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October 3, 2008

Informal Opinion 2008-INF-1003

Sheriff Dwight E. Radcliff  
Pickaway County  
Circleville, Ohio 43113-0710

Dear Sheriff Radcliff

On August 29, 2008, the Ohio Ethics Commission received your request for an advisory opinion. In your letter, you asked whether R.C. 2921.42(A)(1) would prohibit you, if you retire from your office on December 31, 2008, and resume your office shortly thereafter, from reappointing your son, Lt. Robert Radcliff, who has worked as a deputy sheriff for twenty-eight years, to his position. In your letter and a telephone conversation with Commission staff, you explained that after you retire the Board of County Commissioners would appoint you to serve as interim sheriff to serve until January 5, 2009, at which time your new term as sheriff will begin.

By way of history, you have explained that you have held the sheriff's office for over forty years, since January 1965. You explained that you are running unopposed for sheriff in the November general election, having prevailed over a party challenger in the March primary election. You filed a statement, as required by law, ninety days before the March primary with the Pickaway County Board of Elections that publicly declared your intent to retire on December 31, 2008. R.C. 145.38(C)(3)(a).

You stated that you appointed your son to the position of deputy sheriff in September 1980 and that he has served with the office continually for twenty-eight years. You emphasized that you appointed your son before the Ethics Commission issued Advisory Opinion No. 85-015, in which the Commission determined that R.C. 2921.42(A)(1) prohibits a sheriff from appointing a family member to be an employee of the sheriff's office, with subsequent additional advisory and enforcement precedent to the same effect. At the time the Ethics Commission issued Advisory Opinion No. 85-015, the Commission also issued a memorandum to county prosecuting attorneys recommending that no official be prosecuted for knowingly violating R.C. 2921.42 if the official, in reliance upon advice and common practice prior to that date in December 1985, had hired a family member before the date on which the opinion was issued.

Subsequent to his initial hire in 1980, your son has served as a Lieutenant on your Command Staff since 1992. It is to this Lieutenant position that you would reappoint your son upon reassuming the sheriff's position after you retire.

### **Prior Consideration**

On November 1, 2004, the Commission issued an advisory opinion to the late P. Eugene Long, then county prosecutor of Pickaway County, on a similar question. In that opinion, the Commission concluded that, if you made the decision to take a clear and definite separation in your service by retiring, in December 2004, and assumed the newly elected term of sheriff on January 3, 2005, R.C. 2921.42(A)(1) would prohibit you from reappointing your son to his position as deputy sheriff.<sup>1</sup> The opinion explained that, should you cause a clear and definite separation in *your* service by retiring, the restriction in R.C. 2921.42(A)(1) would apply to you, as if your son had not previously worked for the Office.

### **Employment Prior to Election**

You have focused, in your letter, on that fact that the employment of your son as a deputy is "grandfathered" from the R.C. 2921.42(A)(1) prohibition because you hired him prior to the Ethics Commission's opinion in 1985.<sup>2</sup> Since 1985, your son has continued in his employment with the Sheriff's Office after that date, even though you have reappointed him as a deputy at the beginning of each term. R.C. 311.04.

A county sheriff is a public official subject to R.C. 2921.42(A)(1), which provides that no public official shall knowingly:

Authorize, or employ the authority or influence of the public official's office to secure authorization of any public contract in which the public official, a member of the public official's family, or any of the public official's business associates has an interest.

(Emphasis added.) R.C. 2921.01(A). R.C. 2921.42(I)(1)(a) provides that a "public contract" includes "the employment of an individual by the state [or] any of its political subdivisions."

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<sup>1</sup> See also 1994 Ohio Op. Att'y Gen. No. 94-009 (even a brief break in employment (retiring on Friday and being reemployed on the following Monday) is sufficient to demonstrate that a public employee has "separated" from service and is eligible to receive retirement benefits).

<sup>2</sup> While the memorandum to county prosecuting attorneys dated December 23, 1985 does not state or recommend that previously established employment is "grandfathered," the recommendation in the memorandum is frequently described using that term.

R.C. 2921.42(A)(1) prohibits a public official from hiring a family member for a public position, and from securing any changes to the employment relationship subsequent to hire. Ohio Ethics Commission Advisory Opinions No. 85-01, 90-010, and 92-012. A sheriff is the hiring authority for the sheriff's office, responsible for appointing deputies and other employees. R.C. 311.04 and 325.17.

