



OHIO ETHICS COMMISSION
THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

Advisory Opinion Number 92-008
April 10, 1992

Syllabus by the Commission:

(1) Pursuant to Section 135.11 of the Ohio Revised Code, an individual who is an officer, director, stockholder, employee, or owner of any interest in a public depository receiving inactive, active, or interim township deposits is not considered to have an "interest" in the deposit of township funds in the depository such that he would be prohibited by Division (A)(4) of Section 2921.42 of the Revised Code from serving as township clerk or township trustee;

(2) Division (A)(1) of Section 2921.42 and Division (D) of Section 102.03 of the Revised Code prohibit a township clerk, who is also an employee of a bank which is a township depository, from authorizing, or using her authority or influence to secure, the deposit of township funds with the bank that employs her, or otherwise performing any of the duties assigned to the township clerk pursuant to the Uniform Depository Act, with respect to the bank that employs her;

(3) A township clerk is prohibited, by the Ohio Ethics Law and related statutes, from also holding the position of employee of a public depository receiving township funds, even though the clerk would not be considered to have an "interest" in those township deposits pursuant to Section 135.11 of the Revised Code;

(4) Division (A)(1) of Section 2921.42 and Division (D) of Section 102.03 of the Revised Code prohibit a township trustee, who is also a member of the board of directors of a bank that is a township depository, from authorizing, or using his authority or influence to secure, the deposit of township funds with the bank he serves, or otherwise performing any of the duties assigned to the township trustee pursuant to the Uniform Depository Act, with respect to the bank he serves;

(5) The Ohio Ethics Law and related statutes do not, per se, prohibit a township trustee from also holding the position of officer, director, stockholder, employee, or owner of any interest in a public depository receiving township funds, so long as the trustee abstains from any participation as a township trustee in matters affecting the interests of the bank.

* * * * *

You have asked if a township clerk may serve as an employee of a local bank which is a depository of the township's funds. You have also asked if a township trustee may serve as a member of the board of directors of a local bank which is a depository of the township's funds.

By way of history, you have explained that the township clerk is an employee of a local bank that is a depository of township funds. You have further explained that she is not a director of the bank, that she does not own stock in the bank, and that she does not benefit or gain from any deposit made in the bank. You have also explained that the township trustee serves as a member of the board of directors of a bank that is a township depository.

Section 2921.42 (A)(4) of the Revised Code provides as follows:

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

(4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

The term "public official" is defined, in R.C. 2921.01 (A), to include any elected or appointed officer of the state or any political subdivision of the state. Accordingly, both a township clerk and a township trustee fall within the definition of a "public official" for purposes of R.C. 2921.42. See generally Ohio Ethics Commission Advisory Opinion No. 91-001.

A "public contract" is defined, for purposes of R.C. 2921.42, in R.C. 2921.42 (E), as "[t]he purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state or any of its political subdivisions, or any agency or instrumentality of either." The Ethics Commission has previously identified, as a "public contract," the deposit of public funds by a political subdivision in a bank serving as a public depository. See Advisory Opinion No. 85-007. See also Advisory Opinion No. 83-003. Therefore, the deposit of funds by a township in a bank is a "public contract" for purposes of R.C. 2921.42.

Division (A)(4) of Section 2921.42 prohibits a township clerk or trustee from having an "interest" in the profits or benefits of a public contract entered into by the township with which the official is connected. An "interest" which is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. See Advisory Opinion No. 81-008. A member of the board of directors of a private corporation is considered to have a direct and definite, fiduciary, and sometimes pecuniary, interest in the contracts of that corporation. See Advisory Opinions No. 83-003, 85-007, 87-003, and 88-008. However, the Ethics Commission has held that an employee of a company, who does not have an ownership or fiduciary interest in the company, is generally not deemed to have an "interest" in the contracts of her employer for purposes of R.C. 2921.42. See Advisory Opinions No. 78-006 and 92-002. But see Advisory Opinions No. 89-006, 89-008, 89-011, 91-001, and 92-002 (setting forth circumstances under which an employee of a company will be deemed to have an "interest" in the contracts of the company for purposes of R.C. 2921.42).

Therefore, a member of the board of directors of a company is generally considered to have an "interest" in the contracts of the company, and, under some circumstances, an employee may have an interest in the contracts of the company which employs her. However, the Uniform Depository Act, Chapter 135. of the Ohio Revised Code, includes an exemption for officers, directors, stockholders, employees, and owners of interests in public depositories that is applicable to Division (A)(4) of R.C. 2921.42. Section 135.11 of the Revised Code provides as follows:

An officer, director, stockholder, employee, or owner of any interest in a public depository receiving inactive, interim, or active deposits pursuant to sections 135.01 to 135.21, inclusive, of the Revised Code shall not be deemed to be interested, either directly or indirectly, as a result of such relationship, in the deposit of such inactive, interim, or active deposits of public moneys for the purpose of any law of this state prohibiting an officer of the state or of any subdivision from being interested in any contract of the state or of the subdivision.

