



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
8 EAST LONG STREET, SUITE 1200
COLUMBUS, OHIO 43215-2940
(614) 466-7090

Advisory Opinion Number 92-012
August 14, 1992

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 city council member, who marries a city employee from authorizing, approving, voting upon, discussing, deliberating, recommending, or otherwise using the authority or influence inherent in the position and prestige of his city office, formally or informally, to secure, renew, modify, or renegotiate his spouse's individual employment relationship with the city, or to authorize or approve payments to his spouse for services rendered in her public employment;

(2) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code do not prohibit a city council member whose spouse is a city employee who is not subject to a collective bargaining agreement from voting or otherwise participating to secure enactment of an ordinance or resolution to fix the salaries and compensation of the entire class of city employees who are not subject to collective bargaining, provided that the ordinance or resolution does not: (a) establish the salaries and compensation on some basis other than, or in addition to, membership in the class of city employees who are not subject to collective bargaining; (b) differentially affect the compensation or salary which his spouse receives; or (c) secure, renew, modify, or renegotiate the terms of his spouse's individual public employment.

* * * * *

You have asked whether the Ohio Ethics Law and related statutes prohibit a city council member who has married a city employee from participating in matters before city council and the city council's finance committee which will affect either his spouse's compensation or the city department with which she is employed. You have also asked whether the city council member may continue to serve as the chairman of the city council's finance committee.

You state that the city council member recently married a city employee. Before the marriage, the council member served as the chairman of the city council's finance committee for approximately ten years and the council member's spouse had been employed as a secretary in the city's income tax department for approximately five years. The council member's spouse is not employed pursuant to a collective bargaining agreement. City council has, by ordinance, established the compensation of the entire class of city employees who are not employed subject to a collective bargaining agreement.

In order to address your questions, it is first necessary to discern how the provisions of the Ohio Ethics Law and related statutes affect a city council member who is married to a city employee.

Division (A)(1) of Section 2921.42 of the Revised Code reads as follows:

(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.

The term "public official" is defined in R.C. 2921.01 (A) for purposes of R.C. 2921.42 to include an elected or appointed officer of a political subdivision of the state. The legislative power of a city is vested in, and exercised by, city council. See R.C. 731.01. Thus, a city council member is a "public official" who is subject to the prohibitions of R.C. 2921.42. See Ohio Ethics Commission Advisory Opinions No. 80-001, 89-008, and 91-002.

The term "public contract" is defined in R.C. 2921.42 (E)(1) 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. The Ethics Commission has consistently held that an employment relationship between a political subdivision and an employee is a "public contract" for purposes of R.C. 2921.42 since the political subdivision is purchasing or acquiring the services of the employee. See Advisory Opinions No. 82-003, 85-003, 85-015, 86-010, 89-005, and 90-010. The Commission has never distinguished between public employees who are hired pursuant to a collective bargaining agreement and those who are not for purposes of its holding that an employment relationship between a political subdivision and an employee is a public contract. See Advisory Opinions No. 82-003 and 89-005. See also Advisory Opinion No. 90-010 (R.C. 2921.42 (E)(1) does not limit the definition of a public contract to a specific manner or means by which the State or a political subdivision acquires or purchases services).

R.C. 2921.42 (A)(1) limits the exercise of a public official's authority with regard to a family member's public employment. See Advisory Opinions No. 82-003, 85-015, 86-010, 89-005, and 90-010. For purposes of R.C. 2921.42, a family member includes a spouse, children, whether dependent or not, parents, grandparents, grandchildren, siblings, and other persons related by blood or marriage and residing in the same household. See Advisory Opinions No. 80-001, 85-015, 89-005, and 90-010. The Ethics Commission explained the prohibition imposed by R.C. 2921.42 (A)(1) in Advisory Opinion No. 90-010:

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. . . . 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. (Emphasis in original).

R.C. 2921.42 (A)(1) prohibits a public official from "authorizing" the employment of a family member or employing the "authority or influence of his office" to secure authorization of the employment of a family member. See Advisory Opinions No. 85-015, 86-010, and 90-010. See also Advisory Opinion No. 91-007.

