

OHIO ETHICS COMMISSION

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Informal Opinion 1999-INF-0219-1

Paul N. McKinley, Esquire
Director of Law
City of Kenton
[REDACTED]

Dear Mr. McKinley:

In your letter to the Ethics Commission you ask whether the Ohio Ethics Law and related statutes prohibit a township trustee from serving as a city fire captain where the township and city have entered into a contract whereby the city provides fire protection services to the township.

As explained below, R.C. 2921.42(A)(4) prohibits a township trustee from serving as a city fire captain where the township and city have entered into a contract whereby the city provides fire protection services to the township. R.C. 102.03(D) and R.C. 2921.42(A)(1) prohibit a township trustee who is employed by a city fire department from voting, deliberating, participating in discussions, or otherwise using the authority or influence of his office, either formally or informally, with regard to matters that affect the city, including the contract for fire protection services between the township and the city.

Facts

You state that the township receives fire protection services from the city fire department. A member of the board of trustees of the township is a paid employee of the city fire department. You state that if the trustee would be promoted to the position of fire captain, then his authority and responsibility would be increased. You have provided a job description of the fire captain position that states that the fire captain supervises firefighters in the performance of their duties, directs day-to-day operations during his assigned shift, plans and assigns work, and assumes command in the absence of the fire chief or assistant fire chief. You are concerned that this increase in authority and responsibility could create a conflict of interest.

In addition to issues arising under the Ohio Ethics Law and related statutes, your question implicates the issue of "compatibility" of public positions—that is, whether one person may simultaneously hold two public positions. See Ohio Op. Att'y Gen. No. 86-030 (the positions of township trustee and village fire chief are incompatible if the township and village have entered into a contract whereby the village provides fire protection services to the township). The Attorney General has developed a seven-question format for determining whether public positions are compatible. Ohio Op. Att'y Gen. No. 79-111. An advisory opinion rendered by the Ethics Commission interpreting Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code is not the same as a determination of compatibility. Ohio Ethics Commission Advisory Opinion No. 91-002. See also Ohio Op. Att'y Gen. No. 90-037. As the city law director, you would be the appropriate person to determine whether an individual who serves as a township trustee may simultaneously be employed as a city fire captain if the township contracts with the city to provide fire protection services to the township. Because one of the public positions involves a township office, you may wish to consult the prosecutor of the county in which the township is located. R.C. 309.09(B) (the county prosecuting attorney is the legal advisor for all township officers).

Having an Interest in a Public Contract—R.C. 2921.42(A)(4)

Your question implicates R.C. 2921.42(A)(4), which states that no public official shall:

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 for purposes of Section 2921.42 in Section 2921.01(A) to include any elected or appointed officer of a political subdivision. A member of a board of township trustees is a "public official" for purposes of R.C. 2921.42 and subject to its prohibitions. Adv. Ops. No. 84-003, 84-006, and 91-001.

The term "public contract" is defined in R.C. 2921.42(G)(1) to include "a contract for the purchase or acquisition, of property or services by or for the use of . . . [any] political subdivision." A board of township trustees is statutorily authorized to provide for the township's fire protection by contracting with a political subdivision. R.C. 9.60(B) and (C). Therefore, a contract under which a city fire department provides fire protection services for a township is a public contract for purposes of R.C. 2921.42 since it is a contract for the purchase of a service by and for the use of a political subdivision. See generally Adv. Op. No. 91-001.

R.C. 2921.42(A)(4) prohibits a public official of a political subdivision from having an interest in a public contract entered into by or for the use of that political subdivision. Adv. Ops. No. 78-002 and 87-002. See also R.C. 511.13 (prohibiting members of a board of township trustees and officers and employees thereof from being interested in township contracts). The issue becomes whether, for purposes of R.C. 2921.42(A)(4), the trustee who is employed by the city fire department would have an interest in a public contract with his own political subdivision if he were to be promoted to the position of fire captain.

Township Trustee Serving as Fire Captain—R.C. 2921.42(A)(4)

The Ethics Commission has consistently held that an interest which is prohibited under R.C. 2921.42 must be definite and direct, and may be either pecuniary or fiduciary in nature. Adv. Op. No. 81-008. The facts and circumstances of each particular situation determine whether a public official has an "interest" in a public contract with his own political subdivision. Adv. Op. No. 84-009.

The Commission has held that a mere employee generally is not deemed to have an "interest" in the contracts of his employer for purposes of R.C. 2921.42. Adv. Ops. No. 78-006 and 89-008. However, the Commission has held that an employee is deemed to have an interest in the contracts of his employer for purposes of R.C. 2921.42 where any of the following circumstances apply: (1) the employee has an ownership interest in, or is a director, trustee, or officer of, his employer; (2) he takes part in contract negotiations; (3) his salary is based on the proceeds of the contract; (4) he receives a share of the contract's proceeds in the form of a commission or fee; (5) his responsibilities as an employee include participation in the administration or execution of the contract or he serves in a management position with the responsibility to oversee execution or administration of the contract; (6) the establishment or operation of his employing agency is dependent upon receipt of the contract; or, (7) his tenure is dependent upon his employer receiving the award of the contract. Adv. Ops. No. 89-006, 89-011, and 91-001. See also Adv. Ops. No. 78-006, 81-008, 82-003, and 86-005.

