

OPINION NO. 73-052

Syllabus:

A former law director of a city may be retained by the city as special counsel within one year of his resignation as law director.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William J. Brown, Attorney General, June 6, 1973

I have your request for an opinion which may be stated as follows:

Mr. B has been licensed to practice law in the State of Ohio since 1950. B was appointed Director of Law in the City of Berea. In this capacity he acted as legal counsel to the Mayor, to members of Council and to administrative officers of the City, and represented the City before courts and tribunals. In 1968 Mr. B resigned as Law Director and was reappointed in 1972. He again resigned in January, 1973.

The City of Berea would like to retain Mr. B as special counsel, under supervision by the present Law Director, in connection with continuing the City's defense of certain zoning litigation, questions of the application of the City's zoning code, implementation of the City's Urban Renewal Plan, and other matters which the Mayor or the Law Director may from time to time request.

Based on the foregoing facts the following question arises:

May a Law Director of the City of Berea resign his position and within one year after his resignation be retained by the City as special counsel?

You have stated that Mr. B resigned his position as law director, and this Opinion is written on that assumption. Had he retired, other factors would have to be considered. See R.C. 145.381 (D).

Mr. B. is no longer a municipal officer. The only Section of the Revised Code which restricts the action of former municipal officers after resignation is R.C. 2919.10 which provides as follows:

No officer of a municipal corporation or member of the council thereof or a member of a board of township trustees, shall be interested in the profits of a contract, job,

work, or services for such municipal corporation or township, or act as commissioner, architect, superintendent, or engineer, in work undertaken or prosecuted by such municipal corporation or township during the term for which he was elected or appointed, or for one year thereafter, or become the employee of the contractor of such contract, job, work, or services while in office.

Whoever violates this section shall forfeit his office and be fined not less than fifty nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both. (Emphasis added.)

In deciding whether this Section applies here, it is necessary to determine whether the phrase, "or for one year thereafter," modifies only the immediately preceding clause which begins, "or act as commissioner, architect, superintendent or engineer", or whether it also modifies the first clause of the statute. I am satisfied that the former interpretation is correct.

In Opinion No. 2065, Opinions of the Attorney General for 1961, one of my predecessors, when faced with the same problem, relied upon the legislative history and a previous Attorney General's Opinion in interpreting this Section of the Revised Code. Because of the importance of that Opinion, I quote it at considerable length:

A reading of the history of Section 2919.10 supra, indicates that it was originally enacted as section 92 of the Municipal Code of 1869, 66 Ohio Laws, 164 and read as follows:

"Sec. 92. No member of the council or any officer of the corporation shall be interested, directly or indirectly, in the profits of any contract, job, work, or services, (other than official services to be performed for the corporation,) nor shall any member or officer act as commissioner, architect, superintendent or engineer in any work undertaken or prosecuted by the corporation during the term for which he was elected or appointed, or for one year thereafter.* * *"

Section 92, as above quoted, was codified in the Revised Statutes of 1880 in practically the same form and was thereafter re-codified in the General Code as Section 12912 which stated in part as follows:

"Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in

work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter, * * *."

On page 1033 of the Opinions of the Attorney General for the years 1910-11, in interpreting Section 12912, supra, it is stated:

"It is a familiar principle of statutory construction that the re-enactment of a statute for the purpose of codification and revision is presumed not to change the meaning thereof. If then the original act indicates one of several possible meanings of the revised act, that meaning must be given to the latter. It will be noted with respect to the original act that the subject 'no member of the council or any officer of the corporation' is repeated; in fact, the entire structure of the original section indicates clearly that the portion thereof which follows the parenthesis is absolutely separate and distinct from that which precedes, and that it would have been proper grammatically to have placed a period at the division point. This conclusion eliminates one of the possible meanings suggested by you, and indicates clearly that the phrase 'during the term for which he was elected or appointed, or for one year thereafter' does not modify the verb 'is interested.'"

Former Section 12912, General Code, was re-codified as Section 2919.10, Revised Code, in the general code revision of 1953. In such code revision the intent was to make no substantive changes (Section 1.24, Revised Code), and I do not believe that any such change was made. In considering the present language, therefore, I believe that the reasoning of my predecessors as disclosed above, may be applied to said present language. Looking at this language, it appears to me that if the intent had been to apply the "in term" and "one year" restrictions to the earlier language, a comma would have been inserted after the words "by such corporation or township"--in both Section 12912, General Code, and Section 2919.10, Revised Code. Without such a comma, such restrictions appear to apply only to the job classifications enumerated in the statute, namely, commissioner, architect, superintendent or engineer. (Emphasis added.)