The Ethics Commission has held that a public official will be deemed to have "authorized" a public contract for purposes of R.C. 2921.42 where the contract could not have been awarded without the approval of the official. See Advisory Opinions No. 87-004, 88-008, 90-010, 91-007, and 92-008. Accordingly, R.C. 2921.42 (A)(1) prohibits a public official from voting or participating in any part of his public agency's decision-making process authorizing or approving an individual contract of employment for a member of his family. See Advisory Opinions No. 82-003, 89-005, and 90-010.

Also, R.C. 2921.42 (A)(1) prohibits a public official from using his "authority or influence" to secure the authorization of a public contract in which a member of his family has an interest. See Advisory Opinion No. 91-007. The words "authority or influence" are not defined for purposes of R.C. 2921.42. It is a primary rule of statutory construction that words used in a statute which are not defined must be construed according to rules of grammar and common usage. See R.C. 1.42. The word "authority" is defined in Webster's New World Dictionary of the American Language as "power or influence resulting from knowledge, prestige, etc." Webster's New World Dictionary of the American Language 94 (2d College ed. 1970). The word "influence" is defined as "the power of persons . . . to affect others, seen only in its effects" and "the ability of a person . . . to produce effects indirectly by means of power based on . . . high position." Webster's New World Dictionary of the American Language 722 (2d College ed. 1970). The General Assembly's use of the words "authority or influence" in R.C. 2921.42 (A)(1) specifically characterize a broader range of activity than that described by the word "authorize." See Dougherty v. Torrence, 2 Ohio St. 3d 69, 70 (1982) (effect must be given to words used in a statute); Dungan v. Kline, 81 Ohio St. 371, 380-81 (1910) (the presumption is that every word in a statute is designed to have effect); Advisory Opinion No. 74-001 ("it is to be assumed that the Legislature used the language contained in a statute advisedly and intelligently and expressed its intent by the use of the words found in the statute"). Therefore, R.C. 2921.42 (A)(1), by prohibiting a public official from employing the "authority or influence of his office," prohibits a public official from exercising the power and influence inherent in the position and prestige of his public office or employment to affect the decision-making process regarding the employment of a family member even if the official abstains from voting and participating in official proceedings.

The prohibition against a public official "authorizing" the employment of a family member or employing the "authority or influence of his office" to secure authorization of the employment of a family member extends beyond the initial hiring 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 an individual contract of employment for a member of his family even if the prohibitions imposed by R.C. 2921.42 (A)(1) were

inapplicable at the time the initial hiring decision was made. See Advisory Opinions No. 82-003 and 89-005. These matters and decisions include, but are not limited to, the authorization or approval of payments to the family member for services rendered and the renewal, modification, termination, or renegotiation of the family member's public employment. Cf. Advisory Opinion No. 88-008 (the Ethics Commission has held that for purposes of the "continuing course of dealing" exception of R.C. 2921.42 (C)(2), material changes to a public contract, such as modifications or alterations, transform the original understanding of the parties). If it were held that the prohibitions imposed by R.C. 2921.42 (A)(1) applied only to authorizing or securing a family member's initial employment, then the prohibitions could be effectively circumvented where a public official did not participate in the initial hiring decision, but subsequent to the initial employment he authorized or approved payments to a family member for services rendered, or advocated, recommended, voted upon, or participated in discussions or decision-making regarding such matters as pay raises, additional benefits, or other modifications of the public employment.

The legislative authority of a city has the duty to fix the salaries and compensation of officers, clerks, and employees in each department of the city government by ordinance and resolution except as otherwise provided by law. See R.C. 731.08. (The city is a statutory city operating under the general plan found in Title VII of the Ohio Revised Code.) The city council is thus empowered to increase, decrease, or otherwise modify the compensation which the council member's spouse receives as a city employee. Therefore, R.C. 2921.42 (A)(1) prohibits the council member from authorizing, or approving, voting upon, discussing, deliberating, recommending, or otherwise using, formally or informally, the authority or influence which is inherent in the position and prestige of his office, including his power over other city officers or employees, to secure, renew, modify, or renegotiate his spouse's individual contract of public employment or to authorize or approve payments to his spouse for services rendered in her public employment. See Advisory Opinions No. 82-003, 85-003, 85-015, 86-010, 89-005, and 90-010. See also R.C. 102.03 (D) discussed below.

