



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 90-010
August 16, 1990

Syllabus by the Commission:

Division (A)(1) of Section 2921.42 of the Revised Code prohibits a city director of service and safety from authorizing or otherwise using the authority or influence of his office to secure the employment of his son by the fire department of the city which he serves even if: (a) the son has scored the highest on an examination which was administered by a municipal civil service commission to screen potential applicants; (b) the son has been recommended for employment by the city fire chief; and (c) the director has not participated in interviewing the three eligible candidates.

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You have asked whether the Ohio Ethics Law and related statutes prohibit the city director of public service and safety (Director) from appointing his son to the position of city firefighter where: (1) the son has scored the highest on an examination which was administered by a municipal civil service commission to screen potential applicants; (2) the son has been recommended for employment to the Director by the city fire chief; and (3) the Director has not participated in interviewing the eligible candidates.

You have stated that individuals who are interested in applying for an entry level position as firefighter must first take a written examination given by the municipal civil service commission. The applicants who pass the written examination must take a pass-fail physical agility test. The three candidates who score the highest on the written test and pass the physical test are listed by the municipal civil service commission as the three eligible candidates from which selection must take place. See R.C. 124.27, 124.42, and 124.43. The three eligible candidates are then interviewed by the fire chief, assistant chief, and three lieutenants. The assistant chief and the three lieutenants make recommendations to the fire chief based on the result of their interviews with the three candidates. The fire chief reviews these recommendations and makes a decision on which candidate he would like to hire; he then sends a letter stating his recommendation to the city's safety and service director. The safety and service director has the final authority to decide whether to employ the individual recommended to him by the fire chief.

The civil service of a city is divided into the unclassified and classified service. See R.C. 124.11. The classified service is further divided into the competitive and the unskilled labor classes. See R.C. 124.11 (B)(1) and (2). Entry level appointments in the competitive class are required to be made from those certified to the appointing authority in accordance with the provisions of Chapter 124. of the Revised Code. See R.C. 124.11 (B)(1). See also R.C. 124.27, 124.42, and 124.43. The means of determining an applicant's merit and fitness for a competitive classified civil service position has been described in the case of North Olmsted Board of

Education v. North Olmsted Civil Service Commission, 13 Ohio App. 3d 201, 203 (Lorain County 1983), in which the court held:

[T]o qualify, for the competitive classified service, applicant must possess a particular skill or expertise and must demonstrate that expertise on a competitive examination as part-of the employment application process. (Emphasis added).

You state that, in the instant situation, the Director's son achieved the highest score out of fourteen candidates on the written test and passed the physical agility test. The Director's son and the two other highest scoring individuals were interviewed by the fire department officials; the fire chief has recommended to the Director that the Director's son be hired. You further state that the Director has neither participated in interviews nor evaluated his son or any of the other candidates. He must, however, approve the fire chief's recommendation before his son can be hired as a firefighter.

Division (A)(1) of Section 2921.42 of the Revised Code provides:

(A) No public official shall knowingly do any of the following:

(1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest.

The term "public official" is defined in R.C. 2921.01(A) for purposes of R.C. 2921.42 to include any appointed officer of any political subdivision of the state. The director of public service and safety is a city official, who is appointed by the city's mayor and is, therefore, a "public official" for purposes of R.C. 2921.42. See R.C. 733.01, 733.03, and 733.04.

The term "public contract" is defined in R.C. 2921.42(E)(1) for purposes of R.C. 2921.42 to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of a political subdivision. The Ethics Commission has consistently held that an employment relationship between a political subdivision and an employee is a "public contract" for purposes of R.C. 2921.42, since the political subdivision is purchasing or acquiring the employee's services. See Ohio Ethics Commission Advisory Opinions No. 82-003, 85-003, 85-015, 86-010, 89-005, and 89-015. Cf. United States v. Lund, 853 F.2d 242 (4th Cir. 1988) (holding that the ordinary meaning of the word "contract" in a federal statute comparable to R.C. 2921.42 includes an employment contract with the federal government).