R.C. 135.11 provides that a director or an employee of a bank shall not be "deemed to be interested, either directly or indirectly . . . in the deposit of . . . public moneys for the purpose of any law of this state prohibiting an officer of . . . any subdivision from being interested in any contract of . . . the subdivision." (Emphasis added.) See R.C. 135.01 (L) (defining "subdivision" for purposes of R.C. Chapter 135. to include a township). R.C. 135.11 provides an exemption to the prohibition of R.C. 2921.42 (A)(4). See Advisory Opinion No. 85-007. See also Ohio Op. Att'y Gen. No. 65-137. Therefore, an individual who is either an employee or member of the board of directors of a bank that is a depository of township funds is not considered to have an "interest" in the deposit of township funds in the bank, and is not prohibited by R.C. 2921.42 (A)(4) from serving as township clerk or township trustee. See Advisory Opinion No. 85-007.

However, other provisions of the Ohio Ethics Law are applicable to the questions presented. R.C. 2921.42 (A)(1) provides that no public official shall authorize, or use the authority or influence of his office to secure authorization of, a public contract in which he, a member of his family, or any of his business associates has an interest. Division (A)(3) of R.C. 2921.42 provides that no public official shall occupy a position of profit in the prosecution of a public contract authorized by him, or by a legislative body of which he is a member, unless the contract was let by competitive bidding to the lowest and best bidder. Divisions (D) and (E) of R.C. 102.03 provide that no public official or employee shall solicit, accept, or use the authority of influence of his public position to secure anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. R.C. 2921.42 (A)(1) and (A)(3), and R.C. 102.03 must be examined to determine whether a township trustee may serve as a board member of, or a township clerk may be employed by, a bank which is a depository of township funds. Since the duties of the township trustee and the township clerk differ with regard to township deposits, the Commission will turn first to the question concerning the township clerk, and then to the question concerning the township trustee.

TOWNSHIP CLERK

Division (A)(3) of Section 2921.42 provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid.

R.C. 2921.42 (A)(3) does not speak in terms of a public official's "interest," but rather prohibits a public official from "occupy[ing] any position of profit in the prosecution of a public contract," under specific circumstances. Therefore, R.C. 135.11, which states that a bank director or employee will not be deemed to be "interested" in the deposit of moneys in a public depository, does not provide an exemption to the prohibition of Division (A)(3) of Section 2921.42. See generally Advisory Opinions No. 85-007 and 88-005. But cf. Advisory Opinion No. 91-001 (exemption of R.C. 505.011 does apply to the prohibition of R.C. 2921.42 (A)(3)).

R.C. 2921.42 (A)(3) prohibits a public official, during his term of office and for one year thereafter, from profiting from a contract which was authorized by him, unless the contract was competitively bid and his was the lowest and best bid. A public contract is considered to be "authorized" by an official or board if the contract could not have been awarded without the approval of the official or board. See Advisory Opinion No. 87-004. The township clerk, as treasurer for purposes of the Uniform Depository Act, does have the authority to make deposits and investments of certain township funds, as discussed below. See R.C. 135.09 and 135.14. The Ethics Commission has held that a public official will be deemed to profit from a public contract which is awarded to the company which employs him, where: (1) the establishment or operation of his employing organization is dependent upon receipt of the contract; (2) the creation or continuation of the public official's position with his employer is dependent upon the award of the contract; (3) the contract proceeds would be used by his employer to compensate the public official or as a basis for his compensation; or (4) the public official would otherwise profit from the award of the contract. See Advisory Opinions No. 87-004, 88-008, and 92-002. Therefore, R.C. 2921.42 (A)(3) prohibits the township clerk from profiting, as described above, from any deposit of township funds made by the clerk to the bank which employs her, unless the deposits are made pursuant to competitive bidding and are awarded to the bank that will pay the highest interest rate, as provided by the Uniform Depository Act. See, e.g., R.C. 135.07.

Division (A)(1) of R.C. 2921.42 provides that no public official shall knowingly:

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. (Emphasis added.)

A public official is prohibited, by R.C. 2921.42 (A)(1), from authorizing, or using her official position to secure authorization of, a public contract in which she or any of her business associates has an interest. The Ethics Commission has stated that a public official's private employer is considered to be her "business associate" for purposes of R.C. 2921.42. See Advisory Opinions No. 78-006 and 92-002. Therefore, the bank which employs the township clerk is her "business associate" for purposes of R.C. 2921.42.

As discussed above, R.C. 135.11 provides that an employee of a public depository will not be deemed to have an interest in the deposits of the bank for purposes of "any law of this state prohibiting an officer of . . . any subdivision from being interested in any contract of . . . the subdivision." Therefore, in the situation you have described, the employee of the bank does not have an interest in township deposits made to the bank for purposes of R.C. 2921.42 (A)(1). However, the bank itself, which is the business associate of its employees, does have an "interest" in the deposits made to the bank, and does not fall within the exemption of R.C. 135.11. See generally Advisory Opinion No. 84-008.

In Advisory Opinion No. 91-001, the Ethics Commission was asked if the Ohio Ethics Law and related statutes would prohibit a township trustee from serving as a full-time paid employee of the private fire company which contracts to provide fire protection services to the township. In that opinion, the Commission noted R.C. 505.011, which provides that a township trustee may be a member of a private fire company which has entered into an agreement with the township to provide fire protection. The Commission stated that the exemption in R.C. 505.011:

[P]ermits [a township trustee] to serve his township as a firefighter despite his interest in the contract between his township and the fire company. The exemption provided by R.C. 505.011 specifically permits the trustee to serve as a firefighter, but it does not specifically allow him to participate as a trustee in matters affecting the fire company. See 1990 Ohio Op. Att'y Gen. No. 90-037. (Emphasis in original.)

