



OHIO LEGISLATIVE SERVICE COMMISSION

Bill Analysis

Mackenzie Damon

Sub. S.B. 252* 132nd General Assembly (As Reported by S. Ways and Means)

Sen. Peterson

BILL SUMMARY

- Authorizes a local elected official of an entity that has levied a hotel lodging excise tax (or the official's designee) to simultaneously hold the public position and serve on the board of trustees of a convention and visitors' bureau without constituting the holding of incompatible offices or employment.
 - Declares that, notwithstanding Ohio common law or any contrary statutory law, the simultaneous holding of those positions does not constitute the holding of incompatible offices or employment.
 - Specifies that the bill does not prevent a municipal corporation or chartered county from adopting a more restrictive policy regarding the simultaneous holding of those positions.
 - Requires that, upon request, county auditors, municipal fiscal officers, and their employees must share lodging tax return information with the convention and visitors' bureaus operating in their counties.
-

CONTENT AND OPERATION

Elected public officials may simultaneously hold position on CVB board

The bill provides that an elected official¹ of a county, township, or municipal corporation that has levied a hotel lodging excise tax under current law² may

* This analysis was prepared before the report of the Senate Ways and Means Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

simultaneously serve in the elected or appointed position and as a member or officer of the board of trustees of a convention and visitors' bureau organized under the nonprofit corporation law. The bill declares that the simultaneous holding of the two positions does not constitute the simultaneous holding of incompatible offices despite Ohio common law or any Ohio statute indicating anything to the contrary. The bill specifies that it does not prevent a municipal corporation or a chartered county from adopting a more restrictive policy regarding the simultaneous holding of the positions. In recognition of the home rule authority to self-govern, a municipal corporation or chartered county may decide to disallow the simultaneous holding of these positions for its elected officials.³

Background: incompatibility of offices

The common law of Ohio prohibits the simultaneous holding of two public offices or employment when the two are determined to be "incompatible." The Ohio Attorney General makes these determinations by Opinions of the Attorney General using a common law test that is generally looking for impermissible conflicts of interest between the two positions and other state, local, or federal laws that apply to prohibit the simultaneous holding of positions. Usually, the determination involves two public offices or positions but sometimes it may involve a public and a private position,⁴ as exists under the bill.⁵

The Ohio Attorney General has determined, by formal opinion, that the public position of a county commissioner and the position of member or officer of a convention and visitors' bureau are incompatible, presenting an impermissible conflict

¹ The bill also allows an elected official (county commissioner, township trustee, or member of a municipal legislative authority) to appoint a designee to so serve without it constituting the holding of an incompatible office or employment.

² R.C. 5739.08 and 5739.09, not in the bill.

³ Ohio Const., art. XVIII, sec. 3 and art. X, sec. 3.

⁴ A five-question test is used to determine whether a person may hold simultaneously a public position and a private position. See 2012 Op. Att'y Gen. No. 2012-040. A seven-question test is used when examining two public positions. 1979 Op. Att'y Gen. No. 79-111. All of the questions must yield answers in favor of compatibility in order to find that the two positions are compatible. See also <http://www.ohioattorneygeneral.gov/About-AG/Service-Divisions/Opinions/Compatibility-of-Public-Offices-or-Positions>.

⁵ A convention and visitors' bureau is a *private*, nonprofit corporation established under the nonprofit corporation law. Chapter 1702. It may receive public funds, however, in the form of general fund money appropriated by the county, township, or municipal corporation, and it may benefit from the levy of a hotel lodging excise tax. R.C. 307.693 (county), 505.58 (township), and 5739.09 (county, township, and municipal corporation).



of interest that cannot be sufficiently avoided or eliminated to allow the simultaneous holding of the positions.⁶ The Attorney General explained that a public office is a public trust and the public officer is duty-bound to uphold the fiduciary and confidential relationship the office imposes. A conflict of interest exists between a public and private position "when an individual's responsibilities in one position are such as to influence the performance of his duties in the other position, thereby subjecting him to influences which may prevent his decisions from being completely objective."⁷ A conflict of interest exists "when a public servant is subject to divided loyalties and conflicting duties or exposed to the temptation of acting other than in the best interest of the public."⁸