You state that prior to the council member's marriage to the city employee, city council enacted an ordinance which established the compensation of the entire class of city employees who are not employed subject to a collective bargaining agreement. The same ordinance also scheduled pay increases which were to take effect during the next two years for these employees. Therefore, both the spouse's individual contract of employment and the rate of compensation for all employees not subject to collective bargaining, including scheduled pay increases, were established prior to her marriage to the council member. (However, subsequent to both the passage of the ordinance and the council member's marriage to the city employee, city council enacted another ordinance eliminating the scheduled pay increases.) The prohibitions of R.C. 2921.42 (A)(1) did not apply to the council member with regard to matters affecting his spouse's initial hiring by the city, or her compensation which was established by ordinance, including the pay increases scheduled for the next two years, since she was not a member of the council member's family at the time she was hired or when the ordinance was enacted. Neither R.C. 2921.42 (A)(1) nor any other provision of the Ethics Law prohibit, per se, the council member's spouse from continuing to be employed by the city. However, as explained above, the council member is required to abstain from all matters involving his spouse's individual employment relationship with the city.

It is important to note that city council has enacted an ordinance establishing the compensation of the entire class of city employees who are not employed subject to a collective bargaining agreement. The Ethics Commission has recognized a distinction between an individual contract for public employment and a master labor contract for purposes of R.C. 2921.42 (A)(1). See Advisory Opinions No. 82-003 and 89-005. In Advisory Opinion No. 82-003, the Ethics Commission explained that a master labor contract entered into between a political subdivision and a labor organization covering employees of the political subdivision establishing a salary schedule and the terms and conditions of employment for employees of the political subdivision who are covered by the agreement is a public contract for purposes of R.C. 2921.42. See also Advisory Opinion No. 89-005. However, the Commission held that an individual employee's interest in the master labor contract is not sufficiently definite and direct so as to invoke the prohibitions of R.C. 2921.42 (A)(1), unless the employee is an officer, board member, or member of the negotiating team of the labor organization. See Advisory Opinions No. 82-003, 89-005, and 89-008. If a public official's family member is employed pursuant to a collective bargaining agreement, then R.C. 2921.42 (A)(1) does not prohibit the official from voting to approve a master labor contract between his political subdivision and an employees' labor organization despite the fact that his family member is subject to the contract's terms and conditions. See Advisory Opinions No. 82-003 and 89-005. See also R.C. 102.03 (D) (discussed below). However, the Ethics Commission has suggested that a public official whose family member is employed by his political subdivision pursuant to a collective bargaining agreement should refrain from taking an active role in collective bargaining negotiations in order to avoid an appearance of impropriety. See Advisory Opinion No. 89-005.

The issue becomes whether R.C. 2921.42 (A)(1) prohibits a council member whose spouse is a city employee and not subject to a collective bargaining agreement from participating in actions of city council which affect the entire class of city employees who are not subject to a collective bargaining agreement.

As explained above, R.C. 2921.42 (A)(1) does not prohibit a public official whose spouse is employed by the city pursuant to a collective bargaining agreement, from participating to secure ratification of the final master labor contract between the public agency and the employee labor organization provided the official's spouse does not have a definite and direct interest in the master labor contract. In the instant situation, while the compensation of the council member's spouse is not established pursuant to a collective bargaining agreement, it is evident that an ordinance providing an across-the-board pay increase to the entire class of city employees who are not subject to collective bargaining would work a result similar to city council's ratification of a master labor contract with an employee labor organization. Each situation involves city council authorizing a pay change which has a uniform effect upon an entire class of city employees.

Following the rationale of Advisory Opinion No. 82-003, a city employee who is not covered by a collective bargaining agreement would not have a sufficiently definite and direct interest in compensation established by an ordinance of city council which uniformly affects the compensation of all city employees who are not covered by collective bargaining. Therefore, in the instant situation, R.C. 2921.42 (A)(1) does not prohibit a city council member whose spouse is a city employee and does not serve pursuant to a collective bargaining agreement from voting

or otherwise participating in the enactment of an ordinance or resolution to fix the salaries and compensation of the entire class of city employees who are not subject to collective bargaining, provided that city council's action will not differentially affect the rate of compensation which his spouse receives, or secure, renew, modify, or renegotiate the terms of his spouse's individual public employment.