The only criterion listed above that would be applicable in the instant situation is the fifth. As stated above, the trustee presently is an employee of the city fire department. It is apparent that, as an employee of the city fire department, the trustee engages in fire fighting activities within the township. However, as a mere employee, the trustee's authority and responsibility regarding the administration or execution of the contract between the city and township is limited and would not exceed that of any other non-supervisory employee. Therefore, the trustee's mere engagement in fire fighting activities within the township would not constitute participation in the administration or execution of the contract between the city fire department and the township. Accordingly, the trustee, in his current position as an employee of the city fire department, does not have a definite and direct interest in the city's contract with the township under the criteria listed above.

However, the issue remains whether the trustee would have a definite and direct interest in the city's contract with the township under the criteria listed above if he were promoted to the position of fire captain. As stated above, if the trustee would be promoted to the position of fire captain, then his authority and responsibility would entail supervision of firefighters in the performance of their duties, directing day-to-day operations during his assigned shift, planning and assigning work, and assuming command in the absence of the fire chief or assistant fire chief.

As fire captain, the trustee would have the authority and responsibility that would constitute participation in the administration or execution of the contract between the city fire department and the township. In addition, if he were to be promoted to the position of fire captain, then he would meet more than one of the previously listed criteria, because he would serve as an officer

of his employer. Therefore, in such a situation, the trustee would be deemed to have an interest in a public contract with his employing city for purposes of R.C. 2921.42(A)(4).

This determination is consistent with the Attorney General's holding in Ohio Op. Att'y Gen. No. 86-030, which held that the positions of township trustee and village fire chief were incompatible where the township and village have entered into a contract whereby the village provides fire protection services to the township. In Ohio Op. Att'y Gen. No. 86-030, the Attorney General held:

If one person served as trustee of a township and fire chief of a village which contracted for fire protection, he would be in a position as fire chief to control the fire protection services rendered and in a position as township trustee to pass upon the adequacy of the services delivered. An individual who served in both positions would clearly be subject to a conflict of interest.

The Attorney General also stated in a footnote of the same opinion:

If one person served as both township trustee and village fire chief, and the township and village were to contract for fire protection services, the individual could arguably be deemed to have an unlawful interest in a public contract in violation of R.C. 2921.42.

The Attorney General suggested that the Ethics Commission be contacted for further guidance on matters pertaining to the statutes under the jurisdiction of the Ethics Commission.

While Ohio Op. Att'y Gen. No. 86-030 addresses the positions of township trustee and municipal fire chief rather than fire captain, the same analysis would be applicable in light of the fact that the fire captain's authority and responsibility would entail supervision of firefighters in the performance of their duties, directing day-to-day operations during his assigned shift, planning and assigning work, and assuming command in the absence of the fire chief or assistant fire chief.

Therefore, R.C. 2921.42(A)(4) prohibits a township trustee from serving as a city fire captain where the township contracts with the city to provide fire protection services to the township.

The prohibition of R.C. 2921.42(A)(4) as it restricts a township trustee serving as a firefighter must be examined in light of R.C. 505.011 which provides:

A member of a board of township trustees may be appointed as a volunteer fireman and in such capacity be considered an employee of the township, or he may be a member of a private fire company which has entered into an agreement to furnish fire protection for the township of which such member is a trustee; provided that such member shall not receive compensation for his services as a volunteer fireman.

In Advisory Opinion No. 91-001, the Ethics Commission held that the exemption provided by R.C. 505.011 enables a township trustee to serve as a full-time paid employee of a private fire company that is under contract to provide fire protection services to the township which he serves despite the prohibition of R.C. 2921.42(A)(4). See also Ohio Op. Att'y Gen. No. 90-037. The exception provided by R.C. 505.011, however, does not apply in the instant situation because the trustee is neither serving the township as a volunteer fireman nor as a member of a private fire company. Therefore, R.C. 2921.42(A)(4) prohibits a township trustee from serving as a city fire captain where the township contracts with the city to provide fire protection services to the township.

As stated above, R.C. 2921.42(A)(4) does not prohibit the trustee from serving as a mere employee of the city fire department, however, he is subject to the prohibitions imposed by R.C. 2921.42(A)(1) and R.C. 102.03(D). As explained below, R.C. 2921.42(A)(1) and R.C. 102.03(D) restrict his actions as a township trustee in matters affecting contractual relationships between the city and the township even if he is not promoted to the position of fire captain. Adv. Ops. No. 91-001 and 91-002. See also Ohio Ops. Att'y Gen. No. 86-030, 86-059, and 87-084.

Authorizing a Public Contract—R.C. 2921.42(A)(1)

Your attention is also directed to R.C. 2921.42(A)(1), which reads:

- (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.