Advisory Opinion No. 91-001. The Commission further stated that R.C. 505.011 also does not exempt a township trustee from the provisions of R.C. 2921.42 (A)(1) (or R.C. Chapter 102).

R.C. 2921.42 (A)(1) would, therefore, prohibit a township clerk from authorizing the deposit of township funds, or discussing, recommending, or otherwise using her authority or influence as township clerk, formally or informally, to secure the deposit of township funds, with a bank which employs her.

Divisions (D) and (E) of Section 102.03 of the Revised Code are also relevant and provide as follows:

(D) No public official or employee shall use or authorize the use of the authority or influence of his office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

(E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

The term "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office of a township, and thus includes a township clerk. See R.C. 102.01 (B) and (C). See generally Advisory Opinion No. 91-001.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. See R.C. 102.01 (G). A definite and direct pecuniary benefit is considered to be a thing of value under R.C. 102.03 (D) and (E). See Advisory Opinions No. 79-008, 85-006, 88-004, and 89-005. The deposit of township funds in a public depository is a thing of value for purposes of R.C. 102.03 (D) and (E). Employment and the attendant compensation are also considered a thing of value for purposes of R.C. 102.03 (D) and (E). See Advisory Opinions No. 87-006 and 89-006.

In Advisory Opinion No. 85-007, the Ethics Commission was asked if the Ohio Ethics Law and related statutes prohibited a county treasurer from serving as a director of a bank which was a county depository. The Commission examined an exemption set forth in R.C. 135.38, which closely parallels R.C. 135.11 with respect to county officers and depositories. R.C. 135.38 provides that an officer, director, stockholder, employee or owner of any interest in a public depository will not be deemed to be interested in the deposit of public moneys for purposes of any law which prohibits a county officer from being interested in any contract of the county. In Advisory Opinion No. 85-007, the Commission held that although they provide an exemption to R.C. 2921.42 (A)(4), "[s]ections 135.11 and 135.38 of the Revised Code do not provide an exemption from the Ohio Ethics Law, Chapter 102. of the Revised Code." See also Advisory Opinions No. 88-005 and 91-001. In Advisory Opinion No. 85-007, the Commission further stated:

[T]he county treasurer would be prohibited from using his official position for personal gain or benefit. The application of this provision would be dependent upon the facts and circumstances of the particular case, but it should be considered when the county treasurer makes decisions affecting the bank, particularly if he receives director's fees or owns stock. A county treasurer has considerable discretion pursuant to Chapter 135. of the Revised Code to deposit or invest active or inactive county funds. If he has a personal, financial stake in the outcome of a particular decision or transaction concerning the bank, Division (D) of Section 102.03 of the Revised Code would prohibit him from participating in the decision or authorizing the transaction.

In addition, it would create the appearance of impropriety for a county treasurer to serve on the board of a bank that is a depository of county funds, since it would appear that he would be more favorably disposed to his bank than to its competitors within the county. Although the General Assembly established the exemption to permit board members, officers, shareholders, and employees of banks to serve as public officials or employees, the Commission believes that the exemption sweeps too broadly when it permits such interested parties to serve in public positions with significant discretion in the deposit or investment of public funds. (Emphasis added.)

In Advisory Opinion No. 85-007, the Commission clearly states that, although the Uniform Depository Act provides that an officer, director, stockholder, employee, or owner of any interest in a public depository is not deemed to have an interest in the deposits of public funds (see R.C. 135.11 and 135.38), there may still be conflicts under R.C. 102.03 if certain public officials and employees hold positions with a public depository. Further, Advisory Opinion No. 85-007 states that the exemption in R.C. 135.38 (and 135.11) does not permit the

public official or employee to participate, as a public official or employee, in matters affecting a depository with which he is connected, if the official or employee has a personal, financial stake in the outcome of a particular decision or transaction affecting the bank.

The prohibitions of R.C. 102.03 have been substantially broadened since the issuance of Advisory Opinion No. 85-007. Advisory Opinion No. 85-007 was rendered prior to the enactment of Am. Sub. H.B. 300, 116th Gen. A. (1986), which resulted in the current version of R.C. 102.03 (D), and the addition of R.C. 102.03 (E), as set forth above. At the time that Advisory Opinion No. 85-007 was rendered, R.C. 102.03 (D) prohibited a public official or employee from using his official position to secure anything of value for himself if the thing of value were of such character as to manifest a substantial and improper influence upon him with respect to his duties. Thus, Advisory Opinion No. 85-007 held that a county treasurer who also served as a bank director was prohibited from participating in a particular decision or transaction concerning the bank if he had "a personal, financial stake" in the outcome of the decision or transaction. However, Am. Sub. H.B. 300 amended R.C. 102.03 (D) by deleting the requirement that the thing of value be for the public official or employee himself, thereby broadening the prohibition. See Advisory Opinion No. 88-004. Therefore, it is no longer necessary to demonstrate that the thing of value be for the public official himself, although the thing of value must still be of such character as to manifest a substantial and improper influence upon the official. See Advisory Opinion No. 88-004. Am. Sub. H.B. 300 also enacted R.C. 102.03 (E), which prohibits a public official from soliciting or accepting anything of value if the thing of value is of such a character as to substantially and improperly influence the public official's or employee's decision-making. While Division (D) prohibits a public official from using his authority or influence to secure anything of value that is of a substantial and improper character, Division (E) prohibits an official from merely accepting anything of value that is of an improper and substantial character. See Advisory Opinions No. 86-011, 89-006, 89-016, and 90-007.

