



Missouri Ethics Commission

Elizabeth L. Ziegler
EXECUTIVE DIRECTOR

April 29, 2021

Re: Advisory Opinion No. 2021.04.CI.005

Dear _____

At the April 29, 2021 meeting of the Missouri Ethics Commission, your request for an opinion was discussed.

Opinion

Pursuant to Section 105.955.16, RSMo, the Missouri Ethics Commission (MEC or Commission) may issue a written opinion regarding any issue on which the Commission may receive a complaint. Section 105.957.1(5), RSMo, authorizes the MEC to receive complaints alleging violations of “[t]he conflict of interest laws contained in sections 105.450 to 105.468 and section 171.181[.]. The Commission issues this opinion within the context of Missouri’s laws governing such issues, assuming only the facts presented by you in your request and other such facts that are generally available to the public.

The questions presented and the Commission’s opinions appear below.

Our fourth-class city is looking to hire a City Administrator. Would Missouri’s conflict of interest laws prevent the current City Clerk from accepting the position? If a sitting alderman resigned from their office, could s/he accept employment as the City Administrator?

Missouri’s conflict of interest statutes are found in Sections 105.450-105.467, RSMo. Included there is a provision that applies to “elected or appointed official[s] or employee[s] of . . . any political subdivision . . . , serving in an executive or administrative capacity[.]” Such individuals may not:

Perform any service for consideration, during one year after termination of his or her office or employment, by which performance he or she attempts to influence a decision . . . of any political subdivision in which he or she was an officer or employee or over which he or she had supervisory power[.]

Section 105.454.1(5), RSMo.

A threshold question presented by your inquiries is whether someone acting as the City Administrator would necessarily be in a position to attempt to influence the City's decision-makers. If the City Administrator's duties involve attempting to influence the Mayor and the Board of Aldermen, it will be necessary to consider whether the City Clerk and your Aldermen serve in an administrative or executive capacity. Only officials and employees serving in an administrative or executive capacity are subject to the statutory prohibition in Section 105.454.1(5), RSMo.

Duties of the City Administrator

The hiring of a city administrator is expressly authorized by state statute:

The governing body of any . . . fourth class city may by ordinance provide for the employment by the governing body with the approval of the mayor of a city administrator ~~who shall be the chief administrative assistant to the mayor and who shall have general~~ superintending control of the administration and management of the government business, officers and employees of the city, subject to the direction and supervision of the mayor.

Section 77.042, RSMo. Additionally, you have provided information describing specific job duties of the City Administrator. Several of those listed duties would appear to place that person in a position to attempt to influence decisions before the City's Mayor and the Board of Aldermen. For example, the City Administrator is required to:

- Draft a proposed budget to be submitted to the Mayor and Board of Aldermen;
- Propose a position classification system and pay plan to the Mayor and Board of Aldermen;
- Make recommendations regarding the appointment and removal of department heads;
- Submit a proposed agenda for each meeting; and,
- “[R]ecommend to the Mayor and Board of Aldermen adoption of such measures as he/she may deem necessary or expedient for the health, safety or welfare of the City or for the improvement of administrative services for the City.”

Based upon these statutory responsibilities and specific job duties, and for the purposes of providing this advisory opinion, the Commission has determined that your City Administrator could and would be in a position to attempt to influence the city's Mayor and the Board of Aldermen.

Duties of the City Clerk

Turning then to the question regarding the City Clerk, the pertinent inquiry is whether the City Clerk is currently serving in an administrative or executive capacity. If not, the prohibition in Section 105.454.1(5), RSMo, is not applicable.

Section 79.320, RSMo, authorizes the City's Board of Aldermen to elect a City Clerk:

[W]hose duties and term of office shall be fixed by ordinance. Among other things, the city clerk shall keep a journal of the proceedings of the board of aldermen. He shall safely and properly keep all the records and papers belonging to the city which may be entrusted to his care; he shall be the general accountant of the city; he is hereby empowered to administer official oaths and oaths to persons certifying to demands or claims against the city.

Your request for an advisory opinion included a copy of the ordinance prescribing the duties of your City Clerk. Upon a closer review, it appears to contain standard language that is quite similar to ordinances adopted by a number of other Missouri cities. The general provisions are as follows:

-
- ~~Attend all meetings of the Board of Aldermen;~~
 - Have custody of the city's books, records, papers, and documents;
 - Prepare and deliver certificates of election;
 - Keep records of expenditures from the Treasury and countersign all payments;
 - Record the certificates, oaths, and bonds of all city officers;
 - Keep an index of the records of the proceedings of the Board of Aldermen;
 - Prepare a semi-annual financial statement;
 - Provide the city collector with tax information;
 - Issue licenses;
 - Produce certified copies of city records upon request.

These duties do not describe an executive or administrative position as those terms have previously been discussed and defined by this Commission:

[I]ndividuals who serve in managerial and policy-making positions would normally be covered by Section 105.454, RSMo, because they would be performing in executive or administrative capacities, as those words are normally defined. (Dictionary definitions indicate that persons who have managerial responsibilities or who manage or supervise the execution, use or conduct of work would be "serving in an executive or administrative capacity.")