The Ethics Commission has concluded, accordingly, that R.C. 2921.42(A)(1) prohibits a public official from authorizing or using the authority or influence of his office to secure authorization of the employment of a member of his family by the political subdivision with which he serves. See Advisory Opinions No. 82-003, 85-003, 85-015, 86-010, and 89-005. A family member includes a spouse, children, whether dependent or not, parents, grandparents, siblings, and other persons related by blood or marriage and residing in the same household. See Advisory Opinions No. 80-001, 81-004, 89-005, and 89-008.

The Ethics Commission's holding that R.C. 2921.42 prohibits a public official from authorizing the employment of a member of his family was recognized by the Tenth District

Court of Appeals in the unreported case In re Removal of Steed. No. 1909 (Lawrence County July 27, 1989). In denying a motion for leave to appeal, the court of appeals held:

We find **nothing** in the statute [R.C. 2921.42] which reflects an intention by the General Assembly to **exclude** employment contracts. Although there has been very little case law involving R.C. 2921.42, there have been numerous Ohio Ethics Commission Advisory Opinions which construe R.C. 2921.42. Most closely on point is O.E.C. 82-003 which involved a question concerning a school board member whose wife was a teacher in the school district. The Commission stated in that opinion that the teacher's individual employment contract was a public contract within the meaning of the statute and, further, that the teacher's interest in the contract was "definite, direct, and pecuniary." (Emphasis added).

The appeals court upheld the lower court's decision that the officials act of voting on matters concerning the employment of his wife by the school district which he served as a member of the school board violated R.C. 2921.42(A)(1) and thus constituted malfeasance in office which warranted his removal from the school board. Therefore, it has been generally established that R.C. 2921.42(A)(1) prohibits a public official from authorizing the employment of a member of his family.

The Ethics Commission has held that a public official will be deemed to have "authorized" a public contract for purposes of R.C. 2921.42 where the contract could not have been awarded without the public officials approval. See Advisory Opinions No. 87004 and 88-008. In this instance, an applicant for a city firefighter position must, as described above, pass a competitive examination and agility test. He is interviewed by fire department officials, and must be recommended for employment by the fire chief. However, it is the director of public service and safety who makes the final decision whether to hire an applicant. The Director would, therefore, be deemed to "authorize" the employment of his son as a firefighter for purposes of R.C. 2921.42(A)(1). The issue becomes whether the prohibition of R.C. 2921.42(A)(1) against a public official authorizing public employment for a family member applies to a position in the competitive classified civil service where a civil service commission has made a determination of an individuals eligibility for the position.

R.C. 2921.42 does not distinguish between appointments made in the classified civil service and other appointments. Neither Division (A)(1) nor Division (E), which defines a public contract, limits the statutory prohibition or definition of public contract to a specific manner or means by which the state or a political subdivision acquires or purchases the services. An employment contract could be for full-time, part-time, temporary, or permanent employment, in the classified or unclassified civil service, or non-civil service in nature. The classified service comprises all persons in the employ of the state, or specified political subdivisions, except those positions excluded by statute. See R.C. 124.11. The positions described in previous opinions of the Ethics Commission which interpret R.C. 2921.42(A)(1) as prohibiting a public official from employing a family member are commonly in the classified civil service. For example, in Advisory Opinion No. 85-015, the Commission held that:

Division (A)(1) of Section 2921.42 of the Revised Code prohibits a county sheriff from authorizing- or otherwise using the authority or influence of his office to secure approval of a

contract for the employment of his spouse or a family member as a deputy, matron, cook, assistant, clerk, bookkeeper or other employee in the county sheriff's office.

A deputy sheriff is a member of the unclassified civil service only when the deputy is assigned to, and performs, duties such that he holds a fiduciary or administrative relationship to the sheriff. See Pratt v. Collier, 46 Ohio St. 2d 88 (1976). The other employees described in Advisory Opinion No. 85-015, such as matron, cook, or clerk, exercise responsibilities which clearly place them in the classified service. See R.C. 124.11.

