



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 91-006
October 11, 1991

Syllabus by the Commission:

(1) Division (D) of Section 102.03 of the Revised Code does not prohibit a member of city council, who is employed by a local school district which includes the city, from participating in the enactment of general legislation which would uniformly regulate all gas and oil well drilling within the city, despite the fact that the school district desires to drill gas wells upon its property which would be subject to the city regulation;

(2) Division (D) of Section 102.03 of the Revised Code does not prohibit a member of city council, who is employed by a local school district which includes the city, from participating in matters with regard to the enactment of legislation which would enable the development of an industrial plant or a housing tract, despite the possibility that such development could, in some indefinite manner, result in increased tax revenue for the school district or increase the school district's student population;

(3) Division (D) of Section 102.03 of the Revised Code prohibits a member of city council, who is employed by a local school district which includes the city, from voting, discussing, participating in deliberations, or otherwise using his official position as a council member, formally or informally, with regard to city council's grant of a tax abatement to a business located within the school district.

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You have asked whether the Ohio Ethics Law and related statutes prohibit you, as a member of city council, from participating in the enactment of ordinances which may have a financial impact upon your public employer. You state that you are employed as an elementary school principal for a local school district which includes the city which you serve as member of council.

Your question also raises the issue of "compatibility" of public positions -- that is, whether one person may simultaneously hold two public positions. The Ethics Commission's rendering of an advisory opinion interpreting Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code is not the same as a determination of compatibility. See Ohio Ethics Commission Advisory Opinion No. 91-001. See also 1990 Ohio Op. Att'y Gen. No. 90-037. Seven criteria which are independent of the statutes under the Ethics Commission's jurisdiction are used to determine compatibility. See 1979 Ohio Op. Att'y Gen. No. 79-111. See also Ohio Opinions of the Att'y Gen. No. 65-60 and 90-083 (finding the positions of elementary school principal and city council member compatible, but the positions of member of a board of

education of a city school district and trustee of a township located within the city school district incompatible, respectively). The Law Director of your city is the appropriate person to evaluate the criteria used to determine "compatibility" and ascertain whether the positions of elementary school principal and member of city council are compatible in the instant situation. See R.C. 733.51.

You have specifically asked whether you are prohibited from participating as a council member in the enactment of ordinances which: (1) would regulate gas and oil well drilling within the city in light of the fact that the school district desires to drill gas wells upon its property which is located within the city; and, (2) may have an impact upon the tax revenue received by the school district.

Your question concerning city council's enactment of ordinances regulating gas and oil well drilling within the city will be addressed first. The ordinances would not absolutely ban drilling within the city.

You state that the school district is interested in drilling gas wells on its property in order to provide a supply of fuel for its buses. You also state that city council has contemplated enacting ordinances which would regulate gas and oil well drilling within the city. You further state that the proposed ordinances would contain no special provisions or variances concerning the school district.

R.C. 102.03 (D) provides:

No public official or employee shall use or authorize the use of the authority or influence of his office or employment to secure anything of value or the promise or offer of anything of value that is of such character as to manifest a substantial and improper influence upon him with respect to his duties.

The term "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office or is an employee of a city or any other governmental entity. See R.C. 102.01 (B) and (C). You are, as a member of city council, a "public official or employee" for purposes of R.C. 102.03. See Advisory Opinions No. 76-005, 88-004, 89-008, 90-004, and 91-002.

You are also a "public official or employee" by virtue of your position as a school principal. The term "public official or employee" is defined in R.C. 102.01 (B), which reads in pertinent part:

"Public official or employee" means **any person who is** elected or appointed to an office or is **an employee of any public agency**. . . . "Public official or employee" does not include a person who is a teacher, instructor, professor, or other kind of educator whose position **does not involve** the performance of, or authority to perform, **administrative** or supervisory **functions**. (Emphasis added.)

The term "public agency" is defined in R.C. 102.01 (C), which reads in pertinent part:

"Public agency" means 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.

The Ethics Commission has held that a school district is a governmental entity, and thus a "public agency" for purposes of Chapter 102. See Advisory Opinions No. 75-020 and 78-002.

