



**OHIO ETHICS COMMISSION**

THE ATLAS BUILDING  
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Advisory Opinion No. 91-001  
August 21, 1991

Syllabus by the Commission:

- (1) Due to the exemption provided by Section 505.011 of the Revised Code, a township trustee is not prohibited from serving as a full-time paid employee of a private fire company which is under contract to provide fire protection services to the township which he serves, despite the prohibitions of Divisions (A)(3) and (A)(4) of Section 2921.42 of the Revised Code;
- (2) Section 505.011 of the Revised Code does not provide an exemption from the prohibitions of Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code;
- (3) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code prohibit a township trustee who serves as an employee of a private fire company which is under contract to provide fire protection services to the township from discussing, deliberating, voting, or otherwise using the authority or influence of his position, either formally or informally, to authorize, secure, renew, modify, or renegotiate a contract between his employing fire company and the township, and from signing warrants and checks to the company for services provided under the contract.

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You have asked whether the Ohio Ethics Law and related statutes prohibit a member of a board of township trustees (trustee) from serving as a full-time paid employee of the private fire company which is under contract to provide fire protection services to the township with which he serves. You also ask whether the trustee may sign warrants and checks to the company for services provided under the contract.

You state that the township enters into an annual unbid contract with a private fire company to provide fire protection services for the township. You also state that the fire company provides services to one other political subdivision in addition to the township. The fire company pays its employees for their services from the proceeds of these contracts. You further state that the township's practice of contracting with the company for the purchase of firefighting services is one of long duration.

The Attorney General has rendered an opinion which analyzed the issue at hand with respect to the statutes found in Title V of the Revised Code which govern the conduct of members of a board of township trustees. See 1990 Ohio Op. Att'y Gen. No. 90-037. The Attorney General held that the statutes found in Title V of the Revised Code permit a township

trustee to serve as a full-time paid employee of a private fire company that has contracted with his township, provided that the trustee does not vote upon the contract entered into between the township and the private fire company. Id. Specifically, the opinion held that R.C. 505.011, which states that a township trustee "may be a member of a private fire company which has entered into an agreement to furnish fire protection for the township", authorizes a trustee to serve as a paid firefighter with a company contracting with the township, and renders inapplicable R.C. 511.13, which prohibits the members of a board of township trustees and officers and employees thereof from being interested in township contracts. However, since Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code are subject to interpretation by the Ethics Commission pursuant to R.C. 102.08, the Attorney General abstained from rendering an opinion on the issue with respect to those statutes. Id. See also 1987 Ohio Op. Att'y Gen. No. 87-025. The issue thus becomes whether the statutes under the jurisdiction of the Ohio Ethics Commission prohibit a township trustee from serving as a full-time paid employee of the private fire company which is under contract to provide fire protection services to the township with which he serves.

R.C. 2921.42 (A)(4) provides:

(A) No public official shall knowingly do any of the following: . . .

(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.

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 therefore a "public official" for purposes of R.C. 2921.42 and subject to its prohibitions. See Ohio Ethics Commission Advisory Opinions No. 84-003 and 84-006.

The term "public contract" is defined in R.C. 2921.42 (E)(1) for purposes of that section to include the purchase or acquisition or a contract for the purchase or acquisition of property or services by or for the use of a political subdivision. A board of township trustees is statutorily authorized to provide for the township's fire protection. See generally R.C. 505.37. One means by which a board of township trustees may provide for the township's fire protection is by contracting with a private fire company pursuant to R.C. 9.60. R.C. 9.60 (A)(2) defines a private fire company as "any nonprofit group or organization owning and operating firefighting equipment not controlled by any firefighting agency." (R.C. 9.60 (A)(1) defines "firefighting agency" to include a township or township fire district.) Thus, a contract under which a private fire company provides fire protection to 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 Advisory Opinion No. 84-006.

The prohibition of R.C. 2921.42 (A)(4) bars an officer of a political subdivision from having an interest in a public contract entered into by or for the use of that political subdivision. See Advisory Opinions 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, the trustee has an

"interest" in the contract between the private fire company with which he is employed and the township.