However, if city council were to authorize pay changes for its employees who are not subject to a collective bargaining agreement on other than a uniform basis, then the terms and conditions of individual city employees' public employment would be differentially affected and an individual employee's interest in the compensation established by city council's action would be "definite and direct." For example, a city employee who is not subject to collective bargaining would have a definite and direct interest in a pay increase authorized by city council which was determined on some basis of differential treatment other than, or in addition to, membership in the class of city employees who are not subject to collective bargaining. Examples of such differential treatment would include pay increases provided to individual employees, increases based on position or on department, or some other subcategory of the entire class. These would also include, but not be limited to, increases based on merit, increases made to reflect significant changes in an employee's duties, increases which vary in rate from other individual employees within the class of employees not subject to collective bargaining, or where pay increases are provided only to a select group of individuals within this class. In such circumstances, R.C. 2921.42 (A)(1) would prohibit the council member from voting upon, discussing, deliberating, recommending, or otherwise authorizing or using the authority or influence of his position, formally or informally, to secure enactment of the ordinance or resolution. See also R.C. 102.03 (D) (discussed below).

You have stated that the council member pledged at a meeting of city council that he would abstain, while performing his duties as a city council member, including his duties as a member of the finance committee, from voting on proposed legislation which could be construed in any way as financially affecting his spouse. As explained above, R.C. 2921.42 (A)(1) prohibits the council member from voting, discussing, deliberating, recommending, authorizing, or otherwise using his authority or influence, formally or informally, regarding any action on a city ordinance or resolution which would affect his spouse's individual employment relationship with the city or which would provide compensation in which his spouse has a definite and direct interest. Additionally, the council member may wish to refrain from taking an active role in matters before council which would affect the compensation of city employees who are not subject to collective bargaining in order to avoid an appearance of impropriety. See generally Advisory Opinion No. 89-005.

Your attention is also directed to R.C. 102.03 (D), 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 a character as to manifest a substantial and improper influence upon him with respect to his duties.

The term "public official or employee" is defined for purposes of R.C. 102.03(D) to include any person who is elected or appointed to an office of any instrumentality of a city. See R.C. 102.01 (B) and (C). A city council member is a "public official or employee" as defined for purposes of R.C. 102.03, and is, therefore, subject to the prohibitions of that section. See Advisory Opinions No. 89-008, 90-004, and 91-004.

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. 102.01 (G). A city employee's continued employment and the compensation received therefor fall within the definition of "anything of value." See generally Advisory Opinion No. 90-004.

The Ethics Commission explained in Advisory Opinion No. 92-010 that R.C. 102.03 (D) prohibits a public official from participating, formally or informally, in any matter which directly affects the private pecuniary interests of the official's spouse where the official's objectivity and independence of judgment could be impaired. See also Advisory Opinions No. 90-004 and 91-004. Therefore, in the instant situation, R.C. 2921.42(A)(1) and 102.03(D) prohibit the council member from voting, discussing, deliberating, recommending, or otherwise authorizing, or using the authority or influence of his public office, either formally or informally, with respect to increases in compensation or benefits which would be determined on some basis of differential treatment from the entire class of city employees who are not subject to collective bargaining, such as pay increases provided to individual employees, positions, departments, or some other subcategory of the entire class. See Advisory Opinion No. 92-010. See also Advisory Opinions No. 82-003 and 90-010. R.C. 102.03(D), as well as R.C. 2921.42(A)(1), also prohibits the city council member from using his authority or influence, formally or informally, with respect to the terms and conditions of his spouse's individual employment relationship with the city. These matters include, but are not limited to, changes in compensation or benefits determined by individual working conditions, the assignment of duties, evaluations, and actions involving promotions, disciplinary actions, lay-offs, and removal. Furthermore, the council member is prohibited from using the authority or influence of his office, formally or informally, to influence the decisions or actions of other city officials or employees in matters which would affect the interests of his spouse's individual employment relationship with the city.