A principal of a school is appointed by the board of education of a local school district pursuant to R.C. 3319.02, which states in pertinent part:

The board of education shall execute a written contract of employment with each assistant superintendent, **principal**, assistant principal, and other **administrator** it employs or reemploys. . . . The contract shall specify the employee's **administrative position** and duties, the salary and other compensation to be paid. (Emphasis added.)

Therefore, as an elementary school principal employed by a local school district you hold an administrative position; you are not a teacher, instructor, professor, or educator whose position falls outside the statutory definition of "public official or employee." Consequently, you are also a "public official or employee" due to your serving the school district as a principal. See Advisory Opinion No. 78-002.

You are subject to the provisions of R.C. 102.03 in **both** capacities as a city council member and as a school principal. However, since you specifically asked the Ethics Commission to address the restrictions which the Ethics Law and related statutes impose upon you as a city council member, this opinion will not discuss the restrictions imposed upon you as a school district employee. If issues arise in which you, as a school district employee, could affect the interests of the city or your interests as a city council member, then you should request guidance from the Ethics Commission before taking any action.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. See R.C. 102.01(G). A definite and direct, pecuniary benefit to the financial interests of an individual, business, or entity, either private or public, is considered to be a thing of value under R.C. 102.03 (D). See Advisory Opinions No. 88-004, 88-005 and 89-008. See also Advisory Opinions No. 79-008, 85-006, 85-011, and 86-007. The Ethics Commission has held that a public agency's licensing or regulatory decision which affects a party's pecuniary interests is a thing of value for purposes of R.C. 102.03 (D). See Advisory Opinions No. 86-007 and 90-002. In this instance the school district may suffer a pecuniary detriment as a result of having to comply with the city's drilling ordinances.

In Advisory Opinion No. 85-006 the Ethics Commission held that a public official or employee is prohibited from participating in matters which would provide a particular and definite pecuniary benefit to property in which he has an interest. See also Advisory Opinion No. 80-007. Am. Sub. H.B. 300 amended R.C. 102.03 (D) to delete the requirement that the thing of value be for the public official or employee **himself**, thus broadening the scope of the prohibition of R.C. 102.03 (D). See Advisory Opinions No. 87-004, 88-004, and 88-005. However, R.C.

102.03 (D) still requires that the thing of value, whether it is secured for the official or for someone else, be of such character as to manifest a substantial and improper influence upon the official or employee with respect to his duties. Id.

The Ethics Commission reaffirmed the analysis of Advisory Opinion No. 85-006 and applied the broader prohibition of R.C. 102.03 (D) in Advisory Opinion No. 88-004, wherein the Commission held that a city council member was prohibited from participating in issues such as widening roads and installing water and sewer lines where the improvements would benefit or serve property in which he or his business associate had an interest, as well as other property in the same area. The Commission held in Advisory Opinion No. 88-004:

Division (D) of Section 102.03 of the Revised Code prohibits a city council member from voting, deliberating, participating in discussions, or otherwise using his official authority or influence with regard to any matter that would provide a definite and particular pecuniary benefit or detriment to property in which his **business associate** has an interest. (Emphasis added.)

In Advisory Opinion No. 88-005, the Ethics Commission held that a "business associate" includes a public official's or employee's outside employer and that R.C. 102.03 (D) prohibits a city council member from participating in any matter that would directly affect his outside employer's interests. In Advisory Opinion No. 89-008 the Commission further explained:

An employer holds a position of power and authority over the hiring, compensation, discipline, and termination of its employees. A city council 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 council member's objectivity and independence of judgment.

The Ethics Commission has never drawn a distinction between private and public outside employers for purposes of the prohibitions of R.C. 102.03 (D). See Advisory Opinions No. 77-006, 82-002, 89-006, and 89-010. See also Advisory Opinions No. 88-002 and 91-002.

