

OPINION NO. 84-097**Syllabus:**

1. Pursuant to R.C. 305.27, R.C. 2921.42 and principles of common law regarding conflicts of interest, neither an elected or appointed county officer nor a county employee may serve as a trustee of a non-profit hospital corporation with which the county contracts for the provision of hospital services and the management and operation of hospital facilities owned by the county.
2. When a county contracts for such services with a non-profit hospital corporation whose membership is composed of the board

of trustees of a parent corporation, R.C. 305.27, R.C. 2921.42 and common law principles regarding conflicts of interest prohibit a county officer or employee from serving as a trustee of such parent corporation.

To: John E. Shoop, Lake County Prosecuting Attorney, Painesville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 31, 1984

I have before me your request for my opinion concerning the possible reorganization of the management and operation of the county's hospital facilities. Currently, the county hospital is owned by the county and operated by the board of county hospital trustees pursuant to R.C. Chapter 339. The county commissioners and hospital trustees wish to transfer responsibility for the operation of the hospital to a private non-profit corporation. The county proposes to retain ownership of the hospital, buildings, and lands, and the county commissioners will enter into a lease with the hospital corporation pursuant to R.C. 140.03 and R.C. 140.05. Under the proposed lease, the corporation will be responsible for the management, operation and finances of the hospital. The county commissioners will reserve the authority to terminate the lease in the event that the hospital corporation does not comply with the terms of the lease. In this regard, it has been explained by representatives of your office that the commissioners seek to make certain that the hospital facilities will provide care on a nondiscriminatory basis as set forth under R.C. 140.05(B), and also wish to use this termination authority in order to assure continued payment of outstanding bond indentures.

The proposed lease would be entered into between the board of county commissioners and a hospital corporation which will be a subsidiary of a parent corporation. The parent will have other subsidiary corporations, including a fund-raising foundation. Your letter also indicates that the hospital corporation will be responsible for the daily operations of the hospital facilities, while the parent will undertake long range planning and coordinate the activities of the hospital corporation with those of other subsidiaries of the parent. However, you also cite examples of activities which the hospital corporation may not undertake without the approval of the parent, including amendment of its articles of incorporation, regulations, and bylaws; borrowing money; purchase, sale or other disposition of real property; and the filing of any application for a certificate of need pursuant to R.C. Chapter 3702.

Your letter further describes the corporate structure, as follows:

The Articles of Incorporation and Regulations of the Parent provide that the sole member of the Parent shall be its board of trustees and that all authority of the Parent shall be exercised by its trustees. The Articles of Incorporation and Regulations of the Hospital Corporation provide that the Parent shall be the sole member of the Hospital Corporation and shall appoint and may remove all trustees of the Hospital Corporation.

During conversations with your office, it was also explained that, pursuant to the parent's articles of incorporation, the board of county commissioners will appoint the initial board of trustees of the parent. Subsequently, trustees of the parent will be elected by the parent's members, *i.e.*, its board of trustees. R.C. 1702.26. As the sole member of the hospital corporation, the board of trustees of the parent is statutorily authorized to elect the trustees of the hospital corporation. R.C. 1702.21; R.C. 1702.26.

You specifically ask whether a county commissioner or another county employee or officer may serve on the board of trustees of either the parent or the hospital corporation.

Initially, it must be recognized that a board of county commissioners, as a creature of statute, has only those powers which are expressly conferred by statute or which are necessarily implied from an express statutory power. State ex rel.

Shriver v. Board of Commissioners, 148 Ohio St. 277, 74 N.E.2d 248 (1947); State ex rel. Locher v. Menning, 95 Ohio St. 97, 115 N.E. 571 (1916). In this regard, I note that there is no statutory authorization, either express or implied, for a board of county commissioners, qua board, to appoint trustees of a non-profit corporation under the circumstances which you have posed. Consequently, the board of county commissioners may not appoint the board of trustees of the parent or hospital corporation.

In order to address your questions regarding persons who may serve on the boards of trustees of the parent and the hospital corporations, it is necessary to examine the common law as well as relevant statutory provisions. R.C. 305.27 sets forth the following restriction upon the contracting authority of a board of county commissioners:

No county commissioner shall be concerned, directly or indirectly, in any contract for work to be done or material to be furnished for the county. For a violation of this section, a commissioner shall forfeit not less than two hundred nor more than two thousand dollars, to be recovered by a civil action, in the name of the state, for use of the county. Such commissioner shall also forfeit, in like manner, any compensation he may have received on such contract.

