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INFORMATION SHEET: ADVISORY OPINION NO. 2008-02
CITY COUNCIL MEMBER EMPLOYED BY A COLLABORATIVE ORGANIZATION

What is the question addressed in the opinion?

Can a city council member accept a job with a “collaborative organization” that is doing or seeking to do business with, regulated by, or interested in matters before the city?

What is a collaborative organization?

A “collaborative organization” is a union, chamber of commerce, or other trade or professional association that represents the collective interests of individuals, for-profit organizations, or non-profit organizations.

What is the answer in the opinion?

The Ohio Ethics Law and related statutes do not absolutely prohibit a city council member from seeking or accepting employment with a collaborative organization that is doing or seeking to do business with, regulated by, or interested in matters before the city. However, the Ethics Law does limit the council member’s actions in matters related to the collaborative organization. For example, the council member is prohibited from: (1) participating in any matters before council that affect the interests of the organization; (2) accepting compensation to represent the organization on any matter before the city; and (3) participating in the authorization of a city contract with the organization.

To whom does this opinion apply?

While the opinion specifically discusses city council members, the restrictions apply to all public officials and employees at every level of government.

When did the conclusions in the opinion become effective?

The opinion became effective, with any changes requested, upon acceptance by the Commission.

For More Information, Please Contact:

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ADVISORY OPINION NO. 2008-02 IS ATTACHED.**

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Advisory Opinion
Number 2008-02
October 2, 2008

Syllabus by the Ohio Ethics Commission:

- (1) The Ohio Ethics Law and related statutes do not prohibit a public official or employee from seeking or accepting employment with a collaborative organization, provided that: (a) there is no conflict between the interests of the organization and its affiliates and the public duties of the official or employee; and (b) the official or employee does not use his or her public position in any improper way to secure the employment opportunity or to benefit the collaborative organization or its affiliates;
- (2) Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a city council member who is an employee of a collaborative organization from participating in any matters before council that definitely and directly affect the interests of the organization and its affiliates;
- (3) A council member who is an employee of a collaborative organization is not prohibited from participating in matters before council that affect the individual members of the organization, unless the organization or its affiliates also have a definite and direct interest in, have taken a position on, or are representing the members on the matter;
- (4) A council member who is an employee of a collaborative organization is subject to other provisions of the Ethics Law and related statutes, including R.C. 102.03(A)(1) and (B), 102.04(C), and 2921.42(A)(1) and (4), as explained in this opinion;
- (5) For purposes of this opinion, “collaborative organization” means a union, chamber of commerce, and other trade or professional association that represent the collective interests of individuals, for-profit organizations, or non-profit organizations; “affiliate” means a sub-unit of the collaborative organization; and “member” means an individual, company, or association whose interests are represented by the collaborative organization.

* * * * *

The Ohio Ethics Commission is considering whether the Ethics Law and related statutes (Chapter 102. and R.C. 2921.42 and 2921.43) prohibit a member of a city council from holding employment with a union, chamber of commerce, or other trade or professional association that represents the collective interests of individuals or for-profit or non-profit organizations.

In this opinion, these kinds of associations will be referred to as “collaborative organizations.” For example, the Ohio Council of Retail Merchants would be a collaborative organization, representing the collective interests of retail merchants. An “affiliate” is a sub-unit of the collaborative organization. For example, the Ohio Jewelers Association is a sub-unit, or affiliate, of the Ohio Council of Retail Merchants. A “member” is one of the individuals, companies, or for-profit or non-profit organizations whose collective interests are represented by the collaborative organization. For example, a retail jewelry business can be a “member” of the Ohio Jewelers Association and the Ohio Council of Retail Merchants.

The question before the Commission arises because city council positions are frequently part-time and people serving on council often seek or hold private employment positions with businesses or organizations within the city. Collaborative organizations and their affiliates may be doing or seeking to do business with, regulated by, or interested in matters before council and other city offices. Individuals, companies, and associations that are members of collaborative organizations may also have a variety of relationships with the city.