However, the application of R.C. 102.03 (D) is dependent upon the facts and circumstances of each individual situation. See Advisory Opinions No. 85-006 and 88-004. In Advisory Opinion No. 85-006, the Commission explained:

Not all "conflicts of interest" are prohibited by Division (D) of Section 102.03 of the Revised Code, but only those in which a public official has a dual interest that would impair his independence of judgment in making decisions. For example, many general issues before local governmental bodies would provide **a uniform benefit** to all citizens in a jurisdiction, **including the public officials making the decision**. This would include **general legislation** on such matters as taxes, police and fire protection, schools, zoning, sewer and water services, and parks. **In most cases, the benefits derived by the public officials in common with their constituents** would ordinarily accrue to them in the performance of their official duties, and **would not be of such character as to manifest a substantial and improper influence on them**. Furthermore, it is not sufficient merely

to identify some indirect or indefinite benefit that a public official may accrue from the performance of an official act. A public official should not be precluded from participating in such decisions that he was duly elected or appointed to make, unless he would secure a particular benefit for himself that creates a conflict or interest. (Emphasis added.)

The Ethics Commission reaffirmed the analysis of Advisory Opinion No. 85-006 in Advisory Opinion No. 88-004, wherein the Commission explained that a city council member may participate or vote on general legislation which provides a uniform benefit or detriment to all citizens within the city, or a large portion thereof, but may not participate or vote on legislation which provides a particular and definite pecuniary benefit or detriment to his interests or the interests of his business associate. See Advisory Opinions No. 79-003, 79-008, and 85-006. See also Advisory Opinion No. 80-007 (city council members who owned downtown property were prohibited from participating in discussions or voting on matters regarding a downtown revitalization project consisting of street paving, sidewalks, tree planting, and lighting since the project would benefit their property.) Applying the reasoning of the above mentioned Advisory Opinions to the instant situation, you are not prohibited from participating or voting on **general legislation** which applies **uniformly** to all property owners within the city, or a large portion thereof, but are prohibited from participating in matters which would provide a particular and definite pecuniary benefit or detriment to your employer's interests or property.

There is nothing in the facts which you have provided to suggest that the proposed drilling ordinances are directed specifically at the school district or that the school district will be the sole party affected by the ordinances. You have stated that the proposed ordinances would contain no special provisions or variances concerning the school district. In the absence of such conditions, the ordinances which you have described are **general** legislation since they would uniformly regulate all gas and oil well drilling within the city. As general legislation, any pecuniary benefit or detriment accrued by your employing school district as a result of city council's general regulatory action would be a benefit or detriment derived in common with all affected parties within the city. Therefore, R.C. 102.03 (D) does not prohibit you, as a member of city council, from voting, discussing, participating in deliberations, or otherwise using your official position as a council member with regard to ordinances regulating gas and oil well drilling within the city despite the fact that the school district with which you are employed desires to drill gas wells upon its property which is located within the city and would be subject to the city regulation. However, if the proposed ordinances would affect or apply only to the school district, or if the school district should seek a variance, zoning change, conditional use permit, or other specific consideration from city council which would affect its property, then R.C. 102.03 (D) would prohibit you from voting, discussing, participating in deliberations, or otherwise using your official position as a council member with respect to such **specific** considerations for the school district.

You have also asked whether the Ohio Ethics Law and related statutes prohibit you from voting on matters which could have an impact upon the tax revenue received by the school district. You state that city council's actions could increase or decrease the school district's tax revenue received from land-owners within the city. You offered as examples of such situations, the city council's actions to: (1) rezone land to enable an industrial complex to be constructed;

(2) rezone land and build infrastructure improvements to enable development of a housing tract; and, (3) grant a tax abatement to a business located within the city.

The Ethics Commission has held that R.C. 102.03 (D) prohibits an individual who serves the public in two capacities from using the authority or influence of one position to benefit either himself or the entity he serves in his other public capacity. See Advisory Opinions No. 88-002, 89-006, 89-003, 89-010, and 91-002. Also, as discussed above, R.C. 102.03 (D) prohibits a public official from participating in any matter which definitely and directly affects the interests of his outside employer. See Advisory Opinions No. 88-004, 88-005, 89-008, and 91-001.

Therefore, the issue is whether the restrictions of R.C. 102.03 (D) prohibit you from participating in matters before city council which could have an impact upon the tax revenue received by the school district. Your question concerning city council's rezoning of land or building infrastructure improvements will be addressed first.

The issue becomes whether city council's actions which would enable an industrial plant or a housing tract to be developed within the city will secure a definite and direct pecuniary benefit for either yourself or for your employing school district.

