

# OHIO ETHICS COMMISSION

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David E. Freel, *Executive Director*

April 25, 2008

Informal Opinion 2008-INF-0425

Maryellen O'Shaughnessy  
[REDACTED]

Dear Ms. O'Shaughnessy:

The Ohio Ethics Commission has received your letter requesting an advisory opinion. In your letter, you explained that you are a member of Columbus City Council. In a conversation with Commission staff, you explained that you serve as Chair of two council committees: Public Service and Transportation and Development.

You are also employed by the Ohio AFL-CIO as the Special Assistant for Legislation and Policy. As the Ohio AFL-CIO's Special Assistant for Legislation and Policy, you stated that you will assist the organization by advancing its cause in developing and implementing policy with the Ohio Legislature and the Governor's Administration.

You have asked for guidance about the Ohio Ethics Law and related statutes as they apply to you given your employment with the AFL-CIO. You understand that you cannot vote on any contracts the City may enter into with any union affiliated with the AFL-CIO and cannot lobby the City on behalf of any affiliated labor union.

## **Brief Answer**

As explained below, in order to serve in the employment position you have described, the Ethics Law requires that you must be able to withdraw from all matters before you in your council position that definitely and directly affect the interests of the Ohio AFL-CIO and its affiliated labor unions. The Ethics Law also prohibits you from receiving compensation to represent the Ohio AFL-CIO, by appearing before, or submitting documents, reports, or plans that you personally prepared to, any City agency even if the City Council is not required to act on the matter. In addition, you are prohibited, while you serve on City Council and for one year after leaving the position, from representing the Ohio AFL-CIO or any person before any public agency on any matter in which you personally participated as a City Council member.

**General Restrictions on Private Business Activity**

The Ethics Law restrictions in R.C. 102.03(D) and (E) prohibit a public official or employee from engaging in a private business activity if a conflict of interest exists between her public position and private activity. Ohio Ethics Commission Advisory Opinion No. 2004-03. In 1996, the Ethics Commission issued a comprehensive opinion, detailing the application of the conflict of interest law to outside employment and business situations. I have enclosed a copy of Advisory Opinion No. 96-004, which explains these restrictions.

**Soliciting, Accepting, and Securing Things of Value—R.C. 102.03(D) and (E)**

You are correct in your understanding that you cannot vote on any contracts the City may enter into with any union affiliated with the AFL-CIO. This activity is prohibited by R.C. 102.03(D) and (E)<sup>1</sup>, which read:

- (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.

As a City Council member, you are a "public official" subject to R.C. 102.03(D) and (E). Adv. Op. No. 2007-01.

A "thing of value" will have a substantial and improper influence on a public official if it could impair the official's objectivity and independence of judgment because: (1) it is of a substantial nature or value; and (2) it is from a source that is doing or seeking to do business with, regulated by, or interested in matters before the agency the official serves. Adv. Ops. No. 2001-03 and 2004-03. "Anything of value" includes money and the promise of future employment. R.C. 102.01(G); 1.03; Adv. Op. No. 96-004. Because compensation for private employment or business activity provided by any of these sources is of such a nature as to have a substantial and improper influence on a public official, R.C. 102.03(D) and (E) prohibits a public official from using his or her position to secure, and from accepting, compensation from these sources.

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<sup>1</sup> Also relevant are the restrictions on public contracts, contained in R.C. 2921.42(A), which are discussed later in this opinion.

The compensation that you would receive from your employment the Ohio AFL-CIO will have a substantial nature or value. The Ohio AFL-CIO and its affiliated labor unions are doing business with and interested in matters before the City. For that reason, R.C. 102.03(D) and (E) generally would prohibit you from using your position to secure, and from accepting, employment from the union. However, a public official may be able to accept compensation for employment with an otherwise prohibited source if she can withdraw from consideration of matters that definitely and directly affect her outside employer. Adv. Op. No. 96-004. A member of a public board can withdraw from matters before the board, because it is the board itself that is empowered to make decisions. Adv. Op. No. 92-009.<sup>2</sup>

As you have stated you understand, in order to accept employment with the Ohio AFL-CIO, you must be able to fully withdraw from consideration of matters before the City that definitely and directly affect the Ohio AFL-CIO and its affiliated unions. In other words, because you are paid by the union, you can only accept your compensation if you are able to fully withdraw from matters affecting the union. For example, you would be required to remove yourself from council votes, deliberations, and formal and informal discussions on these matters. Even if you are able to withdraw, you must also abide by the prohibitions within R.C. 102.03(D).

#### **Securing a Benefit for an Employer—R.C. 102.03(D)**

R.C. 102.03(D) prohibits a public official from using the authority or influence of her position to secure anything of value for herself. In addition, R.C. 102.03(D) prohibits the official from using her position to secure a benefit for others with whom she has a close familial, economic, business, or other relationship. Adv. Op. No. 97-002. Any financial benefit or detriment that the Ohio AFL-CIO or its affiliated labor unions would realize as a result of City decisions is a thing of value. Adv. Op. No. 2007-01.

