

OHIO ETHICS COMMISSION

Santiago Feliciano, Jr.
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368

Website: <http://www.ethics.state.oh.us>

December 17, 1999 Informal Opinion 1999-INF-1217-1

Judy Sheerer, Member
GCRTA Board of Trustees

Dear Ms. Sheerer:

In your letter to the Ethics Commission dated November 10, 1999, you ask about the Ohio Ethics Law prohibitions imposed upon a member of the Board of Commissioners of Cuyahoga County. Specifically, you ask whether prohibitions imposed on the county commissioner by the Ohio Ethics Law and related statutes preclude the commissioner's spouse from being employed as General Manager of the Greater Cleveland Regional Transit Authority (Authority).

As explained below, the Ethics Law and related statutes do not preclude the Authority's Board of Trustees from hiring the commissioner's spouse. The commissioner, however, is prohibited from exercising the power and influence inherent in the position of commissioner to affect the decisions of members of the Authority's Board of Trustees regarding the initial employment of his or her spouse. The county commissioner is also prohibited from using the commissioner's position to affect the terms and conditions of his or her spouse's employment, such as the amount of compensation and benefits paid to the spouse, after he or she is hired by the Authority. The commissioner is not prohibited from participating in county appropriations to the Authority that are for the general operation of the Authority.

Facts

You state that the Authority's Board of Trustees engaged a search firm to fill the vacant position of General Manager for the Authority. One of the candidates being considered is the spouse of a county commissioner. The Authority operates within Cuyahoga County, but it is an independent political subdivision with the authority to perform all functions inherent in the operation of a transit system. The Board of County Commissioners, however, appoints three of the ten members of the Authority's Board of Trustees. The General Manager for the Authority would be hired by, and responsible to, the Authority's Board of Trustees.

Prohibition Against Securing Public Employment for a Family Member—R.C.2921.42(A)(1)

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 county commissioner is an elected officer of the county and subject to the prohibitions of R.C. 2921.42. Ohio Ethics Commission Advisory Opinion No. 88-003.

The term “public contract” is defined 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, the employment of a General Manager by the Authority’s Board of Trustees is a “public contract” for purposes of R.C. 2921.42.

R.C. 2921.42(A)(1) limits the actions a public official can take with regard to securing public employment for a member of his 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 to the official by blood or marriage and residing in the same household with the official. Id.

In Advisory Opinion No. 90-010, the Ethics Commission explained the prohibition imposed by R.C. 2921.42(A)(1) with regard to a public official securing public employment for a member of his family:

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 public employment of a family member. See Adv. Ops. No. 85-015 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 approval of the official or the position the official holds. See Adv. Op. No. 89-004 (2921.42(A)(1) prohibits a member of a board of county commissioners from authorizing, or using 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, where the public contract is entered into by a regional transit authority which the board of county commissioners participated in creating and which includes the county). See also 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 the public agency's decision-making process authorizing or approving employment for a member of the official's family. Adv. Ops. No. 82-003, 89-005, and 90-010.

In the instant situation, the hiring of a General Manager of the Authority is a prerogative of the Board of Trustees of the Authority—not the Cuyahoga County Commissioners. See R.C. 306.34 (a regional transit authority's board of trustees is statutorily authorized to select its president, vice-president, secretary-treasurer, and other officers and employees, and determine their titles, terms of office, compensation, duties, number, and qualifications). The official approval of the Board of Commissioners of Cuyahoga County is not necessary for the Authority to hire a General Manager. Therefore, the prohibition imposed upon the county commissioner by R.C. 2921.42(A)(1) against "authorizing" the employment of a family member would not be implicated by the Board of Trustees of the Authority hiring the commissioner's spouse as the Authority's General Manager.

