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INFORMATION SHEET: ADVISORY OPINION NO. 2024-01
OFFICIAL CAPACITY EXCEPTION

What is the question in the opinion?

- 1) How should public agencies appoint and instruct public officials or employees to serve in their official capacity?
- 2) Who determines whether a public official or employee is representing the interests of his or her public agency?
- 3) How does the official capacity exception apply to joint appointments by two or more public agencies?

What is the brief answer in this opinion?

- 1) Public agencies can appoint a public official or employee to serve on the board of a non-profit organization in his or her official capacity in any manner the public agency chooses. The public agency should document the appointment in a public record for transparency.
- 2) A public agency is responsible for determining whether a public official or employee is acting in the interest of the agency. If a public official or employee is not following the interest of his or her public agency, then the public agency can remove the public official or employee from that role.
- 3) Two or more public agencies can collaborate to jointly appoint a public official or employee in his or her official capacity.

To whom do the conclusions in this opinion apply?

All public officials or employees serving in an official capacity with a non-profit organization or other public agency.

When did the conclusions in this opinion become effective?

The opinion became effective upon acceptance by the Ethics Commission.

For More Information, Please Contact:

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AN ETHICS COMMISSION ADVISORY OPINION. ADVISORY OPINION NO.
2024-01 IS ATTACHED.**

Syllabus by the Commission:

- (1) Ordinarily, the Ethics Law prohibits a public official from recommending, voting on, or otherwise participating in the authorization of a public contract between a non-profit corporation that he or she serves as a board member and his or her public agency.
- (2) The Commission has recognized an exception to these restrictions for a public official serving on the non-profit in his or her official capacity. A public official serving in his or her official capacity to represent his or her public agency's interests is not prohibited from participating in matters before his or her public agency that affect the non-profit.
- (3) The Commission has provided four criteria that must be met for a public official to serve on the board of a non-profit corporation in his or her official capacity.
- (4) Criteria two of the official capacity exception requires that the public agency appoint a public official or employee to serve on a non-profit organization. The previous requirement that a public agency "formally" designate a public official or employee is no longer required. A public agency may choose how to designate a public official or employee. This advisory opinion explicitly overrules previous opinions to the extent that they required a formal designation.
- (5) Criteria three of the official capacity exception requires that the public agency instruct the public official or employee to represent the interests of his or her public agency. The previous requirement that a public agency "formally" instruct a public official or employee is no longer required. A public agency may choose how to instruct a public official or employee. This advisory opinion explicitly overrules previous opinions to the extent that they required a formal instruction.
- (6) A public agency is responsible for determining whether a public official or employee is acting in the interest of the agency. The public agency is in the best position to determine its own interest. If a public official or employee is not following the interest of his or her public agency, then the public agency can remove the public official or employee from that role.
- (7) Two or more public agencies can collaborate to jointly appoint a public official or employee in his or her official capacity because the process of a joint appointment suggests the agencies' interests are aligned.

* * *

Introduction

In 2023, the Commission considered the official capacity exception in the context of city officials who were appointed to serve on the Mid-Ohio Regional Planning Commission. The Commission expressed interest in reviewing the official capacity exception in more detail in a future advisory opinion. This advisory opinion will clarify the official capacity exception, the criteria required to meet the exception, the role of a public official or employee in representing the interests of his or her public agency, and the application of the exception to joint appointments by multiple public agencies.

Official Capacity Exception

The Commission has explained that, ordinarily, the Ethics Law prohibits a public official from recommending, voting on, or otherwise participating in the authorization of a public contract between a non-profit corporation that he or she serves as a board member and his or her public agency. This restriction exists to prevent a public official or employee from misusing his or her public position to benefit the non-profit organization at the expense of the public interest. For example, a city grant manager who also serves on the board of a non-profit foundation might pick the non-profit foundation for funding over other grant applicants. In this example, the grant manager would have secured a benefit, i.e. grant funds, for his or her own non-profit and harmed other grant applicants by denying them a fair opportunity for funding.