The board of education of a school district is a taxing authority, see R.C. 5705.01 (C), and has the authority to levy taxes on real property within the district to pay operating expenses, acquire or construct permanent improvements and to retire and pay interest on indebtedness. See R.C. 5705.03. See also R.C. 5705.05, 5705.06, and 5705.07. The board of education also has the authority to submit the question of additional levies in excess of the ten mill limitation on the current tax duplicate to the electors of the school district. See R.C. 5705.21, 5705.212, 5705.213, and 5705.214. It is apparent that developed property will have a greater assessed value for taxation purposes than undeveloped property. You have recognized this fact, and stated that an action by city council which would enable an industrial plant or a housing tract to be developed could result in increased tax revenue for the school district. Also, you have stated that the development of a housing tract within the city could benefit your job security by increasing the school district's student population.

A public official is prohibited by R.C. 102.03 (D) from participating in a matter that would secure for himself or his outside employer a benefit that is **direct** and **definite**. The standard in judging whether a public official may participate in a matter such as the one you have presented is whether the matter would provide such a definite and particular pecuniary benefit or detriment to the interests of the official or his outside employer, that these private interests could impair his independence of judgment or unbiased discretion in making his official decisions. See Advisory Opinions No. 88-004 and 88-005. See also Advisory Opinion No. 85-006 ("it is not sufficient merely to identify some indirect or indefinite benefit that a public official may accrue from the performance of an official act"). However, the benefits which you and the school district could receive from city council's actions which would enable an industrial plant or a housing tract to be developed are neither direct nor definite. The benefits which you and the school district could receive are indefinite and are speculative and intangible in nature under these facts. It is uncertain whether such benefits would actually accrue to the school district or when they would accrue. The benefits would not be particular in nature, but would be difficult to

quantify. Furthermore, the realization of the benefits may be dependent on conditions beyond the control of city council. For example, the possibility exists that due to general economic conditions the land may remain vacant for a number of years following a rezoning or the construction of infrastructure improvements. Also, in order for the construction of a housing development to increase your job security as a school district employee by increasing the student population a substantial number of the houses would have to be sold to families with school-age children. Therefore, R.C. 102.03 (D) would not prohibit you, as a member of city council, from voting, discussing, participating in deliberations, or otherwise using your official position as a council member with regard to city council action which would enable an industrial plant or a housing tract to be developed, despite the possibility that city council's action could, in some indefinite manner, result in increased tax revenue for the school district or increase the school district's student population.

You have also asked whether you may participate in city council's grant of a tax abatement to a business located within the school district.

Generally, a business which is granted a tax abatement enters into an agreement with a political subdivision to develop or redevelop property in return for a tax abatement for a specified number of years; the purpose of the tax abatement is to promote economic and community development. See R.C. 5709.62 and 725.02. See also Advisory Opinion No. 89-008. The Ethics Commission has held that the diminution of taxes paid by a business as a result of a city council's grant of a tax abatement to the business is a definite and direct pecuniary benefit to the business and is thus a thing of value for purposes of R.C. 102.03 (D). See Advisory Opinion No. 89-008. Accordingly, R.C. 102.03 (D) prohibits a city council member from participating in city council's grant of a tax abatement which would provide a definite and direct pecuniary benefit to his outside employer. *Id.* See also R.C. 2921.42 (A)(1) (a public official is prohibited from authorizing, or employing the authority or influence of his office to secure authorization of, a public contract, in which a business associate, including his employer, has an interest).

In the instant situation, a tax abatement granted by city council would not be provided to your outside employer, as was the situation in Advisory Opinion No. 89-008, but would affect the revenue received by your employing school district. Furthermore, the award of a tax abatement would have a definite and particular effect on the school district's revenue. This definite effect is evidenced under state statutes governing the award of tax abatements. A political subdivision's legislative authority must, prior to entering into a development agreement exempting improvements to real property from taxation, notify the board of education of the school district in which the tax-exempted property is located. See R.C. 725.021. A board of education which would be affected by a political subdivision's grant of a tax exemption may make comments to the legislative authority concerning the application for tax exemption which must be considered by the legislative authority. See R.C. 5709.83. See also R.C. 5715.27 (a board of education may request the tax commissioner to provide it with notification of applications for exemptions from taxation of property located within the school district and submit evidence and participate in any hearing in the application.)