R.C. 2921.42(A)(1) prohibits a public official from discussing, deliberating, voting, or otherwise using the authority or influence of his position, either formally or informally, to secure the authorization of a public contract in which he, a family member, or a business associate has an interest. Adv. Ops. No. 89-008 and 91-001. A public official's employer is considered to be his "business associate" for purposes of R.C. 2921.42(A)(1). Adv. Ops. No. 78-001, 83-002, 83-008, 89-006, and 89-008.

In the instant situation, the trustee is employed as a firefighter with the city that provides fire protection services to the township. The city is, therefore, the trustee's employer, and his business associate for purposes of R.C. 2921.42(A)(1). R.C. 2921.42(A)(1) would, as a result, prohibit the trustee from discussing, deliberating, voting, or otherwise using the authority or influence of his position as a member of the board of township trustees, either formally or informally, to secure, renew, modify, renegotiate, or otherwise authorize a contract under which his employing city would provide fire protection services to the township, and from signing warrants and checks to the city for services provided under the contract. Adv. Op No. 91-001. R.C. 2921.42(A)(1) also prohibits the trustee from acting in any other contractual relationship between the city and the township, even if the agreement does not involve fire protection services.

R.C. 102.03(D)—Securing Improper Things of Value

The trustee is also subject to Division (D) of Section 102.03 of the Revised Code, 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 improper influence upon the public official or employee with respect to that person's duties.

A "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 member of a board of township trustees. R.C. 102.01(B) and (C); Adv. Op. 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. R.C. 102.03(G). A definite and direct pecuniary benefit is considered to be a thing of value under R.C. 102.03(D). Adv. Ops. No. 79-008, 88-004, and 89-005. The consideration that the city receives from the township for providing fire protection services are things of value for purposes of R.C. 102.03(D).

Division (D) of Section 102.03 does not require that the thing of value be secured for the public official or employee himself. Adv. Ops. No. 88-004 and 91-002. The Ethics Commission has held that R.C. 102.03(D) prohibits a public official or employee from using the authority or influence of his office to secure anything of value for a party if that party's relationship with the official or employee could impair the official's or employee's objectivity and independence of judgment in performing his official duties. Adv. Ops. No. 88-005, 89-008, and 91-002. The Ethics 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 for his outside 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 a 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.

See also Adv. Ops. No. 88-005, 91-001, and 91-002.

The board of township trustees is empowered to decide matters that directly affect the township's contractual relationship with the city and its fire department. It is apparent that a decision by the board of township trustees to contract with a city with which one of the trustees is employed directly affects the interests of the trustee's employer, the city. Therefore, in the instant situation, the relationship between the township trustee and the city with which he is employed would be such that he could be subject to an impairment of his objectivity and

independence of judgment in deciding, as a trustee, matters relevant to the township's contractual relationship with the city and its fire department.

It is interesting to note that the Attorney General, in Ohio Op. Att'y Gen. No. 81-004, addressed the issue of whether a city auditor could serve as a city firefighter under common-law compatibility analysis and recognized that an impairment of the auditor's objectivity created a conflict of interest between the two positions. The Attorney General held in Ohio Op. Att'y Gen. No. 81-004:

If the city auditor were to serve as a firefighter, it would be impossible for him to carry out his duties as auditor with the requisite degree of objectivity. It is to be expected that the auditor would develop a sense of comradeship with his fellow firefighters, with whom he might be risking his life in emergency situations. This individual would, therefore, be subject to divided loyalties when, as auditor, he had to examine the accounts of the fire department. Such a situation would create a conflict of interest between the auditor's duties and his loyalty to the fire department.

See also Ohio Op. Att'y Gen. No. 86-030 (a township trustee, who is employed as a chief of a village fire department located within the township where the township and village have not entered into a contract whereby the village provides fire protection services to the township, must abstain from voting on the formation of a joint fire district comprising the village and township).

Therefore, R.C. 102.03(D), as well as R.C. 2921.42(A)(1), prohibits a township trustee, who is employed by a city fire department where the township and city have entered into a contract whereby the city provides fire protection services to the township, from voting, deliberating, participating in discussions, or otherwise using the authority or influence of his office, either formally or informally, with regard to matters affecting the contract between the township and the city. R.C. 102.03(D) also prohibits the township trustee from voting on any other matters before the board of township trustees that definitely and directly affect the interests of the city, his outside employer. See Adv. Op. 91-006.

R.C. 102.03(B)—Disclosing Confidential Information

Finally, 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 the public official or employee in the course of the public official's or employee's official duties that 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 the trustee from disclosing confidential information to city officials and 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 trustee serves in office and after he leaves office. Adv. Op. No. 88-009.

Conclusion

As explained above, R.C. 2921.42(A)(4) prohibits a township trustee from serving as a city fire captain where the township and city have entered into a contract whereby the city provides fire protection services to the township. R.C. 102.03(D) and R.C. 2921.42(A)(1) prohibit a township trustee who is employed by a city fire department from voting, deliberating, participating in discussions, or otherwise using the authority or influence of his office, either formally or informally, with regard to matters that affect the city, including the contract for fire protection services between the township and the city.

This informal advisory opinion was approved by the Ethics Commission at its meeting on February 19, 1999. The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. If you have any further questions, please feel free to contact this Office again.

Very truly yours,



John Rawski
Staff Attorney