



Members Only

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Restrictions Against Current or Former General Assembly Members Holding Public Offices or Positions of Public Employment*

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This Members Only Brief discusses restrictions in the Ohio Constitution and in statutes that might prevent a current or former member of the General Assembly from holding a public office or position of public employment, including an office or position with a branch of the General Assembly or a legislative agency.

Constitutional Limits on Eligibility for Public Office or Employment

Current General Assembly members

The first paragraph of Section 4 of Article II of the Ohio Constitution states:

No member of the General Assembly shall, during the term for which he [or she] was elected, unless during such term he [or she] resigns therefrom, hold *any public office* under the United States, or this state, or a political subdivision thereof; but this provision does not extend to officers of a political party, notaries public, or officers of the militia or of the United States armed forces.

The Ohio Constitution prohibits a General Assembly member from holding another public office during the member's term.

* This Members Only Brief is an update of earlier Briefs on this subject dated June 12, 1996 (Volume 121 Issue 16) and October 4, 2004 (Volume 125 Issue 8).



The Ohio Supreme Court has ruled that the chief and most-decisive characteristic of a public office is the quality of the duties with which the office holder is invested and the conferring of those duties by law.

The duties of a public office entail the performance of independent and continuing political or governmental functions involving the exercise of some portion of the sovereign power.

The purposes of this prohibition apparently are to prevent conflicts of interest that might result if a General Assembly member held another public office and to promote the separation of powers.

Characteristics of a public office.

In *State ex. rel. Landis v. Bd. of County Commrs.* (1917), 95 Ohio St. 157, 159, the Ohio Supreme Court described the characteristics of a “public office” as follows:

. . . The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

Similarly, in the later case of *State ex. rel. Herbert v. Ferguson* (1944), 142 Ohio St. 496, 501, the Court held that a “public office” is a position created by law, with independent and continuing duties involving in their performance the exercise of some portion of the sovereign power.

And, in *State ex rel. Meshel v. Keip* (1981), 66 Ohio St.2d 379, the Court specifically examined appointments of General Assembly members to the State Controlling Board and held that to be a “public office” for purposes of Section 4 of Article II, the office must involve an exercise of some portion of the *sovereign power of the state*. It indicated that the exercise of the sovereign power of the state, quoting *State ex rel. Landis, supra*, can be determined as follows (66 Ohio St.2d at 387-388):

. . . If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.



Current and former General Assembly members

Section 4 of Article II contains another restriction on the types of appointments former as well as current General Assembly members may receive. Its second paragraph states:

No member of the General Assembly shall, during the term for which he [or she] was elected, or for one year thereafter, be appointed to any public office under this state, which office was created or the compensation of which was increased, during the term for which he [or she] was elected.

This provision prohibits a member of the General Assembly from being **appointed** during the member's term or for one year thereafter to a public office that was created, or the compensation of which was increased, during the term for which the member was elected. It does not matter whether the member voted for or against the bill that created the public office or increased its compensation, or whether the public office was added to the bill after the member voted on it.

The provision does not, however, bar a member from being **elected** to such a public office or from being appointed to a position of public **employment** that was created, or the compensation of which was

increased, during the term for which the member was elected. For example, it appears unlikely that a former General Assembly member would be forbidden by the provision from being appointed to a position as a "public employee" since it would not be a public office. It is possible, however, that a former General Assembly member might be barred from being appointed to such a position by statute.

The history of the provision suggests a reason for the distinction between appointment and election. Section 4 of Article II was adopted at a time when the General Assembly had extensive power to make appointments. The Secretary of State, the Treasurer of State, the Auditor of State, and the chief military officers were chosen by the General Assembly; judges of the Supreme Court and courts of common pleas were elected by joint vote of both houses. The legislative branch no longer has these powers.

Further, by way of illustration, an Attorney General opinion indicates how the provision operates. In the syllabus of 1983 Op. Att'y Gen. No. 83-004, the Attorney General ruled that a General Assembly member who served a term during which the pay ranges in Schedule C of R.C. 124.15 were increased could constitutionally be appointed as director of a state department within one year after the end of that term, as long as the individual did not, as director, receive compensation in excess of

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The Revised Code forbids a General Assembly member from holding certain positions of employment in state government during the member's term, and from representing certain parties before the General Assembly or the Controlling Board for one year after conclusion of the member's service.

the maximum amount authorized for a Schedule C position immediately prior to the term of the member during which the amendment to R.C. 124.15 was enacted. When the opinion was issued, the director of a state department was paid a yearly salary based on an hourly rate assigned to a step in a pay range in Schedule C. The syllabus of the opinion further opined that a deputy director of a state department was not an officer for purposes of Section 4 of Article II, thus allowing a former General Assembly member to accept a deputy directorship even if the position was created, or its compensation increased, during the member's term prior to appointment.