The Ethics Commission has also previously held that a city civil service commission's determination that certain individuals are eligible for public employment does not affect the prohibitions of R.C. 2921.42. In Advisory Opinion No. 78-002, the Ethics Commission held that R.C. 2921.42(A)(4), which prohibits a public official from having an interest in a public contract entered into by his political subdivision, would prohibit the president or vice-president of a private transportation company which provides pupil transportation for a city school district from serving as the school district's transportation director. The Commission determined that R.C. 2921.42(A)(4) would prohibit the employment of the company officers by the school district even in light of the fact that the city civil service commission had determined that both were eligible for the position and had placed their names on the list of eligible candidates. In Advisory Opinion No. 78-002, the Ethics Commission held that R.C. 2921.42(A)(4) imposed a flat prohibition upon the officers of the contracting company from being employed by the school district, even though they were eligible for employment under the civil service process. In the instant situation, R.C. 2921.42(A)(1) only prohibits the Director from authorizing his son's employment, and does not prohibit the Director's son from being employed by the city. See Advisory Opinion No. 85-003. However, it is apparent from the holding of Advisory Opinion No. 78-002 that a determination of fitness for employment by a municipal civil service commission will not override the criminal prohibitions of R.C. 2921.42.

The departments of public service and public safety are established by statute in a non-charter city. See R.C. 737.01 and 735.01 respectively. The legislative authority of a city may merge the two departments; the director of the merged departments is appointed by the mayor. See R.C. 733.03. The director is, under the direction of the mayor, the executive head of the police and fire departments and has all powers and duties over the appointment, regulation, and government of such departments. See R.C. 733.01 and 737.02. The director is the appointing authority of employees of the fire department, except for the statutory provision that permanent full-time firefighters must meet statutorily prescribed training and certification requirements. See R.C. 733.01, 737.02, and 737.08; Martin v. City of Bellefontaine, 64 Ohio App. 2d 170 (Logan County 1979). The director also wields ultimate authority over the discipline and removal of fire department employees. See R.C. 737.12. See also R.C. 124.34; Martin v., City of Bellefontaine.

It is apparent that a city director of service and safety is granted broad authority over the hiring, discipline, and removal of city fire department personnel. While, as described above, applicants must take a written examination and pass an agility test, and other fire department officials must make recommendations to the city director of service and safety concerning the hiring and discipline of fire department employees, the director has the authority and discretion to make the final decision and either accept or reject the recommendations made to him. It is apparent that an applicant's success on a written civil service examination is not the sole factor in determining an applicant's merit and fitness for a position. Rather, the written test is only the first

part of the employment application process, which ultimately relies on the exercise of discretionary decision-making authority by the city service and safety director, and officials under his authority. The Director's exercise of his power of appointment, by authorizing the employment of his son as a firefighter is, therefore, prohibited by R.C. 2921.42 (A)(1) even if: (1) his son has scored the highest on an examination which was administered by a municipal civil service commission to screen potential applicants; (2) the son has been recommended for employment by the city fire chief; and (3) the Director has not participated in interviewing the three eligible candidates.

The instant situation is similar to the facts addressed in a Massachusetts case involving application of a comparable state statute, which prohibits a public official from participating in matters in which immediate family members have a financial interest, to a city director of public safety's appointment of his brother to positions on the city police department. The Supreme Judicial Court of Massachusetts, in the case of Sciuto v. City of Lawrence, 389 Mass. 939, 452 N.E. 2d 1148 (1983), held that a city director of public safety had violated state statute by appointing his brother to the positions of lieutenant and then captain on the city police force even in light of the fact that the safety director's brother had appeared on a list certified by the personnel administrator of the civil service commission. The Supreme Judicial Court of Massachusetts found that these promotions violated the state conflict of interest law and returned the case to the lower court to decide whether any further action should be taken regarding the promotions. The lower court ordered the promotions rescinded and the safety director's brother was demoted three levels. See also The Massachusetts State Ethics Commission Advisory Opinion No. 11.

