improper influence on him with respect to his official council duties. Hence, it would be a violation of Section 102.03 (D) of the Revised Code for the city councilman in question to vote, affirmatively, for the city's acquisition of the property, knowing a portion of the \$25,000 received for the property will be invested by the seller in the councilman's business.

Therefore, a \$10,000 investment in the councilman's business is a valuable thing or valuable benefit which does not ordinarily accrue to the councilman in the performance of his councilmatic duties; which valuable thing or valuable benefit is obtained through the use of his official position -- his affirmative vote for the city's acquisition of the property; and, which valuable thing or valuable benefit is of such character to manifest a substantial and improper influence on him with respect to his official duties.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that a city councilman is a "public official or employee" as that term is defined in Section 102.01 (B) of the Revised Code, and Section 102.03 (D) of the Revised Code prohibits a city councilman from voting affirmatively for the city's acquisition of a specific parcel of property if the councilman is aware at the time he votes that the seller of the property intends to invest a portion of the purchase price in the councilman's business enterprise.


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