The Ethics Commission has consistently held that the current version of R.C. 102.03 (D) prohibits a public official from using the authority or influence of his office to secure anything of value for himself, or for another person or entity if the relationship between the official and that person or entity could impair the official's objectivity and independence of judgment with regard to matters that affect that party. See Advisory Opinions No. 88-004, 88-005, 89-005, 91-001, and 91-004. The Commission has held that R.C. 102.03 (D) prohibits a public official or employee from participating in matters which would secure a thing of value directly for himself in his outside private employment. See Advisory Opinion No. 80-003. However, it is no longer necessary to show, in applying the prohibition of R.C. 102.03 (D), that the official would himself have a financial interest in the matter. Therefore, the Commission has also held that R.C. 102.03 (D) prohibits a public official from acting in any matter which would secure a thing of value for his outside private employer, holding in Advisory Opinion No. 89-008:

An employer holds a position of power and authority over the hiring, compensation, discipline, and termination of its employees. A [public official] who is in the position of making an official decision regarding the pecuniary interests of his private employer would have an inherent conflict of interest impairing the [public official's] objectivity and independence of judgment. (Emphasis added.)

See also Advisory Opinion No. 88-005. In this instance, the township clerk would, in the performance of her duties, be required to act with respect to her private employer.

As summarized in Ohio Attorney General Advisory Opinion No. 89-022, "[a] township clerk is responsible for keeping the accounts and financial records of the township and also for handling public funds." The township clerk's duties are generally set forth in Chapter 507. of the Ohio Revised Code. For example, R.C. 507.04 provides that the township clerk shall keep an accurate record of the accounts and transactions of the township trustees. R.C. 507.07 states that the township clerk shall annually make a detailed statement of the receipt and expenditures of the township for the preceding year. R.C. 507.11 provides that the township clerk must countersign all orders of the township to pay out township funds. Ohio Revised Code Chapter 135., the Uniform Depository Act, assigns other duties, concerning the deposit and investment of township funds, to the township clerk.

The Uniform Depository Act generally regulates the deposit of public funds in this state. The Act sets forth duties for various officials within each political subdivision regarding the deposit of the subdivision's money. The deposits of each subdivision are divided into three types: "active deposits," "interim deposits," and "inactive deposits." The term "active deposit" means a public deposit necessary to meet current demands on the treasury. See R.C. 135.01 (A). The term "interim deposit" means a deposit of interim moneys, which are public moneys in the treasury of any subdivision after the award of inactive deposits has been made in accordance with R.C. 135.07, and which the treasurer or the governing board finds should not be deposited as active or inactive funds because the money will not be needed for immediate use but will be needed before the treasurer or the governing board can access the inactive deposits. See R.C. 135.01 (F). The term "inactive deposit" refers to deposits that are not active or interim deposits. See R.C. 135.01 (E).

R.C. 135.01 (M) defines the term "treasurer," as used in the Uniform Depository Act, as the officer exercising the functions of a treasurer in each political subdivision. A township clerk is considered the chief fiscal officer of the township. See generally Ohio Op. Att'y Gen. 86-057; R.C. 5705.01 (D). Therefore, the duties ascribed to the political subdivision's "treasurer" by the Uniform Depository Act are duties of the clerk in a township. Section 135.09 of the Revised Code provides that the clerk may award interim deposits, as interim moneys become available, to the eligible institution which offers to pay the highest permissible rate of interest on interim deposits. R.C. 135.14 empowers the clerk, as well as the board of township trustees, as the township's governing board (see R.C. 135.01 (D)), to invest interim moneys, so long as the investments will mature or be redeemable within two years from the date of purchase and to enter into repurchase agreements. The clerk has the authority to classify township money as interim money, and the clerk must notify the trustees of the classification. See R.C. 135.14. See also R.C. 135.01 (F). Investments or deposits made pursuant to Section 135.14 are registered in the clerk's name, and the clerk is responsible for the safekeeping of all documents evidencing any deposits or investments under this section. When investments pursuant to R.C. 135.14 mature, the clerk shall present them for payment and collect the money payable.

