

OHIO ETHICS COMMISSION

Merom Brachman, *Chair*
Sarah M. Brown, *Vice Chair*



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368
Web site: www.ethics.ohio.gov

David E. Freel, *Executive Director*

July 21, 2004

Informal Opinion 2004-INF-0721

The Honorable Russell V. Leffler
Huron County Prosecuting Attorney



Dear Prosecutor Leffler:

In a letter received by the Ohio Ethics Commission on March 10, 2004, you have asked whether the Ohio Ethics Law and related statutes prohibit an individual from simultaneously serving in the positions of county administrator and member of the county transit board of the same county.

Brief Answer

As explained more fully below, R.C. 2921.42(A)(4) and (A)(1) prohibit an individual from simultaneously serving in the positions of county administrator and member of the county transit board of the same county. Further, several sections of R.C. Chapter 306. appear to be applicable to your question and to prohibit a county officer from serving on the county transit board. As the county prosecuting attorney, you are the appropriate person to interpret these provisions.

Facts

You state that the Huron County Board of Commissioners (County Commissioners) have created a county transit system and have appointed individuals to a county transit board. The County Commissioners appointed the County Administrator to the county transit board as a member and chair of the transit board.

You explain that the salary of the county administrator is fixed by the County Commissioners pursuant to R.C. 305.30. You also explain that the compensation of the members of the county transit board is also fixed by the County Commissioners, and that the commissioners may fix the salary of the chair of the transit board above the salary of the other board members pursuant to R.C. 306.02.

You ask whether an individual is prohibited from serving simultaneously in the positions of County Administrator and member of the county transit board of the same county. You have asked whether the application of the law differs if the board members are not compensated.

Ohio Ethics Commission Advisory Opinions

Your question involves actions that have already been taken. The purpose of an Ethics Commission advisory opinion is to provide guidance upon which a public official or employee can rely before he or she engages in an action that may be prohibited by the Ethics law. The Commission can render an advisory opinion only in response to a hypothetical question or a question that involves the prospective conduct of the person who requests the opinion. Ohio Ethics Commission Advisory Opinions No. 75-037 and 94-002.

The Commission has explained that its function in rendering an advisory opinion is not a fact-finding process. Adv. Op. No. 94-002. While the Commission cannot provide you with an advisory opinion, it can provide you with general information about the Ohio Ethics Law and related statutes that apply to this kind of question.

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

Several provisions in the Ethics Law and related statutes are applicable to your question, including R.C. 2921.42. R.C. 2921.42(A)(4) provides that no public official or employee shall knowingly:

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.

A county administrator is a “public official” subject to the prohibition of R.C. 2921.42(A)(4). R.C. 102.01(B) and (C); R.C. 305.29.

A public contract is defined as the acquisition of property or services by or on behalf of a political subdivision. R.C. 2921.42(G)(1). R.C. 2921.42(G)(1)(a) expressly includes “the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either” within its definition of a “public contract.” Therefore, the county’s

acquisition of the services of its employees is a public contract. In addition, the acquisition of the services of a county board through the distribution of county funds is a public contract.

R.C. 2921.42(A)(4) prohibits a public official from having a financial or fiduciary interest in a public contract. An individual who receives payment from a public contract would have a financial interest in that contract. An individual who is compensated to serve on a county board that operates through the use or distribution of county funds has both a pecuniary and a fiduciary interest in a public contract.

R.C. 2921.42(A)(4) prohibits a county administrator from having a financial or fiduciary interest in a public contract with the county. The county administrator would have a financial interest in a public contract if the county administrator would receive payment for services as a member of the transit board of the same county that the county administrator serves. The county administrator would have a fiduciary interest in a public contract (the distribution of county funds to the transit board) even if the county administrator does not receive payment for his services as a member of the county transit board.

Therefore, R.C. 2921.42(A)(4) prohibits an individual from simultaneously serving as a county administrator and member of the county transit board of the same county, regardless of whether he is compensated for his services on the board.¹

Exception to the Prohibition of R.C. 2921.42(A)(4)—R.C. 2921.42(C)

R.C. 2921.42(C) provides that R.C. 2921.42(A)(4) does not apply to a public contract in which a public official has an interest, when four requirements are met. Each of the provisions in Division (C) is a question of fact which, when applied to the circumstances of the individual situation, will determine whether a particular transaction fits within the exception. Adv. Ops. No. 80-003 and 88-008. The criteria of Division (C) are strictly construed against the public official, who must show that he meets all four requirements. Adv. Ops. No. 84-011 and 88-008.

One of the requirements is that the services provided by the official are either furnished as part of a continuing course of dealing established before the official became associated with the governmental agency or are "unobtainable elsewhere" for the same or lower cost. R.C. 2921.42(C)(2). Where a person is already county administrator at the time he is considered for appointment to the transit board, the continuing course of dealing requirement cannot be met.