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. See Advisory Opinion 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. See Advisory Opinion No. 84-009.

If the trustee agreed to serve the fire company without compensation and without holding a fiduciary position, then he would not be considered to have a definite and direct interest in a public contract for purposes of R.C. 2921.42 (A)(4). See Advisory Opinion No. 90-003 (a public official who donates services to his political subdivision is not considered to have an interest in a contract with his political subdivision for purposes of R.C. 2921.42 if he does not derive any pecuniary benefit as a result of the donation). R.C. 2921.42 (A)(4) would not prohibit a township trustee from serving a private fire company that provides fire protection to the township if he receives no compensation as a firefighter and if he does not serve the company in a fiduciary capacity. (However, in such a situation, the trustee would still be subject to the prohibitions of R.C. 2921.42 (A)(1) and R.C. 102.03 (D), as described below.) See generally Advisory Opinion No. 88-002. See also Ohio Op. Att'y Gen. No. 86-059 and 87-084.

You have stated, however, that the trustee serves as a full-time paid employee of the fire company. The Commission has held that a mere employee of a firm who does not have an ownership or fiduciary interest in the firm generally is not deemed to have an "interest" in the contracts of his employer for purposes of R.C. 2921.42. See Advisory Opinion No. 78-006. However, the Commission has held that an employee of a firm 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. See Advisory Opinions No. 89-006, 89-008, and 89-011. See also Advisory Opinions No. 78-006, 81-008, 82-003, and 86-005.

In the instant situation, since the fire company provides fire protection services to the township and only one other political subdivision, it is apparent that the company's employees participate in executing the contract between the fire company and the township by performing duties under that contract. Further, as stated above, the company pays its employees from the proceeds of its contracts with the township and the other political subdivision. (Criteria six and seven may also be implicated, depending upon the specific facts of the situation.) Therefore, the trustee is deemed to have a definite and direct interest in the township's contract with the company under the criteria listed above. This determination is consistent with the Attorney General's holding in 1990 Ohio Op. Att'y Gen. No 90-037 that a trustee who is employed by, and receives compensation from, a private fire company which contracts with his township has an

interest in the township contract for purposes of R.C. 511.13. As explained above, R.C. 2921.42 (A)(4) prohibits a public official from having an interest in a public contract with the political subdivision with which he serves. Therefore, R.C. 2921.42 (A)(4) prohibits a member of a board of township trustees from serving as a paid employee of the private fire company which is under contract to provide fire protection services to the township with which he serves, where he would participate in executing the contract between the fire company and the township, and would be paid from the proceeds of the contract. But see Divisions (B) and (C) of Section 2921.42 of the Revised Code which provide exceptions in certain specific circumstances to the prohibition of R.C. 2921.42 (A)(4).

The trustee is also subject to Division (A)(3) of Section 2921.42 of the Revised Code which provides that no public official shall knowingly:

During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid.

A public contract will be deemed to have been "authorized" by a public official, legislative body, or board for purposes of R.C. 2921.42 (A)(3), where the contract could not have been awarded without the public official's or entity's approval. See Advisory Opinions No. 87-004 and 88-008. Therefore, a township trustee is prohibited by R.C. 2921.42 (A)(3) from profiting from the award of a contract to his private outside employer if the contract was approved or authorized by the board of township trustees, unless the contract was competitively bid and was the lowest and best bid. See Advisory Opinion No. 88-008. The Ethics Commission has held that a public official who is employed by a company which is awarded a public contract will be deemed to profit from that public contract for purposes of R.C. 2921.42 (A)(3) if any of the following circumstances apply: (1) the establishment or operation of the company is dependent upon the award of the contract; (2) the creation or continuation of the official's position with the company is dependent upon the award of the contract; (3) the contract moneys would be used by the company to compensate the official or serve as a basis for the official's compensation; or, (4) he would otherwise profit from the contract. See Advisory Opinions No. 87-004, 88-008, and 89-006.