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

All city council members are “public officials,” subject to the restrictions in R.C. 102.03(D) and (E). R.C. 102.01(B) and (C); Ohio Ethics Commission Advisory Opinion No. 2007-01. R.C. 102.03(D) and (E) provide 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.

The Commission has explained that 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) and 1.03; Adv. Op. No. 96-004.

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. For that reason, R.C. 102.03(D) prohibits a public official from *using his or her position to secure* employment from these sources; R.C. 102.03(E) prohibits the official from *soliciting or accepting* employment from these prohibited sources.

A collaborative organization may be doing or seeking to do business with, regulated by, or interested in matters before the city. For example, a union or one of its affiliates may represent city employees and negotiate contracts on their behalf. A chamber of commerce or one of its affiliates may receive grant funds from or provide services to, or partner with, the city.

Collaborative organizations with any of these kinds of connections to the city are potentially improper sources of things of value for officials and employees of the city. R.C. 102.03(D) and (E) prohibit a council member from using his or her position to secure, and from accepting, employment from these organizations. However, a public official may be able to accept compensation for employment with an otherwise prohibited source if he or she can withdraw from consideration of matters that definitely and directly affect his or her outside employer. Adv. Op. No. 96-004. A member of a public board, such as a city council, can withdraw from matters before the board, because it is the board itself that is empowered to make decisions. Adv. Op. No. 92-009.¹

Therefore, in order to accept employment with a collaborative organization, a council member must be able to fully withdraw from consideration of matters before the city that definitely and directly affect the organization or its affiliates. For example, the council member would be required to withdraw from council votes, deliberations, and formal and informal discussions on these matters. Even if he or she is able to withdraw, the council member must also abide by the specific outside employment application of the prohibition in R.C. 102.03(D).

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

Whenever a public official also has a private or outside employer, there is the possibility for conflicts of interest. In matters where the public interest differs from the interest of a public official's outside employer, and even when the interests appear to be aligned, the official would be subject to dual loyalties if he or she was expected to act on the matter in an official capacity. For that reason, R.C. 102.03(D) prohibits a public official from using the authority or influence of his or her position to secure anything of value for an employer. Adv. Op. No. 97-002. "Anything of value" includes a benefit or detriment that an official's employer would realize as a result of a public agency's decision. Adv. Op. No. 2007-01.

¹ 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 unless there is a specific statute that enables his or her withdrawal. Adv. Op. No. 92-009; R.C. 109.04.

R.C. 102.03(D) prohibits a city council member who is employed by a collaborative organization from taking actions to secure a thing of value for the organization and for any of its affiliates. If a matter is before the city that would provide a definite and direct financial benefit or detriment to a collaborative organization or any of its affiliates, a city council member employed by the organization must refrain from: (a) voting; (b) discussing; (c) deliberating; (d) recommending; (e) formally or informally lobbying council members, other city officials, or city personnel; (f) directing city employees; and (g) using his or her position in any other way to secure a particular outcome on the matter.

Further, if a matter is before the city that would affect an affiliate of the collaborative organization, the council member is prohibited from participating in the matter. If, for example, a council member is employed by a collaborative organization that has three affiliates, and a matter before council definitely and directly affects the interests of one of the organization's affiliates, the council member is prohibited from participating, in any of the ways described in the previous paragraph, in the city's consideration or decision-making on the matter.

However, R.C. 102.03(D) does not prohibit a council member from participating, within the scope of his or her authority, on matters that affect individual *members* of the organization, unless the organization itself has an interest in the matter. For example, if a council member is employed by a labor union, and an individual member of an affiliated labor union is interested in a matter before council, the council member is not prohibited from participating in the matter unless the union or its affiliate also has a definite and direct interest in the matter or is representing the individual member on the matter. In a second example, a council member is employed by a collective organization that represents a particular industry. The organization has an affiliate that represents a sub-unit of the industry. A company that is a member of the affiliate has a definite and direct interest in a matter before council. The council member is not prohibited from participating in council's consideration of the matter. However, if the collective organization or its affiliate also has an interest in the matter, or is representing the company on the matter, the council member would be prohibited from participating in the matter. See generally Adv. Op. No. 90-008.

