January 14, 2008

The Honorable Dean Holman
Medina County Prosecuting Attorney
72 Public Square
Medina, Ohio 44256

SYLLABUS: 2008-002

1. The provisions of R.C. 511.13 prohibit a member of the board of township trustees or an officer or employee of the township from being interested in any contract of the board except in circumstances directly addressed by R.C. 511.13 or R.C. 505.011.

2. A trustee, officer, or employee of a township who is employed by an entity with which the township enters into a contract has an interest in the contract for purposes of R.C. 511.13, regardless of whether it can be demonstrated that the trustee, officer, or employee has a direct pecuniary or personal interest in the contract.

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OPINION NO. 2008-002

The Honorable Dean Holman
Medina County Prosecuting Attorney
72 Public Square
Medina, Ohio 44256

Dear Prosecutor Holman:

We have received your request for an opinion concerning the interpretation and application of R.C. 511.13.[1] You have asked the following question:

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[1] R.C. 511.13 states in full:

> *No member of the board of township trustees or any officer or employee thereof shall be interested in any contract entered into by such board.* No such person shall be individually liable to any contractor upon any contract made under sections 511.08 to 511.17, inclusive, of the Revised Code, nor shall he be liable to any person on any claims occasioned by any act or default of a contractor or anyone employed by him.
>
> This section does not apply where such person is a shareholder of a corporation, but not an officer or director thereof, and owns not more than five per cent of the stock of such corporation, the value of which does not exceed five hundred dollars.
>
> If a stockholder desires to avail himself of the exception provided in this section, he shall, before entering upon such contract, first file with the clerk of the board of county commissioners, an affidavit, stating his exact status and connection with the corporation. (Emphasis added.)

> Do the provisions of R.C. 511.13, which prohibit members of a Board of Trustees and officers and employees of a Township from having an interest in contracts entered into by the Board, unless the criteria for a permissible interest set forth in that section is met, limited to a five percent (5%) or less ownership of shares in a company, by an individual who is not an officer or director thereof, with a value of no more than five hundred dollars ($500.00), apply to prohibit all contracts not meeting such criteria, when a Trustee, officer or employee of the Township simply works for the company for which a contract is proposed, or should a particularizing inquiry be utilized to determine the existence of a direct pecuniary or personal interest?

The essence of your question is whether employment with a company that contracts with a township in all cases constitutes an interest in the contract for purposes of R.C. 511.13.

For the reasons set forth below, we conclude that the provisions of R.C. 511.13 prohibit a member of the board of township trustees or an officer or employee of the township from being interested in any contract of the board except in circumstances directly addressed by R.C. 511.13 or R.C. 505.011. We conclude further that a trustee, officer, or employee of a township who is employed by an entity with which the township enters into a contract has an interest in the contract for purposes of R.C. 511.13, regardless of whether it can be demonstrated that the trustee, officer, or employee has a direct pecuniary or personal interest in the contract.

Background Information

You have described the situation with which you are concerned as follows:

> This issue arose as the result of a proposed contract for road work, resulting from competitive bidding, to a company for which a Trustee worked. The Trustee would have had no direct interest in the contract. The exemptions moreover of R.C. 2921.42 would have applied to alleviate any criminal violation thereunder. [2]

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[2] R.C. 2921.42 establishes criminal prohibitions against certain conflicts of interest and renders certain contracts void and unenforceable. It also establishes circumstances in which contracts are not subject to its provisions. In this regard, divisions (C) and (G) of R.C. 2921.42 state:

> (C) This section does not apply to a public contract in which a public official, member of a public official's family, or one of a public official's business associates has an interest, when all of the following apply:
>
> (1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;

Despite such facts, and despite the fact that the bid was significantly lower than that of the next lowest bidder, based upon previous decisions from your office, holding that an employee of a company always has an interest in every contract made by his employer, we advised that R.C. 511.13 would prohibit such a contract, its provisions having a broader prohibition than R.C. 2921.42.

The concern is the scope of the prohibition that results, when in reality the employee may have no real pecuniary or personal interest in the contract, and the contract would be one that would save the Township significant monies.

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(2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official's becoming associated with the political subdivision or governmental agency or instrumentality involved;

(3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;

(4) The entire transaction is conducted at arm's length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of the public official's family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

. . . .

(G) This section does not apply to a public contract in which a township trustee in a township with a population of five thousand or less in its unincorporated area, a member of the township trustee's family, or one of the township trustee's business associates has an interest, if all of the following apply:

(1) The subject of the public contract is necessary supplies or services for the township and the amount of the contract is less than five thousand dollars per year;

(2) The supplies or services are being furnished to the township as part of a continuing course of dealing established before the township trustee held that office with the township;

(3) The treatment accorded the township is either preferential to or the same as that accorded other customers or clients in similar transactions;

(4) The entire transaction is conducted with full knowledge by the township of the interest of the township trustee, member of the township trustee's family, or the township trustee's business associate.