R.C. 135.15 empowers the clerk, as treasurer, to give appropriate notice to public depositories of withdrawals and transfers of deposits from one class of funds to another, and to

sell investments or make transfers from one account to another at the instruction of the board of township trustees as the governing board. Pursuant to R.C. 135.16, interest on inactive and interim deposits shall be paid or credited to the clerk according to the terms and conditions of the time certificates of deposit, or savings or deposit accounts or when the funds are withdrawn. The clerk is empowered, by R.C. 135.17, to keep a designated cash reserve in his vaults. The clerk is empowered to collect and hold securities from public depositories as security for deposits of subdivision funds, pursuant to R.C. 135.18. If the public depository fails to pay over any portion of the funds deposited, R.C. 135.18 empowers the clerk to sell the securities deposited with him at public sale with appropriate notice. The depository may substitute one eligible security for another one only upon the authorization of the clerk, or if the clerk fails to object to the substitution after notice is submitted to him. See R.C. 135.18. A public depository is given the option of pledging a single pool of eligible securities to secure the repayment of all public money held by the depository, and designating a qualified trustee with whom to deposit the eligible securities for safekeeping. See R.C. 135.181. Up to four times each year, the clerk may request that a public depository report the amount of public money deposited and secured pursuant to R.C. 135.181 (B), and the total value of the pool of securities pledged to secure public money held by the depository. See R.C. 135.181 (L). The clerk may also request that the qualified trustee report the total value of the securities deposited with it by the depository, and provide an itemized list of the securities in the pool. Id. The fact that the clerk, as treasurer, carries significant responsibilities with respect to township funds is demonstrated by R.C. 135.14 and 135.19, which state, respectively, that the clerk is neither held accountable for loss occasioned by the sale or liquidation of township investments or deposits at prices lower than their cost, nor held liable for the loss of public money deposited by him if the loss is caused by the failure of a public depository. The clerk is required to comply with orders of the governing board, the board of township trustees for a township, regarding proportions of deposits among depositories. See R.C. 135.20. The clerk also has the authority to deposit subdivision funds in the Ohio subdivision's fund in the Treasurer of State's office. See R.C. 135.45. The clerk may deposit bond proceeds in one of two investment pools established in the Treasurer of State's office. See R.C. 135.46.

It is apparent that the township clerk's decisions concerning the classification, deposits, investments, withdrawals, and transfers of township funds, would directly affect the pecuniary interests of the bank which employs her, if the bank is a depository of township funds. However, as discussed above, R.C. 2921.42 (A)(1) prohibits the township clerk from authorizing, discussing, recommending, or otherwise using her authority or influence as township clerk, formally or informally, to secure the deposit of township funds with the bank which employs her. If the bank which employs the township clerk is a depository of township funds, the clerk is prohibited from acting in any way to secure or authorize the deposit of township funds in the bank. Further, R.C. 102.03 (D) prohibits the clerk from using the authority or influence of her office, and from acting in any matter, to secure the deposit of township funds, or anything else of value, for the bank which employs her. As discussed above, R.C. 135.11 does not provide an exemption to R.C. 102.03 and 2921.42 (A)(1), see Advisory Opinion No. 85-007, and does not allow the township clerk to participate in matters affecting the interests of her employer. See Advisory Opinion No. 91-001 (the exemption provided in R.C. 505.011 provides that a township trustee may serve as an employee of a private fire company which provides fire protection for the

township, but does not allow the trustee to participate as a trustee in matters affecting the fire company). See also Ohio Op. Att'y Gen. No. 90-037.

It is clear, from the statutes enumerated, that the clerk of a township has significant authority regarding authorization of deposits and the investment of township funds. Some of these responsibilities can be performed only by the clerk. See R.C. 135.14, R.C. 2921.42 (A)(1), and R.C. 102.03 (D), as amended subsequent to Advisory Opinion No. 85-007, prohibit a public official or employee from participating in matters where her employer has an interest. See Advisory Opinion No. 91-004 (a member of a city planning commission who is an employee and stockholder in a bank is prohibited from acting with regard to any matters pending before the planning commission in which the bank has an interest). Therefore, R.C. 2921.42 (A)(1) and 102.03 (D) prohibit the clerk from authorizing, recommending, participating in discussions, or otherwise using the authority or influence of her office, either formally or informally, with regard to township deposits or investments made with the bank with which she is employed. See Advisory Opinions No. 91-001 and 91-004. The clerk is subject to this prohibition regardless of whether she would have a personal interest, as an employee of the bank, in the township deposits or investments made with the bank. Accordingly, the clerk would be prohibited from performing any of her statutory duties as they apply to her outside private employer.

The Ethics Commission has stated that a public official or employee is not generally prohibited from holding outside private employment, so long as there is no actual conflict of interest between the official's public duties and his private interests. See Advisory Opinions No. 85-006, 86-008, 89-006, and 89-010. However, the Commission has further stated that, if a public official's or employee's private position could impair his independence of judgment with regard to his official decisions and responsibilities, and could thus manifest a substantial and improper influence upon him with respect to his official duties, the public official or employee is prohibited from holding such a private position. See Advisory Opinions No. 84-009, 85-006, 87-006, 88-002, and 90-002. R.C. 102.03 (E), as set forth above, prohibits a public official or employee from accepting or soliciting anything of value, including employment and payment therefor, that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties. See Advisory Opinion No. 87-006. More specifically, the Commission has stated that R.C. 102.03 (E) prohibits a public official or employee from accepting or soliciting anything of value, including private employment, from a party that is interested in matters before, regulated by, or doing or seeking to do business with the political subdivision with which he serves, or where there is otherwise a conflict of interest. See Advisory Opinions No. 88-002 and 89-010. A public official is required to perform her statutorily mandated duties in an objective and impartial manner. See Advisory Opinion No. 90-002. A township clerk who, in the performance of her official duties, would be required to decide matters affecting the pecuniary interests of her outside employer, would be subject to an inherent conflict of interest, such that her independence and objectivity of judgment could be impaired. See Advisory Opinion No. 90-008. A township clerk who is also employed by a public depository which holds township funds, would be prohibited, by R.C. 2921.42 (A)(1) and 102.03 (D), from performing a significant portion of her statutorily mandated duties regarding township deposits and investments, and would, therefore, be prohibited, by R.C. 102.03 (E), from holding that employment.