R.C. 102.03(D), therefore, prohibits you from voting, discussing, deliberating, recommending, or acting within the scope of your authority as a City Council member in any matter that would secure a definite and direct financial benefit or detriment to the Ohio AFL-CIO or its affiliated labor unions. You are also prohibited from formally or informally lobbying other council members or City officials, directing other City personnel, and using your City Council position to secure a particular outcome on any matter that would provide a definite and direct financial benefit or detriment to the Ohio AFL-CIO or its affiliated labor unions.

In Advisory Opinion No. 96-004, the Commission delineated the specific application of R.C. 102.03(D) to outside employment issues. Some of the restrictions may be directly relevant to you in your employment at the Ohio AFL-CIO. Specifically:

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<sup>2</sup> By contrast, an individual office holder who does not serve on a governing board, and in whom decision-making power is vested by statute, cannot withdraw from matters before his or her office in order to seek outside employment. Adv. Op. No. 92-009.

1. You are prohibited from lending the stature inherent in your public position to promotion or advocacy on a specific matter for your private employer, any of its clients, or any other person in connection with your employment. For example, you are prohibited from using your title as City Council member or identifying your public office on promotional materials related to your private employment or in settings where you are specifically engaged in advocacy of your employer's interests. Adv. Op. No. 2004-03. However, you would not be prohibited from noting your public title or office on materials intended for general distribution, such as resumes or directories, provided that the materials are not prepared for the sole purpose of advocating or advancing your employer's interests;

2. You are prohibited from using your relationship with other City officials and employees to secure favorable decisions of actions on matters that definitely and directly affect the Ohio AFL-CIO or affiliated labor unions. For example, if council is considering a matter related to a contract that involves one of the affiliated unions, you would be prohibited from discussing the matter with one of your council colleagues, or with any City employee;

3. You are prohibited from using your public position or authority in any other way to secure a definite and direct financial benefit for the Ohio AFL-CIO. For example, if the Ohio AFL-CIO has expressed a position on a matter that is before council, even if the union is not a party to the matter, you would be prohibited from participating in the matter. An organization has expressed a position on a matter where its board votes or makes a determination on a matter, directs staff to lobby or speak on its behalf on the matter, or otherwise makes its position on the matter known either through communications by the board or staff of the organization.

Other specific restrictions are enumerated in Advisory Opinion No. 96-004. For example, a public official is prohibited from using public time, facilities, personnel, or other resources in conducting her employer's business. A public official is also prohibited from participating in decisions or recommendations on matters that involve the interests of competitors of her employer. The application of these specific restrictions is dependent on the facts.

#### **Receiving Compensation for Services Rendered—R. C. 102.04(C)**

You have also stated that you understand that you cannot lobby the City on behalf of any AFL-CIO affiliated labor union. R.C. 102.04(C) provides that no elected City official shall:

[R]eceive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which he is an officer or employee.

"Compensation," as used in R.C. 102.04(C) is "money, things of value, or financial benefit." R.C. 102.01(A). A matter is "before" a public agency "when it is being considered by, decided by, or in the presence of or under the official purview of" a governmental agency. Adv. Op. No.

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2007-03. Therefore, R.C. 102.04(C) prohibits you from receiving compensation to lobby on behalf of or represent the Ohio AFL-CIO, by appearing before, or submitting documents, reports, or plans that you personally prepared to, any City agency even if the City Council is not required to act on the matter.

There are two exceptions to R.C. 102.04(C). The first, in R.C. 102.04(D), is inapplicable because it is unavailable to elected office-holders. Adv. Op. No. 89-016. The second, in R.C. 102.04(F), provides that the restriction in R.C. 102.04(C) "shall not be construed to prohibit the performance of ministerial functions." "Ministerial functions" are functions "performed in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of personal judgment upon the propriety of the act being done." Adv. Op. No. 75-017; *Trauger v. Nash* (1902), 66 Ohio St. 612, 618. Because of the exception in R.C. 102.04(F), you are not prohibited from filing applications for permits or licenses, or performing other acts that are "ministerial functions," on matters before the City for the Ohio AFL-CIO. Adv. Op. No. 92-002.

#### **Representation on Matters—R.C. 102.03(A)(1)**

In addition to these restrictions in R.C. 102.03(D) and (E) and 102.04(C) with which you have indicated familiarity, you are subject to the "Revolving Door" statute, R.C. 102.03(A)(1), which reads:

No present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee.

The restriction applies during government service and for one year thereafter.

"Personal participation" includes "decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion," and includes supervision or general oversight of other public officials or employees. R.C. 102.03(A)(1); Adv. Op. No. 91-009. Representation includes any formal or informal appearance before, or written or oral communication with, any public agency, on behalf of any person. R.C. 102.03(A)(5). R.C. 102.03(A)(1) prohibits a public official or employee from representing any person, on a matter in which she personally participated, before any public agency, and not just before the agency with which she serves. Adv. Ops. No. 87-001 and 92-005.

A "public agency" includes "the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, township, and the five state retirement systems, or any other governmental entity." R.C. 102.01(C).

R.C. 102.03(A)(1) defines the term "matter" to include "any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments."