> Wherefore, we would respectfully request an opinion from your office as to the continuing validity of such an interpretation of R.C. 511.13.

Statutory Exceptions to R.C. 511.13

R.C. 511.13 states that "[n]o member of the board of township trustees or any officer or employee thereof shall be interested in any contract entered into by such board." It provides an exception for a person who is a shareholder of a corporation (but not an officer or director) and owns not more than five percent of the stock of the corporation, valued at no more than five hundred dollars. *See* note 1, *supra.* In addition, R.C. 505.011 provides an exception for a township trustee who receives compensation as a member of a private fire company that furnishes the township with fire protection services pursuant to contract. *See* 1990 Op. Att'y Gen. No. 90-037, at 2-152 to 2-155.

Our research has disclosed no other statute that provides a direct exception to R.C. 511.13. As your letter notes, R.C. 2921.42 also addresses conflicts of interest involving contracts of a township. *See* note 2, *supra.* It has, however, been accepted by both the Attorney General and the Ohio Ethics Commission that the exceptions set forth in R.C. 2921.42 do not apply to R.C. 511.13.[3] R.C. 511.13 addresses different issues and operates separately from R.C. 2921.42, which is a criminal statute. *See* 1982 Op. Att'y Gen. No. 82-008; Ohio Ethics Comm'n, Advisory Op. No. 84-006, slip op. at 3 (R.C. 511.13 "prohibits a township trustee from having an interest in any contract entered into by the board of township trustees, unless the interested trustee meets the criteria for a permissible interest specifically set forth in that Section"); *see also* 1948 Op. Att'y Gen. No. 3075, p. 197, at 201; Ohio Ethics Comm'n, Advisory Op. No. 91-001, slip op. at 7; note 5, *infra*.[4]

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[3] This office refrains from rendering advice regarding the interpretation and application of R.C. 2921.42, directing interested persons instead to the Ohio Ethics Commission, which is empowered to render opinions involving ethics, conflicts of interest, or financial disclosure under R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43 and by those opinions to provide immunity from criminal prosecutions, civil suits, or actions for removal. R.C. 102.08; *see also* 2007 Op. Att'y Gen. No. 2007-011, at 2-83 n.1; 1987 Op. Att'y Gen. No. 87-025 (syllabus, paragraph 3) ("[b]ecause R.C. 102.08 grants the Ohio Ethics Commission the authority to render advisory opinions interpreting R.C. 2921.42, the Attorney General will not also render opinions construing R.C. 2921.42").

[4] Differences between R.C. 511.3 and R.C. 2921.42 were described in 1982 Op. Att'y Gen. No. 82-008, at 2-30, as follows:

> The difference between R.C. 511.13 and R.C. 2921.42 may be explained by the differing nature and purpose of the two statutes. R.C. 2921.42 is part of the Criminal Code. The legislature did not wish to impose penal sanctions under R.C. 2921.42 for dealings in which the public officials' personal interest would be very

It might be argued that the relationship between R.C. 511.13 and R.C. 2921.42 was changed by the enactment of division (G) of R.C. 2921.42. That provision applies to a township with a population of five thousand or less in its unincorporated area. It excludes from the application of R.C. 2921.42 certain contracts in which a township trustee, a member of the trustee's family, or a business associate has an interest, but only when specified conditions are met. When division (G) [then division (F)] was enacted in 1994, a news summary of testimony about the legislation indicated that it was intended to allow a township trustee who also owned a gas station to fill up fire trucks when there were no stations open in the township. *See* Capitol Connection Bill History for HB285, 120th Gen. A., House Finance and Appropriations (June 29, 1993); *see also* 1993-1994 Ohio Laws, Part III, 5295, 5313-14 (Am. Sub. H.B. 285, eff. Mar. 2, 1994). It might, thus, have been assumed that division (G) [then division (F)] would operate as an exception to the prohibition of R.C. 511.13 against interests in township contracts.

Further, examination of the plain language of divisions (C) and (G) of R.C. 2921.42 discloses that division (G) codifies a situation that comes within division (C). See note 2, *supra*; *accord* Capitol Connection Bill History for HB285, 120th Gen. A., Campaign Finance Reform Task Force, Senate (Oct. 26, 1993) (testimony of the Director of the Ohio Ethics Commission). Division (C) applies to various public bodies, including townships, and the language of division (F) [now division (G)] does not expand the scope of the exception. Accordingly, one might argue that to give the enactment of division (G) any meaning, it is necessary to read division (G) as applying not only to R.C. 2921.42 but also to other provisions that restrict the authority of a township trustee to have an interest in a public contract, particularly to R.C. 511.13. This

