



OHIO ETHICS COMMISSION

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Advisory Opinion Number 98-004

August 20, 1998

Syllabus by the Commission:

(1) Division (A)(1) of Section 2921.42 of the Revised Code, and Division (D) of Section 102.03 of the Revised Code, prohibit a village clerk-treasurer from authorizing, or employing the authority or influence of her office to secure the authorization of, her husband's contract of employment, and from discussing, deliberating, or otherwise participating in any part of the village's decision-making process authorizing or approving her husband's contract of employment or the continuation, implementation, or terms and conditions of her husband's contract of employment;

(2) Provided the village clerk-treasurer has not authorized, or used her position in any way to secure the authorization of, her husband's employment, or the continuation, implementation, or terms and conditions of her husband's employment, Division (D) of Section 102.03 of the Revised Code does not prohibit her from performing the statutory duties of her office to implement a general budget appropriation which includes money to fund her husband's compensation and benefits where her husband's compensation and benefits have been established by a council action, independent of the clerk-treasurer's authority, and cannot be altered by any action of the clerk-treasurer;

(3) Division (D) of Section 102.03 of the Revised Code does not prohibit a village clerk-treasurer from participating in general budget appropriations for the department which employs her husband 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 her husband;

(4) Provided the village clerk-treasurer has not authorized, or used her position in any way to secure the authorization of her spouse's employment, or the continuation, implementation, or terms and conditions of her husband's employment, neither Division (A)(1) of

Section 2921.42 of the Revised Code, nor Division (D) of Section 102.03 of the Revised Code, prohibit her from signing her husband's payroll checks where her husband's compensation has been established by a council action, independent of the clerk-treasurer's authority, and cannot be altered by any action of the clerk-treasurer.

* * * * *

You have asked whether the Ethics Law and related statutes prohibit a person from serving as a village clerk-treasurer when her husband is currently employed by the village as its chief of police, and whether she could then participate in various matters involving her husband's employment with the village.

The Ethics Law significantly restricts the actions that a public official, including a village clerk-treasurer, may take with respect to a contract in which one of her family members has an interest. See, e.g., Ohio Ethics Commission Advisory Opinions No. 85-015 and 91-004. As explained more fully below, R.C. 2921.42(A)(1) and R.C. 102.03(D) prohibit a village clerk-treasurer from authorizing, or employing the authority or influence of her office to secure the authorization of, her husband's individual contract of employment, and from voting, discussing, deliberating, or otherwise participating in any matter or decision which would affect the continuation, implementation, or terms and conditions of her husband's contract of employment. Also, R.C. 2921.42(A)(1) and R.C. 102.03(D) prohibit a village clerk-treasurer from discussing, deliberating, or otherwise participating in any part of the village's decision-making process authorizing or approving her husband's individual contract of employment, and from exercising the power and influence of her public office to affect the village's decision-making process regarding her husband's individual contract of employment.

The Ethics Law does not, however, prohibit a person from serving as a village officer simply because one of that person's family members is currently employed by the village. Adv. Op. No. 91-004. Assuming that the village clerk-treasurer has not used her position to secure her husband's employment, or the continuation, implementation, or terms and conditions of her husband's employment, R.C. 102.03(D) does not prohibit her from performing the statutory duties of her office to implement a general budget appropriation which includes money to fund her husband's compensation and benefits where her husband's compensation and benefits have been established by a council action, independent of the clerk-treasurer's authority, and cannot be altered by any action of the clerk-treasurer. Also, R.C. 102.03(D) does not prohibit a village clerk-treasurer from implementing general budget appropriations for the department which employs her husband 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 her husband. Finally, provided that the village clerk-treasurer has not used her position to secure her husband's employment, or the continuation, implementation, or terms and conditions of her husband's employment, neither R.C. 2921.42(A)(1) nor R.C. 102.03(D) prohibit her from signing her husband's payroll checks where her husband's compensation has been established by a council action, independent of the clerk-treasurer's authority, and cannot be altered by any action of the clerk-treasurer.

Duties of the Village Clerk-Treasurer

In Advisory Opinion No. 98-001, the Ethics Commission examined the duties of a village clerk-treasurer. The executive power of a village is vested in several officers and departments, including the clerk and the treasurer, which are elected offices. See R.C. 733.23, 733.26, and 733.42. Pursuant to R.C. 733.261, the legislative authority of a village may combine the duties of the clerk and the treasurer into one office, known as the clerk-treasurer, which is also an elected office. A clerk-treasurer performs the duties provided by law for both the clerk and the treasurer, and all laws that pertain to either the clerk or treasurer apply to the clerk-treasurer. See R.C. 733.261(C).

