

Note from the Attorney General's Office:

1986 Op. Att'y Gen. No. 86-059 was clarified by
1990 Op. Att'y Gen. No. 90-037.

OPINION NO. 86-059**Syllabus:**

1. Pursuant to R.C. 505.011, a member of a board of township trustees may be a member of a private fire company that has entered into an agreement to furnish fire protection for the township, provided that he receives no compensation as a volunteer fireman.
2. A township trustee who serves, without compensation, as a member of a private fire company may, under R.C. 505.011, participate, in his capacity as trustee, in negotiating and voting upon contracts between the township and the private fire company; the fact that the trustee's adult son is also a member of the private fire company does not affect this conclusion.
3. The positions of township trustee and maintenance man for a village are compatible, but the township trustee may not participate in negotiating or voting upon contracts between the board of township trustees and the village.
4. A township trustee may not participate in the hiring of an employee for the township when one of the applicants for the position is a member of the trustee's family.
5. A township trustee may not participate in decisions concerning the compensation of a township employee who is a member of the trustee's family.

To: William F. Schenck, Greene County Prosecuting Attorney, Xenia, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, August 21, 1986

I have before me your request for my opinion concerning several situations involving possible conflicts of interest. Based upon conversations with your office, I have stated your questions as follows:

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1. May a township trustee who is a member of a private fire company, as permitted pursuant to R.C. 505.011, participate, in his capacity as trustee, in negotiating and voting upon a contract under which the company will provide fire protection for the township?
2. Is the answer to question one, above, affected if a member of the township trustee's family is also a member of the private fire company?
3. May a township trustee who is an employee of a village participate as trustee in negotiating or voting upon contracts between the township and the village?
4. May a township trustee participate in the selection and hiring of a township employee when an applicant for the position is a member of the trustee's family?
5. May a township trustee participate in decisions concerning the compensation to be paid to a township employee who is a member of the trustee's family?

Each of the questions that you pose asks whether a township trustee may undertake certain activities on behalf of the township. In each situation, there is a possibility that the trustee may be placed in a position of divided loyalties. Consequently, in order to answer your questions, it is necessary to examine the statutory provisions governing the authority of a township trustee to engage in contract negotiations or other activities in circumstances that raise questions concerning possible conflicts of interest.

R.C. 511.13 is addressed directly to situations involving possible conflicts of interest. It states:

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.)

See 1982 Op. Att'y Gen. No. 82-008 (explaining the scope and purpose of R.C. 511.13); 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. 3313.33 ("[n]o member of [a board of education] shall have, directly or indirectly, any pecuniary interest in any contract of the board or be employed in any

manner for compensation by the board of which he is a member"). "The plain purpose of [conflict of interest statutes, such as R.C. 511.13] is to keep the administration of these public agencies free from corruption, and from becoming the means for self enrichment by officers who have been elected to these positions of trust." 1959 Op. Att'y Gen. No. 51, p. 29, at 32.

R.C. 511.13 states generally that a township trustee shall not be interested in a township contract. This section does not specify the type of interest that is prohibited. It appears, however, that the statute was intended to prohibit a township trustee, or other officer or employee of the township, from having an interest which is of such a nature that it may interfere with his capacity to serve the township. As was stated in Op. No. 82-008 at 2-29: "[R.C. 511.13 and similar statutes] are the legislative expression of longstanding legal and ethical principles which forbid a public official, as an agent of the public, from dealing with or for himself, directly or indirectly. See State ex rel. Taylor v. Pinney, 13 Ohio Dec. 210, 211-12 (Franklin County Common Pleas 1902)." See generally 1984 Op. Att'y Gen. No. 84-097. It is clear that a trustee may have an unlawful interest in a contract in violation of R.C. 511.13 even though he does not make a profit from the contract. See 1949 Op. Att'y Gen. No. 1284, p. 911. See generally Op. No. 84-097. See also 1986 Op. Att'y Gen. No. 86-030, n.4.

In addition to the direct prohibition set forth in R.C. 511.13, principles of the common law prohibit a public officer from participating in a situation that involves a conflict of interest. A 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." 1970 Op. Att'y Gen. No. 70-168 at 2-336 (overruled on other grounds by 1981 Op. Att'y Gen. No. 81-100). As was stated in 1981 Op. Att'y Gen. No. 81-027 at 2-101:

By participating on both sides of a contract, a public officer would be exposed to conflicting loyalties and to the potential temptation of acting in a manner not in the best interest of the public. See 1979 Op. Att'y Gen. No. 79-111. A public officer may not be in a position to control services delivered pursuant to contract, while at the same time passing upon the adequacy of the services delivered. See 1979 Op. Att'y Gen. No. 79-055.