This statutory analysis of R.C. 2919.10 is in accord with the holding of the Court of Appeals for Adams County in Stone v. Osborn, 24 Ohio App. 251, 259 (1927), which reads as follows:

The original form of the section is not

confusing. The prohibition is, first, against any municipal officer being interested in the profits of any contract * * * other than for his official services, and, second, against any municipal officer acting as commissioner * * * in any work undertaken or prosecuted by the corporation during his term or for the year following. The officer is forbidden to become interested in the profits, job, work, or service for the corporation. The officer is also forbidden to act as commissioner, architect, superintendent, or engineer in work undertaken or prosecuted by the corporation during a stated period of time, that is, during his term and the year following.

We decline to follow the decisions in City of Findlay v. Parker et al., Trustees, 17 C.C., 294, 9 C.D., 710, and State ex rel. Winn v. Michgar, Aud., 17 C.D., 743, 3 O.L.R., 534.

In the City of Findlay v. Parker, 17 Ohio C.C.R.294 (1898), affirmed 63 Ohio St. 565 (1900), questioned in Stone v. Osborn, Mayor, supra, the court said (at p. 301):

And an officer of a municipal corporation who has retired from the office to which he has been selected or appointed, may not be interested, either directly or indirectly, in any work or service for said corporation, until the expiration of one year after his retirement from office.

But in that case a trustee of a municipal gas works resigned and immediately became superintendent of the plant. He was clearly covered by the second clause of R.C. 2919.10. The quoted passage confuses the two separate clauses.

In Bethesda v. Mallonee, 60 Ohio Op. 107, 112 (1955), the court, in a brief dictum, seems to have interpreted R.C. 2919.10 in line with the above quotation from Parker. The main thrust of the opinion was, however, directed to the issue of restitution. The issue was whether the Village of Bethesda could recover the money it had paid for the construction of a firehouse without returning to the contractor title to the building that was erected. The relevance of R.C. 2919.10 was tangential and it was only summarily discussed.

On the basis of the foregoing, it is my opinion that the better reasoned case law and the Opinions of my predecessors compel the conclusion that the phrase, "or for one year thereafter," modifies only the immediately preceding clause, "or act as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such municipal corporation or township during the term for which he was elected." This conclusion is in accord with Opinion No. 2065, Opinions of the Attorney General for 1961; Annual Report of the Attorney General for 1910-11, at page 1032; Opinion No. 6, Opinions of the Attorney General for 1917; and Opinion No. 3233, Opinions of the Attorney General for 1922. Since the former law director will not be acting as a "commissioner, architect, superintendent or engineer," he does not fall within the one year prohibition of the second clause of R.C. 2910.10.

Finally, it is worthwhile noting that no court opinion and none of my predecessors have interpreted R.C. 2919.10 so as to restrict a person from holding a position with a municipal corporation, other than those specifically mentioned in that Section, after resigning another position with the same municipality. In White v. McGlynn, 35 Ohio Op. 552 (1947), the court was faced with the problem of whether a councilman could resign and immediately thereafter be appointed to a position in the water and light department. In allowing the councilman to accept the appointment, the court interpreted R.C. 2919.10 [G.C. 12912] as follows:

Section 12912 was enacted for the purpose of preventing a municipal officer from having any interest in the profits of any contract or work done for the city, and it specifically prohibits such officer from acting as commissioner, architect, superintendent or engineer in work undertaken by the municipality during the term for which he was elected or appointed; or for one year thereafter.

This statute was enacted for the purpose of preventing any councilman from securing any interest in any contract with the city of Niles; so that he might not be tempted to use his official position to further the interests of a contractor.

It is not the purpose of the statute to prevent an officer from holding another office in the city at the expiration of the term of his first office; even though the position of office manager of the Water and Light Department has duties which pertain to work undertaken by the municipality.

So also in Opinion No. 398, Opinions of the Attorney General for 1912, my predecessor said:

It is not the purpose of the statute to prevent an officer from holding another office in the village or city, at the expiration of the term of his first office, even though the second office has duties which pertain to work undertaken by the municipality. Likewise this section does not prevent an officer resigning a position in the city government and accepting appointment to another office in the service of the city.

See also Opinion No. 3233, Opinions of the Attorney General for 1922; Opinions No. 1863, and No. 2176, Opinions of the Attorney General for 1928.

In specific answer to your question it is my opinion, and you are so advised, that a former law director of a city, may be retained by the city as special counsel within one year of his resignation as law director.