The Ethics Commission has held in certain circumstances that a public official or employee may withdraw from consideration of matters which would pose a conflict of interest due to the provisions of R.C. 102.03 and 2921.42. See Advisory Opinions No. 89-006, 90-002, and 92-004. There may be instances where a public official may delegate responsibility to a subordinate, with review of the subordinate's action by an official or entity independent of, or superior to, the official with the conflict of interest, or empower an authority who is independent of, or superior to, the official with the conflict of interest to approve the matter, if such transfer of authority is permitted under relevant statutes. See Advisory Opinion No. 92-004. However, the Commission has held that such a withdrawal may not interfere with the official's or employee's performance of her duties. Id. In this instance, the township clerk is an independent elected office holder and ultimately responsible for the actions of her office. See Advisory Opinion No. 92-004. The duties of a township clerk are, in some respects, ministerial. See, e.g., R.C. 135.14, 135.15, and 135.20. See also Ohio Op. Att'y Gen. No. 87-085. However, she is the ultimate authority for performing those duties. Furthermore, in addition to the performance of those ministerial duties, the clerk exercises substantial discretion under the Uniform Depository Act. See, e.g., R.C. 135.09, 135.14, 135.17, and 135.18. It would not be possible for her to withdraw from performing the actions and decisions statutorily imposed upon her office and transfer that authority to another party. See Advisory Opinion No. 92-004. It is apparent that a clerk who is employed by a township depository would be unable to comply with R.C. 2921.42 (A)(1) and 102.03 (D). Id. Therefore, it is the opinion of the Ethics Commission that a township clerk would be prohibited, by R.C. 2921.42 (A)(1), and R.C. 102.03 (D) and (E), from also holding the position of employee of a public depository receiving township funds, even though she would not be considered to have an "interest" in those township deposits, for purposes of R.C. 2921.42 (A)(4), pursuant to R.C. 135.11. See generally Advisory Opinion No. 91-001. In response to your initial question, an individual would be prohibited by the Ohio Ethics Law and related statutes from serving both as township clerk and as an employee of a bank which is a depository of township funds.

TOWNSHIP TRUSTEE

You have also asked if a township trustee is prohibited, by the Ohio Ethics Law and related statutes, from serving as a member of the board of directors of a financial institution which is a depository of township funds.

As stated above, R.C. 135.11 provides that a director of a public depository will not be deemed to have an "interest" in the deposits of the bank for purposes of "any law of this state prohibiting an officer of . . . any subdivision from being interested in any contract of . . . the subdivision." Therefore, the bank director does not have an interest in township deposits made to the bank, and R.C. 2921.42 (A)(4) would not prohibit a township trustee from serving on the board of directors of a township depository. See R.C. 2921.42 (A)(4) and 135.11 (discussed above). However, as discussed above, R. C. 135.11 does not provide an exemption to other provisions of the Ohio Ethics Law.

Division (D) of Section 102.03 of the Revised Code, set forth above, prohibits a public official or employee from using the authority or influence of his office or employment to secure anything of value if the thing of value could manifest a substantial and improper influence upon

him with respect to his duties. A township trustee is a "public official or employee" for purposes of R.C. 102.03. See R.C. 102.01 (B) and (C); Advisory Opinion No. 91-001.

As discussed above, R.C. 135.11 does not provide an exemption to R.C. 102.03 (D). Although the Uniform Depository Act provides that an officer, director, stockholder, employee, or owner of any interest in a public depository is not deemed to have an interest in the deposits of public funds (See R.C. 135.11 and 135.38), there may still be conflicts under R.C. 102.03 (D) if certain public officials and employees hold the specified positions with a public depository.

As discussed above, R.C. 102.03 (D) prohibits a public official from using the authority or influence of his office to secure anything of value for another person or entity if the relationship between the official and that person or entity could impair the official's objectivity and independence of judgment with regard to matters that affect that party. See Advisory Opinions No. 88-004, 88-005, 89-005, and 91-001. The Ethics Commission has stated that R.C. 102.03 (D) prohibits a public official from participating in deliberations, voting, or otherwise using his position with regard to the interests of an organization where he is an officer or board member of the organization, and accordingly has a fiduciary relationship with the organization. See Advisory Opinion No. 89-005. See generally R.C. 102.03 (J). As a member of the board of directors of a bank, the township trustee has a fiduciary relationship with that bank. See generally R.C. 1115.04 (each director of a bank must take an oath to diligently and honestly perform his duties); R.C. 1115.06 (providing for the personal and individual liability of bank directors for any knowing violations of the banking law). Therefore, R.C. 102.03 (D) prohibits a township trustee from voting, recommending, discussing, deliberating, formally or informally lobbying, or otherwise using the authority or influence of his office in any way with regard to the interests of the bank of which he is a director.

