

**OPINION NO. 85-099****Syllabus:**

An individual may serve as county auditor even though his son is a member of a board of education of a city school district within the same county.

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**To: Michael F. Boller, Shelby County Prosecuting Attorney, Sidney, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, December 27, 1985**

I have before me your request for my opinion concerning whether there is any conflict of interest or potential conflict of interest which would prohibit a father from serving as county auditor at the same time his son serves as a member of a city board of education within the same county. You note in your letter of request that, "a person in the County is contemplating the filing of a petition for election to the office of County Auditor....This particular individual currently has a son who serves as a member of the [city board of education]. Further, this son is running for re-election."

In order to resolve your question, I must examine the statutory provisions and common law principles governing conflicts of interest in instances where two public positions are held by members of the same family.

I note first that there are no statutory provisions which absolutely prohibit two family members from holding the positions of county auditor and board of education member. Cf. R.C. 340.02 ("[n]o person shall serve as a member or employee of the community mental health board whose spouse, child, parent, brother, sister, stepparent,

stepchild, stepbrother, stepsister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law serves as a county commissioner of a county or counties under the jurisdiction of the community mental health board"); R.C. 5126.03(D) ("[n]o person shall serve as a member or employee of a county board of mental retardation and developmental disabilities if a member of his immediate family serves as a county commissioner of the county served by the board"). See generally 1981 Op. Att'y Gen. No. 81-100. There are, however, certain statutes which regulate the conduct of a public official with regard to family members.

R.C. 2921.42 provides in pertinent part:

(A) No public official<sup>1</sup> 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;

....  
(E) As used in this section, "public contract" means any of the following:

(1) The purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of the state or any of its political subdivisions, or any agency or instrumentality of either;

(2) A contract for the design, construction, alteration, repair, or maintenance of any public property. (Footnote added.)

See also R.C. 2921.42(A)(2); R.C. 2921.42(A)(4);<sup>2</sup> R.C. 2921.42(D) (violation of R.C. 2921.42(A)(1) is a fourth degree felony).

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<sup>1</sup> R.C. 2921.01(A) defines "public official" for purposes of R.C. 2921.01 to R.C. 2921.45 to include any elected officer of any political subdivision of the state. A county auditor and school board member are both elected to office in their respective political subdivisions. See R.C. 319.01; R.C. 3313.02. Thus, both a county auditor and school board member are subject to the prohibitions of R.C. 2921.42. See Ohio Ethics Commission, Advisory Opinion No. 82-003; Ohio Ethics Commission, Advisory Opinion No. 81-004.

<sup>2</sup> R.C. 2921.42(A)(4) prohibits a public official from having any interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision which he serves. See Ohio Ethics Commission, Advisory Opinion No. 81-008; Ohio Ethics Commission, Advisory Opinion No. 81-003 (a prohibited interest may be fiduciary as well as pecuniary in nature). Similarly, R.C. 3313.33 states that no member of a board of education "shall have, directly or indirectly, any pecuniary interest in any contract of the board...." It has been held that a father has an interest in the contracts of his minor, unemancipated children. See In Re Removal of Leach, 19 Ohio Op. 263 (C.P. Jackson County 1940); 1966 Op. Att'y Gen. No. 66-064; 1931 Op. Att'y Gen. No. 3200, vol. I, p. 624; 1927 Op. Att'y Gen. No. 1169, vol. III, p. 2059; 1923

Pursuant to R.C. 102.08, the Ohio Ethics Commission is authorized to render advisory opinions construing R.C. 2921.42. The Ohio Ethics Commission has determined that, for purposes of R.C. 2921.42, members of a public official's family include parents and children, whether dependent or not. Ohio Ethics Commission, Advisory Opinion No. 80-001. Further, the Commission has determined that an "interest" in a contract, for purposes of R.C. 2921.42, may be fiduciary in nature, as well as pecuniary. Ohio Ethics Commission, Advisory Opinion No. 81-008. See 1984 Op. Att'y Gen. No. 84-097. Thus, if the individual in question were elected county auditor, R.C. 2921.42(A)(1) would prohibit the school board member and his father, the county auditor, from knowingly authorizing, or employing the authority or influence of their offices to secure authorization of any public contract in which the other had an interest,<sup>3</sup> including those contracts in which the other had a fiduciary interest as a public officer. See generally Ohio Ethics Commission, Advisory Opinion No. 82-003; Ohio Ethics Commission, Advisory Opinion No. 81-004. While R.C. 2921.42(A)(1) would prohibit the individuals in question from using their influence to authorize a public contract in which their family member had an interest, R.C. 2921.42(A)(1) does not absolutely prohibit the father and son from simultaneously holding public office.

I turn now to common law principles governing conflicts of interest. 1970 Op. Att'y Gen. No. 70-168 at 2-336 (overruled on other grounds by 1981 Op. Att'y Gen. No. 81-100), states:

Any public officer owes an undivided duty to the public. It 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. (Citation omitted.)

