June 10, 1994

OPINION NO. 94-039

The Honorable Jonathan P. Hein
Darke County Prosecuting Attorney
Courthouse
Greenville, Ohio 45331

Dear Prosecutor Hein:

You have requested an opinion whether an individual may serve as a member of the legislative authority of a village when his spouse is employed by the village. A member of your staff has indicated that the individual's spouse is a clerical employee in the village's water department and is not subject to a collective bargaining agreement or an employment contract with the village.

Statutory Provisions

There are no statutory provisions that expressly prohibit two family members from serving, respectively, as a member of the legislative authority of a village and as a clerical employee in the village's water department. There are, however, certain statutes and common law principles regulating the conduct of public officials that bear on your inquiry.

R.C. 731.12, which sets forth the qualifications for members of a village legislative authority, provides, in part, that "[n]o member of the legislative authority shall ... be interested in any contract with the village.... Any member who ceases to possess any of such qualifications ... shall forfeit his office." *Cf., e.g.,* R.C. 305.27 ("[n]o county commissioner shall be concerned, directly or indirectly, in any contract for work to be done or material to be furnished for the county"); R.C. 511.13 ("[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"). A member of the legislative authority of a village thus is statutorily prohibited from having an interest in any village contract. Accordingly, it must be determined whether the individual, as a member of the village legislative authority, is deemed interested in a village contract on the basis that his spouse receives compensation from the village for services she performs as an employee of the village's water department.

It is well established that public employees do not hold their positions pursuant to contract. *Fuldauer v. City of Cleveland*, 32 Ohio St. 2d 114, 290 N.E.2d 546 (1972) (syllabus, paragraph three); *State ex rel. Gordon v. Barthalow*, 150 Ohio St. 499, 83 N.E.2d 393 (1948) (syllabus,

paragraph one); 1990 Op. Att'y Gen. No. 90-040 at 2-161 and 2-162. *But see* R.C. 2921.42.[1] As the Ohio Supreme Court stated:

> The principle that a public officer or public general employee does not hold his position *ex contractu* not only rests upon the great weight of authority but upon sound reason and logic. To constitute a valid contract there must be mutuality in the agreement, and yet it is obvious that, if a public officer or public general employee resigns before his term expires, the political subdivision which he served has no recourse against him. *Reiter v. State, ex rel.*, 51 Ohio St., 74, 36 N.E., 943, 23 L. R. A., 681; *Ratterman v. State*, 44 Ohio St., 641, 644, 10 N.E., 678. Likewise, if the relationship between the public officer or public general employee and the public he serves is contractual, the public itself cannot vary the terms of the contract, and yet it is universally held that, in the absence of constitutional or other legal restraint, the terms, emoluments and the duties of the office or employment may be changed or employment abolished without right of redress upon the part of the holder thereof.

Barthalow, 150 Ohio St. at 509-10, 83 N.E.2d at 397-98. Village employees thus do not hold their positions pursuant to contract, but rather *ex lege*, that is, by force of law or as a matter of law.

As stated above, R.C. 731.12 only prohibits a member of the legislative authority from having an interest in a village contract. Since there is no contractual relationship between the village and the employees of the village, a member of the legislative authority of a village who is the spouse of a village employee does not have an interest in a village contract.[2] Therefore, R.C. 731.12 does

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[1] R.C. 2921.42 prohibits a public official from having an unlawful interest in a public contract. The word "public contract," as used in R.C. 2921.42, means "[t]he purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state, any of its political subdivisions, or any agency or instrumentality of either, including the employment of an individual by the state, any of its political subdivisions, or any agency or instrumentality of either." R.C. 2921.42(G)(1). The Ohio Ethics Commission has determined that an employment relationship between a village and an employee is a "public contract" for purposes of R.C. 2921.42 since the village is purchasing or acquiring the services of the employee. *See* Ohio Ethics Commission, Advisory Op. No. 92-012, slip op. at 2.

