



OHIO ETHICS COMMISSION

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November 3, 1997

Informal Opinion 1997-INF-1103-2

The Honorable Thomas C. Jenkins
Morgan County Sheriff

Dear Sheriff Jenkins:

In your letter to the Ethics Commission, you have asked whether the Ohio Ethics Law and related statutes prohibit your son from continuing his employment as a deputy sheriff with the Morgan County Sheriff's Office and being provided with a "road assignment" in light of the fact that he was appointed and commissioned a deputy sheriff by your predecessor.

As explained below, the Ethics Law and related statutes do not prohibit your son from continuing his employment as a deputy sheriff with the Morgan County Sheriff's Office and being provided with a "road assignment" because continuing his employment as a deputy sheriff and being provided with a "road assignment" neither constitutes a material change to his existing public contract that employs him as a deputy sheriff nor provides him with a definite and particular personal financial benefit that is not uniform and identical to all other deputies who are similarly situated.

Facts

You state that you were elected Sheriff of Morgan County for a term beginning January 3, 1997. You have supplied documentation showing that on January 4, 1994, your predecessor in office, Greg Ryan, appointed and commissioned your son, Tom Jenkins II, as a deputy sheriff in compliance with R.C. 311.04 and 325.17. You also supplied documentation that your son successfully completed the Ohio Peace Officer Basic Training Program on February 25, 1994. You have further provided documentation that, prior to your taking office as Sheriff, your son passed all firearms training and qualifications standards that are required for a deputy sheriff to carry a weapon on and off duty.

You state that your predecessor hired your son with the intention of designating him to serve as a "road deputy" when a road assignment became available. But, because a road assignment was not available when your son received his appointment and commission, your predecessor assigned your son to work full-time as a jailor. However, you state that, in addition to serving as a jailor, your son performed duties as an appointed and commissioned deputy, including enforcing laws, making arrests, investigating crimes, filing reports, filing charges, and testifying as a deputy sheriff. Furthermore, you state that your predecessor issued your son a deputy sheriff's uniform instead of a corrections officer's uniform that was worn by the other jailors. You state that

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your son's job description and duties as a deputy were not an issue, as it may have been within other sheriff's departments, because, in your sheriff's office, there was no collective bargaining agreement at the time.

In a subsequent telephone conversation, you have stated that in June 1997, a collective bargaining agreement became effective. The collective bargaining agreement establishes a compensation schedule and the terms and conditions of employment for employees of the sheriff's office who are covered by the contract. You stated that the collective bargaining agreement establishes the hourly compensation of a probationary deputy in the road division at nine dollars and that of a probationary deputy in the dispatchers and jailors division at eight dollars an hour. You stated that the compensation for each division rises in proportion with seniority.

R.C. 2921.42(A)(1) - Prohibition Against Securing Public Employment for Family Members

In order to address your question, it is first necessary to discern how the Ohio Ethics Law and related statutes affect a public official who is related to an employee within his public agency.

Division (A)(1) of Section 2921.42 of the Revised Code reads as follows:

- (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 an elected or appointed officer of a political subdivision of the state. A sheriff is an elected officer of the county whose office is created by legislative enactment. R.C. 311.01. Thus, a sheriff is a "public official" who is subject to the prohibitions of R.C. 2921.42. Ohio Ethics Commission Advisory Opinion No. 85-015.

The term "public contract" is defined, for purposes of R.C. 2921.42, in 2921.42(G)(1)(a) to include the employment of an individual by a political subdivision, or any of its agencies or instrumentalities. Thus, an employment relationship between a sheriff and an employee of the sheriff's office is a "public contract" for purposes of R.C. 2921.42. Walsh v. Bollas, 82 Ohio App. 3d 588 (Lake County 1992); Adv. Op. No. 85-015 (R.C. 2921.42(A)(1) prohibits a county sheriff from authorizing a contract for employment for a family member as an employee within the sheriff's office).

You state that there was no collective bargaining agreement in force when your predecessor hired your son. This fact does not affect the prohibition imposed by R.C. 2921.42(A)(1). See Walsh. R.C. 2921.42(A)(1) is a general provision of state criminal law that does not distinguish between public employees who are hired pursuant to a collective bargaining agreement, and those who are not, for purposes of its application to an employment relationship between a political subdivision and an employee under the definition of a "public contract." Adv. Ops. No. 82-003, 89-005, and 92-012. See also Adv. Op. No. 90-010 (R.C. 2921.42 (E)(1) does not limit the definition of a public contract to a specific manner or means by which the State or a political subdivision acquires or purchases services).