Also relevant to this discussion is R.C. 2921.42 (A)(1). Pursuant to R.C. 135.11, a township trustee who is also a director of a bank which receives township deposits is not considered to have an interest in the deposit of township funds. (See discussion above.) However, as discussed above, the bank itself does have an interest in the deposits made to the bank. See generally Advisory Opinion No. 84-008. Division (A)(1) of R.C. 2921.42, as set forth above, provides that no public official shall knowingly authorize, or use the authority or influence of his office to secure authorization of, a public contract in which he, a member of his family, or any of his business associates has an interest. In the situation you have described, the township trustee is a member of the board of directors of a bank. R.C. 135.11 does not provide an exemption to R.C. 2921.42 (A)(1) with respect to the interests of a public official's business associates. Therefore, R.C. 2921.42 (A)(1) would prohibit a township trustee from authorizing the deposit of township funds, or voting upon, discussing, recommending, or otherwise using his authority or influence as township trustee, formally or informally, to secure the deposit of township funds, with a bank which he serves as director. See Advisory Opinion No. 88-008.

The duties of the board of township trustees are generally set forth in Chapter 505. of the Ohio Revised Code. However, in R.C. Chapter 135., the Uniform Depository Act, the legislature assigns other duties, concerning the deposit and investment of township funds, to the board of township trustees. The board of township trustees is considered the "governing board" for the township for purposes of the Uniform Depository Law. See R.C. 135.01 (D). Section 135.04 of

the Revised Code provides that the board of township trustees shall award the active deposit of public money to eligible institutions in accordance with the Uniform Depository Law. See R.C. 135.04 (D). See also R.C. 135.04 (H) (setting forth the proportions of awards to eligible financial institutions). R.C. 135.04 (E) and (F) provides that the board of township trustees may, under certain circumstances, designate one or more financial institutions located outside the township as a public depository of inactive or interim deposits. R.C. 135.04 (G) empowers a board of township trustees to designate one or more minority banks, as defined in the statute, as public depositories of its inactive, interim, or active deposits of public money. R.C. 135.05 provides that each board of township trustees shall, on a biennial basis, estimate the aggregate maximum amount of public moneys subject to its control to be awarded and on deposit as inactive deposits. R.C. 135.07 empowers the board of township trustees to award the inactive deposits of public money subject to its control to the institution or institutions offering to pay the highest rate of interest. If more than one institution offers to pay the same rate of interest, the board of township trustees shall divide the deposit of inactive funds among those institutions, in amounts proportionate to the institutions' capital funds. See R.C. 135.07. R.C. 135.09 provides that the board of township trustees or clerk may award interim deposits as interim moneys become available to the eligible institution which offers to pay the highest permissible rate of interest on interim deposits. R.C. 135.12 provides that the board of township trustees shall meet on a biennial basis to designate the public depositories who shall be eligible to receive deposits of township funds, and shall award township money to and among those depositories. R.C. 135.14 empowers the clerk or board of township trustees of a township to invest interim moneys, so long as the investments will mature or be redeemable within two years from the date of purchase and to enter into repurchase agreements. The treasurer and board of township trustees are limited to specified classifications of obligations for investment under R.C. 135.14. The treasurer or board of township trustees may enter into repurchase agreements with any eligible institution. See R.C. 135.14. When the treasurer designates deposits as interim deposits, and the board of township trustees does not concur with the designation, or with investments or deposits made under R.C. 135.14, the board of township trustees is empowered to order the treasurer to sell or liquidate the investments or deposits. Id. Neither the board of township trustees nor the clerk shall be held accountable for any loss which is occasioned by the sale or liquidation of investments or deposits at prices lower than their cost. Id.

R.C. 135.15 provides that the board of township trustees shall instruct the clerk to sell interim investments or deposits, or transfer inactive deposits to active deposits, if the board of township trustees determines that the amount of active deposits is insufficient to meet the anticipated demand on such deposits. Under certain circumstances, the board of township trustees may make provisions for the exchange and release of securities and the substitution of other securities under those circumstances. See R.C. 135.18 (E). If a public depository makes a substitution or exchange of securities deposited with a trustee for safekeeping, as permitted by R.C. 135.18 (G), the depository must notify the board of township trustees. See R.C. 135.18 (H). Any public depository which feels that it has been the subject of discrimination against it and in favor of another depository may complain to the board of township trustees, which shall hear the complaint after giving one week's notice to the clerk and the other depositories named in the complaint. See R.C. 135.20. If the board of township trustees finds that such discrimination has occurred, it shall direct the clerk to transfer funds as specified among the depositories. See R.C. 135.20. The board of township trustees also has the authority to deposit subdivision funds in the

Ohio subdivision's fund in the Treasurer of State's office. See R.C. 135.45. The board of township trustees may deposit bond proceeds in one of two investment pools established in the Treasurer of State's office. See R.C. 135.46. The board of township trustees also has numerous duties regarding defaulting depositories. See R.C. 135.51-.54.