It must be noted, however, that R.C. 2921.42(A)(1) also prohibits a public official from employing the "authority or influence of his office" to secure authorization of any public contract in which a family member has an interest. The words "authority or influence" are not defined for purposes of R.C. 2921.42. A primary rule of statutory construction requires that words used in a statute which are not defined must be construed according to rules of grammar and common usage. R.C. 1.42. The word "authority" is defined in Webster's New World Dictionary of the American Language as "power or influence resulting from knowledge, prestige, etc." Webster's New World Dictionary of the American Language 94 (2d College ed. 1970). The word "influence" is defined as "the power of persons . . . to affect others, seen only in its effects" and "the ability of a person . . . to produce effects indirectly by means of power based on . . . high position." Webster's New World Dictionary of the American Language 722 (2d College ed. 1970). Adv. Op. No. 94-002.

The General Assembly's use of the words "authority or influence" in R.C. 2921.42(A)(1) specifically characterize a broader range of activity than that described by the word "authorize." See Dougherty v. Torrence, 2 Ohio St. 3d 69, 70 (1982) (effect must be given to words used in a statute); Dungan v. Kline, 81 Ohio St. 371, 380-81 (the presumption is that every word in a statute is designed to have effect); Adv. Op. No. 74-001 ("it is to be assumed that the Legislature used the language contained in a statute advisedly and intelligently and expressed its intent by the use of the words found in the statute").

Therefore, the prohibition against a public official employing the “authority or influence of his office” to secure a public contract in which a family member has an interest bars the commissioner from exercising the power and influence inherent in the position of commissioner to affect the decisions of members of Authority’s Board of Trustees to appoint his or her spouse General Manager of the Authority. This prohibition includes, but is not limited to, discussing, recommending, or otherwise using the authority or influence of the position of commissioner, either formally or informally, in order to persuade members of the Authority’s Board of Trustees to appoint his or her spouse to be General Manager. See also R.C. 102.03(D) (set forth below).

Securing a Thing of Value for a Family Member—RC. 102.03(D)

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 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 commissioner 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. 88-003.

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). The employment of the commissioner’s spouse as General Manager of the Authority and the compensation received therefor fall within the definition of “anything of value.”

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. As explained above, the Authority is an independent political subdivision of the state and the Board of Commissioners of Cuyahoga County does not exercise oversight regarding the personnel decisions of the Board of Trustees of the Authority. However, because R.C. 102.03(D) uses the words “the authority or influence of office” in defining the prohibition, it has relevance to the instant situation.

R.C. 102.03(D) prohibits the commissioner from using the authority or influence of the commissioner’s position with regard to any matter that would provide a definite and direct pecuniary benefit to his or her spouse. The Ethics Commission has recognized that a public official or employee will develop working relationships with other public officials and employees while performing his or her official duties. This would be especially true in this situation because Cuyahoga County is a member of the Authority and, as part of the conditions of membership, the Board of Commissioners of Cuyahoga County appoints three out of ten members of the Authority’s

Board of Trustees. R.C. 102.03(D) prohibits a public official or employee from using relationships developed while performing his public duties to secure a favorable decision or action by another public official or employee regarding his private financial interests or those of a family member.

As a person holding a county elected office in a county that appoints three out of ten members of the Authority's Board of Trustees, the commissioner has unique access to, and relationship with, the members of the Authority's Board of Trustees. R.C. 102.03(D) prohibits the commissioner from using this unique access to, and relationship with, the members of the Authority's Board of Trustees to affect its decision to hire his or her spouse to be the Authority's General Manager, or its setting of his or her compensation and expenses. The commissioner is prohibited from formally and informally lobbying for his or her spouse, and from taking any other formal or informal action to persuade members of the Authority's Board of Trustees to select his or her spouse to be General Manager of the Authority. For example, the commissioner is obviously prohibited from stating that the reappointment of the members appointed by the county commissioners will be based upon whether his or her spouse was hired as the Authority's General Manager.

Participation in County Appropriations to the Authority

The issue becomes whether the Ethics Law and related statutes would prohibit the commissioner from participating in county appropriations to the Authority if the commissioner's spouse was employed as the Authority's General Manager. R.C. 306.47 statutorily authorizes a board of commissioners of a county that is included within a regional transit authority to appropriate funds for a portion of the authority's expenses as provided for in the resolution that made the county a member of the authority. You have not stated whether, or to what extent, the county appropriates funds for the Authority. In this opinion, the Ethics Commission will provide guidance to the county in the event that it does appropriate funds to the Authority.