The Commission has created an exception to these restrictions for a public official or employee serving on the non-profit in his or her official capacity. This exception enables a public agency to create, or participate in, a non-profit corporation to acquire community services.¹ A public official or employee can then serve with the non-profit corporation in his or her official capacity as a representative of his or her public agency.²

A public official or employee serving in his or her official capacity to represent his or her public agency's interests is not prohibited from participating in matters before his or her public agency that affect the non-profit, unless the official or employee, his or her family members,³ or his or her business associates⁴ have an interest in the contract.⁵ The exception allows the public agency to partner with non-profit organizations to tackle important issues for the benefit of the community.

When a public official or employee serves with a non-profit corporation in his or her official capacity, "there would not be a dual interest in which private considerations would distract from his [or her] serving the public interest."⁶ In other words, the public official or employee is expected to serve as a representative of the public employer that appointed him or her to the non-profit board position. The public official's or employee's service with the non-profit is an extension of his or her service with the public agency.⁷

Beginning with Advisory Opinion No. 82-004, the Commission created a test with four criteria for a public official or employee to serve with a non-profit organization in his or her official capacity. However, the Commission has received feedback suggesting that some of these four criteria have proven burdensome to public agencies and distract from public agencies' efforts to

use partnerships to benefit their communities. This advisory opinion will address these four criteria and provide a simplified framework for public agencies to utilize the official capacity exception.

Previous Criteria: Formal Designation and Instruction

In previous advisory opinions, the Commission had set forth four criteria that must be met for a public official or employee to serve on the board of a non-profit corporation in his or her official capacity:

- (1) the public agency must create the non-profit corporation or participate in its operation;
- (2) any public official or employee connected with the jurisdiction . . . may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent its interests;
- (3) the public official or employee must be formally instructed to represent his or her public agency and its interests; and
- (4) there must be no other conflict of interest on the part of the designated representative.⁸

The Commission's prior precedents had required a more formalized process for the designation and instruction to a public official or employee serving in his or her official capacity. For criteria two, the Commission previously required a legislative authority or appointing governing body to "formally" designate a public official or employee to serve in his or her official capacity.⁹ For criteria three, the Commission previously required that the legislative authority or appointing governing body "formally" instruct a public official or employee to represent the public agency's interest.¹⁰ To meet the "formal" requirement, the Commission stated that a public agency could use legislative ordinances or resolutions.¹¹ The Commission also stated that a statute requiring a public official or employee to serve in his or her official capacity meets the requirement.¹² Beyond these options, any "formal action" was sufficient to meet the requirements of the exception.¹³ The "formal" requirement has proven burdensome to public agencies seeking to collaborate with non-profit organizations. For example, some city governments have told Commission staff that they have spent a significant portion of every city council meeting addressing official capacity designations.

New Criteria for Official Capacity Exception

The new criteria for the official capacity exception remove duplicative language and the "formal" requirements. A public official or employee seeking to serve with a non-profit corporation in his or her official capacity must meet the following criteria:

- (1) the public agency must create the non-profit corporation or participate in its operation;
- (2) the public agency must appoint the public official or employee to serve on the non-profit corporation;

- (3) the public agency must instruct the appointed public official or employee to represent his or her public agency and its interests; and
- (4) the appointed public official or employee must not have any other conflict of interest.

When a public official or employee meets all four criteria, then he or she is not prohibited from serving on a non-profit corporation board in his or her official capacity. The public official's or employee's service with the non-profit board is an extension of his or her service with the public agency.¹⁴

The new criteria do not include the "formal" requirement. This provides a public agency with flexibility to decide how to appoint and instruct public officials or employees serving in an official capacity role. Public agencies can still use formal methods to appoint public officials or employees.¹⁵ However, public agencies also have the option to use motions, appointment by the chair, directive of an elected official, or directive of a high-level executive, such as a city manager, village administrator, agency executive director, university dean, or university president. For example, a city manager could appoint a city employee to serve in his or her official capacity on a regional planning commission. In another example, a university president could appoint a university administrator to serve in his or her official capacity on the board of a local, non-profit organization.

In the interest of transparency, a public agency should document the appointment of a public official or employee to serve in his or her official capacity in an appropriate public record. A public agency could utilize a memorandum, meeting minutes, letter, or other public record to document the official capacity appointment. This public record will prevent confusion about whether a public official or employee is serving in his or her private capacity or through the official capacity exception. The public record will also allow transparency, so the public can help ensure the public official or employee is acting in the public agency's interest.