This section does not apply where a commissioner, being a shareholder of a corporation but not an officer or director, owns not in excess of five per cent of the stock of such corporation and the value of the stock so owned does not exceed five hundred dollars. (Emphasis added.)

The term "concerned," as used in R.C. 305.27, is not defined by statute. Thus, one must construe this word in accordance with its ordinary meaning. See Carter v. City of Youngstown, 146 Ohio St. 203, 65 N.E.2d 63 (1946). Black's Law Dictionary 262 (5th ed. 1979) defines "concern" as follows: "[t]o pertain, relate, or belong to; be of interest or importance to; have connection with; to have reference to; to involve; to affect the interest of. . ." (citation omitted). Furthermore, the court in State ex rel. Taylor v. Pinney, 13 Ohio Dec. 210, 211 (C.P. Franklin County 1902), applying an earlier enactment of R.C. 305.27, examined similar proscriptive language, and stated:

While statutes which are in their nature penal are to be strictly construed, . . . yet it is also a rule of statutory construction, not to be lost sight of in construing these and similar statutes enacted to prevent fraud, that they are not to be so construed as to encourage but to prevent the evil aimed at.

Thus, the term "concerned," as used in R.C. 305.27, should be construed in accordance with its ordinary, broad meaning so as to effectuate the legislative intent to prevent impropriety associated with the awarding of county contracts. See 1974 Op. Att'y Gen. No. 74-039.

¹ R.C. 307.85 permits a board of county commissioners to participate in and cooperate with private organizations, including non-profit corporations, to establish and operate any federal program enacted by the United States Congress. See 1979 Op. Att'y Gen. No. 79-055. However, in this instance, the hospital corporation will be formed to operate county hospital facilities, rather than any federal program. Based upon conversations with your office, it appears that involvement with federal programs, if any, will be merely that which is incidental to most hospital operations. I note further that my predecessor concluded that R.C. 307.85(A) provides insufficient authority to enable a board of county commissioners to appoint the initial board of trustees of a non-profit corporation, since, pursuant to R.C. 1702.04, the initial board must be designated in the articles of incorporation. Op. No. 79-055.

As set forth in your letter, it is proposed that the board of county commissioners contract with a non-profit hospital corporation, which will manage and operate hospital facilities that are owned by the county, and have administrative control of the hospital services provided at such facilities. You have asked whether a county commissioner could be appointed to serve as a trustee of this hospital corporation. I note that a non-profit corporation must conduct its affairs through its board of trustees. R.C. 1702.01(K); R.C. 1702.30(A).² Thus, a county commissioner, if appointed trustee of the hospital corporation, would be required to act on behalf of the party with which the board of county commissioners proposes to contract. It is apparent that as a trustee, an individual would have a connection with, or be involved with, any agreement made between the board of county commissioners and the corporation. Further, the interests of the corporation, which a trustee is bound to serve, would clearly be affected by the proposed agreement between the county and the hospital corporation. R.C. 305.27 expressly proscribes such concern by a county commissioner in a contract entered into for services to be rendered to the county.

You also ask whether a county commissioner could be appointed to serve as a trustee of the parent corporation. Under the corporate organization outlined in your letter, the sole member of the hospital corporation is its parent corporation; the sole member of the parent is its board of trustees. Thus, the board of trustees of the parent is the only member of the hospital corporation. It has been said that the trustees of a non-profit corporation are the agents of the corporation members. State v. Standard Life Association, 38 Ohio St. 281, 290 (1882). In the situation which you pose, the trustees of the hospital corporation would be the agents of the parent corporation's trustees. Accordingly, the parent's trustees would be interested, at least indirectly, in the contract between the hospital corporation and the board of county commissioners. If a county commissioner were to be appointed trustee of the parent corporation, the commissioner would share this interest in the contract. As stated above, R.C. 305.27 proscribes any such concern, whether direct or indirect, in a contract for work to be done for the county.

Based upon the foregoing, I conclude that R.C. 305.27 prohibits a county commissioner from serving as a trustee of a non-profit hospital corporation with which the county contracts for the provision of hospital services and the management and operation of hospital facilities owned by the county. Furthermore, when a county contracts for such services with a non-profit hospital corporation whose membership is composed of the board of trustees of a parent corporation, R.C. 305.27 prohibits a county commissioner from serving as a trustee of such parent corporation.

In addition, R.C. 2921.42(A) proscribes certain conduct of public officers and employees by providing, in pertinent part:

- (A) No public official 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;
 - . . .
 - (3) During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, and not let by competitive bidding, or let by competitive bidding in which his is not the lowest and best bid;

² The articles of incorporation or the corporation's regulations may provide for the conduct of business in some different manner. R.C. 1702.30(A). However, you have not indicated that the hospital corporation's articles or bylaws provide for anyone other than the trustees to engage in such conduct.