The Ethics Commission has held that R.C. 102.03(D) does not prohibit a public official from participating in a general budget appropriation which includes money that ultimately funds a family member's compensation and benefits where either of two sets of facts are present. First, the Commission has held that R.C. 102.03(D) does not prohibit a public official from participating in a general budget appropriation provided that the amount of the family member's compensation and benefits has been established by an action separate from the appropriation and the appropriation measure does not provide the official with the authority or discretion to alter the compensation and benefits that would be received by the official's family member. Adv. Ops. No. 92-012 and 98-004. See generally Adv. Ops. No. 90-004 and 91-004. Second, the Commission has held that R.C. 102.03(D) does not prohibit a public official from participating in a general budget appropriation provided that the family member's compensation and benefits are identical to and in common with the entire class of employees who are not subject to a collective bargaining agreement. See Adv. Ops. No. 92-010, 92-012, and 98-004.

In this situation, as stated above, the Authority is statutorily authorized by R.C. 306.34 to establish rules and regulations providing for the selection of its officers and employees, and establishing their compensation. Therefore, the first provision applies—the amount of the spouse's compensation and benefits would be established by an action separate from the appropriation and the appropriation measure does not provide the Board of Commissioners of Cuyahoga County with the authority or discretion to alter the compensation and benefits established by the Authority.

Therefore, R.C. 102.03(D) does not prohibit the commissioner from participating in county appropriations to the Authority if his or her spouse were employed as the Authority's General Manager. Once again, it must be stressed that the commissioner is prohibited from exercising the power and influence inherent in the commissioner's position to affect any decisions of members of the Authority's Board of Trustees regarding the appointment of the commissioner's spouse as General Manager of the Authority, including the establishment of the amount of the General Manager's compensation and benefits.

The Ethics Commission has held that R.C. 102.03(D) prohibits a public official from participating in matters where the public official's family member would receive a definite and direct, private pecuniary benefit. See Adv. Ops. No. 90-004 and 98-004. The Commission has held that, while an employee's workload may be eased and the functioning of his job expedited by general budget appropriations for such items as accommodations, personnel, and supplies, appropriations for the use of a public agency generally will not provide a definite and direct, personal pecuniary benefit to an individual employee of the agency. Id. Accordingly, the Ethics Commission has held that R.C. 102.03(D) does not prohibit a public official from participating in general budget appropriations to the department which employs a family member of the official provided that the appropriations are for the department's general accommodations, supplies, and operating expenses and do not provide a definite and particular personal benefit to the family member. See Adv. Ops. No. 92-012 and 98-004. Therefore, R.C. 102.03(D) does not prohibit the commissioner from participating in general budget appropriations to the Authority provided that the appropriations are for the Authority's general operating expenses and do not provide a definite and particular personal benefit to the commissioner's spouse.

Conclusion

As explained above, the Ethics Law and related statutes do not preclude the Authority's Board of Trustees from hiring the commissioner's spouse. The commissioner, however, is prohibited from exercising the power and influence inherent in the position of commissioner to affect the decisions of members of the Authority's Board of Trustees regarding the initial employment of his or her spouse. The county commissioner is also prohibited from using the commissioner's position to affect the terms and conditions of his or her spouse's employment, such as the amount of compensation and benefits paid to the spouse, after he or she is hired by the Authority. The commissioner is not prohibited from participating in county appropriations to the Authority that are for the general operation of the Authority.

Judy Sheerer
December 17, 1999
Page 7

It should be noted that the Ethics Commission assumes that Authority officials who are participating in the hiring process will give no undue preference to the spouse of the county commissioner, and that the hiring process will be fair and open to all qualified candidates who seek to serve the Authority. If the commissioner's spouse is the candidate selected as a result of the Authority's selection process, it should be clear that the process was open and fair, and that the commissioner's spouse is the best and most-qualified person, among the candidates who responded, for the public service position of General Manager.

The Ethics Commission approved this informal advisory opinion at its meeting on December 17, 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.

Sincerely,

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

John Rawski
Staff Attorney