¹ Where there is some statutory provision therefor, a public official can be assigned by his public agency to serve on the board of another public agency in his "official capacity," as a representative of first public agency, without any violation of the Ethics Law. For example, R.C. 3311.19 provides that the board of a joint vocational school district shall be composed of members of the school districts that are members of the joint vocational district. See Adv. Op. No. 99-004. However, in the situation you have set forth, there is no statutory provision that allows for a county official or employee to serve on the board of a county transit authority.

In order to meet the “unobtainable elsewhere” prong of the exception, it must be demonstrated by some objective standard that the services provided by the county administrator to the county transit board are unobtainable elsewhere for the same or lower cost. Because the compensation for the position is set, there must be a showing that there is no one else having the qualifications necessary for the position. In most situations, this would be very difficult to demonstrate. Therefore, it appears that a county administrator would be unable to meet the exception in R.C. 2921.42(C), because (C)(2) cannot be met.

Securing a Contract in Which Transit Board Member Has an Interest—R.C. 2921.42(A)(1)

R.C. 2921.42(A)(1) is also applicable to the situation you have described. R.C. 2921.42(A)(1) 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.

As stated above, a county administrator is subject to the prohibitions of R.C. 2921.42. Therefore, R.C. 2921.42(A)(1) prohibits a county administrator from using his position to secure a county contract in which he has an interest. As stated above, the county’s distribution of funds to the county transit board is a public contract.

R.C. 2921.42(A)(1) prohibits a county administrator who serves on a county transit board from taking any action, formally or informally, to use his position as county administrator to secure funds for the county transit board. This prohibition would place onerous restrictions on an individual attempting to serve simultaneously as county administrator and member of a county transit board.

Therefore, the application of both R.C. 2921.42(A)(4) and (A)(1) would prohibit an individual from serving simultaneously in the positions of county administrator and member of a county transit board in the same county.

Applicable Provisions of Chapter 306.

In addition to these provisions of the Ethics Law, there are several provisions of R.C. Chapter 306., related to the operation of a county transit system, that are applicable to your question. While these provisions are significant to your question, the Commission does not have the authority to interpret them. As the County Prosecutor, you are the proper person to interpret these statutes and determine how they apply to the question you have raised, or to refer the question to the Attorney General.

R.C. 306.01 provides that, in counties where the commissioners have decided to establish a county transit system, the commissioners shall either appoint a county transit board to govern the transit system and exercise the powers and duties specified by R.C. 306.01 to 306.13 and 306.99, or the board of county commissioners shall operate the county transit system itself.

R.C. 306.11 provides that, where the county commissioners have established a county transit board, the transit board shall have exclusive control over the county transit system's budgets, appropriations, collections, custody, and application of its revenues or other funds received by it and shall have jurisdiction over all purchases and contracts entered into in connection with the county transit system. Further, R.C. 306.11 provides: "[T]he officers and employees of the county transit system shall be under the sole control of the county transit board and are not subject to supervision of other county officers." (Emphasis added.) In R.C. 305.29, the county administrator's position is described as an "office" of the county.

Finally, R.C. 306.02 sets forth conflict of interest guidelines for members of a county transit board. R.C. 306.02 provides that "members of the [county transit] board shall not be interested financially in any contract, work, or service for the county."

While you or the Attorney General have final authority to apply these provisions to the situation at issue, it appears that R.C. 306.02 prohibits a member of the county transit board from holding any paid position with the county. Further, R.C. 306.01 and 306.11, in concert, appear to provide that no county officer shall be in a supervisory position regarding a county transit system. There does not appear to be an exception to these prohibitions. The combined impact of R.C. 306.02 and 306.11 would appear to prohibit a county officer, such as the county administrator, from serving in a supervisory position regarding the county transit system.

Compatibility of Public Positions

County prosecuting attorneys and the Ohio Attorney General have authority to issue opinions on the compatibility of public positions. However, the Attorney General's Office has stated that, where R.C. 2921.42 prohibits one individual from serving simultaneously in two public positions, there is no need for a compatibility determination. If the Ohio Attorney General were to look at this compatibility issue, the Attorney General would apply a seven-factor test to determine whether the positions are compatible. One of the factors deals with conflict of interest. For instance, the potential for a county administrator to fail to serve the broad interests of the county due to his other position as member of the county transit board may be viewed as a conflict of interest under the Attorney General's analysis.

Conclusion

As explained more fully above, R.C. 2921.42(A)(4) and (A)(1) prohibit an individual from simultaneously serving in the positions of county administrator and member of the county transit board of the same county. Further, several sections of R.C. Chapter 306. appear to be

Russell V. Leffler
July 21, 2004
Page 6

applicable to your question and to prohibit a county officer from serving on the county transit board. As the county prosecuting attorney, you are the appropriate person to interpret these provisions.

The letter was approved by the Ohio Ethics Commission at its meeting on July 1, 2004. It provides general information about the application of the Ethics Law if a county administrator is asked to serve as a member of the county transit board. It is based on the facts presented, 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. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jennifer A. Hardin".

Jennifer A. Hardin
Chief Advisory Attorney