(4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected. . . .

(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. (Emphasis added.)

The term "public official" as used in R.C. 2921.42 is defined as "any elected or appointed officer, or employee, or agent of the state or any political subdivision thereof, whether in a temporary or permanent capacity, and including without limitation legislators, judges, and law enforcement officers." R.C. 2921.01(A).

As discussed earlier, it is proposed that the county will lease its hospital facilities to the hospital corporation which will maintain and operate such facilities, and will make payments to retire certain bonds for which the county is liable. The lease or other agreement entered into between the county and the hospital corporation must provide for, inter alia, management, maintenance, and repair of the county's hospital facilities, as well as management or administration of any hospital services provided at such facilities. R.C. 140.03(B); R.C. 140.05. Accordingly, I conclude that such a lease or agreement would constitute a "public contract" within the meaning of R.C. 2921.42.

The Ohio Ethics Commission, which is authorized to render advisory opinions pursuant to R.C. 102.08, has interpreted "interest," as used in R.C. 2921.42, to mean a definite, direct interest, which may be either pecuniary or fiduciary in nature. See Ohio Ethics Commission, Advisory Opinions No. 81-003 and No. 78-005. An officer or board member of a corporation is deemed to have an interest in the contracts of his corporation. See Ohio Ethics Commission, Advisory Opinion No. 81-008. See also 1973 Op. Att'y Gen. No. 73-043 at 2-167 through 168 (noting, in the interpretation of a statute similar to R.C. 2921.42(A)(4), that, "[a]ny 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").

A trustee of a non-profit corporation is an agent of that corporation and, as such, has a fiduciary duty to execute that trust. Thus a trustee of the hospital corporation would be required to act in the manner which would be most beneficial to the members of the corporation. Similarly, a trustee of the parent corporation would have an interest, on behalf of both the hospital and parent corporations, in the benefits that the corporation would derive from contracts with the county. R.C. 2921.42(A)(4) and R.C. 2921.01(A), read together, prohibit a county officer from having an interest³ in the profits or benefits of a public contract entered into by or for the use of the county with which he is connected. I, therefore, conclude that, pursuant to R.C. 2921.42(A)(4), no elected or appointed officer of the county may serve as a trustee of a non-profit hospital corporation with which the county

³ A county is clearly a political subdivision of the state. See Fair v. School Employees Retirement System, 44 Ohio App. 2d 115, 118-19, 335 N.E.2d 868, 871 (1975) ("[t]he term [political subdivision]. . . may designate a true governmental subdivision such as a county. . . or it may have a broader meaning").

⁴ In this regard, I also note that R.C. 1702.301(A)(3) authorizes trustees of a non-profit corporation, unless otherwise provided in the corporation articles or regulations, "by the affirmative vote of a majority of those in office, and irrespective of any financial or personal interest of any of the trustees. . . to

contracts in accordance with R.C. 140.03 and 140.05 for the management, maintenance and operation of county-owned hospital facilities and the provision of hospital services at such facilities. In addition, pursuant to R.C. 2921.42(A)(4), no officer may serve as a trustee of one non-profit corporation which is a member of a non-profit hospital corporation that enters into a contract with the county as described above.

You have inquired whether a county officer or employee, other than a county commissioner, could serve as trustee of either the hospital or the parent corporation. During conversations with representatives of your office, it was made clear that the county administrator and the clerk of the board of county commissioners are under consideration for appointment as trustee. I note that R.C. 2921.42 is applicable to employees of the county, as well as to elected and appointed officers. See R.C. 2921.01(A). Thus, for those reasons set forth above with regard to commissioners, I conclude that R.C. 2921.42 prohibits all county officers and employees from serving on the board of trustees of the hospital corporation or on the board of trustees of the parent corporation.