The duties of a village clerk-treasurer, therefore, include all duties prescribed for a village clerk and village treasurer. These duties include: attending all meetings of the legislative authority of the village and keeping a record of its proceedings and of all rules, bylaws, resolutions, and ordinances passed or adopted (R.C. 733.27); keeping the books of the village that exhibit accurate statements of all moneys received and expended, of all the property owned by the village and the income derived therefrom, and of all taxes and assessments (R.C. 733.28); keeping an accurate account of all moneys received and disbursements made, organizing the village account books so that the amounts received and paid on separate funds are exhibited in separate accounts, and performing such duties as are required by village ordinance (R.C. 733.43); demanding and receiving levied taxes, assessments, judgments, fines, penalties, forfeitures, licenses, costs taxed in mayor's court, and other debts due the village, and disbursing the funds on the order of any person who is authorized by law to issue such order (R.C. 733.44); accounting to the legislative authority on a quarterly basis, reporting the condition of the village finances, and exhibiting the balance due each fund that came into her hands during the year (R.C. 733.45); receiving and disbursing all village funds (R.C. 733.46); delivering all money, books, papers, and other property when leaving office (R.C. 733.47); and, in noncharter villages, collecting and depositing taxes to the village treasury, and enforcing and administering the village's income tax ordinances, resolutions, and rules (R.C. 733.85). See Adv. Op. No. 98-001.

Prohibitions Against Authorizing a Family Member's Employment

You have asked whether the Ethics Law and related statutes prohibit a person from serving as a village clerk-treasurer when her husband is currently employed by the village as its chief of police, and whether she could then participate in various matters involving her husband's employment with the village. The Ethics Law generally prohibits a public official, including a village clerk-treasurer, from acting in any way to secure the employment of family members. See R.C. 2921.42(A)(1) and R.C. 102.03(D) and (E); Adv. Ops. No. 85-015, 90-010, 92-012, and 97-004. In your situation, however, you have stated that the husband of the clerk-treasurer was employed by the village before she would begin to serve the village as its clerk-treasurer. Generally, the Ethics Law does not prohibit any of the members of her family from continuing to be employed by the village simply because she begins serving as the clerk-treasurer. See Adv. Op. No. 97-004. The Ethics Law does, however, restrict the actions which a village clerk-treasurer may take with respect to her husband's continued employment with the village. Id.

Participation in the Continuation of a Family Member's Employment--R.C. 2921.42(A)(1)

The section of the law that is most applicable to your question is R.C. 2921.42(A)(1), which 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.

The term "public official" is defined in R.C. 2921.01(A) for purposes of R.C. 2921.42 to include any elected or appointed officer of a political subdivision of the state. The Ethics Commission has previously held that a village clerk-treasurer is a "public official" under R.C. 2921.01(A), and therefore is subject to the prohibitions in R.C. 2921.42(A)(1). See Adv. Op. No. 98-001.

The term "public contract" is defined in R.C. 2921.42(G)(1)(a) for purposes of R.C. 2921.42 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. 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." See also Adv. Ops. No. 90-010 and 97-004; Walsh v. Bollas (Lake App. 1992), 82 Ohio App. 3d 588 (holding that "public contract" under R.C. 2921.42(A)(1) includes public employment); In re Removal of Steed,

unreported, Case No. 1909 (Lawrence App., July 27, 1989) (same). Therefore, her husband's employment with the village is a "public contract" under R.C. 2921.42.

As stated above, R.C. 2921.42(A)(1) prohibits a public official from authorizing the hire of a family member, including a spouse. See Adv. Ops. No. 80-001, 85-015, 90-010, 92-012, and 97-004. The Commission has further held that this prohibition extends beyond the initial hire of a family member and prohibits a public official from participating in any matter or decision which would affect the continuation, implementation, or terms and conditions of her family member's employment. See Adv. Ops. No. 82-003, 89-005, 92-012, and 97-004.

The exact actions prohibited by R.C. 2921.42(A)(1) turn on what constitute actions that "authorize" and "employ the authority or influence of his office." The Commission has interpreted this statutory language to mean that a public official will be deemed to have "authorized" a public contract, for the purposes of R.C. 2921.42, where the contract could not have been awarded without the public official's approval. See Adv. Ops. No. 87-004, 88-008, 90-010, and 92-012. Accordingly, R.C. 2921.42(A)(1) prohibits a public official from voting, discussing, deliberating, or otherwise participating in any part of his public agency's decision-making process with respect to the continuation, implementation, or terms and conditions of his family member's employment. See Adv. Ops. No. 89-005, 90-010, 92-012, and 97-004.