In making the compatibility (or incompatibility) determination, the Attorney General examines the powers and duties of each position. As noted by the Attorney General in the opinions cited in footnote. 6, a board of county commissioners manages and administers the county's affairs, including, among others, the fiscal and budgetary matters of the county. As the taxing authority for the county, the board may issue securities and general obligation bonds, prepare the county's annual tax budget, and levy taxes. The Articles of Incorporation outline the duties of members of the board for the convention and visitors' bureau. A bureau officer or trustee owes a fiduciary duty to the bureau and must act in the best interests of the bureau; a county commissioner has a fiduciary duty as an agent of the people of the county and has a duty to hold public funds in trust⁹ for the county taxpayers. The significant conflict of interest the Attorney General found for a county commissioner is the authority to appropriate moneys from the general fund to make contributions to convention and visitors' bureaus operating within the county¹⁰ and the duty to prepare and adopt the county's annual tax budget, which involves making appropriations to county entities that are entitled to moneys appropriated from the county's general fund. Because the general fund is a finite pool of money, the fund recipients are in competition with one another for their appropriations. A county commissioner who is also a board member of a convention and visitors' bureau may be unable to impartially determine when an appropriation to the bureau is necessary that otherwise may be at the expense of other county entities. A county commissioner serving in both positions may be subject to divided loyalties when trying

⁶ 2017 Op. Att'y Gen. No. 2017-036; 2018 Op. Att'y Gen. No. 2018-003.

⁷ 1985 Op. Att'y Gen. No. 85-100, at 2-427.

⁸ 1998 Op. Att'y Gen. No. 98-033, at 2-188 to 2-189.

⁹ See *State ex rel. Smith v. Maharry*, 97 Ohio St. 272 (1918); 2002 Op. Att'y Gen. No. 2002-031.

¹⁰ R.C. 307.693, not in the bill.



to balance the interests of the bureau against the financial needs of county entities entitled to share in county general fund moneys.

Sometimes the potential for conflict may be remote or speculative and the Attorney General may find it can be sufficiently avoided or eliminated. However, the Attorney General determined that the potential for conflict between the positions of county commissioner and member of a convention and visitors' bureau¹¹ is not remote or speculative and cannot be avoided. The preparation of a tax budget and appropriation measure is a primary function and essential duty of a county commissioner that requires independent decision-making that cannot be delegated to another person; it occurs annually.¹²

Consequence of statutory allowance

The bill reflects a policy of the General Assembly to allow the simultaneous holding of the positions in the bill despite the existence of conflicts of interest; the conflict of interest remains but it is permissible under the bill because the General Assembly is statutorily condoning the simultaneous holding of the positions regardless of any conflicts.¹³

Sharing of lodging tax information

The bill requires that, upon request, a county auditor or municipal fiscal officer (or the employees of either) must share a hotel's lodging tax return information with the executive director of the convention and visitors' bureau operating in their county.¹⁴

Generally, a county auditor is prohibited from releasing tax return information to private parties unless specifically authorized in law to do so. The bill creates an exception to this general rule for requests of lodging tax return information by the executive director of a convention and visitors' bureau. (There is no similar restriction in state law on the municipal fiscal officers. However, current law also contains no

¹¹ There is no determination of the Attorney General for a township trustee or member of a municipal legislative authority serving simultaneously on a bureau, but to the extent those positions may pose similar conflicts, an analogous outcome may be anticipated.

¹² 2017 Op. Att'y Gen. No. 2017-036; 2018 Op. Att'y Gen. No. 2018-003.

¹³ See, for example, 2009 Op. Att'y Gen. No. 2009-005 (although conflicts of interest may exist between the positions of member of a city legislative authority and member of the governing board of a community improvement corporation that has been designated under R.C. 1724.10 as the agency of the city, "the General Assembly has legislatively sanctioned a person serving in both positions at the same time" under R.C. 1724.10(A)).

¹⁴ R.C. 5715.49, 5715.50, and 5739.081.



affirmative requirement that municipal fiscal officers share such information on request.)

HISTORY

ACTION

DATE

Introduced
Reported, S. Ways & Means

01-30-18

S0252-RS-132.docx/ts