Therefore, it is apparent that city council's action to award a tax abatement would have a definite and particular effect on your employing school district's pecuniary interests. A decrease

in the tax revenue received by the school district which results from city council's grant of a tax abatement is different from the above instances where the effect of city council's actions governing land use within the school district is speculative and intangible. Rather, 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 judgement 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.

Your attention is also directed to Section 102.04 (C) which reads as follows:

(C) Except as provided in division (D) of this section, **no person who is elected or appointed to an office of** or employed by a county, township, **municipal corporation**, or any other governmental entity, excluding the courts, shall receive 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. (Emphasis added.)

As a member of city council you are subject to R.C. 102.04 (C). See Advisory Opinions No. 87-009, 89-008, and 89-016. Accordingly R.C. 102.04 (C) prohibits you from receiving compensation for personally rendering any service on behalf of the school district, or any other party, in a case, proceeding, application, or other matter pending before any agency, department, board, commission, or other instrumentality, of the city, including of course, city council. See Advisory Opinions No. 87-009, 89-008 and 89-016. R.C. 102.04 (D) provides an exception to the prohibition of R.C. 102.04 (C) but is unavailable to an elected official as well as to an official who wishes to receive compensation for rendering services on a matter pending before the agency with which he serves. See Advisory Opinion No. 87-009.

You are also subject to Division (A) of Section 102.03 which reads in pertinent part:

(A) No present or former public official or employee shall, during his 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 he personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion. . . . As used in this division, "matter" includes 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. As used in the division, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person. . . .

R.C. 102.03 (A) prohibits you, while you serve as a city council member and for one year after you leave office, from representing the school district, or any other party before council or any other public agency on any matter in which you personally participated as a council member. The representation which is prohibited by R.C. 102.03 (A) is not, in contrast to R.C. 102.04 (C), dependent upon the receipt of compensation.

Finally, your attention is directed to R.C. 102.03 (B) which provides:

(B) No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

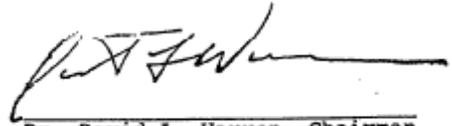
R.C. 102.03 (B) prohibits a public official from disclosing confidential information to his outside employer or any other party, or using such confidential information, without appropriate authorization. No time limitation exists for this prohibition, and it is effective while you serve in your public position and after you leave public service. See Advisory Opinion No. 89-006.

Again, it is noted that the prohibitions of R.C. 102.04 (C) and R.C. 102.03 (A) and (B), as well as R.C. 102.03 (D), apply to you as a school district employee, as well as a city council member. Feel free to contact this office if you have questions about the application of these prohibitions to you in either of your public capacities.

This advisory opinion is based on the facts presented and is rendered only with regard to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.

Therefore, it is the opinion of the Ethics Commission and you are so advised, that: (1) Division (D) of Section 102.03 of the Revised Code does not prohibit a member of city council, who is employed by a local school district which includes the city, from participating in the enactment of general legislation which would uniformly regulate all gas and oil well drilling within the city, despite the fact that the school district desires to drill gas wells upon its property which would be subject to the city regulation; (2) Division (D) of Section 102.03 of the Revised Code does not prohibit a member of city council, who is employed by a local school district which includes the city, from participating in matters with regard to the enactment of legislation which would enable the development of an industrial plant or a housing tract, despite the possibility that such development could, in some indefinite manner, result in increased tax revenue for the school district or increase the school district's student population; and, (3)

Division (D) of Section 102.03 of the Revised Code prohibits a member of city council, who is employed by a local school district which includes the city, from voting, discussing, participating in deliberations, or otherwise using his official position as a council member, formally or informally, with regard to city council's grant of a tax abatement to a business located within the school district.

A handwritten signature in black ink, appearing to read "D. L. Warren", written over a horizontal line.

Dr. David L. Warren, Chairman
Ohio Ethics Commission