(Emphasis added.) "Matter" includes such concrete items as a specific occurrence or problem requiring discussion, decision, research, or investigation, a lawsuit or legal proceedings, an oral or written application, and a settlement of a dispute or question. Adv. Ops. No. 99-003 and 2004-03. "Matter" also includes such abstract items as a dispute of special or public importance and a controversy submitted for consideration, regardless of the parties to the issue or question. *Id.* In other words, R.C. 102.03(A)(1) would prohibit you from representing any party on matter before any public agency, if you participated in the matter, even if your participation involved a party other than the one engaging you to represent its interests.

The term "matter" does not include a general subject matter. *Id.* Furthermore, the term "matter" does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments. As a member of City Council, your official duties include the proposal, consideration, or enactment of ordinances involving contracts and expenditures of City funds.

Therefore, R.C. 102.03(A)(1) prohibits you, while you serve on City Council and for one year after leaving the position, from representing the AFL-CIO or any other person before any public agency on any matter in which you personally participated as a City Council member, *unless* your participation was limited to the proposal, consideration, or enactment of rules, ordinances, and resolutions. R.C. 102.03(A)(1) *does not* prohibit you from representing the Ohio AFL-CIO before a public agency *other than the City* on a matter if your personal participation in the matter was limited to the proposal, consideration, or enactment of City rules, ordinances, or resolutions. See also R.C. 102.04(C) (discussed above) (you are prohibited from representing your employer before the City on any matter regardless of the nature of, or your participation in, the matter).

### **Other Matters—Public Contracts and Confidentiality**

You should also note the restrictions related to public contracts contained in R.C. 2921.42(A)(1) and (4). A City Council member is a "public official," and shall not knowingly:

- (1) Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public official's business associates has an interest. . . .
- (4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which the public official is connected.

An employment contract, including a labor agreement, is a "public contract." R.C. 2921.42(I)(1)(a). The Commission has explained that a public official's outside employer is her "business associate." Adv. Op. No. 2007-01. R.C. 2921.42(A)(1) prohibits you from taking any action, formally or informally, to secure authorization of any public contract in which the Ohio AFL-CIO or any of its affiliated unions has a definite and direct interest. For example, you are

prohibited from voting, discussing, deliberating, or taking any other kind of formal or informal action on contract-related matters before council or other City offices and departments involving these organizations.

R.C. 2921.42(A)(4) prohibits you from having an interest in any contracts between the City and the Ohio AFL-CIO and its affiliated labor unions. The Commission has explained that an employee of an organization has a definite and direct interest in a contract of the organization if: (1) her responsibilities at the organization include preparing, submitting, or negotiating the contract; (2) she would perform work or receive compensation under the contract; (3) her tenure, compensation, or other benefits received from the organization would be based or dependent upon the contract; or (4) the facts otherwise indicate that she would have a definite and direct pecuniary or fiduciary interest in the contract as a result of her position with the organization. Therefore, while R.C. 2921.42(A)(4) does not absolutely prohibit you from being employed by the Ohio AFL-CIO, it does prohibit you, for example, from receiving compensation from the organization for services on matters related to any contracts with the City. Adv. Op. No. 89-006.

Finally, R.C. 102.03(B) prohibits a public official from disclosing or using confidential information acquired in the performance of her public duties. You are prohibited from disclosing or using any confidential information you acquired through your service on City Council. There is no time limit for this restriction. Adv. Op. No. 89-009.

Because of the restriction on disclosure of confidential information, you should not attend the portion of an executive session of council during which: (1) council will be discussing matters in which the Ohio AFL-CIO or any of its affiliated labor unions have a definite and direct interest; or (2) the City attorney will be giving legal advice or sharing privileged information with council regarding matters in which Ohio AFL-CIO or any of its affiliated labor unions have a definite and direct interest. While the law does not require this, the best practice may be to isolate, from among the items to be discussed in the executive session, the items in which the union has an interest and to designate a separate executive session for discussion of those matters. The distinct separation of matters in which the union has an interest will facilitate your removal from the executive session.

### **Conclusion**

As explained above, in order to serve in the employment position you have described, the Ethics Law requires that you must be able to withdraw from all matters before you in your council position that definitely and directly affect the interests of the Ohio AFL-CIO and its affiliated labor unions. The Ethics Law also prohibits you from receiving compensation to represent the Ohio AFL-CIO, by appearing before, or submitting documents, reports, or plans that you personally prepared to, any City agency even if the City Council is not required to act on the matter. In addition, you are prohibited, while you serve on City Council and for one year after leaving the position, from representing the Ohio AFL-CIO or any person before any public agency on any matter in which you personally participated as a City Council member.

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The conclusions in this opinion are applicable to you while serving as a member of City Council. Any change in the nature of your public position would affect the application of the law and you should contact the Commission for further guidance if that occurs.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 11, 2008. 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,

A handwritten signature in black ink, appearing to read "Jennifer A. Hardin". The signature is fluid and cursive, with a large initial "J" and "H".

Jennifer A. Hardin  
Chief Advisory Attorney

Enclosure: Advisory Opinion No. 96-004