



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 85-003
May 16, 1985

Syllabus by the Commission:

- (1) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a county engineer from authorizing or otherwise using the authority or influence of his office to secure approval of a contract for the employment of his spouse in the county engineer's office or other agency of the county.
- (2) Division (A)(4) of Section 2921.42 of the Revised Code does not, per se, prohibit the spouse of a county engineer from being employed by the county.
- (3) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a county engineer from having a direct, pecuniary interest in his spouse's employment contract with the county.

* * * * *

You asked whether the Ohio Ethics Law and related statutes would prohibit a county engineer from authorizing the employment of his spouse in the county engineer's office or prohibit her from serving as an employee of the county.

You stated, by way of history, that a county engineer is considering the employment of his spouse in his office. You stated further that her employment would augment his salary and benefits from the county, including health insurance benefits that are not otherwise available to him as county engineer.

Division (A) of Section 2921.42 of the Revised Code provides, in pertinent part:

(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;

....

- (4) 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 engineer is a "public official" as defined in Division (A) of Section 2921.01 of the Revised Code because he is an elected officer of the county, a political subdivision of the state. A spouse is a family member for purposes of Section 2921.42 of the Revised Code (See: Ohio Ethics Commission Advisory Opinion No. 80-001). Division (E)(1) of Section 2921.42 of the Revised Code defines "public contract" as follows:

The purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state or any of its political subdivisions, or any agency or instrumentality of either.

A political subdivision that employs an individual is purchasing or acquiring his or her services. Also, an employment relationship is usually created by contract:

In distinguishing between office and employment, that the powers are created and conferred by law is an important item to be considered, for though an employment may be created by law, it is not necessarily so and is often, if not usually a creature of contract. A public office, on the other hand, is never conferred by contract, but finds its course and limitations in some act or expression of governmental power. Where, therefore, the authority in question is conferred by contract, it must be regarded as an employment and not a public office. 14 Ohio Jur 3d. Civil Servants and Other Public Officers and Employees ¶9.

Thus, we conclude that the employment relationship contemplated in the instant case is a "public contract" for purposes of Section 2921.42 of the Revised Code, because it is a contract for the purchase or acquisition of services by the county (See: Ohio Ethics Commission Advisory Opinion Number 82-003, supra).

In Advisory Opinion No. 82-003, the Commission held that a school board member, whose spouse is a teacher in a school district, is prohibited by Division (A)(1) of Section 2921.42 of the Revised Code from authorizing, voting, or otherwise using the authority or influence of his office to secure approval of an individual contract employing his spouse as a teacher. Similarly, Division (A)(1) of Section 2921.42 of the Revised Code would prohibit a county engineer from authorizing or otherwise using the authority or influence of his office to secure approval of the employment of his spouse by an agency of the county, including the county engineer's office. In addition, Division (D) of Section 102.03 of the Revised Code prohibits the county engineer from using his official position to secure additional benefits for himself as a result of the employment of his spouse.

Division (A)(4) of Section 2921.42 of the Revised Code prohibits a public official from having an interest in a public contract with his own entity of government. Thus, the question arises whether the county engineer would have a prohibited interest in a public contract if his wife were employed by an agency of the county with which he serves, even though he takes no part in the decision authorizing her employment. For purposes of the prohibitions of Section 2921.42 of the Revised Code, a public official's interest in a public contract must be definite and direct, and either fiduciary or pecuniary (See: Advisory Opinions No. 78-005, 81-003, and 81-008). Thus, while the county engineer may receive some benefit from his spouse's salary or benefits, the issue is whether he has a direct, pecuniary interest in her employment contract.

An analogous provision of law, Section 3313.33 of the Revised Code, prohibits a school board member from having any pecuniary interest, directly or indirectly, in any contract with the board with which he or she serves. In Board of Education v. Boal, 104 Ohio St. 482 (1922), the Supreme Court held that a wife is independent and has the power to contract in her own right. Based on this opinion, Attorney General Opinion No. 55-5811 concluded that Section 3313.33 of the Revised Code does not prohibit a wife of a school board member from serving as clerk of the board or secretary to the superintendent. In addition, Attorney General Opinion No. 62-2855 held that the prohibition does not apply to a school board member whose wife is employed by the school district as a janitor. Therefore, absent additional facts to the contrary, a public official is not generally considered to have an interest in a spouse's employment contract with the governmental entity or agency with which the public official serves. Consequently, Division (A)(4) of Section 2921.42 of the Revised Code does not, per se, prohibit the spouse of a county official from being employed by the county.

However, the facts of the instant case indicate that, as a result of his spouse's employment, the county engineer would receive health insurance coverage that is not otherwise available to him as county engineer. Thus, the county engineer would derive a direct, pecuniary benefit as a result of his spouse's employment with the county, which would constitute an "interest" in the employment contract (Cf. 62 O.A.G. 2855). We conclude, therefore, that under the facts presented, Division (A)(4) of Section 2921.42 of the Revised Code would prohibit the spouse of the county engineer from being employed by the county.

This advisory opinion is based on the facts presented, and is limited to questions arising under Chapter 102. and Section 2921.42 of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a county engineer from authorizing or otherwise using the authority or influence of his office to secure approval of a contract for the employment of his spouse by an agency of the county; (2) Division (A)(4) of Section 2921.42 of the Revised Code does not, per se, prohibit the spouse of a county engineer from being employed by the county; and (3) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a county engineer from having a direct, pecuniary interest in his spouse's employment contract with the county.


Robert Y. Farrington, Chairman
OHIO ETHICS COMMISSION