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 are directly relevant to a city council member who is employed with a collaborative organization. Specifically:

(1) The council member is prohibited from lending the stature inherent in his or her public position to the promotion or advocacy of a specific matter for the collaborative organization or its affiliates. For example, the council member is prohibited from using his or her title as city council member or identifying his or her public office on promotional materials related to his or her private employment or in settings where he or she is specifically engaged in advocacy of his or her employer's interests. Adv. Op. No. 2004-03. However, the council member would not be prohibited from noting his or her 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 his or her employer's interests;

(2) The council member is prohibited from using his or her relationship with other city officials and employees to secure favorable decisions or actions on matters that definitely and directly affect the collaborative organization or its affiliates. For example, if council is considering a matter related to a contract that involves his or her employer, the council member would be prohibited from discussing the matter with one of his or her council colleagues, or with any city employee; and

(3) The council member is prohibited from using his or her public position or authority in any other way to secure a definite and direct financial benefit for the collaborative organization or its affiliates. For example, if the organization has expressed a position on a matter that is before council, even if the organization is not a party to the matter, the council member would be prohibited from participating in the matter. An organization expresses 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 his or her employer's business. See also R.C. 2921.41 (theft in office). A public official is also prohibited from participating in decisions or recommendations on matters that involve the interests of competitors of his or her employer. The application of these specific restrictions is dependent on the facts.

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

The Ethics Law also prohibits a public official from lobbying the public agency on behalf of his or her outside employer. 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. 2007-03. Therefore, R.C. 102.04(C) prohibits a city council member from receiving compensation to lobby on behalf of or represent his or her employer, by appearing before, or submitting documents, reports, or plans that he or she has 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 to council members 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), a council member would not be prohibited from filing applications for permits or licenses, or performing other acts that are “ministerial functions,” on matters before the city for the organization by which he or she is employed. Adv. Op. No. 92-002.

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

In addition to the restrictions in R.C. 102.03(D) and (E) and R.C. 102.04(C), a council member is subject to the “Revolving Door” statute, R.C. 102.03(A)(1), which reads:

No present or former public official or employee shall . . . 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.

A public official is representing his or her employer on a matter if the official formally or informally appears before, or engages in written or oral communication with, any public agency on behalf of the employer. R.C. 102.03(A)(5). A public official who is employed by a collaborative organization would not be engaging in representation if he or she were to discuss a matter with other employees or with officials of the organization. Adv. Op. No. 89-003. A current or former public official is not prohibited from engaging in behind-the-scenes consultation with his or her outside employer or coworkers on matters even if the official personally participated in those matters during his or her public service. *Id.* The official is not prohibited from sharing his or her opinions or impressions about any matter or from providing advice and guidance about the best way to present a matter to the public agency. *Id.*

R.C. 102.03(A)(1) prohibits a public official from representing any person, on a matter in which he or she personally participated, before any public agency, and not just before the agency with which he or 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)(5) 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 a council member from representing a collaborative organization that is his or her employer on a matter before any public agency, if he or she participated in the matter, even if his or her participation did not involve the organization.

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. R.C. 102.03(A)(5). A city council member’s 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 a council member, while he or she serves on city council and for one year after leaving the position, from representing the union, chamber of commerce, or other collaborative organization by which he or she is employed, or any other person, before any public agency on any matter in which he or she personally participated as a city council member, *unless* his or her participation was limited to the proposal, consideration, or enactment of rules, ordinances, and resolutions. R.C. 102.03(A)(1) *does not* prohibit the council member from representing any person, including an organization by which he or she is employed, before a public agency *other than the city* on a matter if his or her 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 on pages five and six of this opinion).

