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March 5, 2009

Informal Opinion 2009-INF-0305-1

Richard Isbell
Veterans Affairs Coordinator

Dear Mr. Isbell:

On January 20, 2009, the Ohio Ethics Commission received your request for an advisory opinion. You explained that you are currently the Veterans Affairs Coordinator for the City of Columbus (City). You have recently been nominated by the Disabled American Veterans to represent them as a Commissioner on the Franklin County Veterans Services Commission (VSC). You have asked whether the Ethics Law prohibits you from holding these two public positions simultaneously. At your request, the Commission has expedited consideration of the question you raised.

Brief Answer

As explained more fully below, your question involves two public positions that perform similar or closely related activities for the same or overlapping groups of constituencies. Therefore, you can serve as a member of the VSC only if you are able to comply with significant restrictions on your activities in both positions. It may be difficult for the Coordinator to comply with these restrictions. Because the two public agencies perform similar or closely related activities for veterans in Columbus and Franklin County, you would be prohibited from:

- Representing the City or any veteran receiving services from the City before the VSC and its staff;
- Representing the VSC or any veteran receiving services from the VSC before the City Veterans Affairs Office;
- Participating, as the Veterans Affairs Coordinator, in any matters before the City that affect the interests of the VSC; and
- Participating, as a member of the VSC, in any matters before the County that affect the interests of the City.

Facts

In your letter, you explained that Veteran Services Commissioners meet once a week for three hours during the work day and on the weekends for training. Commissioners are compensated \$7,000 per year. You stated that the City's Human Resources and Civil Service Departments have agreed to allow you to adjust your City schedule to make up for time you spend during your regular work hours performing services for the VSC.¹

You stated that the VSC has no jurisdiction over your office with the City nor does it have any input in City policy. You stated that the duties of a Commissioner are to regularly attend meetings, act as a liaison between the VSC, the Veterans Service Office, and the veteran population, and keep veterans and their organizations informed of services provided by the office and other pertinent information. According to the VSC's Web site, one of the services it provides is to give advice and assistance to veterans when they are applying for claims, benefits or entitlements from federal, state, or local agencies. You also attached a copy of the Commissioner position description to your request.

In a conversation with Commission staff, you explained that there are no contracts, grants, or loans between the VSC and the Veterans Service Office. You have also explained that neither office provides any other kind of financial support to the other office. Further, you explained that the City uses Veterans Memorial, which is owned by Franklin County, for veterans' events. However, the VSC does not charge any veterans organization for the use of the facility.² Finally, you explained that, while each office is generally supportive of the efforts of the other office, the two offices do not co-sponsor events for veterans.

Matters Beyond the Ethics Commission's Jurisdiction—"Compatibility of Public Positions"

Whenever a public employee desires to occupy more than one public position at the same time, the question arises whether the positions are "compatible." Seven criteria, which the Ethics Commission has no authority to interpret, are used to determine "compatibility." See 1979 Att'y Gen. Op. No. 79-111. The Commission has explained that an interpretation of the prohibitions imposed by the Ethics Law, Chapter 102., and related statutes, Sections 2921.42 and 2921.43 of the Revised Code is not the same as a determination of compatibility. Ohio Ethics Commission Advisory Opinion No. 91-006. See also 1990 Att'y Gen. Op. No. 90-037. If you have questions

¹ R.C. 2921.43(A) prohibits a public official from accepting or soliciting compensation, except as allowed by law, for the performance of his public service, or additional or greater expenses or other fees than allowed by law. R.C. 2921.43(A)(1) would prohibit you from performing services for the VSC at any time the City is paying you to serve as the Veterans Affairs Coordinator, and from performing services for the City at any time the County is paying you to serve as a VSC member. Also, R.C. 2921.43(A)(2) prohibits you from accepting payment or reimbursement from the City for expenses incurred in service to the VSC and from the County for expenses incurred as a City employee. Because you have established this method of accounting for your hours, which may assist you to avoid any violation of R.C. 2921.43, this opinion will not discuss the restriction.

² When two public agencies do have a contractual relationship, the public contract law, R.C. 2921.42, may prohibit one person from holding positions with both agencies. However, because there are no contracts, grants, loans, or other financial relationships between the City and the VSC, this opinion will not discuss the public contract law.

regarding the compatibility of the two positions you have described, you should contact the City Attorney's Office or County Prosecuting Attorney's Office.

Providing Services for Compensation—R.C. 102.04(C)

R.C. 102.04(C) prohibits a person who is an official or employee of a county or city from receiving or agreeing to receive compensation other than from the county or city for any service rendered by him personally in any matter which is before any department or agency of the governmental entity. Because both of the positions you have described are compensated, R.C. 102.04(C) will restrict your activities if you serve in both positions.

R.C. 102.04(C) will prohibit you, in the course of your employment as a City employee, from representing any person's interests on matters before the VSC. R.C. 102.04(C) will also prohibit you, in the course of your service as a VSC member, from representing any person's interests before the City.

In other words, while you are engaged in your employment as the Veterans Affairs Coordinator, R.C. 102.04(C) will prohibit you from representing any person on any matter before the VSC. For example, as Veterans Affairs Coordinator, you would be barred from meeting, on behalf of a veteran, with the employees or officials of the VSC to arrange for the VSC to provide services to the veteran. You would also be prohibited, while you are engaged in your service as a member of the VSC, from representing any person on any matter before the City Office of Veterans Affairs. For example, as a member of the VSC, you would be prohibited from advocating, before the City, the interests of a veteran receiving services from the VSC. This restriction may significantly affect your ability to perform your job duties and exercise your authority in both positions.³

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

If you can comply with the restriction in R.C. 102.04, the conflict of interest statutes will also restrict your actions and may prohibit you from serving in both public positions.