In the instant situation, the township enters into an annual unbid contract with the fire company; the trustee is paid for his services as an employee of the fire company from the proceeds of this contract and the fire company's contract with the other political subdivision. Therefore, the trustee will be deemed to occupy a position of profit in the contract between the township and the fire company since the proceeds from the contract are used by the fire company to compensate the trustee. (Criteria one and two may also be implicated depending upon the specific facts.) Accordingly, R.C. 2921.43 (A)(3) would prohibit a member of a board of township trustees from serving as a paid employee of the private fire company which has an unbid contract to provide fire protection services to the township with which he serves, where he is paid as an employee of the company from the proceeds of the contract.

The township trustee is subject to the prohibition of Division (A)(3) regardless of whether he participated in discussions or voted on the contract as a member of the board of township trustees. See Advisory Opinions No. 88-008 and 90-003. See also R.C. 2921.42 (A)(1)

and 102.03 (D), as described below. The prohibition of R.C. 2921.42 (A)(3) would not, however, apply to any contract authorized or approved by the board of township trustees prior to the election or appointment of the trustee to the board. See Advisory Opinion No. 88-008.

Therefore, Divisions (A)(4) and (A)(3) of R.C. 2921.42 prohibit a member of a board of township trustees from serving as a paid employee of the private fire company which has entered into an unbid contract to provide fire protection services to the township with which he serves where he would be paid from the proceeds of the contract and participate in executing the contract. In the instant situation, however, the prohibitions of Divisions (A)(4) and (A)(3) 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. (Emphasis added.)

As stated above, the Attorney General, in 1990 Ohio Op. Att'y Gen. No. 90-037, held that R.C. 505.011 renders inapplicable the prohibition imposed by R.C. 511.13 against a township trustee having an interest in a contract with his township where the trustee serves as a full-time paid employee of a private fire company. The Attorney General explained in 1990 Ohio Op. Att'y Gen. No. 90-037:

By enacting R.C. 505.011, the General Assembly has implicitly sanctioned this interest in a township contract. The General Assembly has evidently deemed that the potential conflicts of interest which might arise between a township trustee and member of a private fire company which contracts with the township are outweighed by the need for firefighters.

The issue becomes whether the exemption provided by R.C. 505.011 is also applicable to the prohibitions imposed by R.C. 2921.42 (A)(3) and (A)(4).

As explained above, R.C. 511.13 and 2921.42 (A)(4) prohibit a township trustee from having an interest in a contract with his township and R.C. 2921.42 (A)(3) prohibits a township trustee from profiting from a non-bid public contract authorized by the board of township trustees. The Attorney General in 1982 Ohio Op. Att'y Gen. No. 82-008 compared R.C. 2921.42 (A)(4) to R.C. 511.13. The Attorney General explained that R.C. 511.13 is a remedial statute which does not impose a criminal sanction but safeguards the public interest by the introduction of a regulation conducive to the public good. R.C. 511.13 prevents favoritism and fraud by prohibiting contracts between a public official and his township except where the public official has a minor ownership interest in the contracting corporation. In contrast, R.C. 2921.42 is part of the Criminal Code which prevents favoritism and fraud by imposing criminal sanctions upon the public official who acts in contravention of its prohibitions. However, Divisions (B) and (C) of Section 2921.42 of the Revised Code provide limited exemptions to the prohibition of R.C. 2921.42 (A)(4). See 1982 Ohio Op. Att'y Gen. No. 82-008. R.C. 511.13 imposes a broader prohibition than R.C. 2921.42, since R.C. 511.13 is a remedial statute and R.C. 2921.42 is a penal statute, and since the Ethics Commission has held that the exemptions to R.C. 2921.42 (A)(4) do not apply to R.C. 511.13. See Advisory Opinion No. 84-006; 1982 Ohio Op. Att'y Gen. No. 82-008.

