

OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

July 18, 2003

Informal Opinion 2003-INF-0718-3

Bruce Aaron Thompson
Village Council Member
Village of Jefferson

Dear Mr. Thompson:

On March 10, 2003, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you have asked whether you are prohibited, as a member of council in your village, from participating in a tax abatement proposal before the village council that will affect the school district by which you are employed.

Brief Answer

As explained more fully below, R.C. 102.03 (D) prohibits you from voting, discussing, deliberating about, recommending, or taking any other formal or informal action, on a tax abatement matter, pending before village council, that will result in a definite and direct measurable benefit or detriment for your employer, the school district. R.C. 102.03(E) prohibits you from using your unique access to other village officials, and village employees, to solicit a benefit related to the tax abatement for the school district. The fact that you do not have a definite and direct personal interest in the tax abatement matter does not change the application of the Ohio Ethics Law.

Facts

By way of history, you explained that you have been employed, for twenty-eight years, as a teacher for a local school district. You asked whether the Ohio Ethics Law and related statutes prohibit you from participating, as a village council member, with respect to an application for enterprise zone tax incentives submitted by a business in the village. The business requested a 75% tax abatement, for five years, on real and personal property investment in the business totaling \$2.1 million dollars. If a tax abatement were to be approved, the school district by which you are employed would lose property tax revenue for the next five years.

In a telephone conversation with Commission staff, you explained that the specific matter about which you had asked has been resolved, and that you did not participate in that matter. However, you have asked for an opinion to guide you if a similar matter arises in the future.

Relevant Commission Precedent

The Commission understands that you are familiar with Advisory Opinion No. 91-006, in which the Commission considered a question similar to the one you ask. In 1991, the Commission was asked whether a city council member, who was also a school district principal, was prohibited from participating in a tax abatement matter before council that would have an impact upon the tax revenue received by the school district. Speaking to the council member who requested the opinion, the Commission concluded:

[A] decrease in tax revenues resulting from an exemption from taxation of improvements to real property is a **definite and direct, particular** detriment to the school district.

If the city council were requested to grant a tax abatement to a business located within the school district, then as a city council member, you could be subject to impaired objectivity and independence of judgment in deciding matters which would result in a definite and direct pecuniary detriment to your employing school district. Therefore, R.C. 102.03 (D) prohibits you, as a city council member, from voting, deliberating, participating in discussions, or otherwise using the authority or influence of your office, either formally or informally, with regard to matters that would provide a definite and particular pecuniary benefit or detriment to your employing school district and the tax revenues it receives. You are prohibited from participating, as a council member, in the consideration of, and vote upon, a tax abatement for property located within the school district.

You have asked the Commission to issue an opinion providing specific guidance to you regarding the application of Advisory Opinion No. 91-006.

Prohibition against Participating in Matters that Affect Employer—R.C. 102.03(D) and (E)

In Advisory Opinion No. 91-006, the Commission considered R.C. 102.03(D), which provides:

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.

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Although the Commission did not consider it in 1991, R.C. 102.03(E) is also relevant to your question. R.C. 102.03(E) provides:

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.

As a village council member, you are a person elected to an office of a public agency, and are therefore a public official, for purposes of the restrictions in R.C. 102.03(D) and (E). See R.C. 102.01(B) and (C); Ohio Ethics Commission Advisory Opinion No. 96-001. Therefore, you are prohibited from soliciting, or using your position to secure, anything of value that is of such a character as to manifest a substantial and improper influence upon you with respect to your duties.

The term "anything of value" is defined to include money and every other thing of value. See R.C. 1.03; 102.01(G). A definite and direct, financial benefit or detriment to an individual, business, or entity, either private or public, is a thing of value under R.C. 102.03(D) and (E). See Adv. Ops. No. 88-004, 88-005, and 89-008.

A public agency's decision that affects a party's pecuniary interests is a thing of value for purposes of R.C. 102.03 (D) and (E). When a public agency grants a tax abatement, the abatement will result in a definite and direct pecuniary benefit for the company that has requested the abatement. Adv. Ops. No. 89-009 and 91-006. The tax abatement will also result in a definite and direct pecuniary detriment to the school district whose revenues will be lowered by the tax abatement. Adv. Op. No. 91-006.

The application of R.C. 102.03(D) and (E) is dependent upon the facts and circumstances of each individual situation. Adv. Ops. No. 87-007 and 89-003. Changes in the Ohio Ethics Law that broadened its coverage are also important in responding to your question.

Prior to 1986, R.C. 102.03(D) prohibited a public official or employee from using his official position to secure anything of value for himself "that would not ordinarily accrue to him in the performance of his official duties, which thing is of such character as to manifest a substantial and improper influence upon him with respect to his duties." (Emphasis added.) This statutory language prohibited a public official or employee from participating in matters that would benefit the public official's or employee's own financial interests. Adv. Ops. No. 79-003 and 80-007. R.C. 102.03(D) also prohibited a public official or employee from acting on matters that affect the property, business, or other financial interests of his spouse or his employer, if the official himself would derive some benefit as a result of his actions. Adv. Ops. No. 79-008, 80-003, and 84-010. By contrast, the Commission concluded that R.C. 102.03(D) did not "apply to things of value accruing to a family member or business associate, provided the public official does not benefit personally." Adv. Op. No. 86-007.

You have acknowledged that your employer, the school district, will lose tax dollars if a tax abatement is awarded. But with respect to your own interest in the tax abatement matter, you state: "abatements do not affect directly my employment." Under the version of R.C. 102.03(D) that existed prior to 1986, your own personal interest would have been a critical factor in the application of the law to your question. However, the law has been amended.