Statutory Limits on Eligibility for a Public Office or Employment

A General Assembly member (while continuing to serve in the General Assembly) generally may not knowingly do any of the following: (1) be appointed as a trustee, officer, or manager of a benevolent, educational, or correctional institution that is authorized, created, or regulated by the state and that is supported in whole or in part with funds from the state treasury, (2) serve on, or accept any appointment, office, or employment from, any commission or committee that is authorized or created by the General Assembly and that provides compensation other

than actual and necessary expenses, or (3) accept any appointment, office, or employment from any executive or administrative branch or department of the state that provides compensation other than actual and necessary expenses. These restrictions do *not prohibit* a General Assembly member from (a) serving an educational institution of the state, supported in whole or in part by funds from the state treasury, in a capacity other than one named in item (1) above, (b) serving as a school teacher, board of education employee, notary public, or officer of the militia, or (c) being appointed as a trustee, officer, or manager of a private institution that receives funds from the state treasury only in exchange for services rendered. (R.C. 101.26.)

A former member of the General Assembly, for a period of *one year after the conclusion of service* as a member, is prohibited from representing, or acting in a representative capacity for, any **person** on any matter before the General Assembly, any committee of the General Assembly, or the Controlling Board. This "revolving door" prohibition does not apply to or affect a member who separated from service with the General Assembly on or before December 31, 1995, and "person," as used in this prohibition, does not include any state agency or political subdivision of the state. Thus, because of this definition of "person," it appears that a former General Assembly member could represent a state agency or political



subdivision before the General Assembly, a legislative committee, or the Controlling Board during the one-year period after the end of the member's legislative service. (R.C. 102.03(A)(4).)

Joint Legislative Ethics Committee: Advisory Opinions and Private Written Opinions

The Ohio Ethics Law (chiefly R.C. Chapter 102.) establishes a Joint Legislative Ethics Committee (JLEC) and the Office of the Legislative Inspector General. The Office provides staff assistance to JLEC. Composed of 12 legislators, JLEC has the authority to do all of the following:

- Recommend legislation relating to the conduct and ethics of members and employees of and candidates for the General Assembly;
- Recommend a Legislative Code of Ethics to govern the members and employees of and candidates for the General Assembly;
- Adopt rules regarding the Ethics Law;
- Receive, initiate, and hear complaints concerning misconduct, breach of privilege, or violation of the Legislative Code of Ethics;
- Recommend sanctions for violations;

- Report findings of violations of the law to the appropriate prosecuting authority;
- *Advise General Assembly members, employees, and candidates on questions relating to ethics, possible conflicts of interest, and financial disclosure.*

JLEC provides advice to members in the form of advisory opinions and private written opinions. Both types of opinions state JLEC's position regarding the ethical appropriateness of specified actions under a set of hypothetical circumstances. Private written opinions may be converted into advisory opinions upon request and the approval of a majority of the Committee. Advisory opinions are public records and *provide criminal and civil immunity*, as well as protection from removal from office actions, for activities approved by the opinion. Private written opinions are not public records and grant no immunity.

In light of the constitutional and statutory restrictions on eligibility for a public office or position of public employment discussed in this brief, a General Assembly member, before accepting a potential appointment or employment opportunity, may want to consider asking JLEC whether it would be appropriate to accept the position. The member would send a written description of the position in question to the Office of the Legislative Inspector General or to the

Before accepting a potential appointment or employment opportunity, a General Assembly member may want to ask the Joint Legislative Ethics Committee whether it would be appropriate to accept the position. The Committee is authorized to issue advisory opinions (public records) or private written opinions upon request. Those opinions have distinctive characteristics and ramifications.



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Chair of JLEC and specify the type of opinion (advisory or private written) requested. According to JLEC's Internet web site, which contains JLEC advisory opinions from 1995 through 2000:

. . . Advisory Opinions serve to interpret the law and may be especially useful to individuals who are *considering an activity*, which they suspect may involve a conflict of interest or other violation. When an Advisory Opinion is sought and rendered by JLEC, the person to whom the opinion is directed, *and anyone similarly situated*, may rely on that opinion and shall be provided immunity from criminal, civil, or removal of office actions. (Emphasis added.)

Three advisory opinions posted on this web site illustrate the potential value to a General Assembly member of seeking *advance* JLEC advice on possible Ethics Law or conflicts of interest issues. Advisory Opinion 95-002 advised a General Assembly member that the Ohio Ethics Law generally

does not prohibit a member from accepting *employment* with a state college or university, but specified Ethics Law prohibitions would preclude the member from engaging in certain activities in connection with that employment and the member's General Assembly office. Advisory Opinion 97-001 advised that a former General Assembly member or employee, within the first 12 months after separating from the General Assembly, is prohibited from representing or acting in a representative capacity (i.e., lobbying) for a state institution of higher education on any matter before the General Assembly, any of its committees, or the Controlling Board; a state college or university is not a "state agency" covered by the exception to the "revolving door" prohibition of R.C. 102.03(A)(4) discussed above. And, Advisory Opinion 98-001 advised that R.C. 101.26 discussed above does not prohibit a General Assembly member from being employed by a state institution of higher education *as a professor* and that a specified Ethics Law provision does not preclude such a General Assembly member from voting on legislation that is being actively advocated by the institution.