Other Matters—Public Contracts and Confidentiality

The council member 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,” who 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 is a “public contract.” R.C. 2921.42(I)(1)(a). The Commission has explained that a public official’s outside employer is his or her “business associate.” Adv. Op. No. 2007-01. R.C. 2921.42(A)(1) prohibits the council member from taking any action, formally or informally, to secure authorization of any public contract in which the union, chamber of commerce, or other collaborative organization by which he or she is employed has a definite and direct interest. For example, the council member is 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 his or her employer.

However, R.C. 2921.42(A)(1) does not prohibit the council member from participating in contract matters that involve the individuals or businesses that are *members* of the collaborative organization by which he or she is employed, unless that organization itself has an interest in the matter. For example, a council member who is employed by a chamber of commerce is prohibited from authorizing any contract for the chamber. The council member is not prohibited from participating in council’s authorization of a contract for a business located in the city, even though the business is a member of the chamber of commerce, unless the chamber also has an interest in the contract. The chamber would have an interest if, for example, it were to partner with the business on the contract.

R.C. 2921.42(A)(4) prohibits a city council member from having a definite and direct financial or fiduciary interest in any contract between the city and his or her employer. Adv. Op. No. 89-008. The Commission has explained that an employee of an organization has a definite and direct interest in a contract of the organization if he or she is an officer, director, or owner of the organization, or if: (1) his or her responsibilities at the organization include preparing, submitting, or negotiating the contract; (2) he or she would perform work or receive compensation under the contract; (3) his or her tenure, compensation, or other benefits received from the organization would be based or dependent upon the contract; (4) the employer receives all or most of its funding from the contract and its establishment or continuation is dependent on the receipt of the contract; or (5) the facts otherwise indicate that he or she would have a definite and direct interest in the contract as a result of his or her position with the organization. Therefore, while R.C. 2921.42(A)(4) does not absolutely prohibit a council member from being employed by a labor union, chamber of commerce, or other collaborative organization, it does prohibit the council member, for example, from receiving compensation from the organization for services on matters related to any contracts with the city. Adv. Op. No. 89-006.

If the council member were engaged by the organization as a trustee or an officer, such as the executive director, he or she would have an interest in the organization’s contracts. For this reason, a council member is prohibited from serving as a trustee, officer, or executive director of a collaborative organization that has contracts with, or receives grant funds from, the city.

Finally, R.C. 102.03(B) prohibits a public official from disclosing or using confidential information acquired in the performance of his or her public duties. A council member is prohibited from disclosing or using any confidential information he or she acquired through his or her 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, the council member should not attend the portion of an executive session of council during which: (1) council will be discussing matters in which the collaborative organization has 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 the organization has 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 organization has an interest and to designate a separate executive session for discussion of those matters. The distinct separation of matters in which the organization has an interest will facilitate the council member's removal from the executive session.

This advisory 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.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised as follows: First, the Ohio Ethics Law and related statutes do not prohibit a public official or employee from seeking or accepting employment with a collaborative organization, provided that: (a) there is no conflict between the interests of the organization and its affiliates and the public duties of the official or employee; and (b) the official or employee does not use his or her public position in any improper way to secure the employment opportunity or to benefit the collaborative organization or its affiliates.

Second, Divisions (D) and (E) of Section 102.03 of the Revised Code prohibit a city council member who is an employee of a collaborative organization from participating in any matters before council that definitely and directly affect the interests of the organization and its affiliates.

Third, a council member who is an employee of a collaborative organization is not prohibited from participating in matters before council that affect the individual members of the organization, unless the organization or its affiliates also have a definite and direct interest in, have taken a position on, or are representing the members on the matter.

Finally, a council member who is an employee of a collaborative organization is subject to other provisions of the Ethics Law and related statutes, including R.C. 102.03(A)(1) and (B), 102.04(C), and 2921.42(A)(1) and (4), as explained in this opinion.



Ann Marie Tracey, Chair
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