There is at least one instance in which the duties of county auditor and city school board member conflict. R.C. 5705.28 requires the taxing authority of each subdivision to adopt a tax budget. See R.C. 5705.01(C) (the taxing authority of a school district is the board of education). The various tax budgets are then submitted by the county auditor to the county budget commission, of which the county auditor is a member, R.C. 5705.27; R.C. 5705.31. The budget commission must examine each budget and ascertain the total amount proposed to be

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Op. Att'y Gen. No. 302, vol. I, p. 236. In this instance, the son is not a minor, see Ohio Const. art. XV, §4 and R.C. 3503.01 (person must be at least eighteen years to hold public office), and there is no indication that either individual has contracted with the political subdivision his family member serves. If there were such a contract, the family member serving the contracting political subdivision would be prohibited from having an interest in such contract. See generally 1931 Op. No. 3200.

<sup>3</sup> Cf. R.C. 3319.21 (providing that whenever a member of a board of education "votes for or participates in the making of a contract with a person as a teacher or instructor in a public school to whom he is related as father, brother, mother, or sister, or acts in any matter in which he is pecuniarily interested, such contract, or such act in such matter, is void").

raised by each subdivision, and must ascertain whether certain tax levies have been properly authorized. R.C. 5705.31. The budget commission must "adjust the estimated amounts required from the general property tax for each fund, as shown by [the tax] budgets," in order to bring the tax levies within the proper limitations, and further, "may revise and adjust the estimate of balances and receipts from all sources for each fund and shall determine the total appropriations that may be made therefrom." R.C. 5705.32. Representatives of each subdivision may appear before the budget commission in order to explain the subdivision's financial needs prior to the commission's final determination of the amount to be allotted to each subdivision. R.C. 5705.32. See R.C. 5705.36. In 1931 Op. Att'y Gen. No. 3506, vol. II, p. 1072, the provisions of what is now R.C. 5705.32 were found to render the positions of county auditor and city school board member incompatible.<sup>4</sup> 1931 Op. No. 3506 states at 1074:

It is apparent...that the budget commission may be compelled to make changes in the original estimates made and contained in the budget submitted by the several school districts in the county and other taxing subdivisions within the county. In the event this becomes necessary, which is no doubt frequently the case, the duties of the county auditor, as a member of the county budget commission, would conflict with the duties of the members of a city board of education within the county, who oftentimes are required to appear before the budget commission to insist upon the proper share of revenues for their district.

Thus, it is apparent that, in the situation you pose, the father, as county auditor, is in a position to affect the revenue available to the city school district which his son serves, and it is possible, that the auditor could be influenced in the performance of his duties by the fact that his son serves on the board of education. I am not of the opinion, however, that such potential conflict prohibits the father from serving as county auditor.

In State ex rel. Corrigan v. Hensel, 2 Ohio St. 2d 96, 206 N.E.2d 563 (1965), the court addressed the question whether a member of a board of education forfeited his right to office merely because he owned a teachers' placement agency, even though there were no contracts between the board and the agency. The court stated that, "[t]he law does not punish an officeholder for what he 'could do' or where there was a 'possibility' or opportunity to commit some wrongful act." 2

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<sup>4</sup> Compatibility questions arise when one individual holds or wishes to hold two public positions. See 1984 Op. Att'y Gen. No. 84-070; 1979 Op. Att'y Gen. No. 79-111. Since your question concerns two individuals, rather than one individual, wishing to serve in two public positions, a compatibility analysis is inappropriate, although in both situations, it must be ascertained whether the public officials involved would be subject to a conflict of interest. Cf. 1981 Op. Att'y Gen. No. 81-078 (a compatibility analysis is inapplicable where an individual holds concurrently a public position and a private employment, although it must be determined whether the individual would be subject to a conflict of interest).

Ohio St. 2d at 99, 206 N.E.2d at 565, and concluded in the syllabus:

A person, whose private vocation is that of owner and manager of a teachers' placement agency, duly elected to office as a member of a local board of education and who continues in said private occupation after his election, will not be ousted from said elective office by quo warranto, on the ground that by reason of his private occupation he might possibly or could secure personal monetary benefits by using his public office in a wrongful manner, it being established by the evidence that said person had not committed, nor was he about to commit, any act or acts in violation of law or violative of his oath of office. (Emphasis in original.)

See also State ex rel. Hunt v. Hildebrant, 93 Ohio St. 1, 112 N.E. 138 (1915); 1983 Op. Att'y Gen. No. 83-037 at 2-141 ("this office must assume, in the absence of evidence to the contrary, that all parties are acting in good faith, and in accordance with the law"); 1979 Op. Att'y Gen. No. 79-111 (syllabus, paragraph three ) ("[w]here possible conflicts are remote and speculative, common law incompatibility or conflict of interest rules are not violated").

In this instance, I must assume that the county auditor would act in good faith, and in accordance with the law and his oath of office. Although there is a possibility that the auditor would be influenced in the performance of his duties by the fact that his son serves on the city board of education, I find such possibility to be remote and speculative and conclude that an individual may serve as county auditor even though his son is a member of a city board of education within the same county.

In conclusion, it is my opinion, and you are advised, that an individual may serve as county auditor even though his son is a member of a board of education of a city school district within the same county.