R.C. 2921.42(A)(1) limits the exercise of a public official's authority with regard to securing public employment for a member of the public official's family. Adv. Ops. No. 82-003, 86-010, and 90-010. For purposes of R.C. 2921.42, a family member includes a spouse, children, whether dependent or not, parents, grandparents, grandchildren, and siblings. Adv. Ops. No. 80-001 and 85-015. The term also includes other persons related by blood or marriage and residing in the same household. Id.

The Ethics Commission explained the prohibition imposed by R.C. 2921.42 (A)(1) in Advisory Opinion No. 90-010:

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. . . . 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. (Emphasis in original).

R.C. 2921.42 (A)(1) prohibits a public official from "authorizing" the employment of a family member or employing the "authority or influence of his office" to secure authorization of the employment of a family member. See Adv. Ops. No. 85-015, 86-010, and 90-010. See also Adv. Op. No. 91-007.

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 official's approval. Adv. Ops. No. 87-004, 88-008, and 92-008. Accordingly, R.C. 2921.42 (A)(1) prohibits a public official from voting or participating in any way in his public agency's decision-making process authorizing or approving employment for a member of his family. Adv. Ops. No. 82-003, 89-005, and 90-010.

Also, R.C. 2921.42 (A)(1) prohibits a public official from using his "authority or influence" to secure the authorization of a public contract in which a member of his family has an interest. Adv. Ops. No. 91-007 and 92-012. The words "authority or influence" specifically characterize a broader range of activity than that described by the word "authorize." Adv. Op. No. 92-012. Therefore, R.C. 2921.42 (A)(1), by prohibiting a public official from employing the "authority or influence of his office," prohibits a public official from exercising the power and influence inherent in the position and prestige of his public office or employment to affect the decision-making process regarding the employment of a family member even if the official abstains from voting and participating in official proceedings. Id.

The prohibition against a public official "authorizing" the employment of a family member or employing the "authority or influence of his office" to secure authorization of the employment of a family member extends beyond the initial hiring of a family member and prohibits a public official from participating in any matter or decision that would affect the individual employment contract for a member of his family even if the prohibitions imposed by R.C. 2921.42 (A)(1) were inapplicable at the time the initial hiring decision was made. Adv. Ops. No. 82-003, 89-005, and 92-012. These matters and decisions include, but are not limited to, the authorization or approval of payments to the family member for services rendered and the renewal, modification, termination, or renegotiation of the family member's contract for public employment. Adv. Op. 92-012. If it were held that the prohibitions imposed by R.C. 2921.42 (A)(1) applied only to authorizing or securing a family member's initial employment, then the prohibitions could be effectively circumvented where a public official did not participate in the initial hiring decision, but subsequent to the initial employment, he exercised his discretionary, decision-making authority to authorize or approve payments to a family member for services rendered, or advocated, recommended, voted upon, participated in discussions or deliberations regarding such matters as pay raises, additional benefits, or other modifications under the public contract. Id. Cf. Adv. Op. No. 88-008 (the Ethics Commission has held that for purposes of the "continuing course of dealing" exception of R.C. 2921.42 (C)(2), material changes to a public contract, such as modifications or alterations, are not allowed by the exception because they transform the original understanding of the parties).

As stated above, your predecessor's appointment and commission of your son as a deputy sheriff predated your election to the office of sheriff by three years. Thus, you could not have authorized or employed the "authority or influence of your office" to secure the employment of your son because you were not a public official at the time of your son's appointment and commission as a deputy sheriff. Thus, the prohibition that R.C. 2921.42(A)(1) imposed upon you does not preclude your son from continuing his present employment as a sheriff's deputy.

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As stated above, since June 1997, a collective bargaining agreement has established a compensation schedule and the terms and conditions of employment for employees of the sheriff's office who are subject to its terms. Thus, the payments that your son receives for services that he renders as a deputy is not dependent upon your discretionary, decision-making authority, rather it is determined by a collective bargaining agreement that is binding upon all individuals who are subject to its terms.

The issue becomes whether R.C. 2921.42 (A)(1) prohibits you from providing your son with a "road assignment," as some material change to his existing public contract.