The Ohio Ethics Commission has determined, in previous advisory opinions, that when a public official is prohibited from participating in a particular matter the public official may withdraw from the matter which would create the conflict, if such withdrawal does not interfere with performance of his duties, and is approved by the appropriate officials at his employing agency. See Advisory Opinions No. 89-006, 89-010, and 90-002. These opinions addressed the application of R.C. 102.03(D) and (E) rather than R.C. 2921.42. However, the application of the principle is relevant in the instant situation. As stated above, a city service and safety director is the executive head of the police and fire departments, under the direction of the mayor. See R.C. 733.01, 733.03, and 737.02. It is apparent that the mayor is superior to, and a check upon, the actions of the city service and safety director. If, under Title VII of the Revised Code, it is possible for the mayor of a non-charter city to act in the place of the city service and safety director in all matters pertaining to the employment of the Director's son, then the employment of the Director's son would not be prohibited. However, R.C. 2921.42(A)(1) prohibits the Director from participating in deliberations or discussions, or otherwise using his position, either formally or informally, to secure his son's employment. The determination of whether a mayor of a non-charter city may, instead of the service and safety director, independently review a recommendation for employment made by the fire chief, and appoint an employee to the city fire department is for the determination of the city law director.

The argument has been made that the prohibition of R.C. 2921.42 imposes a "punishment" upon family members of public officials by limiting their potential employment opportunities. Such an argument misconstrues the prohibition of R.C. 2921.42. R.C. 2921.42(A)(1) is not a "no relatives policy" which determines eligibility for employment with a political subdivision on the basis of family relationships. Cf. Bloomington v. City of Fairborn 2

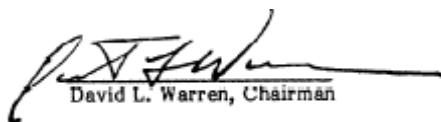
Ohio St. 3d 142 (1983). The Commission is aware that family members of public officials may also desire to enter into public employment and in many instances families have established a tradition of public service. R.C. 2921.42(A)(1) does not prohibit a family member of a public official from being employed by the same political subdivision which the official serves; rather it prohibits the public official from taking any action to secure employment for his family member. The purpose of R.C. 2921.42(A)(1) is to prevent the possibility that a public official may show favoritism in the exercise of his discretionary, decision-making authority in authorizing a contract for public employment. R.C. 2921.42 is part of the state criminal code and imposes a criminal penalty upon the public official who acts in contravention of the prohibition. See R.C. 2921.42(D).

The Commission is aware that in this instance the son of the Director has expressed an interest in serving as a firefighter by attending the volunteer firefighting school, obtaining his EMTA Certification, and serving the city as a volunteer firefighters. The Commission understands the Director's difficult position in this situation, as well as the City's interest in appointing qualified employees.

As stated above, however, R.C.2921.42(A)(1) will absolutely prevent employment of a public officials family member only in instances where the public official is the sole or ultimate hiring authority, and where there is no other person or entity who may exercise such hiring authority. See generally Advisory Opinions No. 82-003 and 88-007. „A family member of an official will not be prevented from being employed by the same political subdivision in instances where the appointment may be made by some other person or entity who may exercise such hiring authority, where it is possible for a superior to authorize the employment, or where the official is not the appointing authority for that particular position. The official is, however, required under all circumstances to abstain from participating in the employment process.

The conclusions of this opinion are based on the facts presented and are rendered only with regard to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission and you are so advised that, Division (A)(1) of Section 2921.42 of the Revised Code prohibits a city director of service and safety from authorizing or otherwise using the authority or influence of his office to secure the employment of his son by the fire department of the city which he serves even if: (a) the son has scored the highest on an examination which was administered by a municipal civil service commission to screen potential applicants; (b) the son has been recommended for employment by the city fire chief; and (c) the director has not participated in interviewing the three eligible candidates.



David L. Warren, Chairman