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remote or clearly aboveboard. Committee Comment, Am. H.B. No. 511, 109th Gen'l Assembly (1972). In contrast, R.C. 511.13 is a remedial statute. See State ex rel. National Mutual Insurance Co. v. Conn, 115 Ohio St. 607, 620, 155 N.E. 138, 142 (1927) (a statute which safeguards the public interests or remedies a public evil is a remedial statute); In re Arnold, 8 Ohio N.P. 112, 115 (Hamilton County Common Pleas 1900), rev'd on different grounds sub nom. Board of County Commissioners v. Arnold, 65 Ohio St. 479, 63 N.E. 89 (1902) (remedial statutes have for their object the introduction of some regulation conducive to the public good). Like other statutes which forbid public officers to have an interest in public contracts, R.C. 511.13 is intended to introduce a regulation which will safeguard the public interest. Cf. Doll v. State, 45 Ohio St. 445, 449, 15 N.E. 293, 295 (1887) ("To permit those holding offices of trust or profit to become interested in contracts for the purchase of property for the use of the state, county, or municipality of which they are officers, might encourage favoritism, and fraudulent combinations and practices. . . . The surest means of preventing this, was to prohibit all such contracts. . ."). Thus, it appears that R.C. 511.13 provides a broader prohibition than R.C. 2921.42, although it provides no criminal sanctions.

argument would support incorporating the exceptions of division (G) of R.C. 2921.42 into R.C. 511.13.

We are unable to find that division (G) of R.C. 2921.42 establishes an exception to R.C. 511.13, however, because such a finding would be inconsistent with the plain language of division (G) that limits the exception to "[t]his section," clearly referring only to R.C. 2921.42. *See* Ohio Legislative Service Comm'n, 120-HB285 Analysis, Am. Sub. H.B. 285 (Preliminary Summary) at 12 (Feb. 25, 1994) ("[t]he act provides that the criminal statute that prohibits having an unlawful interest in public contracts does not apply" to township contracts described in division (F) [now division (G)]). As was stated in *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902) (syllabus, paragraph two): "[T]he intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction." *Accord State v. Hairston*, 101 Ohio St. 3d 308, 2004-Ohio-969, 804 N.E.2d 471, at ¶12 (2004); *see also State ex rel. Nimberger v. Bushnell*, 95 Ohio St. 203, 116 N.E. 464 (1917) (syllabus, paragraph four) ("[w]hen the meaning of the language employed in a statute is clear, the fact that its application works an inconvenience or accomplishes a result not anticipated or desired should be taken cognizance of by the legislative body, for such consequence can be avoided only by a change of the law itself, which must be made by legislative enactment and not by judicial construction").

There have been attempts to read into R.C. 511.13 (or similar statutes imposing general prohibitions against interests in public contracts) the exceptions set forth in R.C. 2921.42 that permit contracts that would otherwise run afoul of prohibitions against conflicting interests, provided that there is sufficient openness about the contracts. These attempts have been rejected on the grounds that R.C. 511.13 (or a similar statute imposing a general prohibition against interests in public contracts) is not a criminal statute and sets forth broader prohibitions than a criminal statute, with a view toward preventing situations that might provide the opportunity or temptation for wrongdoing. *See* 1999 Op. Att'y Gen. No. 99-023.[5] Where exceptions are to be

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[5] 1999 Op. Att'y Gen. No. 99-023 considered an unreported case that applied the exceptions contained in R.C. 2921.42 to the provisions of R.C. 3313.33 prohibiting a school board member from having, directly or indirectly, any pecuniary interest in a contract of the board. The 1999 opinion declined to adopt the reasoning of that case. *See* 1999 Op. Att'y Gen. No. 99-023 (syllabus) (concluding that R.C. 3313.33 prohibited "a contract under which the board of education of a local school district purchases technological services from an educational service center when a member of the board of education is employed by the educational service center as a technology consultant even if the individual does not provide technological services directly to the local school district"). We concur in the conclusions reached in 1999 Op. Att'y Gen. No. 99-023 and explained as follows:

Our research has disclosed that, in at least one case, a court has applied to the standards established by R.C. 3313.33 the exceptions set forth in other statutes. In the unreported case *Board of Education of the Boardman Local School District v. Ferguson*, No. 74 C.A. 82 (Ct. App. Mahoning County Dec. 30, 1974), the Seventh Appellate District Court of Appeals applied the exceptions set forth in R.C. 2921.42 to the contractual prohibition of R.C. 3313.33, stating: "We hold that R.C. 2921.42 and the part of R.C. 3313.33 cited in this opinion relate to the same subject matter, have the same purpose and are in pari materia to the extent that they apply to the same facts." *Board of Educ. of the Boardman Local School Dist. v. Ferguson*, No. 74 C.A. 82, slip op. at 12-13 (Ct. App. Mahoning County Dec. 30, 1974). The *Boardman* court thus would exclude from the application of R.C. 3313.33 a contract [meeting the exception requirements set forth in R.C. 2921.42]. *See generally* Ohio Ethics Comm'n, Advisory Op. No. 90-003 (noting that an interest which is prohibited under R.C. 2921.42 must be definite and direct and may be pecuniary or fiduciary in nature); Ohio Ethics Comm'n, Advisory Op. No. 82-003 (stating that the Commission has found that an employee of a large firm is not generally considered to be interested in the contracts of the employer for purposes of R.C. 2921.42); Ohio Ethics Comm'n, Advisory Op. No. 78-006 (finding that a member of a board of education who is employed by a company that contracts with the board does not per se have an interest that is prohibited by R.C. 2921.42).