The Attorney General in 1990 Ohio Op. Att'y Gen. No. 90-037 held that the General Assembly enacted R.C. 505.011 to provide a limited exemption to the prohibition of R.C. 511.13 in order to enable township trustees to serve their communities as volunteer firefighters without jeopardizing their trusteeship. Since R.C. 511.13 imposes a broader prohibition than the one imposed by R.C. 2921.42 (A)(4), a holding by this Commission that the exemption provided by R.C. 505.011 does not also apply to the prohibition imposed by R.C. 2921.42 (A)(4), as well as by (A)(3) would be inconsistent and contrary to the General Assembly's legislative policy and intent to enable township trustees to serve their communities as firefighters. Therefore, due to the exemption provided by R.C. 505.011, a township trustee is permitted to serve as a paid employee of a private fire company which is under contract to provide fire protection services to the township which he serves, despite the prohibitions imposed by R.C. 2921.42 (A)(4) and (A)(3).

(It must be noted that this opinion addresses the situation where a township trustee serves as a paid employee of a private fire company that contracts with the township. This opinion does not address the situation where a trustee serves as an employee of the township in the capacity of volunteer fireman. R.C. 505.011 would, in that instance, prohibit the trustee from receiving compensation for his services as a volunteer fireman. The prohibition in R.C. 505.011 against a trustee receiving compensation as a township volunteer fireman does not extend to a trustee who is employed by a private fire company which contracts with the township. See 1990 Ohio Op. Att'y Gen. No. 90-037.)

Your attention is 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. See Advisory Opinion No. 89-008. A public official's outside employer is considered to be his "business associate" for purposes of R.C. 2921.42 (A)(1). See Advisory Opinions No. 78-001, 83-002, 83-008, 89-006, and 89-008. In the instant situation both the trustee and his employing fire company have an interest in the contract between the company and the township.

The issue becomes whether R.C. 505.011 provides an exception to Division (A)(1) as well as to Divisions (A)(3) and (A)(4). In order to address this issue it is instructive to examine a situation previously addressed by the Ethics Commission. The Commission has recognized that the General Assembly has provided statutory exemptions to the prohibition of R.C. 2921.42 which are not included in that Section. One means by which the General Assembly has provided an exemption to the prohibition of R.C. 2921.42 is by enacting a statute declaring that in a specified circumstance a public official is not deemed to have an "interest" in a contract for purposes of any state law. For example, R.C. 135.38, part of the Uniform Depository Act, provides that officers, directors, and employees of financial institutions which receive public deposits are not deemed to have an "interest" in the deposit of such public moneys for the purpose of "any law of this state." Accordingly, the Ethics Commission held that the exemption

provided by R.C. 135.38 enables a county treasurer to serve as a board member of a bank that is a depository of county funds even in light of the fact that a board member of a bank would otherwise be deemed to have an "interest" in the bank's contracts for purposes of R.C. 2921.42. See Advisory Opinion No. 85-007. See also Advisory Opinion No. 83-002. However, the Commission held that the county treasurer who, due to the exemption of R.C. 135.38, serves as a board member of a bank that receives county funds is still subject to the other provisions of the Ethics Law. See also Advisory Opinion No. 88-005 (R.C. 1724.10, which provides that membership on the board of a community improvement corporation "shall not constitute an interest . . . in a contract or expenditure of money by any municipal corporation . . . or other political subdivision" exempts a city official from the prohibition of R.C. 2921.42 so that he would be permitted to serve on the board of a community improvement corporation which had entered into a public contract with the city; however, he is still subject to the other provisions of the Ethics Law).

The exception provided by R.C. 505.011 is distinguishable from the exception provided by R.C. 135.38 of the Uniform Depository Act. R.C. 135.38, as described above, provides that officers, directors, and employees of financial institutions which receive public deposits are not deemed to have an "interest" in the deposit of such public moneys for the purpose of "any law of this state." The exception provided by R.C. 505.011 is less broad. R.C. 505.011 does not state that the trustee will not be deemed to have an interest in the township contract; it permits him to serve his township as a firefighter despite his interest in the contract between his township and the fire company. The exemption provided by R.C. 505.011 specifically permits the trustee to serve as a firefighter, but it does not specifically allow him to participate as a trustee in matters affecting the fire company. See 1990 Ohio Op. Att'y Gen. No. 90-037. Therefore, R.C. 2921.42 (A)(1) would prohibit the trustee from participating in the board's authorization of the contract to the fire company, since he would, as discussed above, have an interest in the contract. Also, the company would be considered his "business associate" for purposes of R.C. 2921.42, and R.C. 2921.42 (A)(1) would prohibit the trustee from participating in matters affecting the fire company even if the trustee served the company without compensation or did not otherwise have an interest in the contract. See Advisory Opinion No. 88-002.