[2] Further, the existence of an employment contract between the village and the spouse of the legislative authority member does not, per se, result in the forfeiture of the member's office pursuant to R.C. 731.12 since it is well settled that an individual does not, merely as a result of a marital relationship, have an interest in his spouse's earnings. *See Board of Educ. v. Boal*, 104 Ohio St. 482, 484, 135 N.E. 540, 540 (1922); 1990 Op. Att'y Gen. No. 90-040 at 2-163; 1986 Op. Att'y Gen. No. 86-059 at 2-329; *see also Scherer v. Rock Hill Local School Dist.*, 63 Ohio App. 3d 555, 558, 579 N.E.2d 525, 526-27 (Lawrence County 1990) ("[n]either R.C. 3319.21's nor 3313.33's proscription of a board of education member's voting on something he has a pecuniary interest in is violated by the indirect benefit [the board member] received from his wife's employment"). The facts of a particular case may show, however, that an individual does derive a benefit from his spouse's

not prohibit two family members from serving, respectively, as a member of the legislative authority of a village and as a clerical employee in the village's water department.

In addition to the prohibition set forth in R.C. 731.12, R.C. Chapter 102 and R.C. 2921.42 also prohibit members of the legislative authority of a village from using their public positions to secure anything of value that manifests a substantial and improper influence upon them, from having unlawful interests in public contracts, and from authorizing or using their authority or influence to secure authorization of public contracts in which they, their family members, or their business associates have an interest. *See, e.g.*, R.C. 102.03(D) ("[n]o 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"); R.C. 2921.42(A)(1) (no public official shall "[a]uthorize, 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"); Ohio Ethics Commission, Advisory Op. No. 92-017 (discussing whether the provisions of R.C. Chapter 102 and R.C. 2921.42-.43 prohibit a school board member from being covered under group insurance coverage that his spouse receives as an employee of the school district under a collective bargaining agreement); *see also* note one, *supra*. Pursuant to R.C. 102.08, the authority to render advisory opinions on the provisions of R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43 (governing ethics, conflict of interest, and financial disclosure) is vested in the Ohio Ethics Commission. In light of this express statutory grant of power, the Attorney General generally refrains from rendering opinions on matters governed by these statutes. 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three). It is, therefore, recommended that you contact the Ohio Ethics Commission for an analysis of the situation you have described.

Common Law Principles

Finally, "[i]t is contrary to public policy for a public officer to be in a position which would subject him to conflicting duties or expose him to the temptation of acting in any manner other than the best interest of the public." 1970 Op. Att'y Gen. No. 70-168 at 2-336 (overruled on other grounds by 1981 Op. Att'y Gen. No. 81-100); *accord* Op. No. 90-040 at 2-162; *see 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"); 1973 Op. Att'y Gen. No. 73-043 at 2-167 and 2-168 ("[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"). Pursuant to R.C. 731.13, "[t]he legislative authority of a village shall fix the compensation and bonds of all officers, clerks, and employees of the village except as otherwise provided by law." Insofar as the individual, as a member of the legislative authority of the village, may be required to discuss and vote on whether to increase, decrease, or otherwise modify the compensation his spouse receives as

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employment, and that such benefit constitutes an interest in a contract for purposes of statutory prohibitions. Op. No. 86-059 at 2-329; *see* Op. No. 90-040 at 2-163.

a village employee, the individual will be exposed to influences that may prevent him from making completely objective, disinterested decisions. Prior opinions of the Attorney General have determined that when a public officer is exposed to influences that may prevent him from making completely objective, disinterested decisions in a particular matter, the public officer should abstain from any discussions or votes concerning that matter. *See, e.g.*, 1994 Op. Att'y Gen. No. 94-022; 1994 Op. Att'y Gen. No. 94-013. Accordingly, the individual, as a member of the legislative authority of the village, should abstain from any discussions or votes on any matter that may concern or affect his spouse's compensation as an employee of the village. *See* Ohio Ethics Commission, Advisory Op. No. 92-012, slip op. at 8 (a city council member who is married to a city employee "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"); Ohio Ethics Commission, Advisory Op. No. 92-010 (syllabus, paragraph four) ("Division (D) of Section 102.03 of the Revised Code prohibits a township trustee who is married to the township clerk from voting, deliberating, participating in discussions or otherwise taking action or using the authority or influence of his office, formally or informally, in any matter where the board of trustees exercises discretion as to the amount of compensation the clerk is entitled to receive or otherwise has the authority to act to affect the clerk's compensation").

Conclusion

Therefore, it is my opinion, and you are hereby advised that an individual may serve as a member of the legislative authority of a village when his spouse is employed as a clerical employee in the village's water department, but is not subject to a collective bargaining agreement or an employment contract with the village. As a member of the legislative authority, however, the individual should not participate in any discussions or votes on any matter that may concern or affect his spouse's compensation as an employee of the village.

Respectfully,

LEE FISHER
Attorney General

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SYLLABUS: 94-039

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