While the equitable concerns of the court are clear, we cannot find statutory authority sufficient to justify a wholesale adoption of R.C. 2921.42 exceptions in the construction of R.C. 3313.33. The *Boardman* court stated that R.C. 2921.42(C), then newly-enacted, "for the first time gives some indication of legislative intent in the determination of what constitutes 'pecuniary interest' as used in R.C. 3313.33 especially under the facts of this case where the member of the board of education is an employee of a large corporation which has contracts with such board of education." *Id*., slip op. at 16; *see* 1971-1972 Ohio Laws, Part II, 1866, 1954 (Am. Sub. H.B. 511, eff. Jan. 1, 1974) (enacting R.C. 2921.42). *The language of R.C. 2921.42(C), however, does not find that no pecuniary interest exists when its requirements are met. Instead, it acknowledges that, in such circumstances, the public servant "has an interest" and states merely that the criminal provisions of R.C. 2921.42 do not apply.*

In contrast, R.C. 3313.33 sets forth a simple prohibition, with no criminal penalties. It sets a high standard for school board members, prohibiting any pecuniary interest, direct or indirect, in any contract of the board. The exception for small stockholders predates the enactment of R.C. 2921.42(C), going back to the General Code. *See* 1943-1944 Ohio Laws 475, 520 (H.B. 217, filed June 17,

recognized, they are provided by enactment of the General Assembly. *See* R.C. 2921.42; R.C. 3313.33.

We conclude, accordingly, that the exceptions set forth in R.C. 2921.42 do not apply to R.C. 511.13. Rather, the provisions of R.C. 511.13 prohibit a member of the board of township trustees or an officer or employee of the township from being interested in any contract of the board except in circumstances directly addressed by R.C. 511.13 or R.C. 505.011.

Established Meaning of an Interest in a Contract

The next issues to consider are what it means for a person to have an interest in a contract and whether an employee necessarily has an interest in a contract of the employer for purposes of R.C. 511.13. R.C. 511.13 does not specify whether the interest prohibited by its provisions must be a direct interest, or whether an indirect interest is also prohibited. The manner in which R.C. 511.13 and similar statutes have been interpreted and applied indicates, however, that the prohibition extends to an interest of any sort, whether direct or indirect. *See* 1990 Op. Att'y Gen. No. 90-040, at 2-161 ("[t]ownship trustees, members of the zoning commission, and members of

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> 1943) (enacting G.C. 4834-6). The exception for election of a benefit plan was adopted in 1985. *See* 1985-1986 Ohio Laws, Part II, 3418, 3424 (Sub. H.B. 369, eff. Oct. 17, 1985) (amending R.C. 3313.33). *The General Assembly has not seen fit to incorporate into R.C. 3313.33 the exceptions contained in R.C. 2921.42(C).* The Ohio Ethics Commission has noted that "the exception which Division (C) [of R.C. 2921.42] provides to the prohibition imposed by Division (A) (4) [of R.C. 2921.42] does not apply to R.C. 3313.33." Ohio Ethics Comm'n, Advisory Op. No. 93-008, slip op. at 9; *cf.* Ohio Ethics Comm'n, Advisory Op. No. 78-006 (discussing the *Boardman* case). We decline to follow the *Boardman* court in reading that exception into R.C. 3313.33. *See* S. Ct. R. Rep. Op. 2(G)(2) (except as applied to the original parties, an "unofficially published opinion or unpublished opinion shall be considered persuasive authority on a court, including the deciding court, in the judicial district in which the opinion was rendered").

1999 Op. Att'y Gen. No. 99-023 at 2-158 to 2-159 (emphasis added). Since the issuance of 1999 Op. Att'y Gen. No. 99-023, the General Assembly has enacted in R.C. 3313.33 exceptions that are similar, but not identical, to those appearing in R.C. 2921.42. *See* 2007 Op. Att'y Gen. No. 2007-011, at 2-85 to 2-86; 2004 Op. Att'y Gen. No. 2004-025, at 2-229 n.10; *cf. Board of Education of the Boardman Local School District v. Ferguson*, No. 74 C.A. 82, 1974 Ohio App. LEXIS 2859, at *18 (Ct. App. Mahoning County Dec. 30, 1974) ("[u]nless the salary of such employee is based, directly or indirectly, on such contract we do not feel that such employee has the 'pecuniary interest' specified in R.C. 3313.33. To hold otherwise would effectively bar substantial numbers of employees of large corporations from seeking election to boards of education"); Ohio Ethics Comm'n, Advisory Op. No. 92-013; Ohio Ethics Comm'n, Advisory Op. No. 78-006.

