April 10, 2001

OPINION NO. 2001-016

G. Michael Payton, Acting Executive Director
Ohio Civil Rights Commission
1111 E. Broad Street, Suite 301
Columbus, Ohio 43205-1379

Dear Acting Executive Director Payton:

You have requested an opinion concerning the compatibility of two public positions. Specifically, you have asked whether a member of the Ohio Civil Rights Commission (Commission) may serve simultaneously as a full-time assistant director in the public utilities department of the City of Columbus (assistant director).

The following seven questions are used for determining whether two public positions are compatible:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?

2. Do the empowering statutes of either position limit employment in another public position or the holding of another public office?

3. Is one position subordinate to, or in any way a check upon, the other?

4. Is it physically possible for one person to discharge the duties of both positions?

5. Is there a conflict of interest between the two positions?

6. Are there local charter provisions, resolutions, or ordinances which are controlling?

7. Is there a federal, state, or local departmental regulation applicable?

2000 Op. Att'y Gen. No. 2000-025 at 2-166 and 2-167.

The sixth and seventh questions relate to the applicability of charter provisions, resolutions, ordinances, and federal, state, and local departmental regulations. There are no applicable state or federal regulations in this instance. Whether there is an applicable local departmental regulation, charter provision, resolution, or ordinance is a matter for officials at the Commission and the City of Columbus to determine. We will assume, for purposes of this opinion, that no local departmental regulation, charter provision, resolution, or ordinance prohibits a person from serving simultaneously in these two positions.

The first question asks whether either of the positions is a classified employment within the terms of R.C. 124.57, which prohibits a person in the classified service of the state, counties, cities, city school districts, and civil service townships from taking part in partisan politics other than to vote or express political beliefs. Members of the Ohio Civil Rights Commission are appointed by the Governor of Ohio, R.C. 4112.03, and thus are in the unclassified service of the state. R.C. 124.11(A)(3). We have been informed that the position of assistant director is in the unclassified service of the City of Columbus. Because neither position is in the classified service, the prohibition of R.C. 124.57 does not apply.

The second question asks whether the empowering statutes of either position limit a person from being employed in another public position or holding another public office. No statutory provision prohibits a person from serving simultaneously as a Commission member and assistant director. The second question of the compatibility test thus may be answered in the negative.

The third question asks whether one position is subordinate to, or in any way a check upon, the other. Members of the Commission are appointed and removed by the Governor of Ohio pursuant to R.C. 4112.03. The assistant director, on the other hand, is appointed by and serves at the pleasure of officials of the City of Columbus. *See generally* 1991 Op. Att'y Gen. No. 91-011 at 2-58 ("individuals in the unclassified service hold their positions at the pleasure of their appointing authority, and are subject to dismissal from their positions without cause"). The positions operate independently of each other, and neither is required to assign duties to, or supervise, the other. Neither position, therefore, is subordinate to, or in any way a check upon, the other.

The fourth question asks whether it is physically possible for one person to perform the duties of both positions. This is a factual question that is best answered by the interested persons because they may more precisely determine the time constraints imposed by each position. 1999 Op. Att'y Gen. No. 99-027 at 2-177.

The fifth question asks whether there is a conflict of interest between the two positions. A person may not hold two public positions simultaneously if he would be subject to divided loyalties and conflicting duties or be exposed to the temptation of acting other than in the best interest of the respective offices or agencies he serves. 2000 Op. Att'y Gen. No. 2000-025 at 2-168. In order to answer this question, we must examine the powers, duties, and responsibilities of each position.

The Ohio Civil Rights Commission was created pursuant to R.C. 4112.03 to enforce the Ohio civil rights statutes and to prevent persons from engaging in unlawful discriminatory practices.[1] R.C. 4112.04; R.C. 4112.05(A). The general powers and duties of the Commission include formulating policies to prevent unlawful discriminatory practices, receiving, investigating, and passing upon written charges of unlawful discriminatory practices, making periodic surveys of the existence and effect of discrimination, preparing a comprehensive educational program that is designed to eliminate prejudices, and receiving progress reports regarding affirmative action programs and affirmative housing accommodations programs. R.C. 4112.04; R.C. 4112.05. The Commission may also initiate and undertake, on its own motion, investigations of problems of employment or housing accommodations discrimination, hold hearings to prevent persons from engaging in unlawful discriminatory practices, study the problems of discrimination, and foster through community effort, or otherwise, good will among the groups and elements of the population of the state. R.C. 4112.04; R.C. 4112.05.

According to the position description provided with your opinion request, the assistant director serves the City of Columbus as the public utilities department's liaison with the minority and female business community, and designs, implements, and monitors special projects that enhance the achievement of equal business opportunity within the public utilities department. The assistant director advises the public utilities department's director on the operation of the division of electricity in a deregulated environment and on the activities and functions related to the advancement of equal business opportunities within the public utilities department. The assistant director is also responsible for overseeing the contract management of engineering, construction, and consulting services in the public utilities department, and preparing comprehensive and technical reports, documents, and correspondence.

A review of the powers, duties, and responsibilities of the positions about which you are concerned discloses that there may be instances in which a person who serves as a Commission member and assistant director in the public utilities department of the City of Columbus could be subject to conflicts of interest. As explained previously, the Commission is required to enforce the Ohio civil rights statutes and prevent persons from engaging in unlawful discriminatory practices.[2] In this capacity, the Commission may determine that it is necessary to investigate

---

[1] As used in R.C. Chapter 4112, "[u]nlawful discriminatory practice" means "any act prohibited by [R.C. 4112.02-.022]." R.C. 4112.01(A)(8). *See generally* R.C. 4112.02 (unlawful discriminatory practices); R.C. 4112.021 (unlawful discriminatory practice of creditor); R.C. 4112.022 (discrimination against persons with a disability by educational institution).

[2] R.C. 4112.01(A)(1) defines "[p]erson," for purposes of R.C. Chapter 4112, as follows:

> "Person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons. "Person" also includes, but is not limited to, any owner, lessor, assignor, builder, manager, broker, salesperson,

charges filed with the Commission alleging that a person has engaged or is engaging in an unlawful discriminatory practice. R.C. 4112.04(A)(6); R.C. 4112.05(B)(2). The Commission may also initiate and undertake, upon its own motion, investigations relating to unlawful discriminatory practices. R.C. 4112.04(B)(2); R.C. 4112.05(B)(2). In addition, the Commission may initiate a complaint alleging that a person has engaged or is engaging in an unlawful discriminatory practice, R.C. 4112.05(B)(3), and hold hearings to determine whether a person has engaged or is engaging in an unlawful discriminatory practice, R.C. 4112.04(B)(3); R.C. 4112.05(B)(5). *See also* R.C. 4112.04(A)(6) (the Commission is required to "[r]eceive, investigate, and pass upon written charges made under oath of unlawful discriminatory practices").

Thus, a member of the Ohio Civil Rights Commission who serves simultaneously as an assistant director in the public utilities department of the City of Columbus may be required to discuss, or to deliberate, negotiate, or vote upon, whether to investigate or initiate a complaint against the city or any of the city's agencies, departments, or offices, or whether the city or any of its agencies, departments, or offices have engaged or are engaging in unlawful discriminatory practices. *See generally* R.C. 4112.01(A)(1) (as used in R.C. Chapter 4112, the term "[p]erson" includes "all political subdivisions … of the state"). In such situations, it would be difficult for the Commission member to set aside his loyalty to the City of Columbus. Such a predisposition of loyalty could prevent him from making completely objective decisions. *See* 1997 Op. Att'y Gen. No. 97-044 at 2-274. Further, the Commission member may be unable to perform his duties with respect to matters concerning the city in a completely objective manner for fear of reprisals by city officials. *See id.* at 2-277.

In addition, there may be situations in which the Commission member may have to discuss, or to deliberate, negotiate, or vote upon, whether to institute or maintain a civil action against the City of Columbus or any of its agencies, departments, or offices. In this regard, the Commission may seek temporary or permanent injunctions or temporary restraining orders from the Franklin County Court of Common Pleas to prevent the occurrence of unlawful discriminatory practices by the City of Columbus, R.C. 4112.05(B)(3), or may commence civil actions in the Franklin County Court of Common Pleas to protect a person's fair housing rights under R.C. 4112.02(H); R.C. 4112.052. *See also* 1970 Op. Att'y Gen. No. 70-108. The Commission may also initiate civil actions in the Franklin County Court of Common Pleas to enforce its final orders, R.C. 4112.06, and may appeal to the Tenth District Court of Appeals adverse judgments rendered by the Franklin County Court of Common Pleas, R.C. 4112.061. Further, the Commission may institute a civil action against the City of Columbus if it fails to file an affirmative action progress report required by R.C. 4112.04(A)(10), or if it willfully files a false entry or statement in its progress report. R.C. 4112.11; R.C. 4112.99; 10 Ohio Admin. Code 4112-7-01; *see also* 1970 Op. Att'y Gen. No. 70-108.

---

appraiser, agent, employee, lending institution, and the state and all political subdivisions, authorities, agencies, boards, and commissions of the state.

In such situations, potential conflicts of interest exists because the Commission member is exposed to the temptation of acting other than in the best interest of the Commission when participating in deliberations, discussions, negotiations, or votes relating to civil actions against the City of Columbus. And again, the Commission member may be influenced not to perform his duties with respect to matters involving the City of Columbus in a completely objective manner for fear of reprisals by city officials. *See* 1997 Op. Att'y Gen. No. 97-044 at 2-277.

However, the fact that a person who holds two public positions simultaneously is subject to potential conflicts of interest does not require a finding of incompatibility. Rather, where possible conflicts are not definite and immediate, the person may serve in both positions.[3] 2000 Op. Att'y Gen. No. 2000-025 at 2-170. Factors used in determining whether potential conflicts are definite and immediate include the probability of the conflicts, the ability of the person to remove himself from the potential conflicts, whether the person exercises decision-making authority in both positions, whether the potential conflicts involve the primary functions of each position, and whether the conflicts relate to financial or budgetary matters. *Id*.

We believe that it is speculative whether this person, as a member of the Commission, will be required to participate in any deliberations, discussions, negotiations, or votes relating to unlawful discriminatory practices by, or civil actions against, the City of Columbus or any of its agencies, departments, or offices. In this instance we are informed that investigations and cases concerning unlawful discriminatory practices by the City of Columbus or any of its agencies, departments, or offices are brought before the Commission infrequently, and thus deliberations, discussions, negotiations, or votes by the members of the Commission upon such matters will also be unlikely to occur often. This also means that the potential conflicts confronting the Commission member pertain to only a small fraction of the duties of both positions. Therefore, the probability of a conflict of this nature confronting this Commission member is remote and speculative.

Further, even when such matters involving the City of Columbus or any of its agencies, departments, or offices are presented to the Commission, the Commission member will be able to remove himself from any such deliberations, discussions, negotiations, or votes since the Commission is capable of functioning and performing its statutory duties when one of its members abstains from a matter. *See generally* R.C. 4112.03 ("[t]hree members of the commission shall constitute a quorum for the purpose of conducting the business thereof. A vacancy in the commission shall not impair the right of the remaining members to exercise all

---

[3] The Ohio Ethics Commission is authorized to render opinions regarding the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. R.C. 102.08(A). In light of this authority, we believe that it is proper for the Attorney General to refrain from interpreting such provisions by way of a formal opinion. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three). Therefore, it is recommended that you contact the Ohio Ethics Commission for advice concerning the application of these provisions in this situation.

the powers of the commission");[4] *State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 48, 212 N.E.2d 604, 605 (1965) ("[i]n the absence of a statute to the contrary, any action by a board requires that a quorum participate therein, and that a majority of the quorum concur"). The potential conflicts also do not relate to financial or budgetary matters or involve decision-making authority by the person, as an assistant director.

The potential conflicts do involve the decision-making authority of Commission members, however. In prior opinions the Attorneys General have advised that this fact is not sufficient in and of itself to result in a finding of incompatibility if the conflicts are unlikely to occur and the person is able to remove himself from the conflicts. *See, e.g.*, 1997 Op. Att'y Gen. No. 97-045 at 2-284; 1994 Op. Att'y Gen. No. 94-022 at 2-100. As explained previously, the deliberations, discussions, negotiations, or votes relating to unlawful discriminatory practices by, or civil actions against, the City of Columbus or any of its agencies, departments, or offices are not likely to occur often. The Commission member is also able to remove himself from any such deliberations, discussions, negotiations, or votes. Moreover, the Commission member has a duty to abstain from participating in any matter that would impair his objectivity. 2000 Op. Att'y Gen. No. 2000-025 at 2-170; *see* note three, *supra*. Consequently, the Commission member is required to abstain from any deliberations, discussions, negotiations, or votes that involve the City of Columbus. Accordingly, the potential conflicts discussed above do not prohibit a person from serving simultaneously as a Commission member and assistant director, provided that as a Commission member he does not participate in any deliberations, discussions, negotiations, or votes relating to unlawful discriminatory practices by, or civil actions against, the City of Columbus or any of its agencies, departments, or offices.

Based on the foregoing, it is my opinion, and you are hereby advised that a person may serve simultaneously as a member of the Ohio Civil Rights Commission and full-time assistant director in the public utilities department of the City of Columbus, provided that as a Commission member he does not participate in any deliberations, discussions, negotiations, or votes relating to unlawful discriminatory practices by, or civil actions against, the City of Columbus or any of its agencies, departments, or offices.

Respectfully,

BETTY D. MONTGOMERY

---

[4] R.C. 4112.03 provides that the Ohio Civil Rights Commission shall consist of five members.

Attorney General

April 10, 2001

G. Michael Payton, Acting Executive Director
Ohio Civil Rights Commission
1111 E. Broad Street, Suite 301
Columbus, Ohio 43205-1379

SYLLABUS: 2001-016

A person may serve simultaneously as a member of the Ohio Civil Rights Commission and full-time assistant director in the public utilities department of the City of Columbus, provided that as a Commission member he does not participate in any deliberations, discussions, negotiations, or votes relating to unlawful discriminatory practices by, or civil actions against, the City of Columbus or any of its agencies, departments, or offices.