

OHIO ETHICS COMMISSION

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January 24, 2002

Informal Opinion 2002-INF-0124-1

Kenneth S. Stumphauzer
Baumgartner & O'Toole L.P.A.

Dear Mr. Stumphauzer:

In a letter received by the Ethics Commission on June 4, 2001, you ask whether the Ethics Law and related statutes prohibit the Mayor of the City of Vermilion (City) from receiving compensation for simultaneously serving as the Director of Public Safety (Safety Director). You have explained that, pursuant to City Charter, the Mayor nominated himself for the position of Safety Director, and currently serves as Safety Director without compensation.

It is clear that the City intended to act on this matter in 2001, with the compensation becoming effective in 2002 at the beginning of the Mayor's term. The City desired to receive guidance from the Commission before acting on the ordinance.

Brief Answer

As explained below, within the narrow facts of the instant situation, R.C. 102.03(D) and (E) do not prohibit the Mayor from accepting compensation, during the term that began this month, for simultaneously serving in the position of Safety Director, pursuant to an ordinance presented and approved by City Council. However, R.C. 102.03(D) prohibits the Mayor from taking any positive action with respect to the ordinance.

Facts

You state that the City is a chartered municipality that operates under a mayor and council form of government. You state that Article V Section 3 of the City Charter provides for the position of Safety Director. The City Charter provides that the Mayor, with the consent of a majority of the City Council, shall appoint a Safety Director. The City Charter also provides that "the Mayor, with the consent of a majority of the members of the City Council, may act as the Director of Public Safety." You state that the Mayor currently acts as the Safety Director but receives no compensation for performing this additional service.

You also state that the City Council is considering enacting an ordinance that would provide the Mayor with a salary of \$50,000.00 for his service as both Mayor and Safety Director. The proposed ordinance establishes the compensation of the Mayor's position as \$24,000.00 and the Safety Director's position as \$26,000.00.

The City Charter requires that every ordinance be presented to the Mayor for approval or disapproval. City Charter Article IV Section 4(B). The City Charter states that an ordinance becomes effective when the Mayor either: (1) approves it within ten days after its adoption by Council by signing it and returning it to the Clerk of Council, or (2) takes no action to either approve or disapprove it within ten days after its adoption by Council by which the ordinance will take effect as if he had signed it. Id. If the ordinance or resolution appropriates money, then the Mayor may disapprove all, or any part of the resolution or ordinance, and return it with his objections to council; he cannot disapprove of parts of an ordinance or resolution that does not appropriate money. Id. City Council may override the Mayor's disapproval, but only by a two-thirds vote of the members of City Council. Id.

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

Your attention is directed to 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.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office of a city. R.C. 102.01(B) and (C). A city mayor is a "public official or employee" and, thus is subject to the prohibitions of R.C. 102.03(D) and (E). Ohio Ethics Commission Advisory Opinion No. 85-002.

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. See R.C. 102.01(G). The pecuniary benefit received by a public official for serving in a compensated public office is a thing of value for purposes of R.C. 102.03(D) and (E). Adv. Op. No. 88-002. See also Adv. Op. No. 86-003 (a public employee serves pursuant to a public contract and thus, is subject to the prohibitions imposed by R.C. 2921.42). In the instant situation, the position of Safety Director is created by City Charter and is a public office. If a person serves as Safety Director, and receives no compensation for his service, the person is not receiving anything of value. However, if a person serves as Safety Director, and is compensated for his service, the compensation he receives for his service is a thing of value for purposes of R.C. 102.03(D) and (E). Adv. Op. No. 88-002.

Application of R.C. 102.03(D) and (E) to Compensation

R.C. 102.03(D) prohibits a public official or employee from taking any action, formally or informally, to secure a thing of value if the thing of value could manifest a substantial and improper influence upon the public official or employee with respect to that person's duties. Adv. Ops. No. 88-004 and 91-004. The Ethics Commission has held that a determination of whether a thing of value could manifest a substantial and improper influence upon a public official or employee with respect to that person's duties is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 87-008, 88-004, and 91-004. A matter that affects the personal financial interests of a public official or employee is of such a character as to manifest an improper influence upon him with respect to his duties. Adv. Op. No. 90-003.

In Advisory Opinion No. 91-008, the Ethics Commission concluded that R.C. 102.03(D) prohibits a city mayor from acting to approve an ordinance that would result in an in-term increase in the compensation he receives for performing his public duties. The Commission also concluded that R.C. 102.03(E) would prohibit the city mayor from receiving an in-term increase in his compensation. Adv. Op. No. 91-008. The Commission concluded that R.C. 102.03(E) applied regardless of whether the mayor approves, fails to act on, or vetoes the ordinance in which his compensation is considered. Id. The city that was the subject of Advisory Opinion No. 91-008 did not operate pursuant to charter. However, the statutorily defined duties of a mayor with respect to approval of ordinances are substantially similar to the duties set forth in the charter provisions you have described

R.C. 102.03(D) does not prohibit a city mayor from acting on an increase in the compensation he will receive for serving in the position he holds, so long as that increase will not be effective until the beginning of a new term. Adv. Op. No. 93-006. Further, R.C. 102.03(E) does not prohibit a city mayor from receiving an increase in the compensation he receives for serving in the position he holds, so long as the increase was enacted by ordinance in a term that preceded his receiving the increase. Id.

Application of Precedent

You explained, in your letter, that the City contemplated that the ordinance would be enacted in 2001 but not become effective until the beginning of the Mayor's new term, in January 2002. The draft ordinance you presented provides that the Mayor would be compensated for performing the duties of Safety Director at the beginning of his new term. The City desired to receive guidance from the Commission before acting on the ordinance.

As explained above, R.C. 102.03(D) and (E) prohibit a public official from soliciting, accepting, or using his position to secure anything of value, including an increase in compensation, if the thing of value could have a substantial and improper influence upon the individual with respect to the performance of his duties. In this instance, had the increase been enacted prior to the beginning of the Mayor's new term, then the Ethics Law would not have precluded the Mayor from receiving the increase for the term beginning in 2002.

Conclusion

The City submitted its questions in a letter received by the Commission on June 4, 2001, and stated that it would not act on the ordinance until it received guidance from the Commission. The Commission understands from conversations between you and its staff that the City council is eager to act on this matter, and is waiting for the Commission's response.

Because the City intended to act on the ordinance in 2001, but did not do so in anticipation of an answer from the Commission, the Commission concludes that within the narrow facts of the instant situation, R.C. 102.03(D) and (E) do not prohibit the Mayor from accepting compensation, during the term that began this month, for simultaneously serving in the position of Safety Director, pursuant to an ordinance presented and approved by City Council. However, R.C. 102.03(D) prohibits the Mayor from taking any positive action with respect to the ordinance.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on January 24, 2002. The Commission commends you for seeking advisory guidance, on behalf of the City, 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