the township board of zoning appeals are, thus statutorily prohibited, pursuant to R.C. 511.13, from having any interests in township contracts"); *see also* 1959 Op. Att'y Gen. No. 51, p. 29, at 32 (noting that the addition in some statutes of the words "directly or indirectly" does not "detract in any degree from the force of the language in the statutes in which these words are not employed"); *cf.* Ohio Ethics Comm'n, Advisory Op. No. 92-002, slip op. at 4 (for purposes of R.C. 2921.42, a prohibited interest must be definite and direct and may be either pecuniary or fiduciary in nature).[6]

R.C. 511.13 and its predecessor provisions have long been part of Ohio law and have been the subject of opinions of various Attorneys General. The opinions have consistently read R.C. 511.13 as prohibiting a member of a board of township trustees or an officer or employee of a township from having any interest in any contract entered into by the board of township trustees, except in the limited circumstances directly addressed by statute. *See* R.C. 511.13; R.C. 505.011 and 1990 Op. Att'y Gen. No. 90-037, at 2-152 to 2-155; *see also* 1990 Op. Att'y Gen. No. 90-078 (if an individual who is employed by a township as a paramedic under R.C. 505.37 also operates a private paramedic service, the individual is prohibited by R.C. 511.13 from

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[6] We are aware that the Ohio Ethics Commission requires that for purposes of the prohibition of R.C. 2921.42(A)(4) an interest must be definite and direct, Ohio Ethics Comm'n, Advisory Op. No. 78-006, slip op. at 2, and that for purposes of R.C. 2921.42(A)(1) and (A)(4) "the fact that a member of a board of education is employed by a company seeking to contract with the board does not, per se, constitute a prohibited interest in the contract," Ohio Ethics Comm'n, Advisory Op. No. 78-006 (syllabus paragraph 2); *see also* Ohio Ethics Comm'n, Advisory Op. No. 92-008, slip op. at 3 ("an employee of a company, who does not have an ownership or fiduciary interest in the company, is generally not deemed to have an 'interest' in the contracts of her employer for purposes of R.C. 2921.42"); Ohio Ethics Comm'n, Advisory Op. No. 92-002, slip op. at 5 (setting forth the following circumstances in which an employee of a firm will be deemed to have an interest under R.C. 2921.42 in a public contract entered into by the employer: "(1) the employee has an ownership interest in, or is a director, trustee, or officer of, her employer; (2) she takes part, as a firm employee, in contract negotiations or the application process; (3) her salary is based or dependent upon, or is paid from, the proceeds of the contract; (4) she receives a share of the contract's proceeds in the form of a commission or fee; (5) her responsibilities as an employee include participation in the administration or execution of the contract or she has the responsibility to oversee execution or administration of the contract; (6) the employing agency receives most or all of its funding from the contract, such that the establishment or operation of her employing agency is dependent upon receipt of the contract; or, (7) the creation or continuation of her employment is dependent upon her employer receiving the award of the contract"); Ohio Ethics Comm'n, Advisory Op. No. 81-008. Prior Attorneys General have declined to apply a similar analysis to R.C. 511.13 or other general prohibitions against interests in contracts, and we follow our predecessors in this matter. *See* notes 4 and 5, *supra.*

entering into a contract to provide ambulance or emergency medical services to the employing township).

It has generally been established under Ohio law that an individual who is employed by an enterprise that has a contract with a public body has an interest in the contract, even if there is no direct connection between the employee and the proceeds of the contract. *See* 2000 Op. Att'y Gen. No. 2000-015.[7] It has further been established that a prohibition against having an interest

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[7] 2000 Op. Att'y Gen. No. 2000-015, at 2-88, states that "provisions prohibiting public officials from having direct or indirect interests in public contracts have generally been construed to encompass any contract that might create a conflicting interest" and, at 2-89 to 2-90, elaborates on the nature of the conflict in these words:

> Each trustee of an airport authority has a duty to honestly, faithfully, and impartially perform the duties of the office and to refrain from being interested directly or indirectly in any contract entered into by the airport authority. R.C. 308.04. On the facts presented, it appears that an individual who is a trustee of the airport authority and an officer or employee of the university has an interest in the lease between the two entities that may affect the individual's duty to impartially serve the airport authority. A disinterested trustee might seek to acquire different land for an airport or to negotiate different terms regarding the land or facilities, whereas a trustee who is also employed by the university will have an interest in entering into a lease that benefits the university. Even if a university officer or employee does not receive compensation as a result of the contract, the individual may benefit by having the university retain its airport-related activities. A lease or other contract between the airport authority and the university can affect the scope of activities of the university and its need for employees or agents to perform various functions. By promoting a lease or other contract that favors the university, an airport authority trustee could accrue benefits for the position that the trustee holds with the university. The conflicting interests that result from being affiliated with both parties to a contract constitute the type of interests that R.C. 308.04 is intended to prohibit.
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> In the situation you have described, each individual who is employed by the university has an interest in the lease of the airport to the airport authority because under that lease the university receives rent and such other benefits as are secured by contract. An employee of the university is interested in having the university obtain contractual benefits so that the university retains its ability to employ and compensate the employee. The interest of an individual employee in a particular contract of the employer may be very small and indirect, but, as discussed above, such an interest is sufficient to come within the expansive statutory language prohibiting any direct or indirect interest in a contract.