Further, the Commission has determined that R.C. 2921.42(A)(1) prohibits a public official from using "the authority or influence of his office" by exercising the power and influence inherent in the position and prestige of his public office or employment, either formally or informally, to affect the decision-making process of other public officials or employees regarding the continuation, implementation, or terms and conditions of his family member's employment. Thus, the public official's use of the authority or influence of his office takes place, even if the official abstains subsequently from the act of voting in official proceedings. See Adv. Ops. No. 90-012 and 97-004.

Therefore, R.C. 2921.42(A)(1) prohibits a village clerk-treasurer from discussing, deliberating, or otherwise participating in any part of the village's decision-making process, and from exercising the power and influence of her public office, to affect the continuation, implementation, or terms and conditions of her husband's employment even if she did not participate in the original hiring decision.

Use of Authority to Affect a Family Member's Employment--R.C. 102.03(D) and (E)

In addition to R.C. 2921.42(A)(1), your question also implicates R.C. 102.03(D) and (E), which provide:

(D)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.

(E)No public official or employee shall solicit or accept 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) and (E) to include any person who is elected or appointed to an office of a village. See R.C. 102.01(B) and (C). The Commission has previously held that a village clerk-treasurer is a "public official or employee" for purposes of R.C. 102.03(D) and (E), and is subject to the provisions of R.C. 102.03(D) and (E). See Adv. Op. No. 98-001.

The term "anything of value" is defined for the purposes of R.C. 102.03(D) and (E) to include money, a promise of future employment, and every other thing of value. See R.C. 102.01(G) and R.C. 1.03. An employee's continued employment, and the compensation received therefor, fall within the definition of "anything of value." See Adv. Ops. No. 90-004 and 92-012.

The Commission has held that R.C. 102.03(D) and (E) prohibit a public official or employee from using his authority or influence, formally or informally, to secure anything of value for himself or any other party, if the relationship between the employee and the other party is such that the employee's objectivity and independence of judgment could be impaired. See Adv. Ops. No. 88-004, 89-005, and 97-002. Specifically, the Commission has stated that R.C. 102.03(D) and (E) prohibit a public employee from using her authority or influence, formally or informally, to secure anything of value for members of the employee's family, including her spouse. See Adv. Ops. No. 89-008, 90-004, 91-004, and 92-012.

Therefore, R.C. 102.03(D) prohibits a village clerk-treasurer from using her authority or influence, formally or informally, to secure the employment of her

husband, or to otherwise act with respect to matters that affect her husband's contract of employment. See Adv. Ops. No. 92-012 and 97-004. These matters include, but are not limited to, any of the following: changes in compensation or benefits that are determined by individual working conditions; the assignment of duties that will change the terms of the contract; evaluations; and actions involving promotions, discipline, lay-offs, and termination. Id. Furthermore, R.C. 102.03(D) prohibits a village clerk-treasurer from using the authority or influence of her office, formally or informally, to influence the decisions or actions of other officials or employees in matters that would affect her husband's interest in his employment relationship with the village.

Participating in the Implementation of Appropriations

You have also asked whether the Ohio Ethics Law and related statutes prohibit a village clerk-treasurer from participating in matters involving general payroll resolutions and general budget appropriations for the department that employs her husband. The 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 to fund a family member's compensation and benefits where either of two sets of facts are present. First, the Commission has stated that R.C. 102.03(D) does not prohibit a public official from participating in such 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. Adv. Op. No. 92-012. 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 such a general budget appropriation provided that the family member's compensation and benefits are identical to and in common with the entire class of city employees who are not subject to a collective bargaining agreement. See Adv. Ops. No. 92-010 and 92-012.

In the situation you have set forth, the employee is the police chief, a management employee whose salary may be higher than the salaries paid to other village employees. Therefore, the first provision, 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, is the one that must be applied in this case.

The Ohio Supreme Court has held that R.C. 731.13 confers "full and complete authority upon a village council to fix the salaries of officers of such village." See South Euclid v. Bilkey (1933), 126 Ohio St. 505, at syllabus ¶2 (emphasis added). The

salaries of village officers are set by village council, in an action separate from appropriations, and independent of the authority of the village clerk-treasurer. The village clerk-treasurer has no statutory authority to fix or alter the salaries of village officers or employees at any time, including during the exercise of her duties relative to appropriations.

