



OHIO ETHICS COMMISSION
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Advisory Opinion
No.: 77-004
May 25, 1977

Syllabus by the Ohio Ethics Commission:

A part-time village engineer who exercises sovereign power is a "public official," as that term is defined in Section 102.01 (B) of the Revised Code, and is therefore subject to the Ohio Ethics Law, even though he is engaged as an independent contractor.

* * * * *

In your request for an Ohio Ethics Commission Advisory Opinion, you asked whether a part-time village engineer is a "public official or employee" for purposes of the Ohio Ethics Law, even though he is an independent contractor.

You state, by way of history, that you are a professional engineer, and have been engaged by the village council to serve as village engineer on a part-time basis for several years. Last year the council authorized a change in the status of the position to permit you to serve as an independent contractor, and you are presently engaged on a retainer basis and paid hourly for additional work. Your duties are the same, and they include preparing plans, specifications, and estimates, and performing the engineering work necessary for the installation of village projects such as streets and sewers, supervising the letting of contracts on such projects, and determining that the work on village projects is properly completed. You ask whether by virtue of these functions and your relationship with the village, you are a "public official or employee" under the jurisdiction of the Ohio Ethics Law.

The prohibitions of Chapter 102. of the Revised Code, the Ohio Ethics Law, apply generally to any "public official or employee" or any "person elected or appointed to an office of or employed by the . . . state. . . (or). . . a county, township, municipal corporation, or any other governmental entity, excluding the courts." Section 102.01 (B) of the Revised Code defines "public official or employee" as "any person who is elected or appointed to an office or is an employee of any public agency." (emphasis added) Section 102.01 (C) of the Revised Code defines "public agency" to include a township. Therefore, to determine whether the Ohio Ethics Law applies to a village engineer, it is necessary to determine whether he is a "person. . . appointed to an office. . . or an employee" of the township.

In Wright v. Clark, 119 Ohio St. 462 (1928), the court held that a part-time "engineer of a city or village is an officer within the meaning and intent of. . . (the). . . code." In that case, Wright was engaged as a part-time engineer with

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village of Bedford. In determining whether Wright was a public officer, the court refused to look exclusively at the contract or village council resolution, but cited State ex rel. v. Brennan, 49 Ohio St. 33 (1892), which reviewed the definitions of an "office" and concluded:

"it is not important to define with exactness all of the characteristics of a public office, but it is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with the independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office."

The Ohio Ethics Commission, in Advisory Opinion No. 74-007, established tests to determine whether a person is "appointed to an office" for purposes of the Ohio Ethics Law; that is, whether the person: 1) is appointed; 2) has a title; 3) exercises a governmental function; 4) is not subject to a contract of employment; and 5) exercises sovereign power. The advisory opinion relied on the decision of the Ohio Supreme Court in State ex rel. Herbert v. Ferguson, 142 Ohio St. 496 (1944), in which it was determined that "a public office of a civil nature. . . is a charge or trust conferred by public authority for a public purpose, with independent and continuing duties, involving in their performance the exercise of some portion of the sovereign power." Sovereign power includes the exercise of a duty entrusted to one by virtue of a statute or other public authority, a duty that is not merely clerical, but that involves discretionary, decision-making qualities.

In the instant case, the village engineer is: 1) appointed by the village council; 2) has the title "village engineer;" 3) exercises the governmental function of contracting for and supervising the construction of village street and sewer projects; and 4) exercises sovereign power with respect to public construction contracts and other discretionary governmental decisions, but is subject to a contract of employment.

Thus, the village engineer does not meet every criterion for determining whether a person is "appointed to an office." However, although the presence or absence of a contract of employment is a factor, it is not determinative. The village engineer meets all other criteria for determining whether a person is "appointed to an office," including exercise of sovereign power, and the Ohio Supreme Court has determined that a village engineer is an officer. The Ohio Ethics Commission in establishing the tests, emphasized that they are:

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"Among some of the tests that may be applied to determine whether members of various entities of government are officers of that entity. No one indicium is determinant all of the time. Generally there exists a combination of these factors. Sometimes the inclusion of others not listed is the basis for (the) determination. . . ."

We conclude, therefore, that a village engineer is "appointed to an office" and is a "public official" for purposes of the Ohio Ethics Law. Since Section 102.01 (B) of the Revised Code distinguishes between a person "elected or appointed to an office" and a person who is "an employee of any public agency," we conclude that a village engineer is not a "public employee" for purposes of the Ohio Ethics Law.

In your request for an advisory opinion, you stated that although you serve in the capacity of village engineer, you do so as an independent contractor, and you understand that under such circumstances you are not subject to the Ohio Ethics Law.

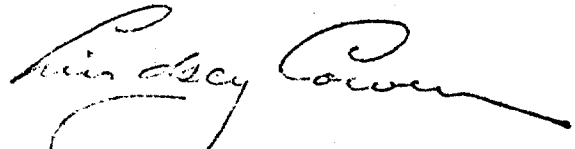
In order to determine whether a public official is subject to the Ohio Ethics Law, even though he is engaged as an independent contractor, it is necessary to examine the distinctions among public officials, public employees, and independent contractors. Public officials are elected or appointed to an office, exercise the sovereign power of government, and as such are within the purview of the Ethics Law. Public employees, as distinguished from public officials in Section 102.01 (B) of the Revised Code, share in the responsibilities of the public trust exercised principally by their elected or appointed superiors, and are subject to the Ethics Law. An independent contractor, who is not a public official and not vested with sovereign authority, does not share in the exercise of the public trust, because the very nature of the employer-independent contractor relationship is such that the independent contractor is involved in an independent, short-term arrangement, and engaged to perform a specific task or set of tasks at the completion of which the relationship is terminated.

Whether a person is a public official subject to the Ethics Law depends on the amount and kinds of authority and discretion he exercises, and not on the contractual or other arrangement under which he serves. We conclude that once a person becomes a public official, he exercises the sovereign power of government and is vested with the public trust, and as such he ceases to be an independent contractor. Otherwise, an appointed public official could avoid the Ethics Law simply by executing a contract that declares him to be an independent contractor.

The Ohio Ethics Commission cautions that its advisory opinions may be relied upon only with respect to questions arising under Chapter 102. of the Revised Code and Section 2921.42 of the Revised Code, and do not address possible violations of other laws or rules.

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The conclusions of this Advisory Opinion are based on an examination of the particular facts and circumstances of the instant case. Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised that, as a part-time village engineer who exercises sovereign power, you are a "public official" appointed to an office of a village, and subject to the Ohio Ethics Law.



OHIO ETHICS COMMISSION
Lindsey Cowen, Chairman