The first question listed above asks whether a township trustee who is a member of a private fire company may, while acting in his capacity as trustee, participate in negotiations with the private fire company on a contract under which the company will provide fire protection to the township. R.C. 505.37(A) authorizes such a contract, stating that a board of township trustees "may employ one or more persons to maintain and operate fire-fighting equipment, or it may enter into an agreement with a volunteer fire company for the use and operation of fire-fighting equipment." You have informed me that the township owns certain fire equipment, and that the contract in question will allow the private fire company to use such fire equipment to protect the township from fires. The board will then compensate the fire company for any firefighting services it provides the township, paying the fire company a designated amount of money for each firefighter who participates on a firefighting call.

I note, first, that R.C. 505.011 expressly authorizes a township trustee to serve as a member of a private fire company. It states:

A member of a board of township trustees may be appointed as a volunteer fireman and in such capacity be considered an employee of the township, or he may be a member of a private fire company which has entered into an agreement to furnish fire protection for the township of which such member is a trustee; provided that such member shall not receive compensation for his services as a volunteer fireman.

See 1984 Op. Att'y Gen. No. 84-018; 1978 Op. Att'y Gen. No. 78-017. You have indicated that the individual members of the fire company will not be compensated for their activities. Therefore, there is no question but that the township trustee in question may serve as a member of the private fire company, regardless of any interest the trustee may be deemed to have in the contract between the township and the fire company. See 1960 Op. Att'y Gen. No. 1166, p. 120 (overruled by Op. No. 78-017); cf. R.C. 135.11 (providing that an officer, director, stockholder, employee, or owner of an interest in a public depository is not deemed interested in the deposit of moneys in such depository, for the purpose of laws that prohibit officers from being interested in public contracts, even though such individual might otherwise be deemed to have such an interest, as per Ohio Ethics Commission, Advisory Op. No. 83-003).

You also wish to know, however, whether a township trustee who is a member of a private fire company may participate, in his capacity as trustee, in contract negotiations with the fire company. You have indicated that the trustee in question will not be part of the negotiating team of the fire company.

In Op. No. 84-018, I had occasion to consider whether a township trustee could serve as the assistant chief of a township volunteer fire department and concluded that he could, even though the board of township trustees appointed the chief of the department and the chief appointed the assistant chief. Notwithstanding the general principle that public officials who have appointive powers may not serve in a position over which they exercise such powers, I found that such a result was permitted under the provisions of R.C. 505.011. Op. No. 84-018 states at 2-62: "The General Assembly [by enacting R.C. 505.011] has evidently deemed that the potential conflicts of interest which might arise between a township trustee and volunteer firefighter...are outweighed by the need for firefighters." See Op. No. 78-017; 1960 Op. No. 1166. See also R.C. Chapter 102; R.C. 2921.42.¹

¹ R.C. 102.03(D) prohibits a public official from using his position to secure anything of value which manifests a substantial and improper influence upon him. R.C. 2921.42 prohibits public officials 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, family members, or business associates have an interest. See generally 1982 Op. Att'y Gen. No. 82-008 and Ohio Ethics Commission, Advisory Op. No. 84-006 (the prohibition of R.C. 511.13 is broader than that of R.C. 2921.42(A)(4)). Pursuant to R.C. 102.08, the Ohio Ethics Commission is authorized to render advisory opinions construing R.C. Chapter 102 and R.C. 2921.42. Therefore, I am not, in this opinion, considering either R.C. 102.03 or R.C. 2921.42. I strongly urge you or the township trustee in question to contact the Ohio Ethics Commission for guidance with respect to these provisions.

For the same reasons, I conclude that R.C. 505.011 permits a township trustee who is a member of a private fire company to participate, in his capacity as trustee, in negotiating and voting upon a contract with the private fire company. It is clear that such participation may place the trustee in a position where he has certain loyalties to both parties to the contract. A township trustee has the duty of assuring that the township receives adequate fire protection at a reasonable price; a member of the fire company is concerned that any contract provide adequate compensation and favorable conditions for the firefighters. See also 1960 Op. No. 1166. I find, nonetheless, that R.C. 505.011 implicitly sanctions the participation of a single individual in both capacities. As I stated in Op. No. 84-018, I believe that, by enacting R.C. 505.011, the General Assembly has indicated that the conflicts of interest which might arise in such a situation are outweighed by the need for firefighters.

