



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 92-016
October 9, 1992

Syllabus by the Commission:

Divisions (D) and (E) of Section 102.03 of the Revised Code do not prohibit a city law director from soliciting, accepting, or using the authority or influence of his position to secure an in-term change in the form of his compensation, so long as the total amount of compensation received by the law director does not increase.

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You have asked whether the Ohio Ethics Law and related statutes prohibit a city law director from receiving a change in the form of his compensation, replacing a comprehensive health insurance package with an increase in salary, where the total amount of the compensation package does not increase.

By way of history, you have explained that you are the elected law director of a statutory city. You have explained that the office of law director receives both a salary and comprehensive medical coverage. You have further explained that your private employer also provides you with comprehensive medical coverage and that you have secondary medical coverage provided by your wife's employer. You have asked if you may decline the insurance coverage offered by the City, and take, instead, the amount the City is paying for that coverage as your salary. You have stated that, in order to initiate this change, the city council would pass a resolution or ordinance reducing your total annual compensation package by \$2,500.00 and paying the \$5,700.00 the City currently pays for annual health insurance premiums to you in the form of salary. This arrangement would increase the salary paid to you, but would reduce the total compensation package paid to you.

In your request letter, you referred to Revised Code Sections 102.03 (D) and (E), which provide as follows:

(D) 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 a character as to manifest a substantial and improper influence upon him with respect to his 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 him with respect to his duties.

A city law director is a "public official or employee" for purposes of R.C. 102.03 (D) and (E). See R.C. 102.01 (B) and (C); Ohio Ethics Commission Advisory Opinion No. 91-008. The term "anything of value" is defined for purposes of R.C. 102.03 to include money and every other thing of value. See R.C. 1.03 and 102.01 (G). The Ethics Commission has defined compensation received by a city official for performing his duties, and increases in that compensation, as within the definition of "anything of value" for purposes of R.C. 102.03 (D) and (E). See Advisory Opinions No. 91-007 and 91-008.

A city has the authority, pursuant to Ohio Constitution Article XVIII, Section 3 to fix the compensation of its officers and employees. Northern Ohio Patrolmen's Benevolent Ass'n v. Parma, 61 Ohio St. 2d 375 (1980). "Compensation" is not limited to salary alone. The city may fix the compensation of the law director to include items other than the salary he is paid. See Ohio Op. Att'y Gen. No. 83-042 (a city may take legislative action to include the payment of Supreme Court registration fees for the municipal law director as a part of the law director's compensation). The Ohio Supreme Court has stated that while fringe benefits to an employee, such as health insurance, are not "salary," they are "compensation" to the employee. See State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389, 391 (1976). See also Advisory Opinion No. 91-007 (a "pick-up in lieu of salary increase" plan, where an employer pays the employee's contributions to a pension plan (such as PERS) in lieu of an increase in the employee's salary, is a fringe benefit, and hence, "compensation" to the employee). The "compensation" package you receive is composed of your salary and health insurance benefits, and any other benefits. You ask whether you may receive a change in the form of your compensation package which would result in a compensation package which is of a lesser value than the compensation package you currently receive.

The issue is, therefore, whether a change in the form of your compensation could render a substantial and improper influence upon you with respect to the performance of your official duties such that you would be prohibited from accepting, soliciting, or using the authority or influence of your office to secure a change in the form of your compensation.

The Ethics Commission has stated that a public official is prohibited, by R.C. 102.03 (D), from participating in any matter that would result in a direct, personal, pecuniary benefit to the official such that his objectivity and independence of judgment in the performance of his official duties could be impaired. See Advisory Opinions No. 88-004, 88-005, 91-007, and 91-008. The Commission has also stated that a public official is prohibited by R.C. 102.03 (E) from accepting anything of value if the thing of value could impair the official's objectivity and independence of judgment with respect to his official duties. See Advisory Opinions No. 89-016 and 90-008. As stated above, the compensation a public official receives for performing his official duties is within the definition of "anything of value" for purposes of R.C. 102.03 (D) and (E). See Advisory Opinion No. 91-007.

The Ethics Commission stated, in Advisory Opinion No. 91-007, that R.C. 102.03 (D) and (E) prohibit city council members and presidents of council from accepting, soliciting, or using their authority to secure in-term increases in compensation, since they exercise discretionary authority with respect to the enactment and passage of ordinances establishing the increases and appropriating city funds.

In Advisory Opinion No. 91-008, the Ethics Commission was asked whether a city law director may receive an in-term increase in compensation. The Commission stated that, in order to determine whether the law director could receive the in-term increase in compensation, it was necessary to examine the law director's duties and authority:

The law director is elected to office, and serves in the executive branch of city government. See R.C. 733.01, 733.49. R.C. 733.51 provides that the law director "shall prepare all contracts, bonds and other instruments in writing in which the city is concerned, and shall serve the several directors and officers provided in Title VII of the Revised Code as legal counsel and attorney." The law director also serves as the prosecuting attorney of the mayor's court. R.C. 733.51, R.C. 733.52. R.C. 733.53 provides the law director "when required to do so by resolution of the legislative authority of the city, shall prosecute or defend on behalf of the city, all complaints, suits, and controversies in which the city is a party, and such other suits, matters, and controversies as he is, by resolution or ordinance, directed to prosecute." He is also required to provide opinions to any city officer who "entertains doubts concerning the law in any matter before him in his official capacity." R.C. 733.54.

The city law director acts as legal counsel and advisor to city council. See generally Chinnoch v. Blackie, 53 Ohio App. 2d 237 (Cuyahoga County 1979). The law director may assist council in the preparation of ordinances, approves ordinances as to form, may advise council as to the lawfulness or propriety of ordinances or proposed ordinances, and defends and enforces duly enacted ordinances.