Therefore, R.C. 102.03(D) does not prohibit a village clerk-treasurer from performing the statutory duties of her office to implement a general budget appropriation which includes money to fund her husband's compensation and benefits provided that her husband's compensation and benefits have been established by a council action separate from the appropriation and the appropriation measure does not provide the clerk-treasurer with the authority to alter her spouse's compensation and benefits during the performance of her duties. Once again, it must be stressed that the village clerk-treasurer is prohibited from authorizing, or using her position in any way to secure the authorization of her spouse's employment, or the continuation, implementation, or terms and conditions of her husband's employment, both prior to and during the exercise of her statutory duties relative to appropriations. The clerk-treasurer would also be prohibited from using any authority she may have with respect to ordinances to alter the amount or nature of the compensation received by her spouse.

Likewise, the 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. Op. No. 90-004. While it is possible that the 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, the Commission has held that such appropriations by and for the use of a public agency generally will not provide a definite and direct, personal pecuniary benefit to the individual employee. Id. Accordingly, the 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. 90-004 and 92-012. Therefore, R.C. 102.03(D) does not prohibit a village clerk-treasurer from participating in general budget appropriations for the department which employs her husband 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 her husband.

Signing the Payroll Checks of a Family Member

You have also asked whether the Ohio Ethics Law and related statutes prohibit a village clerk-treasurer from signing, or having her authorized signature stamped on, her husband's payroll checks. Ohio law provides that "[a] signature may be made manually or by means of a device" such as an authorized signature stamp. See R.C. 1303.41(B). The Commission has stated that the counter-signing of a payroll check, by the fiscal officer of a political subdivision, once the payment of that compensation has been independently approved by the governing board of the political subdivision, is a ministerial function performed without decision-making authority or discretion. See Adv. Op. No. 92-010; but see Adv. Op. No. 91-001 (a public official is prohibited by R.C. 2921.42(A)(1) and R.C. 102.03(D) from signing warrants or checks to a company which employs him); State v. Pinkney (1988), 36 Ohio St. 3d 190. Therefore, although it may be better practice for someone else to sign the warrants or checks to her husband, R.C. 2921.42(A)(1) and R.C. 102.03(D) do not prohibit a village clerk-treasurer from signing her husband's payroll checks, where the underlying compensation has been set and approved by the village council. Once again, R.C. 2921.42(A)(1) and 102.03(D) prohibit the village clerk-treasurer from authorizing, or using her position in any way to secure the authorization of her spouse's employment, or the continuation, implementation, or terms and conditions of her husband's employment. The clerk-treasurer can take no action, independent of the direction of the village council, to affect her spouse's compensation or employment.

This advisory opinion is based on the facts presented. It 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.

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, and Division (D) of Section 102.03 of the Revised Code, prohibit a village clerk-treasurer from authorizing, or employing the authority or influence of her office to secure the authorization of, her husband's contract of employment, and from discussing, deliberating, or otherwise participating in any part of the village's decision-making process authorizing or approving her husband's contract of employment or the continuation, implementation, or terms and conditions of her husband's contract of employment; (2) Provided the village clerk-treasurer has not authorized, or used her position in any way to secure the authorization of, her husband's employment, or the continuation, implementation, or terms and conditions of her husband's employment, Division (D) of Section 102.03 of the Revised Code does not prohibit her from performing the statutory duties of her office to implement a general budget appropriation which includes money to fund her husband's compensation and benefits where her husband's compensation and benefits have been established by a council

action, independent of the clerk-treasurer's authority, and cannot be altered by any action of the clerk-treasurer; (3) Division (D) of Section 102.03 of the Revised Code does not prohibit a village clerk-treasurer from participating in general budget appropriations for the department which employs her husband 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 her husband; and (4) Provided the village clerk-treasurer has not authorized, or used her position in any way to secure the authorization of her spouse's employment, or the continuation, implementation, or terms and conditions of her husband's employment, neither Division (A)(1) of Section 2921.42 of the Revised Code, nor Division (D) of Section 102.03 of the Revised Code, prohibit her from signing her husband's payroll checks where her husband's compensation has been established by a council action, independent of the clerk-treasurer's authority, and cannot be altered by any action of the clerk-treasurer.

Sister Mary Andrew Matesich

Sister Mary Andrew Matesich, Chair
Ohio Ethics Commission