The governing board of a subdivision, including the board of trustees of a township, clearly has significant authority regarding authorization of deposits and the investment of funds of that subdivision. As stated above, R.C. 2921.42 (A)(1) prohibits the township trustee from voting upon, discussing, recommending, deciding, formally or informally lobbying, or otherwise using his authority or influence as township trustee to secure the deposit of township funds with the bank he serves as director. Division (D) of R.C. 102.03 prohibits a township trustee from using his official authority or influence with regard to any matter that would affect the interests of a bank he serves as director. See generally Advisory Opinions No. 88-005 and 90-008. Therefore, R.C. 2921.42 (A)(1) and 102.03 (D) prohibit the township trustee from authorizing, voting, discussing, deliberating, recommending, or otherwise using the authority or influence of his office, formally or informally, in any way with regard to the interests of the bank of which he is a director. The trustee is also prohibited from using his authority or influence with regard to the other officials, including the clerk, or the employees, of the township in any way with regard to the interests of the bank he serves as a director. See Advisory Opinion No. 90-003. The trustee is prohibited, by R.C. 2921.42 (A)(1) and 102.03 (D), from exercising any of the trustees' enumerated statutory duties relating to public depositories, in any way, to secure or administer the deposit of township funds in the bank of which he is a director. Therefore, a township trustee is prohibited from serving as a director of a depository of township funds, unless he withdraws from participation in all decisions and proceedings of the township relating to the investment and administration of the deposits of township funds. See generally Advisory Opinion No. 89-006. It should be noted that, unlike the township clerk, the township trustee can abstain from the proceedings of the township which affect the bank he serves as a director, since the board of township trustees is the governmental authority empowered by the Uniform Depository Act to act thereunder. The other township trustees can act on behalf of the township if one trustee is unable to participate. If a township trustee does serve as a director of a bank which is a depository of township funds, he must abstain from participating in all matters which would affect the interests of the bank. See generally R.C. 1115.021 (This section provides that no member of a board of directors of a bank may have been convicted of or pleaded guilty to any violation of R.C. Section 2921.42 that is a felony. A violation of R.C. 2921.42 (A)(1) is a fourth degree felony. If, during his term of office, a director is convicted of or pleads guilty to a violation of R.C. 2921.42 (A)(1), the director forfeits his directorship.).

You should also note R.C. 2921.42 (A)(3), set forth fully above, which provides that no public official shall during his term of office and for one year thereafter, occupy a position of profit in a contract which was awarded or approved by him, or by a legislative body of which he is a member, unless the contract was competitively bid and was the lowest and best bid. A public contract is considered to be "authorized" by an official or board if the contract could not have been awarded without the approval of the official or board. See Advisory Opinion No. 87-004. The board of township trustees, as the governing board for purposes of the Uniform Depository Act, does have the authority to make deposits of township funds, which are public contracts. See discussion above. The Ethics Commission has held that a public official will be deemed to profit

from a public contract that is awarded to the company with which he serves where, for example, the official's fee or compensation would be paid from, or dependent upon, the contract, or the official would receive some other profit or benefit from the contract. See Advisory Opinion No. 88-008. The township trustee is subject to the prohibition of R.C. 2921.42 (A)(3) regardless of whether he participated in the discussions or votes on the award of township funds as a trustee. See R.C. 2921.42 (A)(1) (set forth above). Therefore, R.C. 2921.42 (A)(3) prohibits a township trustee from profiting from any deposit of township funds made to the bank which he serves as a director, unless the deposits are made pursuant to competitive bidding and are awarded to the bank which will pay the highest interest rate as provided by the Uniform Depository Act. See, e.g., R.C. 135.07.

Division (B) of Section 102.03 provides:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

R.C. 102.03 (B) prohibits a township official from disclosing confidential information to the public depository, its employees, or any other party, or from using such confidential information, without appropriate authorization. No time limitation exists for this prohibition and it is effective while the official serves in office and after he leaves office. See Advisory Opinion No. 88-009.

This advisory opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules.

Therefore, it is opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Pursuant to Section 135.11 of the Ohio Revised Code, an individual who is an officer, director, stockholder, employee, or owner of any interest in a public depository receiving inactive, active, or interim township deposits is not considered to have an "interest" in the deposit of township funds in the depository such that he would be prohibited by Division (A)(4) of Section 2921.42 of the Revised Code from serving as township clerk or township trustee; (2) Division (A)(1) of Section 2921.42 and Division (D) of Section 102.03 of the Revised Code prohibit a township clerk, who is also an employee of a bank which is a township depository, from authorizing, or using her authority or influence to secure, the deposit of township funds with the bank that employs her, or otherwise performing any of the duties assigned to the township clerk pursuant to the Uniform Depository Act, with respect to the bank that employs her; (3) A township clerk is prohibited, by the Ohio Ethics Law and related statutes, from also holding the position of employee of a public depository receiving township funds, even though the clerk would not be considered to have an "interest" in those township deposits pursuant to Section 135.11 of the Revised Code; (4) Division (A)(1) of Section 2921.42 and Division (D) of Section 102.03 of the

Revised Code prohibit a township trustee, who is also a member of the board of directors of a bank that is a township depository, from authorizing, or using his authority or influence to secure, the deposit of township funds with the bank he serves, or otherwise performing any of the duties assigned to the township trustee pursuant to the Uniform Depository Act, with respect to the bank he serves; and (5) The Ohio Ethics Law and related statutes do not, per se, prohibit a township trustee from also holding the position of officer, director, stockholder, employee, or owner of any interest in a public depository receiving township funds, so long as the trustee abstains from any participation as a township trustee in matters affecting the interests of the bank.

Marquerite B. Lehner

Marquerite B. Lehner, Chair
Ohio Ethics Commission