Advisory Opinion No. 91-008. The Ethics Commission determined that, although the law director "does not participate directly to enact an ordinance," the law director does play a significant and authoritative role in the introduction, adoption, interpretation, and enforcement of ordinances and other council enactments. The Ethics Commission concluded that an increase in the law director's compensation could impair his objectivity and independence of judgment in performing his responsibilities as law director with respect to an ordinance increasing his compensation, and that, therefore, Division (E) of R.C. 102.03 prohibits a law director from accepting an increase in compensation enacted by city council while the law director is in his present term. The Ethics Commission further stated that Division (D) of R.C. 102.03 prohibits a city law director from using the authority or influence of his position to secure an in-term increase in compensation. It is clear, therefore, that R.C. 102.03 (D) and (E) prohibit a city law director from accepting, soliciting, or using his authority or influence to secure an in-term increase in his compensation.

The Ethics Commission further stated: "The issue of an in-term increase for members of city council presents an inherent and fundamental conflict of interest for those council members. There is no question but that a public official's objectivity could be impaired in considering and acting upon an increase in compensation for himself." Advisory Opinion No. 91-007 (emphasis added). However, in the question you have asked, the form, rather than the amount, of your compensation is to be changed.

The issue is whether a change in the form of your compensation would manifest such a substantial and improper influence upon you in the performance of your duties that you would be prohibited from receiving such a change. In Advisory Opinion No. 90-006, the Ethics Commission was asked whether the Ohio Ethics Law prohibited employees of the Ohio Student Loan Commission who would participate in the anticipated restructuring of the Student Loan Commission to a nonprofit corporation from subsequently accepting employment with the resulting nonprofit corporation. The Ethics Commission concluded that the officials and employees who are participating in the restructuring of the OSLC are not prohibited from subsequently accepting employment with the nonprofit corporation. However, the Commission went on to caution:

It must be noted . . . that the executive director and other employees of the OSLC would be prohibited from accepting, soliciting, or using their positions to secure compensation or benefits from the nonprofit corporation that are greater than that which the employees are receiving as OSLC employees. (Citation omitted.) It is the understanding of the Ethics Commission that the benefits that would be offered to the employees by the nonprofit corporation would not be identical to the benefits they receive as state employees. For example, the OSLC employees would no longer be eligible for state insurance and retirement benefits if they are employed by the nonprofit corporation. However, the benefits and compensation that are offered in total to the employees may not be substantially greater than what the employees are receiving from the state. (Emphasis added.) Advisory Opinion No. 90-006.

Applying the reasoning in Advisory Opinion No. 90-006, a modification in the form of your compensation, where there is no net gain in the amount of compensation paid to you, is not of such a character as to manifest a substantial and improper influence upon you in the performance of your duties as law director, such that R.C. 102.03 (D) and (E) would prohibit you from receiving, soliciting, or participating in a modification in the form of your compensation. See also Advisory Opinion No. 92-010.

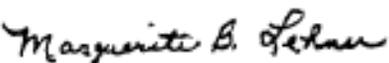
If, however, the change in the form of your compensation would result in an increase in the amount of your compensation, or would otherwise result in some direct increased pecuniary benefit to you, the change would be of such a character as to manifest a substantial and improper influence upon you in the performance of your duties as law director, and would, therefore, be prohibited by R.C. 102.03 (D) and (E). The change in compensation you have described may ultimately result in some increased benefits to you. For example, you will be relieved of an unnecessary third insurance source. In addition, you may receive an increased PERS benefit since your salary will increase. The increased salary may also result in a detriment to you, in the form of an increased income tax burden. It is possible, under some facts and circumstances, that some future benefits may, in fact, have such a substantial and improper influence upon the public official or employee that he would be prohibited from accepting, soliciting, or using the authority or influence of his office to secure the benefits. This would be true, for example, where the public official or employee has misused his authority or influence to gather substantially increased future benefits to which he would not otherwise be entitled. Indirect benefits or detriments related to compensation which will ultimately accrue to the officeholder, however, are not generally of the same character as a direct increase in compensation. The result of any

consequential benefits and detriments is too remote and speculative, in the factual situation you have set forth, to manifest a substantial and improper influence upon you with respect to your duties. An increase in compensation is of such a character that a public official's objectivity and independence of judgment could be impaired if he exercised his official judgment with regard to the in-term increase or if he accepted such an increase. Advisory Opinions No. 91-007 and 91-008. However, in the situation you have described, you have stated that while your salary will increase in the compensation package proposed, your total compensation will, in fact, decrease. Therefore, a change in compensation of the type that you have described is not of such a character as to manifest a substantial and improper influence upon you in the performance of your duty, and you are not prohibited, by R.C. 102.03 (D) and (E), from soliciting, accepting, or using the authority or influence of your office to secure, such a change in the form of your compensation. You should note, however, that R.C. 102.03 (D) prohibits you from misusing the authority or influence of your office over other city officials or employees to secure a change in the form of your compensation. See Advisory Opinion No. 92-010.

In your request, you have also asked about the application of Section 731.07 of the Revised Code to your question. The Ethics Commission's statutory jurisdiction is limited to Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. See R.C. 102.06 and 102.08. The application of R.C. 731.07 to the question you have asked is not within the purview of the Ethics Commission, and is for the determination of the appropriate legal advisor. See generally Advisory Opinion No. 91-007.

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 opinion of the Ohio Ethics Commission, and you are so advised, that Divisions (D) and (E) of Section 102.03 of the Revised Code do not prohibit a city law director from soliciting, accepting, or using the authority or influence of his position to secure an in-term change in the form of his compensation, so long as the total amount of compensation received by the law director does not increase.



Marguerite B. Lehner, Chair
Ohio Ethics Commission