Op. No. 78-017 states at 2-42 through 2-43: "The obvious purpose of R.C. 505.011 is to allow township trustees to serve the communities as volunteer firemen without jeopardizing their trusteeship. The only caveat is that the trustee may not receive any compensation." In accordance with this principle, I conclude that R.C. 505.011 permits a township trustee who serves, without compensation, as a member of a volunteer fire company to participate, in his capacity as trustee, in negotiating and voting upon contracts between the township and the company. But see R.C. 2921.42(A)(1) (prohibiting a public official from authorizing or using his influence to secure authorization of a public contract in which his business associate has an interest) and note 1, supra; 1963 Op. Att'y Gen. No. 122, p. 206.

You have also asked whether the analysis set forth above is affected by the fact that a member of the trustee's family--in this case, his son--is also a member of the private fire company. As discussed above, R.C. 505.011 permits the trustee to serve as both trustee and firefighter, and to act as the township's representative in negotiating a contract with the fire company. Your question is whether the participation of the trustee's son as a firefighter makes this arrangement impermissible.

As a preliminary matter, I note that a father is not presumed to have an interest in his son's contracts, including contracts of employment, where the son is not a minor and where the father has no actual interest in his son's profits. See 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. It is my understanding that, in this instance, the son is an adult and there is no indication that the father has any interest in his profits. Further, you have informed me that none of the firefighters receive compensation for their services. It follows that the trustee does not, by virtue of his relationship with his son, acquire an interest of the sort prohibited by R.C. 511.13. There remains the question whether the trustee is subject to such a division of loyalties that he may not represent the township in negotiations with the fire company.

In 1985 Op. Att'y Gen. No. 85-099, I addressed the issue whether an individual could serve as county auditor where his son was a member of a board of education of a city school district within the same county. After discussing the manner in which a school district's tax budget is prepared, I concluded:

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 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.

Id. at 2-420 to 2-421.

In this instance, I am similarly inclined to conclude that the possibility that the township trustee would be improperly influenced in contract negotiations with the fire company because his son is a firefighter with the company is remote and speculative. As noted above, you have informed me that none of the firefighters will be paid for their services and that amounts paid by the township to the fire company will be used to further the firefighting capacity of the department rather than for the personal benefit of the firefighters. Thus, the son has no pecuniary interest in the contract between the township and the fire company. See generally Op. No. 66-064 at 2-109 ("the presumption, if any, that there are profits [in a public contract] in which to be interested, is also rebuttable"). There is also no indication that the son serves as an officer or as an employee with managerial responsibilities with the fire company. Thus, the son has no fiduciary interest in the contract. See generally Op. No. 84-097; Ohio Ethics Commission, Advisory Op. No. 78-006 (an employee does not have an interest in his employer's contracts, for purpose of R.C. 2921.42, where the employee neither holds stock nor has management responsibility and where the salary of the employee is not based, directly or indirectly, on the contract). The son may be concerned with the outcome of the contract negotiations to the extent they affect his duties as a firefighter. I find, however, that the possibility that the township trustee will be improperly influenced in negotiations over such a contract by the fact that his son serves as a firefighter is so remote that the township trustee need not refrain from discussing or voting upon the contract. My conclusion is supported by 1931 Op. No. 3200, which stated that a contract may properly be made between a board of education and the adult son of a board member for the transportation of school pupils, and further concluded that the board member could vote for such contract. Id. at 625.

Your next question is whether a township trustee who is an employee of a village may participate as a trustee in contract negotiations between the township and the village. You have indicated that the trustee is employed by the village as a maintenance man, and that the proposed contracts between the township and the village will not relate to or affect the duties of the maintenance man.

In order to answer this question, it is first necessary to determine whether the positions in question are

compatible--that is, whether, as a matter of law, an individual may simultaneously serve as a township trustee and a maintenance man for a village. The standard analysis of compatibility is based upon the following seven questions, set forth in 1979 Op. Att'y Gen. No. 79-111 at 2-367 to 2-368:

1. Is either of the positions a classified employment within the terms of R.C. 124.57?
2. Do the empowering statutes of either position limit the outside employment permissible?
3. Is one office subordinate to, or in any way a check upon, the other?
4. Is it physically possible for one person to discharge the duties of both positions?
5. Is there a conflict of interest between the two positions?
6. Are there local charter provisions or ordinances which are controlling?
7. Is there a federal, state, or local departmental regulation applicable?