As stated above, your predecessor in office, Greg Ryan, appointed and commissioned your son, Tom Jenkins II, as a deputy sheriff with the intention of designating him to serve as a "road deputy" when a road assignment became available. Because a road assignment was not available when your son received his appointment and commission, your predecessor assigned your son to work full-time as a jailor. As also stated above, although serving as a jailor, your son was issued a deputy sheriff's uniform instead of a corrections officer's uniform that was worn by the other jailors, and performed duties as a deputy, including enforcing laws, making arrests, investigating crimes, filing reports, filing charges, and testifying as a deputy sheriff.

R.C. 341.05(A) requires a sheriff to assign sufficient staff to ensure the safe and secure operation of the county jail. R.C. 341.05(A)(2) authorizes a sheriff to employ "[j]ail officers, including civilian jail officers who are not sheriff's deputies, to conduct security duties." R.C. 341.05(A)(2) requires that civilian jail officers wear uniforms that are "differentiated clearly from the uniforms worn by sheriff's deputies." R.C. 311.281 prohibits anyone other than a sheriff or a deputy sheriff from wearing the badge or uniform for sheriffs and their deputies.

Based upon your representation, and as stated above, your predecessor appointed and commissioned your son as a "deputy sheriff." Since his appointment and commission, he has continuously worn the uniform of a deputy sheriff, not a civilian jailor.

Also, R.C. 325.17 authorizes a sheriff to appoint and employ "the necessary deputies, assistants, clerks, bookkeepers, or other employees" for his office. See Att'y Gen. Op. No. 67-123 (a sheriff may employ general office personnel without formally deputizing such employees). R.C. 311.04 authorizes a sheriff to appoint, in writing, one or more deputies. It must be noted that neither R.C. 311.04 nor 325.17 refer to "road deputies" or any other classification of deputy.

The Attorney General, in Att'y Gen. Adv. Op. No. 91-037, examined the differences between a "regular deputy sheriff" and a "special deputy sheriff." Attorney General Advisory Opinion No. 91-037 states in pertinent part:

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“Regular deputy sheriffs,” generally, are those deputy sheriffs assigned to full-time duty under the supervision and control of the county sheriff and paid compensation by the county by the sheriff.

“Special deputy sheriffs,” in contrast are those deputies authorized to perform only some of the duties of the sheriff, or appointed by the sheriff without being immediately assigned to perform any of his duties, but subject to duty from time to time as the sheriff in his discretion may determine. (Citations omitted).

However, while there is a legal distinction between jailors and deputies, and “regular” and “special” deputy sheriffs, the Revised Code does not provide distinctions within the class of deputy sheriffs who are appointed in compliance with R.C. 311.04 and 325.17. It is apparent that a change in classification from a civilian jailor to a deputy, or from a “special” to “regular” deputy, would result in a material modification of the original understanding between the appointing authority and the employee of the sheriff’s office. However, because R.C. 311.04 and 325.17 govern the appointment of deputy sheriffs regardless of the duties that the sheriff assigns the deputies to perform, a reassignment of your son’s duties is not a material change to the initial public contract for employment between your predecessor and your son that would constitute a use of your authority or influence that is prohibited by R.C. 2921.42 (A)(1). The difference in compensation between a deputy in the road division and a deputy in the dispatcher or jailor division that is established under the collective bargaining agreement is not the same as the difference in classification between a regular appointed and commissioned deputy and either a civilian jailor or “special” deputy. Thus, a change in the duties of an employee, within the class of employees to which he was initially hired, that affects his compensation does not constitute a material change to the initial public contract because it does not modify the original understanding between the appointing authority and the employee.

Accordingly, in the instant situation, R.C. 2921.42(A)(1) does not prohibit your son from continuing his employment as a deputy sheriff with the Morgan County Sheriff’s Office and being provided with a “road assignment” in light of the fact that he was appointed and commissioned a deputy sheriff by your predecessor.

Prohibition Imposed by R.C. 102.03 (D) - Securing a Thing of Value for a Family Member

Your attention is also directed to R.C. 102.03 (D), which provides:

No public official or employee shall use or authorize the use of the authority or influence of 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

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improper influence upon the public official or employee with respect to that person's duties.

The term "public official or employee" is defined for purposes of R.C. 102.03 (D) to include any person who is elected or appointed to an office of any instrumentality of a county. R.C. 102.01 (B) and (C). A county sheriff is a "public official or employee" as defined for purposes of R.C. 102.03, and is, therefore, subject to the prohibitions of that section. Adv. Op. No. 92-004.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money, a promise of future employment, and every other thing of value. R.C. 102.01(G). A public employee's continued employment and the compensation received therefor fall within the definition of "anything of value." Adv. Op. No. 92-012.