in a contract "establishes a standard that cannot be met simply by abstaining from participating in particular matters." 2000 Op. Att'y Gen. No. 2000-025, at 2-91; *see also Doll v. State*, 45 Ohio St. 445, 15 N.E. 293 (1887); 1982 Op. Att'y Gen. No. 82-008; *cf.* 2006 Op. Att'y Gen. No. 2006-003 (a person may serve simultaneously as a township trustee and a member of the board of directors of a port authority but must refrain from participating in matters involving contracts between the two bodies).

It has been held in many contexts that the fact of employment with a contracting entity is in itself sufficient to create a conflicting interest. For example, 1973 Op. Att'y Gen. No. 73-043, at 2-167 to 2-168, states:

> "Any interest" is broad in its sweeping prohibition. A public officer must be beyond temptation and he should not be in a position to profit from his public office. His position is one of a fiduciary nature to the community which requires that all his public decisions be completely objective.

See, e.g., 2000 Op. Att'y Gen. No. 2000-015, at 2-85 ("[i]n general, a direct or indirect interest in a contract includes a pecuniary or fiduciary interest of any sort, however slight"); 1949 Op. Att'y Gen. No. 1284, p. 911, at 912 ("[i]t has been held in Ohio and elsewhere that an officer may be interested in a contract although he makes no profit thereby"); *see also In re Removal of Leach*, 19 Ohio Op. 263, 268 (C.P. Jackson County 1940) ("the statutes do not require the interest to be great, but merely provide that any pecuniary interest moving directly or indirectly to the officer is sufficient. . . . It is not even necessary for the contract to be profitable to the officer"); 2007 Op. Att'y Gen. No. 2007-011, at 2-87 ("[t]his literal construction that prohibits any interest, however indirect, has been applied consistently to interests in contracts with the board [of education] where business operations are concerned and the board member is in a position to benefit financially"); 1973 Op. Att'y Gen. No. 73-043 (syllabus) ("[a]n employee of an insurance company which has contracts with a city council cannot at the same time become a member of the city council"); 1961 Op. Att'y Gen. No. 2466, p. 494 (prohibiting contract when school board member is salaried milk truck driver or salaried employee of automobile sales agency, even if member receives no monetary benefits from the contract); 1956 Op. Att'y Gen. No. 6672, p. 432 (prohibiting contract when school board member is employed on a commission basis by a concern that sells school supplies to the board, even if the member does not sell the supplies, or when school board member is a member of law firm that is employed by a casualty company that sells insurance and bonds to the school board); 1948 Op. Att'y Gen. No. 3075, p. 197 (prohibiting contract when school board member is foreman for a school bus dealer and is paid a salary only).

> Therefore, we conclude that an individual who is employed by a university that leases an airport to a regional airport authority cannot fulfill the obligations of a trustee of the airport authority under R.C. 308.04.

The reasoning behind this policy was addressed in 2000 Op. Att'y Gen. No. 2000-015, at 2-87 to 2-88, as follows:

> In considering questions of prohibited interests, various authorities have concluded that an employee has a direct or indirect interest in every contract made by the employer. Under a statute prohibiting a school board member from having a direct or indirect pecuniary interest in a contract, a prior Attorney General concluded that an employee is considered to have a pecuniary interest in every contract of the employer, even if the employee's compensation is not directly affected by the particular contract. 1956 Op. Att'y Gen. No. 6672, p. 432. That opinion concerned an employee who had no ownership interest in the contracting company, worked on a commission basis, and made no sales to the school board. The opinion stated:
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> > In the case of the board member who is an employee selling certain articles on commission for a company which has extensive dealings with his board, *it would of course be impossible from the facts which you state to trace any actual interest which he might have as a member of the board, in contracts made by his board* with that corporation. However, it must be manifest that a company which deals extensively with a board of education in the sale of school equipment, would certainly be put in a highly advantageous position by having one of its employees on the board of education, and *the temptation on the part of that board member to throw all of his influence in favor of the company by which he is employed, would seem almost overpowering*.
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> *Id.* at 440 (emphasis added).
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> The basis for finding the prohibited interest was the reasoning set forth in an earlier opinion:
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> > Provisions such as these are merely enunciatory of common law principles. *Nunemacher vs. Louisville*, 98 Ky. 384. These principles are that no man can faithfully serve two masters and that a public officer should be absolutely free from any influence which would in any way affect the discharge of the obligations which he owes to the public. It is only natural that an officer who is an employe of a concern would be desirous of seeing a contract for the purchase of supplies by the city awarded to his employer, rather than to one with whom he has no relationship. Such an officer would certainly be interested in such a contract or expenditure, *at least to the extent that upon the success of his employer's business financially primarily depends the continued*