Amendment to Conflict of Interest Law—Am. Sub. H.B. 300

In Am. Sub. H.B. 300, effective September 17, 1986, the General Assembly amended R.C. 102.03(D) to delete the requirement that the thing of value be for the public official or employee, and broadened the scope of the prohibition imposed by R.C. 102.03(D). Adv. Op. No. 87-004. As a result, the law is not limited in its application to situations where the public official or employee would himself secure a benefit. Adv. Op. No. 88-004. R.C. 102.03(D) still requires that the thing of value, whether it is secured for the official or for someone else, have a concrete and direct effect such that it is of a character as to manifest a substantial and improper influence upon the official with respect to his duties. Id.

In Advisory Opinion No. 93-003, the Commission stated:

R.C. 102.03(D) prohibits a public official or employee from using his authority or influence to secure anything of value, not only for himself, but for members of his family (see Advisory Opinion No. 92-012), for his business associates, (see Advisory Opinions No. 88-004 and 88-005), for a professional organization on which the public official or employee serves as a board member (see Advisory Opinion No. 90-012), [and] for his private outside employer (see Advisory Opinion No. 91-004).

It should be noted that this is not a vague or arbitrary application of the law to any person with any type of relationship to a public official or employee. In the cited opinions, where a matter is pending before a public agency that definitely and directly affects the financial interests of a party with a close familial, economic, or fiduciary relationship to an official or employee of the agency, R.C. 102.03(D) prohibits the official or employee from securing anything of value for the related party by participating in the matter. R.C. 102.03(E) prohibits the official or employee from using his unique access to other officials and employees of the agency he serves to solicit anything of value for the related party.

Application to Specific Facts

You have noted that you have been employed by the school district as a teacher for 28 years. You have also stated that being a teacher with the school district does not affect your ability to exercise independent judgment regarding the abatement matter.

The law does not restrict your participation because you are a schoolteacher. Rather, R.C. 102.03(D) and (E) would prohibit any public official, who is also employed in another position, from participating in any matter that affects his private or public employer. This restriction protects the public against the potential for inherent influence present when a public official is asked to make a decision that definitely and directly affects the interest of his employer.

When a public official is otherwise employed, he has a close economic relationship with his employer, regardless of whether his employer is a private corporation or a public agency. In Advisory Opinion No. 88-005, the Ethics Commission concluded that a public official or employee was prohibited from participating in any matter that would directly affect his outside employer's interests. Adv. Ops. No. 89-010 and 91-006. As the Commission explained in Advisory Opinion No. 89-008:

An employer holds a position of power and authority over the hiring, compensation, discipline, and termination of its employees. A [public official] member who is in the position of making an official decision regarding the pecuniary interests of his private employer would have an inherent conflict of interest impairing the [public official's] objectivity and independence of judgment.

A company or public agency has a position of power and authority over all of its employees, regardless of each individual employee's job duties, level of compensation, or role in the management of the company or public agency. Therefore, as a teacher in the school district, you have the same close economic relationship with the district that a principal of a school, as discussed in Advisory Opinion No. 91-006, would have.

The Commission has stated that, if the benefit or detriment of a particular public decision is general or uniform, it is not a definite and direct thing of value. For example, if the matter pending before the public agency will affect all, or most, of the citizens served by the agency, including the official and parties with whom he has a close familial, economic, or fiduciary tie, the benefit or detriment is not a definite and direct benefit or detriment to any one of those parties. Adv. Op. No. 88-004.

You have stated that the company that has requested the tax abatement employs 129 people, and projects that it will create 60 more jobs as a result of the improvements. You also refer to additional potential results from a tax abatement, such as "the prospect of 60 new employees who will pay income tax, maybe move to the village buying land and a home, purchasing products from our businesses, etc." Another potential impact could be additional students in the school district if 60 new employees, with their families, move into the village.

The tax abatement may provide a benefit to the community as a whole. However, while a tax abatement, such as the one you described, may have an impact on the community as a whole, there is no question that two parties—the company that requested the tax abatement and the school district in which the company is located—will be affected in a definite and direct manner that is distinguishable from the general affect on other parties in the village. In a situation such

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as the one you have presented, a school district will be definitely and directly affected by a village council's decision regarding a tax abatement because the school district will suffer a measurable detriment, in the loss of tax revenue, if the abatement is awarded. Adv. Op. No. 91-006. The private corporation will be definitely and directly affected by a village council's decision regarding a tax abatement it has requested because the corporation will receive a measurable benefit, in the waiver of the requirement to pay a percentage of its property taxes, if the abatement is awarded. Adv. Op. No. 89-008.

Therefore, in direct response to your question, you are prohibited, as a village council member, from voting, discussing, deliberating about, making recommendations about, or otherwise participating, formally or informally, in any matter pending before village council in which your employer, the local school district, has a definite and direct interest. Such a matter would include a tax abatement application filed by a company in the district because the tax abatement will definitely and directly affect the financial interests of the school district. You are also prohibited from soliciting any benefit, related to the tax abatement, for the school district.

Summary

As explained more fully above, R.C. 102.03 (D) prohibits you from voting, discussing, deliberating about, recommending, or taking any other formal or informal action, on a tax abatement matter, pending before village council, that will result in a definite and direct measurable benefit or detriment for your employer, the school district. R.C. 102.03(E) prohibits you from using your unique access to other village officials, and village employees, to solicit a benefit related to the tax abatement for the school district. The fact that you do not have a definite and direct personal interest in the tax abatement matter does not change the application of the Ohio Ethics Law.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on July 18, 2003. The Commission commends you for requesting guidance before taking any actions that could be prohibited by the Ethics Law.

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 desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney