

OPINION NO. 2009-042**Syllabus:**

2009-042

A person may serve simultaneously as the mayor of a noncharter city that has not adopted an optional statutory plan of government and president of the city's chamber of commerce, provided the person, as mayor, does not participate in deliberations, discussions, and negotiations concerning contracts between the city and chamber of commerce.

To: Jonathan D. Blanton, Jackson County Prosecuting Attorney, Jackson, Ohio

By: Richard Cordray, Ohio Attorney General, October 27, 2009

You have requested an opinion whether the positions of mayor of a non-charter city that has not adopted an optional statutory plan of government and president of the city's chamber of commerce are compatible.¹

¹ A city may operate under the statutory form of government prescribed by general laws, *see* R.C. Chapters 731 and 733, or an optional statutory form of government, *see* R.C. Chapter 705. 1989 Op. Att'y Gen. No. 89-050 at 2-213 and 2-214; *see* Ohio Const. art. XIII, § 6; Ohio Const. art. XVIII, § 2. However, if a city should prefer a form of government different from those provided in R.C. Title 7, the city may frame and adopt "a charter for its government and may, subject to the provisions of section 3 of [Article XVIII of the Ohio Constitution], exercise thereunder

The following five-question test is used for determining whether a person serving in a public position may hold a private position at the same time:²

1. Is the public position a classified employment within the terms of R.C. 124.57?
2. Does a constitutional provision or statute prohibit a person from serving in both positions at the same time?
3. Is there an impermissible conflict of interest between the two positions?
4. Are there local charter provisions, resolutions, or ordinances which are controlling?
5. Is there a federal, state, or local departmental regulation applicable?

See 2005 Op. Att’y Gen. No. 2005-023 at 2-227.

Question one asks whether the public position is a classified employment within the terms of R.C. 124.57. This statute prohibits, except as provided therein, an officer or employee in the classified service of a city from holding a partisan political office.³ See 2 Ohio Admin. Code 123:1-46-02(C)(1), (6); 2007 Op. Att’y Gen. No. 2007-037 at 2-379.

As an elected city officer, *see* R.C. 733.02, a mayor is in the city’s unclassified service, rather than its classified service. R.C. 124.11(A)(1). R.C. 124.57 thus does not prohibit a city mayor from serving as the president of a city’s chamber of commerce.

Question two asks whether a constitutional provision or statute prohibits a person from serving in both positions at the same time. Nothing in either the Ohio Constitution or the Revised Code bars a person from serving concurrently in the positions of city mayor and president of a city’s chamber of commerce. Hence, no constitutional provision or statute prohibits a person from serving in both positions at the same time.

Question three asks whether there is an impermissible conflict of interest

all powers of local self-government.’’ Ohio Const. art. XVIII, § 7. R.C. Title 7 thus prescribes several statutory forms of government for noncharter cities, while the form of government for cities that adopt a charter is established by the charter. 1989 Op. Att’y Gen. No. 89-050 at 2-213 and 2-214.

² The position of president of a city’s chamber of commerce is a private position. See R.C. 1725.01; R.C. 1725.06.

³ Language in a city charter, ordinance, resolution, or collective bargaining agreement may declare that an officer or employee in the classified service of the city may hold a partisan political office. 2006 Op. Att’y Gen. No. 2006-005 at 2-47 n.6; 1991 Op. Att’y Gen. No. 91-065 (syllabus, paragraph one).

between the two positions.⁴ A review of the powers, duties, and responsibilities of the positions of city mayor and president of a city's chamber of commerce discloses that potential conflicts of interest may arise because the city and chamber of commerce may enter into contractual relationships with each other. *See, e.g.*, R.C. 715.01; R.C. 715.011; R.C. Chapter 1731; 2003 Op. Att'y Gen. No. 2003-036. If a city mayor were required to deliberate, discuss, or negotiate the terms of a contract between the city and a chamber of commerce that employs him as president, it might be difficult for the mayor to perform his duties and exercise his discretion in a completely objective and disinterested manner because of his position with the chamber of commerce. *See* 2009 Op. Att'y Gen. No. 2009-005 at 2-32; 2006 Op. Att'y Gen. No. 2006-003 at 2-29.

While such conflicts may arise between the positions of city mayor and president of its chamber of commerce, the mere possibility of them occurring does not prohibit a person from holding both of these positions at the same time, provided the person is able to avoid the conflicts by abstaining from participating in deliberations, discussions, and negotiations pertaining to contracts between the city and chamber of commerce. *See, e.g.*, 2006 Op. Att'y Gen. No. 2006-003 at 2-29 and 2-30; 2004 Op. Att'y Gen. No. 2004-051 at 2-445 and 2-446. With respect to your particular situation, we believe that it is likely that a city mayor can avoid participating in deliberations, discussions, and negotiations pertaining to contracts between the city and its chamber of commerce.

No statute mandates that a city and its chamber of commerce enter into any contracts with each other. Thus, the occasions in which a person who serves as the city's mayor and president of its chamber of commerce would be required to discuss, deliberate, or negotiate the terms of such contracts should be infrequent. Also, the city mayor may remove himself from any such deliberations, discussions, and negotiations should they arise without impairing the city's ability to enter into such contracts. *See generally* 2003 Op. Att'y Gen. No. 2003-006 at 2-37 and 2-38 (in a matter in which the objectivity of a person is impaired, the person has a duty to

⁴ R.C. 102.08 authorizes the Ohio Ethics Commission (Commission) to address the application of the ethics and conflict of interest provisions of R.C. Chapter 102 and R.C. 2921.42-.43. In light of this specific grant of authority to the Commission, we will refrain from interpreting and applying these provisions to your situation by way of a formal opinion. *See* 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph 3). Instead, any questions concerning the interpretation and application of R.C. Chapter 102 and R.C. 2921.42-.43 to your situation should be directed to the Commission. *See generally* Ohio Ethics Comm'n, Advisory Op. No. 2008-02 (applying the provisions of R.C. Chapter 102 and R.C. 2921.42-.43 to a situation involving a city council member accepting a job with a chamber of commerce that is doing or seeking to do business with, regulated by, or interested in matters before the city); Ohio Ethics Comm'n, Advisory Op. No. 76-007, slip op. at 1 (addressing the question "whether there would be a 'conflict of interest' for the city to pay the fifty dollar annual dues for membership in the Chamber of Commerce for the mayor's administrative assistant to represent the city at Chamber functions").

abstain from participating in the matter). Accordingly, conflicts of interest that may arise because the city and its chamber of commerce may enter into contractual relationships with each other do not prohibit a person from serving simultaneously as a city mayor and president of its chamber of commerce, provided the person, as mayor, does not participate in deliberations, discussions, and negotiations concerning contracts between the city and chamber of commerce.

The final two questions ask about the applicability of charter provisions, resolutions, or ordinances, and federal, state, and local regulations. No charter provision or federal or state regulation prohibits a person from serving simultaneously as a city mayor and president of a city's chamber of commerce.⁵ Whether an applicable city resolution, ordinance, or regulation bars a person from holding these two positions at the same time is a question for city officials to answer. Therefore, absent a city resolution, ordinance, or regulation prohibiting its mayor from serving also as the president of the city's chamber of commerce, a person may hold these two positions at the same time, provided the person, as mayor, does not participate in deliberations, discussions, and negotiations concerning contracts between the city and chamber of commerce.⁶

In conclusion, it is my opinion, and you are hereby advised that a person may serve simultaneously as the mayor of a noncharter city that has not adopted an optional statutory plan of government and president of the city's chamber of commerce, provided the person, as mayor, does not participate in deliberations, discussions, and negotiations concerning contracts between the city and chamber of commerce.

⁵ Except as provided in 5 U.S.C.S. § 1502(c) and 5 U.S.C.S. § 1503, if a city officer or employee is employed principally in connection with an activity that is financed in whole or in part by loans or grants made by the federal government, and exercises some function in connection with that activity, the city officer or employee may not be a candidate for elective office. *See* 5 U.S.C.S. § 1501(4); 5 U.S.C.S. § 1502(a)(3); *see also* 5 C.F.R. §§ 151.101-.122. This prohibition is commonly known as the Hatch Act.

Whether the Hatch Act applies in your situation is a question of fact that must be addressed by city officials or, ultimately, the courts. *See* 2009 Op. Att'y Gen. No. 2009-010 at 2-92 n.6. Guidance in answering this question may be provided by the United States Office for Special Counsel. *See* 5 U.S.C.S. § 1504. We therefore recommend that city officials confronted with the situation in question contact that federal entity for guidance.

⁶ While it is unlikely, a regulation or rule of a chamber of commerce may prohibit its president from serving as a city mayor. It is assumed, however, for the purpose of this opinion, that such a regulation or rule does not exist.