Therefore, R.C. 2921.42 (A)(1) prohibits 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 company would provide fire protection services to the township, and from signing warrants and checks to the company for services provided under the contract. See generally Advisory Opinions No. 78-006, 88-002, 88-008 and 90-005.

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 his office or employment to secure anything of value or the promise or offer of anything of value that is of such character as to manifest a substantial and improper influence upon him with respect to his 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. See R.C. 102.01 (B) and (C).

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. See 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). See Advisory Opinions No. 79-008, 85-006, 88-004, and 89-005. The compensation which the trustee receives as a fire company employee and the consideration which the fire company receives from the township for providing fire protection services are things of value for purposes of R.C. 102.03 (D).

The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official from using the authority or influence of his office to secure anything of value for himself, or for another person or entity if the relationship between the official and that person or entity could impair the official's objectivity and independence of judgment with regard to matters that affect that party. See Advisory Opinions No. 88-004, 88-005, and 89-005. 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 directly for himself in his outside private employment. See Advisory Opinion No. 80-003. The Commission has also held that R.C. 102.03 (D) prohibits a public official from acting in any matter which would secure a thing of value for his private 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 Advisory Opinion No. 88-005. It is apparent that a decision by the board of township trustees to contract with the private fire company directly affects the pecuniary interests of the trustee and his employer, the fire company.

R.C. 505.011 permits a township trustee to serve his township as a fireman despite his interest in the contract between the township and the fire company. However, R.C. 505.011 does not provide an exception to R.C. 102.03 (D) and does not, as discussed above, permit the trustee to participate in the township's actions to award the contract to his employing company. See Advisory Opinion No. 85-007 (a county treasurer, due to the exemption provided by R.C. 135.38 may serve on the board of a bank which is a depository of public funds, but R.C. 102.03 (D) prohibits him from participating in decisions or authorizing transactions involving the bank). See also Advisory Opinion No. 88-005.

Therefore, R.C. 102.03 (D) prohibits the trustee from voting, deliberating, participating in discussions, or otherwise using the authority or influence of his office, either formally or informally, to secure, renew, renegotiate, or modify a contract between his employing fire company and the township with which he serves. See Advisory Opinion No. 80-003. R.C. 102.03 (D) also prohibits the trustee from signing warrants and checks to the company for services provided under the contract. Id.



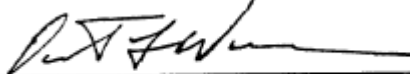
Finally, Division (B) of Section 102.03 provides:

No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which 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 the private fire company, its 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. See Advisory Opinion No. 88-009.

This advisory opinion is based on the facts presented and is rendered only with regard to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.

Therefore, it is the opinion of the Ethics Commission and you are so advised, that: (1) Due to the exemption provided by Section 505.011 of the Revised Code, a township trustee is not prohibited from serving as a full-time paid employee of a private fire company which is under contract to provide fire protection services to the township which he serves, despite the prohibitions of Divisions (A)(3) and (A)(4) of Section 2921.42 of the Revised Code; (2) Section 505.011 of the Revised Code does not provide an exemption from the prohibitions of Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code; and, (3) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code prohibit a township trustee who serves as an employee of a private fire company which is under contract to provide fire protection services to the township from discussing, deliberating, voting, or otherwise using the authority or influence of his position, either formally or informally, to authorize, secure, renew, modify, or renegotiate a contract between his employing fire company and the township, and from signing warrants and checks to the company for services provided under the contract.



Dr. David L. Warren, Chairman  
Ohio Ethics Commission