Your question involves two public positions that perform similar or closely related activities for the same or overlapping group of constituents. The information you provided from the County explains that one of the responsibilities of the VSC is to establish programs of outreach and coordination with other agencies to enhance available services to veterans within the county. See also R.C. 5901.03(E). The City's Web site explains that one of the duties of the Office of Veterans Affairs is to provide assistance to veterans with referrals for services. One of the Veterans resources listed on the City's Web site is the VSC.

³ R.C. 102.04(D) provides an exception to this prohibition for public officials and employees who are not elected. However, the exception would not apply if you were representing any individuals before either the VSC or the City Office of Veterans Affairs. For more information about the exception, see Advisory Opinion No. 96-002.

A person who wishes to serve in two public positions that are closely related because they perform some of the same services for an overlapping constituency is faced with a broad range of potential conflicts. The individual may be required to choose between the two positions.

As a city employee, you are a public employee subject to the conflict of interest prohibitions contained in R.C. 102.03(D) and (E). Members of the VSC are also subject to these restrictions. R.C. 102.03(D) and (E) state that:

- (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.

R.C. 102.01(B) and (C). The term "anything of value" is defined to include money and every other thing of value. R.C. 1.03, 102.01(G); Adv. Ops. No. 82-002 and 89-003. Any compensation that you would receive for your service in either public position is a "thing of value." In addition, the beneficial or detrimental economic impact of a decision by a public decision-making body is a thing of value. Adv. Ops. No. 85-012, 90-002, and 90-012.

R.C. 102.03(D) and (E) prohibit a public employee from soliciting, accepting, or using the authority or influence of his public position to secure anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. A public employee who serves in two public positions is prohibited from using his authority or influence in one position to benefit either himself or the interests he serves in his other public capacity. Adv. Op. No. 91-006. Therefore, a public employee who serves with two public entities is prohibited from participating, in either public position, with respect to matters that affect the other public entity.

If you were to serve as both the Veterans Affairs Coordinator for the City and a member of the County VSC, you would be prohibited from soliciting, accepting, or using the authority or influence of either position to secure anything of value for yourself or the other public agency that you serve. See Adv. Op. No. 2007-01 (a member of city council who is employed by a public university may not participate as a council member in matters that affect the university). You are prohibited from taking any action, formally or informally, in either public position, on matters that affect the interests of the other public agency with which you are connected.

For example, as a Commissioner, you would be prohibited from participating in any matter before the VSC involving the interests of the City, including County outreach programs that would affect the City's Office of Veterans Affairs. You would be prohibited from participating in such matters in *any* way, including discussion, deliberation, the rendering of advice, voting, or any other exercise of administrative discretion. Likewise, if a matter is assigned to you as Veterans Affairs Coordinator for the City that affects the interests of the County, you are prohibited from participating, as a City employee, in that matter. You would be prohibited from discussing, making recommendations, or formally or informally lobbying officials or employees of the City, on matters involving the County.

In Advisory Opinion No. 89-010, the Ethics Commission explained that an employee of a public agency owes his responsibility to the exercise of the public trust by performing the tasks assigned to him by the agency. Where one person serves two public agencies, he has an obligation to objectively and effectively serve the interests of each without detrimentally affecting the interests of the other. Adv. Op. No. 2007-01. In order for a person to serve in more than one public position, he must be able to withdraw from matters before him in either position that definitely and directly affect the other agency.

A public employee's withdrawal may be accomplished only if such a withdrawal: (1) does not interfere with the employee's performance of his assigned duties; and (2) is approved by his employing agency. Adv. Op. No. 90-002. A public agency may, in some instances, be willing to accommodate the personal interests of its employees, but it is within the discretion of the agency to determine whether it is possible or desirable to make that accommodation. An advisory opinion from the Commission does not compel any public agency to accommodate the private interests of its officials or employees. Adv. Op. No. 90-002.

Therefore, as a member of the VSC, you must be able to fully withdraw from any matter before the Commissioners if the City will receive a definite and direct benefit or detriment from the VSC's decision. As a City employee, you must be able to fully withdraw from any matter before the City if the VSC will receive a definite and direct benefit or detriment from the City's decision. In both situations, it must be clear that your withdrawal does not interfere with the performance of your assigned duties. Your withdrawal from matters before the City must be approved by your supervisor and the City's legal advisor.

Generally, a member of a public board, such as the VSC, can withdraw from matters before the board, because it is the board itself that is empowered to make decisions. Adv. Op. No. 92-009. By contrast, an individual who does not serve on a governing board may be unable to withdraw from matters before his public agency without significantly affecting his ability to fulfill the obligations of his employment. If there is considerable overlap of authority between the VSC and the City's Veterans Affairs Office, it may be difficult for you to effectively withdraw from your responsibilities as Veterans Affairs Coordinator in order to serve in both positions. Adv. Op. No. 92-009; R.C. 109.04.

Conclusion

As explained more fully above, your question involves two public positions that perform similar or closely related activities for the same or overlapping groups of constituencies. Therefore, you can serve as a member of the VSC only if you are able to comply with significant restrictions on your activities in both positions. It may be difficult for the Coordinator to comply with these restrictions. Because the two public agencies perform similar or closely related activities for veterans in Columbus and Franklin County, you would be prohibited from:

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- Participating, as a member of the VSC, in any matters before the County that affect the interests of the City.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on March 3, 2009. 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