The first question is easily answered in this case, since neither the position of township trustee nor the position of employee of a village is a classified employment. See R.C. 124.11(A)(1); R.C. 505.01; State ex rel. Giovanello v. Village of Lowellville, 139 Ohio St. 219, 39 N.E.2d 527 (1942). See generally Op. No. 86-030; 1985 Op. Att'y Gen. No. 85-080.

The second question is, similarly, easily resolved. My review of the relevant statutory provisions has disclosed none that prohibit an individual from simultaneously holding both of the positions here under consideration.

Questions six and seven are of local concern. I assume, for purposes of this opinion, that there are no federal, state, or local provisions addressing the issue in question. Question four requires a determination of fact which can best be made by local officials. See Op. No. 79-111.

I turn, therefore, to questions three and five, which ask whether one position is subordinate to, or a check upon, the other, and whether there is a conflict of interest between the two positions. In general, a township and a village function independently of one another. A township trustee is elected for a four-year term, R.C. 505.01, and performs various duties concerning the government of the township. See, e.g., R.C. 505.07 (board of township trustees may publish and distribute newsletters); R.C. 505.10 (board of township trustees may accept and sell property); R.C. 505.17 (board of township trustees may regulate vehicle parking); R.C. 505.75 (board of township trustees may adopt building code). A village maintenance man performs the duties assigned to him by the village. The positions are, thus, independent of one another, and neither is subordinate to, or a check upon, the other. Cf. Op. No. 86-030 (the positions of township trustee and chief of a village fire department are independent; neither is subordinate to, or a check upon, the other); 1955 Op. Att'y Gen. No. 5565, p. 328 (disapproved in part, on other grounds, by Op. No. 79-111) (the positions of township trustee and city public safety director do not conflict with or act as checks upon one another); 1941 Op. Att'y Gen. No. 4664, p. 1079 (the positions of township trustee and village marshal are not subordinate to, or a check upon, one another).

There are, however, instances in which the operations of a township and a village may interact. For example, townships and municipal corporations are authorized to contract for the

provision of various services. See, e.g., R.C. 9.60 (fire protection); R.C. 505.43 (police protection); R.C. 505.44 (ambulance or emergency medical services); R.C. 505.50 (additional police protection). It is, therefore, necessary to determine whether the possibility that such a contract may be entered into, or the existence of such a contract, presents such a conflict of interest as to render the positions incompatible.

I do not believe that the mere possibility that the township and village may enter into a contract renders the positions of township trustee and village employee incompatible. The possibility that a township will enter into a contract involving the village employee's duties is remote, and it is my understanding that the village employee in question has no decision-making authority or power to enter into any of the contractual arrangements authorized by statute. See Pistole v. Wiltshire, 90 Ohio L. Abs. 525, 189 N.E.2d 654 (C.P. Scioto County 1961); Op. No. 86-030; Op. No. 79-111; 1955 Op. No. 5565. If, however, the township and village have entered into a contract whereby the board of township trustees would have the responsibility of passing upon the adequacy of services delivered under the contract by a village employee who is in a position to control such services, then the village employee and a township trustee would have a conflict of interest and the positions would be incompatible. See Op. No. 86-030; Op. No. 81-027. It is my understanding that, in this instance, the contracts do not require the village employee to control services delivered to the township or otherwise affect the employee's duties. Thus, the two positions are not incompatible.

I note further that R.C. 511.13 states expressly that a township trustee may not be interested in any contract entered into by the board of trustees. You have informed me that the contracts in question will not directly affect the compensation or duties of the village maintenance man. The relationship of the maintenance man to the subject of any such contract does not, therefore, appear to be an interest of the sort that is prohibited by R.C. 511.13. Cf. 1970 Op. Att'y Gen. No. 70-107 (syllabus, paragraph one) ("[R.C. 3313.33], in the absence of extenuating circumstances, would prohibit the board of education from purchasing electrical power and heating units from an electrical power company where a member of the board is an employee of said power company"). See generally Ohio Ethics Commission, Advisory Op. No. 78-006. I conclude, therefore, that R.C. 511.13 does not prohibit a township trustee from holding a position as maintenance man with a village which has contracted with the township.