Where a person's employment with a public agency has been continuous and longstanding, there is no assertion of improper selection or advancement of the person, and the person's employment predated his or her family member's election to an office of the agency, the Commission has not concluded that the newly elected official is required to terminate the employment of the family member hired by a previous office holder.<sup>3</sup> See generally Adv. Op. No. 98-004 (the spouse of a newly elected village official, who was employed by the village before her election, is not prohibited from continuing in his employment). Subsequently, if the same office holder is re-elected to his or her position, the Commission has not held that he or she is prohibited from continuing the employment of the family member even if he or she is required to reappoint the employees of the office. See Whyte v. Jefferson Cty. Engineer (1987), 41 Ohio App. 3d 54, 56 ("[E]ach elected term is, in and of itself, a separate unit. An elected official, each time he takes office, comes into that office with the same rights and privileges that his opponent would have had.")

Specifically with respect to family members serving the same public agency, the Commission has held:

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. (Citation omitted.) The Commission is aware that family members of public officials may also desire to enter into public employment and in many instances families have established a tradition of public service. 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.

Adv. Op. No. 90-010. See also State ex rel. Halleck v. Delaware Cty. Cmms. (Dec. 13, 1996), Delaware App. No. 96CA-E-04-021 (holding that R.C. 124.11(B)(1) prevents local governments from implementing a broadly inclusive "no relatives" employment policy).

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<sup>3</sup> If an office-holder elect's family member is hired by his or her immediate predecessor in the weeks preceding or after that election and the beginning of the new officer's term, such a hire may suggest some improper use of authority by either or both officials and would necessitate additional scrutiny. City of Parma Hts. v. Schroeder (1963), 26 Ohio Op. 2d 119 (a public official cannot do indirectly what he or she cannot lawfully do directly).

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As explained above, one of the purposes of the Ethics Law is to protect citizens from decisions of public officials that are influenced because of favoritism for their family members. Where a public official is making an employment decision (authorizing a public contract) regarding a family member, the family member's financial interest in the compensation and other benefits that accompany employment is likely to influence the official.

In this situation, however, you are suggesting that you would not favor your family member because he would be continuing in his longstanding pre-established employment relationship with the county. Rather, you want to treat your son in the same manner that you will treat all other continuing employees of your office and reappoint him to an unchanged public position.

Citizens and voters in Pickaway County were informed of your intention to retire when you filed the required notice with the Board of Elections in October 2007, prior to the primary election in March 2008. If this issue was a determinative one for voters, it could be argued that they could have chosen your opponent in the primary election. You won that election with 58% of the vote. No candidate from any other party has since filed a certificate of candidacy to challenge you in the general election.

The requirement to file notice of retirement was enacted by the 126<sup>th</sup> General Assembly in Senate Bill 3. The statute, R.C. 145.38(C)(3)(a), became effective on May 2, 2006. You were not required to file a comparable notice in 2004, when guidance was previously requested on your behalf. By enacting R.C. 145.38(C)(3)(a), the General Assembly made it possible for elected officials to retire at the end of one elected term, and resume the elected office at the beginning of the next term, without any loss of benefits, provided that voters are properly informed before the election.

From the information you have provided, it appears that, between the date of your retirement and the beginning of your new term as Sheriff, there will be no change in your son's employment status with the Sheriff's office. The facts you have presented, involving an elected county officer who has served for over forty years and whose family member has been employed by the same office for twenty-eight years, appear to be unique. Further, you have explained that you will reappoint your son to the same position he holds currently, and there will be no change to the nature of his service.

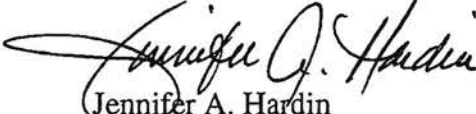
Given these unique and specific circumstances, the Commission concludes that, although your retirement is a break in your services to the county, unless and until there is some formal break in your *son's* long-term service to the county, the Ethics Law restrictions that apply to *you* do not prohibit him from continuing to serve as a deputy sheriff in your office. Even if you are required to reappoint your son to his employment position when you begin your service as appointed sheriff, and again after you begin your new elected term, provided that there is no change to his employment status throughout, you would not be authorizing your son's employment, or employing the authority or influence of your office to secure authorization of his employment.

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Therefore, provided that your son's employment status remains the same throughout, the law does not prohibit you, as interim or newly elected sheriff, from reappointing him to his current position. However, *you would be prohibited*, during your current term, while you serve as interim sheriff, and after you are sworn into your new elective term as sheriff, from taking any new action to secure any raises, promotions, additional benefits, or other changes in the terms and conditions of your son's employment with the sheriff's office. Adv. Op. No. 90-010.<sup>4</sup>

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on October 2, 2008. The 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. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,

  
Jennifer A. Hardin  
Chief Advisory Attorney

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<sup>4</sup> The law does not prohibit you from acting to secure an across-the-board salary or benefit increase for all employees of the Sheriff's office, including your son, provided that all employees receive an identical increase. Adv. Op. No. 92-012.