The Ethics Commission explained in Advisory Opinion No. 92-010 that R.C. 102.03(D) prohibits a public official from participating, formally or informally, in any matter that directly affects the private pecuniary interests of the official's family member where the official's objectivity and independence of judgment could be impaired. See also Adv. Ops. No. 90-004, 91-004, and 92-012. Therefore, R.C. 102.03 (D), as well as R.C. 2921.42 (A)(1), prohibits a public official from using his authority or influence, formally or informally, with respect to any matter that would affect a family member's individual employment relationship by providing a definite and particular personal financial benefit to his family member that is not uniform and identical to all other employees who are similarly situated. Adv. Op. No. 90-012.

As stated above, your predecessor's appointment and commission of your son as a deputy sheriff predated your election to the office of sheriff by three years. Thus, you could not have used or authorized the use of the authority or influence of office to secure the employment of your son as a deputy because you were not a public official at the time of your son's appointment and commission as a deputy sheriff. Thus, the prohibition that R.C. 102.03(D) imposes upon you does not preclude your son from continuing his present employment as a sheriff's deputy.

The issue becomes whether R.C. 102.03(D) prohibits you from providing your son with a "road assignment."

R.C. 102.03(D) prohibits you from using your authority or influence, formally or informally, with respect to any matter involving your son's individual employment relationship that provides him with a definite and direct personal financial benefit that is not uniform and identical to all other employees of the sheriff's department who are similarly situated. As stated above, since June 1997, a collective bargaining agreement has established a compensation schedule and the terms and conditions of employment for employees of the sheriff's office who are subject to its terms. Therefore, the payments that your son receives for services that he renders as a deputy is not

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dependent upon your discretionary, decision-making authority, rather it is determined by a collective bargaining agreement that is binding upon all employees who are subject to its terms.

As explained above, while there is a legal distinction between jailors and deputies, and "regular" and "special" deputy sheriffs, the Revised Code does not provide distinctions within the class of deputy sheriffs who are appointed in compliance with R.C. 311.04 and 325.17 that are based upon the duties that they are assigned to perform for the sheriff. Because R.C. 311.04 and 325.17 govern the appointment of deputy sheriffs, regardless of the duties that the sheriff assigns the deputies to perform, and the fact that the compensation of a deputy in the road division and a deputy in the dispatcher or jailor division is established under the collective bargaining agreement, you are not prohibited from providing your son with a "road assignment" so long as he does not receive a definite and particular personal financial benefit that is not uniform and identical to all other deputies who are similarly situated.

Conclusion

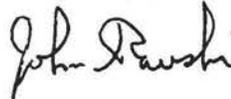
As explained above, the Ethics Law and related statutes do not prohibit your son from continuing his employment as a deputy sheriff with the Morgan County Sheriff's Office and being provided with a "road assignment" because continuing his employment as a deputy sheriff and being provided with a "road assignment" neither constitutes a material change to his existing public contract that employs him as a deputy sheriff nor provides him with a definite and particular personal financial benefit that is not uniform and identical to all other deputies who are similarly situated.

As a final matter, it must be noted that this advisory opinion addresses a unique and unusual situation that arose due to your being elected to the Office of Morgan County Sheriff after your predecessor in office employed your son as a deputy sheriff. The conclusion of this advisory opinion is based and dependent entirely on the information that you have provided to the Commission. It is limited to addressing whether the Ohio Ethics Law and related statutes prohibit your son from continuing his employment as a deputy sheriff with the Morgan County Sheriff's Office and being provided with a "road assignment." Nothing in this advisory opinion should be construed as relieving you from the restrictions described above that prohibit you from participating in matters regarding his employment with your Office that would constitute a material change to his existing public employment as a deputy sheriff and/or provide him with a definite and particular personal financial benefit that is not uniform and identical to all other deputies who are similarly situated. You should seek the advice of the Ohio Ethics Commission if, in the future, other matters arise concerning changes in your son's employment.

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This advisory opinion was approved by the Ethics Commission at its meeting on November 3, 1997. This opinion is based on the facts presented, and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, 2921.43 of the Revised Code. The Commission apologizes for the delay in responding to your request, and regrets any inconvenience this delay may have caused. Please do not hesitate to contact this Office if you have any further questions or desire any additional information.

Very truly yours,

A handwritten signature in cursive script that reads "John Rawski".

John Rawski
Staff Attorney