Although I have concluded that the fact that a contract exists between the village and the township does not necessarily render the positions of township trustee and village employee incompatible and that R.C. 511.13 does not, in this instance, prohibit a township trustee from holding a position with a village with which the township has contracted, I believe that a township trustee who also serves as a village employee should abstain from voting on a contract between the township and the village. It is apparent that a trustee who is employed by a village in any capacity may be more favorably disposed toward the village than one who is not, even if contracts between the two bodies do not directly affect the village employee's duties or compensation. See also R.C. 2921.42(A)(1); 1949 Op. No. 1284. Further, you have indicated that, in this instance, the individual who negotiates on behalf of the village serves as the supervisor of the trustee who is employed as a village maintenance man. Thus, in negotiations

with the village, that trustee may be tempted to please his supervisor at the expense of carrying out his duties to the township. See generally Op. No. 70-107. I conclude, therefore, that the township trustee should abstain from discussing or voting upon contracts with the village. See Op. No. 86-030; Op. No. 79-111.

Your fourth question asks whether a township trustee may participate in the hiring of a township employee when an applicant for the position is a member of the trustee's family. You have informed me that the position in question is that of a dispatcher, and that the family member involved is the trustee's daughter. You have also indicated that the trustee's daughter is not a minor. Thus, on the facts presented, there is no basis for finding that the trustee has an interest in the daughter's employment for purposes of R.C. 511.13. See Op. No. 66-064; 1931 Op. No. 3200; 1927 Op. No. 1169.

It does, however, appear that participating in the hiring of his daughter would place the trustee in a position of divided loyalties. It is apparent that a trustee would be tempted to favor a member of his family over other applicants, and that his loyalty to a family member might interfere with his duty to the township. It follows that the trustee should abstain from discussing, or voting upon, any matter relating to the hiring of a township employee when an applicant for the position is a member of the trustee's family. See Op. No. 81-027; Op. No. 79-111; cf. R.C. 3319.21 ("[w]hensoever a local director or 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"); 1932 Op. Att'y Gen. No. 4635, p. 1091 (syllabus)("[a] member of a board of education is not prohibited by [G.C. 12932, now R.C. 3319.21, or G.C. 4757, now R.C. 3313.33] from voting for or participating in the making of a contract of employment with his or her father, brother, mother or sister for any position other than that of teacher or instructor"). See also R.C. 102.03; R.C. 2921.42(A)(1).

Finally, your fifth question asks whether a township trustee may participate in any decisions regarding the compensation of a township employee who is also a member of the trustee's family. You have informed me that the family member involved here is the trustee's wife. It has been established that a husband does not, merely as a result of the spousal relationship, have an interest in his wife's earnings. See Board of Education v. Boal, 104 Ohio St. 482, 484, 135 N.E. 540, 540 (1922) (holding that "the earnings of a married woman, or property acquired by her labor, constitute her separate property, and no part thereof or interest therein can in any wise be claimed by her husband as against her"); 1962 Op. Att'y Gen. No. 2855, p. 168; 1955 Op. Att'y Gen. No. 5811, p. 499; Ohio Ethics Commission, Advisory Op. No. 85-003. The facts of a particular case may show that the husband does derive a benefit from his wife's employment which constitutes an interest for purposes of statutory prohibitions. See, e.g., Ohio Ethics Commission, Advisory Op. No. 85-003. See generally 1962 Op. No. 2855. No such evidence has, however, been presented in this instance. It appears, therefore, that the trustee does not have an interest in his spouse's compensation for purposes of R.C. 511.13.

In keeping with the foregoing analysis, however, it is clear that participating in decisions concerning the

compensation of his wife, or another family member, would put the trustee in a position of divided loyalties. Consequently, the township trustee should abstain from discussing, or voting upon, matters concerning the compensation of his spouse, or another member of his family. See Op. No. 81-027; Op. No. 79-111. See also R.C. 102.03; R.C. 2921.42(A)(1); note 1, supra.

It is, therefore, my opinion, and you are hereby advised that:

1. Pursuant to R.C. 505.011, a member of a board of township trustees may be a member of a private fire company that has entered into an agreement to furnish fire protection for the township, provided that he receives no compensation as a volunteer fireman.
2. A township trustee who serves, without compensation, as a member of a private fire company may, under R.C. 505.011, participate, in his capacity as trustee, in negotiating and voting upon contracts between the township and the private fire company; the fact that the trustee's adult son is also a member of the private fire company does not affect this conclusion.
3. The positions of township trustee and maintenance man for a village are compatible, but the township trustee may not participate in negotiating or voting upon contracts between the board of township trustees and the village.
4. A township trustee may not participate in the hiring of an employee for the township when one of the applicants for the position is a member of the trustee's family.
5. A township trustee may not participate in decisions concerning the compensation of a township employee who is a member of the trustee's family.