MEC Advisory Opinion 1999.09.109.

The duties of your City Clerk do not include any managerial or policy-making responsibilities. To the contrary, these duties appear to be generally ministerial. *See Division Cavalry Brigade v. St. Louis County*, 269 S.W.3d 512, 518 (Mo. App. 2008) ("A ministerial act is one that a public official is required to perform upon a given state of facts, in a prescribed manner, in obedience with the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed.")

The Commission finds that the current City Clerk is not currently serving in an executive or administrative capacity. Therefore, the prohibition in Section 105.454.1(5), RSMo, is not

applicable to the City Clerk: that individual would not be prohibited from accepting the position of City Administrator.

The Role of Aldermen

The final question is whether an Alderman serves in an executive or administrative capacity for the purposes of applying the prohibition in 105.454.1(5), RSMo.

Chapter 79 of the Revised Statutes of Missouri addresses fourth-class cities. Sections 79.070 to 79.220, RSMo, describe the powers and duties of the Board of Aldermen and the Mayor of a fourth-class city, and a summary of those duties is found in Section 79.110, RSMo:

The mayor and board of aldermen of each city governed by this chapter shall have the care, management and control of the city and its finances, and shall have power to enact ~~and ordain any and all ordinances not repugnant to the constitution and laws of this state,~~ and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same.

This enabling statute provides the Board of Aldermen with the power to act as a legislative body and charges the Board with the “care, management and control of the city and its finances.” Missouri’s Supreme Court has long recognized these varied responsibilities: “City councils and town boards, while primarily exercising legislative functions, also perform many executive and administrative acts.” *State Inf. McKittrick ex rel. Ham v. Kirby*, 163 S.W.2d 990, 996 (Mo. banc. 1942).

However, your request letter suggests that the provisions of Section 105.454.1, RSMo, might not apply to an individual Alderman. Put another way, you have asked whether an individual Alderman is actually serving in an executive or administrative capacity when the individual is merely serving as a member of a body, and it is the body that has been empowered to act. You cite to a City ordinance to illustrate your point:

No member of the Board of Aldermen shall directly interfere with the conduct of any department or duties of employees subordinate to the Board of Aldermen except at the express direction of the Board of Aldermen or with the approval of the City Administrator.

However, the Commission does not believe that this ordinance in any way nullifies the overarching character of the functions of the Board of Aldermen as laid out in Chapter 79, RSMo. Those functions establish that the Aldermen serve in executive and administrative capacities, in addition to serving as members of a legislative body.

More to the point, there is nothing contained in the conflict of interest provisions found in Sections 150.450-150.467, RSMo, to suggest that those statutes do not apply to individual

elected and appointed officials whose service is as a member of a body. To the contrary, this Commission has long applied the one-year prohibition in Section 105.454.1(5), RSMo to individual elected and appointed officials serving on bodies such as boards, councils, and commissions. See, for example:

- MEC Advisory Opinion 2009.04.CI.003 – Ambulance District Board;
- MEC Advisory Opinion 2008.03.CI.001 – College Board of Trustees;
- MEC Advisory Opinion 2002.02.104 – Special State Agency Task Force, Board, or Commission;
- MEC Advisory Opinion 2001.08.106 – Fire Protection District;
- MEC Advisory Opinion 1997.07.114 – Committee Member.

In fact, the Commission has previously applied that particular statutory prohibition to an individual alderman from a fourth-class city. MEC Advisory Opinion 2009.01.CI.001 cautioned ~~a former alderman against taking a position as “Administrative Assistant” to the Mayor. Even~~ though that position would be specifically prohibited “from attempting to influence a decision of the City of the Board of Aldermen,” this Commission advised against it, saying:

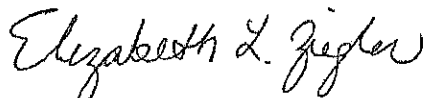
To the extent that you would serve as a liaison and representative of the City in these projects, it may be difficult to distinguish between the duties by which performance you attempt to influence a decision of the City by their very nature. This is despite a specific prohibition in the position itself.

The Commission finds in this instance, as it did in Advisory Opinion 2009.01.CI.001, that individual aldermen serving in fourth-class cities are subject to the one-year prohibition in Section 105.454.1(5), RSMo, because those aldermen serve in an administrative or executive capacity.

Summary/Conclusion

Based upon the responsibilities and duties assigned to the City Administrator for your fourth-class city, that employee will inevitably need to attempt to influence the decisions of the Mayor and the Board of Aldermen. Because your City Clerk does not serve in an administrative or executive capacity, the one-year prohibition in Section 105.454.1(5), RSMo, would not prevent the City Clerk from accepting the City Administrator position. However, because your Aldermen do serve in administrative and executive capacities, Section 105.454.1(5), RSMo, would prohibit an Alderman from becoming the City Administrator for one year after leaving office.

Sincerely,



Elizabeth L. Ziegler
Executive Director