This advisory opinion explicitly overrules previous opinions to the extent that they required a public agency to formally designate and instruct a public official or employee to serve in his or her official capacity.¹⁶

Representing the Public Agency's Interests

Previously, both criteria two and three of the official capacity exception required the public official or employee to represent the interests of the public agency. In particular, criteria two stated "any public official or employee connected with the jurisdiction . . . may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally *designate the office or position to represent its interests.*" (Emphasis added.) Criteria three stated "the public official or employee must be formally *instructed to represent his or her public agency and its interests.*" The italicized phrase in both criteria created confusion because of the duplicative language. The duplicative phrase has been removed from the new criteria.

An “interest” for purposes of the official capacity exception is not the same as a fiduciary duty.¹⁷ A public agency’s interest can include the benefit of other public agencies, communities, or the state generally. These indirect benefits are important to the functioning of good government and allowing public agencies to collaborate on public projects. For example, a city employee serving as a member of a regional planning commission could vote on matters that would benefit another city in the region and not directly benefit the member’s own city. In this example, the member is not bound to only vote for matters that directly benefit the member’s city because the interest of the city could include benefiting the region as a whole. In another example where a township participates in a fire district, a township official serving in his or her official capacity could vote to locate the fire station in a neighboring municipality because the existence of collective fire services benefits all participants in the fire district.

A public agency is responsible for determining whether a public official or employee is acting in the interest of the agency. If a public official or employee is not following the interest of his or her public agency, then the public agency can remove the public official or employee from that role. For example, if a city is a member of a regional planning commission and a city official or employee votes to authorize a grant project that city council opposes, then city council is free to withdraw the official capacity designation and prevent the public official or employee from continuing to serve in his or her official capacity.

It should be emphasized that a public official or employee, while serving in his or her official capacity on a non-profit corporation, is not automatically in violation of the Ethics Law simply because they take an action that may not directly and exclusively benefit their public agency. However, there may be instances where a public official or employee acts against the interests of the public agency to secure a personal benefit that may be a violation of the Ethics Law.

Official Capacity Joint Appointments

The requirement to follow the interest of the public agency raises the related question of how a public official or employee can serve in his or her official capacity when appointed by two or more agencies acting together. The Commission has not previously considered the official capacity exception in the context of joint appointments.

If a public official or employee is appointed by two or more public agencies in his or her official capacity, it can be presumed that the interests of the public agencies are aligned. The public agencies choosing to jointly appoint a public official or employee is a strong indication that the public agencies’ interests are aligned. The public agencies would likely not be acting together to appoint a representative if it was not in the interest of the agencies.

Potentially, the interests of the agencies may change resulting in a joint appointee receiving conflicting instructions from the appointing agencies. Public agencies should consider the potential outcome in these instances and provide for the ability to remove an appointee or change the appointment method. If there is a strong likelihood that the public agencies’ interests will diverge, the agencies should not use joint appointments.

A public official or employee jointly appointed to serve with a non-profit corporation in his or her official capacity must meet the following criteria:

- (1) the public agencies must create the non-profit corporation or participate in its operation;
- (2) the public agencies must jointly appoint the public official or employee to serve on the non-profit corporation;
- (3) the public agencies must instruct the appointed public official or employee to represent the appointing agencies and the agencies' collective interests; and
- (4) the appointed public official or employee must not have any other conflict of interest.

When a public official or employee meets all four criteria, then he or she is not prohibited from serving on a non-profit corporation board in his or her official capacity as a joint appointee of two or more public agencies. The public official's or employee's service with the non-profit board is an extension of his or her public service.