> *tenure of his position and the compensation he receives for his services as such employe*. This is especially objectionable where such officer is a member of the board which makes such contract or authorizes such expenditure on behalf of the city.

1933 Op. Att'y Gen. No. 179, vol. I, p. 214, at 215 (emphasis added). . . .

> Thus, provisions prohibiting public officials from having direct or indirect interests in public contracts have generally been construed to encompass any contract that might create a conflicting interest. The fact of employment with a contracting entity is sufficient to create such an interest.

See also 1999 Op. Att'y Gen. No. 99-023, at 2-153 to 2-154; 1989 Op. Att'y Gen. No. 89-030, at 2-125 ("R.C. 3313.33 is a strong statement of public policy guarding against favoritism and fraudulent practices by prohibiting contracts in which a public official has any pecuniary interest moving directly or indirectly to the officer"); 1948 Op. Att'y Gen. No. 3075, p. 197, at 199 ("[i]t is too obvious to admit of argument that if an employe who is a member of the board of education is in a position to throw his employer large and profitable contracts, he will inevitably build up for himself a standing with his firm and in all probability ultimately reap substantial rewards growing out of his usefulness in that respect"); *cf.* R.C. 340.02 ("[n]o member of a board of alcohol, drug addiction, and mental health services shall be an employee of any agency with which the board has entered into a contract for the provision of services or facilities. No person shall be an employee of a board and such an agency unless the board and agency both agree in writing").

The conclusion that an employee of a contractor has an interest in a public contract entered into by the contractor is thus firmly established under Ohio law and has been affirmed in recent Attorney General opinions. Even when an employee has no direct connection with the contract, it has been found that there is a connection between the contract and the individual's employment that constitutes an interest in the public contract for purposes of statutory prohibitions. *See* 2000 Op. Att'y Gen. No. 2000-015;[8] 1999 Op. Att'y Gen. No. 99-023, at 2-

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[8] 2000 Op. Att'y Gen. No. 2000-015 recognizes an exception for the provision of goods or services by a public body, stating at 2-90: "[A] public official, as a member of the general public, may purchase goods or services made available to the general public at standard prices." This exception applies to such matters as purchases at an airport snack bar and gift shop or the acquisition of hangar privileges at a standard rate. The exception does not apply when, as in the instant case, the public body is entering into a contract to obtain goods or services. *See generally* R.C. 2921.42(I) (defining "[p]ublic contract" for purposes of R.C. 2921.42); 1993 Ohio Ethics Comm'n, Advisory Op. No. 93-009, slip op. at 2-3 (discussion of what constitutes a public contract under R.C. 2921.42); 2001 Ohio Ethics Comm'n, Advisory Op. No. 2001-06 (syllabus, paragraph 4) (tuition payment contracts are not public contracts under R.C. 2921.42, and a

154; 1949 Op. Att'y Gen. No. 1284, p. 911, at 911 (under G.C. 3410-8 (the predecessor to R.C. 511.13) a township trustee who was employed as a mechanic by an enterprise that was seeking to sell a maintainer to the township was disqualified from voting on the contract when his vote was necessary, thereby making it impossible for the township to enter into the contract, "because he would be acting on behalf of a public authority while having an interest in the contract").

The language used in divisions (C) and (G) of R.C. 2921.42 supports this conclusion. *See* note 2, *supra*. These divisions state that R.C. 2921.42 "does not apply" to a public contract in which certain public officials or their family members or business associates have "an interest" if various listed conditions apply. It is thus implicit in the statutory language that in the situations described in divisions (C) and (G) the officials, family members, or business associates have an interest in the contract, but R.C. 2921.42's criminal penalties and provisions rendering contracts void and unenforceable are not applicable. In contrast with R.C. 2921.42, R.C. 511.13 does not impose criminal penalties or expressly render contracts void and unenforceable, but rather prohibits a township trustee, officer, or employee from having an interest in a contract, subject only to the exceptions in R.C. 511.13 and R.C. 505.011.[9]

The evident intent behind R.C. 511.13 was to require that township trustees perform their fiduciary duties on behalf of the township without any personal interests (such as employment) that might tempt them to favor one contractor over another for reasons apart from the good of the township and its residents. *See generally Halliday v. Norfolk & Western Ry. Co.*, 44 Ohio Law Abs. 208, 213, 62 N.E.2d 716 (Ct. App. Franklin County 1945) ("[a] public office is a public trust and the prosecution of such a trust must always be consonant with the fiduciary and confidential relationship that the office imposes"); *State ex rel. Taylor v. Pinney*, 13 Ohio Dec. 210, 212 (C.P. Franklin County 1902) ("[t]he self interest of the public official and the public interests which he represents, must not be brought into conflict").