The Ethics Commission has held that R.C. 102.03 (D) does not prohibit a council member from participating in general budgetary appropriations to the city department which employs a family member provided that the appropriations do not provide a definite and particular personal benefit to his family member, but are for the department's general accommodations, supplies, and operating expenses. See Advisory Opinion No. 90-004. See also Advisory Opinion No. 91-004 and 92-010. For example, in the instant situation, R.C. 102.03 (D) does not prohibit the council member from voting on an appropriation to computerize the city's income tax records despite the fact that such appropriation would aid his spouse in the performance of her duties as a secretary in the income tax department, since such appropriation would be for the benefit of her employing city department and not for herself personally.

Also, R.C. 102.03 (D) does not prohibit the council member from participating in a general budgetary appropriation which includes money to fund his spouse's compensation and benefits provided that the council has established the amount of his spouse's compensation and

benefits independently of the appropriation and the appropriation measure does not provide council with the authority or discretion to alter the compensation and benefits, see generally Advisory Opinion No. 91-004, or provided that the spouse'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, as discussed above. See generally Advisory Opinion No. 92-010.

You have asked whether the prohibitions of the Ethics Law prevent the city council member from serving as the chairman of the city council's finance committee.

In the instant situation, R.C. 2921.42 (A)(1) and 102.03 (D) would not, per se prohibit a city council member who is married to a city employee from serving as the chairman of the finance committee; however, the council member is, as described above, prohibited from participating in matters before city council and the finance committee which would affect his spouse's individual employment relationship or provide a definite and direct personal pecuniary benefit for his spouse which is not identical to and in common with all other city employees who are not subject to a collective bargaining agreement.

R.C. 102.03 (B) reads as follows:

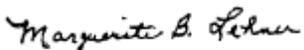
No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such 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 a city council member from using or disclosing to his spouse or any other party without proper authorization, any confidential information acquired in the course of his official duties. No time limit exists for this prohibition and it is effective while serving on city council and after leaving office. See Advisory Opinion No. 88-009.

It must be emphasized, that in addressing the requirements imposed by the Ohio Ethics Law and related statutes, the Ethics Commission's function in rendering advisory opinions is not a fact-finding process. See Advisory Opinions No. 75-037, 90-013, and 92-003. An advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes and sets forth the standards and criteria which must be observed in order to avoid a violation of the law. See Advisory Opinion No. 90-013. An advisory opinion cannot determine whether certain facts exist, but must rely on the accuracy and completeness of the facts presented in the request for an opinion. However, an advisory opinion can explain the application of the Ethics Law and related statutes to a given set of circumstances. Id. Therefore, this opinion cannot determine whether the requirements of the Ethics Law and related statutes have been met, factually and as a matter of law in this instance, but will provide the prohibitions to which a city council member who is married to a city employee is subject.

As a final matter, it must be noted that R.C. 731.02 prohibits a city council member from having an interest in a contract with his own city. See also R.C. 733.72 (B). The Ethics Commission does not have jurisdiction to interpret provisions found in Title VII of the Revised Code. See R.C. 102.08. The city law director is the appropriate authority to determine the manner in which the facts of the instant situation relate to a qualification imposed by R.C. 731.02. See R.C. 733.54.

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 city council member, who marries a city employee from authorizing, approving, voting upon, discussing, deliberating, recommending, or otherwise using the authority or influence inherent in the position and prestige of his city office, formally or informally, to secure, renew, modify, or renegotiate his spouse's individual employment relationship with the city, or to authorize or approve payments to his spouse for services rendered in her public employment; and (2) Division (A)(1) of Section 2921.42 of the Revised Code and Division (D) of Section 102.03 of the Revised Code do not prohibit a city council member whose spouse is a city employee who is not subject to a collective bargaining agreement from voting or otherwise participating to secure enactment of an ordinance or resolution to fix the salaries and compensation of the entire class of city employees who are not subject to collective bargaining, provided that the ordinance or resolution does not: (a) establish the salaries and compensation on some basis other than, or in addition to, membership in the class of city employees who are not subject to collective bargaining; (b) differentially affect the compensation or salary which his spouse receives; or (c) secure, renew, modify, or renegotiate the terms of his spouse's individual public employment.


Marguerite B. Lehner, Chair
Ohio Ethics Commission