Conclusion

Limited to questions arising under Chapter 102 and Sections 2921.42 and 2921.43 of the Revised Code, it is the opinion of the Commission and the Commission advises that:

- (1) Ordinarily, the Ethics Law prohibits a public official from recommending, voting on, or otherwise participating in the authorization of a public contract between a non-profit corporation that he or she serves as a board member and his or her public agency.
- (2) The Commission has recognized an exception to these restrictions for a public official serving on the non-profit in his or her official capacity. A public official serving in his or her official capacity to represent his or her public agency's interests is not prohibited from participating in matters before his or her public agency that affect the non-profit.
- (3) The Commission has provided four criteria that must be met for a public official to serve on the board of a non-profit corporation in his or her official capacity.
- (4) Criteria two of the official capacity exception requires that the public agency appoint a public official or employee to serve on a non-profit organization. The previous requirement that a public agency "formally" designate a public official or employee is no longer required. A public agency may choose how to designate a public official or employee. This advisory opinion explicitly overrules previous opinions to the extent that they required a formal designation.
- (5) Criteria three of the official capacity exception requires that the public agency instruct the public official or employee to represent the interests of his or her public agency. The previous requirement that a public agency "formally" instruct a public official or employee is no longer required. A public agency may choose how to instruct a public

official or employee. This advisory opinion explicitly overrules previous opinions to the extent that they required a formal instruction.

- (6) A public agency is responsible for determining whether a public official or employee is acting in the interest of the agency. The public agency is in the best position to determine its own interest. If a public official or employee is not following the interest of his or her public agency, then the public agency can remove the public official or employee from that role.
- (7) Two or more public agencies can collaborate to jointly appoint a public official or employee in his or her official capacity because the process of a joint appointment suggests the agencies' interests are aligned.



Merom Brachman, Chairman
Ohio Ethics Commission

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's website: www.ethics.ohio.gov

¹ See Ohio Ethics Commission Advisory Opinions No. 83-010 (community development), 84-010 (paramedic services), and 92-012 (hospital services). See also 1979 Ohio Atty.Gen.Ops. No. 79-055.

² While the official capacity exception is most commonly used with non-profit organizations, the Commission has recognized the official capacity exception for public officials or employees serving with other public agencies. See, e.g., Adv. Ops. No. 99-004 and 2001-05. The conclusions in this opinion apply to persons serving in their official capacity with both non-profit organizations and other public agencies.

³ See Adv. Op. No. 2010-03 (the definition of "member of a public official's family" includes parents and step-parents; grandparents; a spouse; children and step-children, whether dependent or not; grandchildren; siblings and any other individual related to a public official by blood or marriage if the individual lives in the same household with the official).

⁴ See Adv. Op. No. 86-002 (business associates are parties that conduct a common business enterprise). See also Adv. Op. Nos. 79-001, 84-014, and 85-004.

⁵ Adv. Ops. No. 96-005 and 99-004.

⁶ See Adv. Ops. No. 83-010, 84-001, and 2001-05. See also 1991 Atty.Gen.Ops. No. 91-007 (stating that the Ethics Commission's "official capacity" exception is "eminently reasonable and a valid statement of general ethical principles governing participation by public servants in the affairs of nonprofit corporations").

⁷ Adv. Op. No. 2001-05.

⁸ See also Adv. Ops. No. 82-004, 83-010, 92-002, and 93-012; 1991 Atty.Gen.Ops. No. 91-007.

⁹ Adv. Ops. No. 84-001, 88-005, 93-012, 94-001, 96-005, 99-004, and 2001-05.

¹⁰ *Id.*

¹¹ Inf. Adv. Ops. No. 2009-INF-0819-2 (Chambers) and 2010-INF-0629-1 (Lodermeier).

¹² Adv. Op. No. 99-004.

¹³ Inf. Adv. Op. No. 2011-INF-0926-1 (Casey).

¹⁴ Adv. Op. No. 2001-05.

¹⁵ In certain limited circumstances, the Commission has recognized the official capacity exception for a public official serving on the board of a for-profit corporation created as a collaboration between multiple non-profit corporations. See Inf. Adv. Op. No. 2006-INF-0929-2 (Kridler). In these rare cases, a public agency should use more formal methods to appoint a public official in his or her official capacity to a for-profit corporation.

¹⁶ See Adv. Ops. No. 84-001, 88-005, 93-012, 94-001, 96-005, 99-004, 2001-05, and 2021-01.

¹⁷ See generally Adv. Op. No. 99-004.