Your letter indicates that you are aware of the authorities discussed above and have followed them in advising your clients. You are asking whether this remains the law of Ohio, even when it appears that no actual conflict exists and a township could save money if the potentially conflicting contract were allowed. On the basis of the authorities discussed above,

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member of the Ohio Tuition Trust Authority who invests in a college savings program administered by the Authority does not have a prohibited interest in a public contract).

[9] If a board of township trustees enters into a contract that meets all the requirements set forth in division (C) or (G), the provisions of R.C. 2921.42 will not apply to the contract, no one will be guilty of a crime under R.C. 2921.42(E), and the contract will not become void and unenforceable under R.C. 2921.42(H). However, a trustee, officer, or employee of the township may still have an interest in the contract under R.C. 511.13 and, if so, the township and its personnel will be subject to whatever consequences result from entering into a contract in violation of R.C. 511.13.

we find ourselves constrained to interpret R.C. 511.13 as applying to any interest in a contract, whether direct or indirect. Like prior Attorneys General, we adopt the firmly established principle that an employee is deemed to have an interest in a contract of the employer for purposes of R.C. 511.13, with no need or opportunity for a particularized inquiry to determine whether a direct pecuniary or personal interest exists in a specific instance. *See* 2000 Op. Att'y Gen. No. 2000-015, at 2-86 to 2-87 (similar language governing regional airport authority); 1999 Op. Att'y Gen. No. 99-023, at 2-160 (similar language governing board of education).[10] We conclude, accordingly, that a trustee, officer, or employee of a township who is employed by an entity with which the township enters into a contract has an interest in the contract for purposes of R.C. 511.13, regardless of whether it can be demonstrated that the trustee, officer, or employee has a direct pecuniary or personal interest in the contract.

It may be argued that the standards set forth in R.C. 511.13 are too strict to be applied literally. However, this is the established law of the State of Ohio, and we find no basis for changing it even though, in certain circumstances, it may prevent a township from entering into a contract with favorable terms. *See, e.g*, 1956 Op. Att'y Gen. No. 6672, p. 432, at 438 (providing illustrations of the severity with which principles prohibiting interests in contracts have been

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[10] As was stated in 1999 Op. Att'y Gen. No. 99-023, at 2-160:

> Therefore, notwithstanding the fact that the result may in some circumstances appear harsh, we feel constrained to apply R.C. 3313.33 as written. It may be that a rule less stringent than the one set forth in R.C. 3313.33 would be more equitable in some circumstances, and it may be appropriate for the General Assembly to consider whether additional exceptions, such as those appearing in R.C. 2921.42(C), should be included in R.C. 3313.33. Nonetheless, in construing R.C. 3313.33 as it currently exists, we must first look to the language of the statute and, when there is no ambiguity, apply that language as written. *See, e.g.*, 1938 Op. Att'y Gen. No. 2854, vol. II, p. 1596, at 1597 ("where legislative intent is clearly and definitely expressed, this office is bound to give effect to it and cannot, however liberal it may wish to be, nullify, change or amend by its rulings the express provisions of a statute"). In the instant case, the individual in question would have an indirect pecuniary interest in the contract at issue. Hence, the language of the statute prohibits the contract.
>
> It is important to note that the conclusion reached in this opinion in no way challenges the integrity or impugns the motives of any particular individual. Rather, it is set forth as a general principle of law adopted as a strict prohibition to prevent any possibility that an individual might be able to secure personal benefit at the expense of the public trust. *See, e.g.*, *Grant v. Brouse*; 1956 Op. Att'y Gen. No. 6672, p. 432.

applied); note 10, *supra*. The remedy in this case, if one is needed, rests with the General Assembly. *See State ex rel. Nimberger v. Bushnell*; note 10, *supra*.

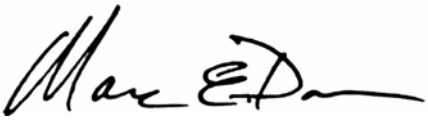
Conclusions

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. The provisions of R.C. 511.13 prohibit a member of the board of township trustees or an officer or employee of the township from being interested in any contract of the board except in circumstances directly addressed by R.C. 511.13 or R.C. 505.011.

2. A trustee, officer, or employee of a township who is employed by an entity with which the township enters into a contract has an interest in the contract for purposes of R.C. 511.13, regardless of whether it can be demonstrated that the trustee, officer, or employee has a direct pecuniary or personal interest in the contract.

Respectfully,



MARC DANN
Attorney General