As stated earlier, common law principles as well as statutory provisions, reinforce the impermissibility of a county commissioner, or other county officer or employee, serving as trustee of either the hospital or parent corporation under the circumstances posed in your letter. One of my predecessors, addressing an issue regarding potential interest by a public officer in a public contract, opined that statutory provisions such as those heretofore discussed "are merely enunciatory of the common law principles. . . 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." 1933 Op. Att'y Gen. No. 179, vol. I, p. 214, 215. The foregoing opinion further indicated that, when a public officer has an interest, as an employee or agent of a party to whom a public contract is awarded, in a contract entered into by the governmental body which that officer serves, such contract is void, "even though it may further appear that the contract was a good contract for the . . . [governmental body], that there was no fraud in the contract, and that the parties who made it derived no direct benefit from the contract itself. . . ." 1933 Op. No. 179 at p. 216 (quoting *People v. Sperry*, 314 Ill. 205). This principle was also expressed in *State ex rel. Taylor v. Pinney*, 13 Ohio Dec. 210, 211-12 (C.P. Franklin County 1902), as follows:

It is a doctrine of our law, as old as the principles of equity, that an agent in the execution of his agency, shall not be permitted to put himself in a position antagonistic to his principal. An agent, by accepting the undertaking committed to his care, impliedly agrees that he will use his best endeavors to further the interest of his principal. This principle of law precludes him absolutely from dealing with himself, either directly or indirectly. Public policy requires, and the law upon that subject, as I say, is as old as courts of equity, that the agent shall not deal with or for himself directly or indirectly, and all such contracts made by an agent are voidable as against his principal. This salutary principle of the law applies as well to public as to private agents, and public officials, who are the agents of the public, will not be permitted to put themselves in a position antagonistic to the public interests which are represented and which it is their duty to protect. (Emphasis added; citation omitted.)

See *State v. McKelvey*, 12 Ohio St. 2d 92, 232 N.E.2d 391 (1967) (syllabus, paragraph

establish reasonable compensation, which may include pension, disability, and death benefits, for services to the corporation by trustees. . . ." It is my understanding that the articles and regulations of the hospital and parent corporation do not alter this statutory authorization. Accordingly, a county officer or employee serving as a trustee of either corporation would be subject to a potential personal financial interest, apart from the role of such officer or employee as an agent of the corporation. R.C. 2921.42(A)(3) and (4) prohibit such an interest.

1) ("[a] public official has a fiduciary duty to the citizens of the state"); Oliver v. Brill, 14 Ohio App. 312, 319 (Guernsey County 1921) ("every public official is, in a way, an agent and as such owes his first duty to his constituents and the unselfish discharge of every official obligation"). It is, therefore, clear that a county commissioner or other county officer has a fiduciary duty as an agent of the people of the county. The trustee of a non-profit corporation, as an agent of the corporate members, bears a similar responsibility to faithfully execute the trust which the law and the corporate articles and regulations impose. State v. Standard Life Association, 38 Ohio St. 281 (1882). Thus, as trustee or as county officer or employee, one must not be influenced by considerations that are relevant to the other position.

In the situation posed in your letter, the county commissioners intend the lease or other agreement to provide a means by which the county may resume control of its hospital facilities or transfer such control to another hospital agency. A trustee of a non-profit hospital corporation or its parent would be expected to work to ensure that the hospital corporation retained its contract with the county, rather than effecting resumption of county control or transfer of the contract to another hospital agency. The duty of loyalty to one's principal cannot simultaneously be carried out in such circumstances where a county employee or officer is also a corporate trustee.

As noted above, you have inquired whether the county administrator and the clerk of the board of county commissioners could serve as trustee. I note that the county administrator is appointed by the board of county commissioners, R.C. 305.29, and is to execute the duties of that position under the direction of such board, R.C. 305.30. Similarly, the clerk of the board of county commissioners is appointed by such board to perform the duties imposed pursuant to R.C. 305.10 and R.C. 305.11 and other duties which the board may require. R.C. 305.13. County employees such as these, who are under the control of the county commissioners, could not properly serve in a position of management or control as trustee of a non-profit hospital corporation with which the county contracts, or as trustee of the sole corporate member of such a hospital corporation. See 1979 Op. Att'y Gen. No. 79-055 at 2-186 ("a county employee or official whose public duties would be in any way a check upon, or subordinate to, the functions performed by [a] non-profit corporation [with a contractual relationship with the county] could not properly act as a trustee. Similarly, conflicts may result if the county commissioners select as trustee a person who is under their control as a county employee").

In conclusion, it is my opinion, and you are so advised, that:

1. Pursuant to R.C. 305.22, R.C. 2921.42, and principles of common law regarding conflicts of interest, neither an elected or appointed county officer nor a county employee may serve as a trustee of a non-profit hospital corporation with which the county contracts for the provision of hospital services and the management and operation of hospital facilities owned by the county.
2. When a county contracts for such services with a non-profit hospital corporation whose membership is composed of the board of trustees of a parent corporation, R.C. 305.27, R.C. 2921.42, and common law principles regarding conflicts of interest prohibit a county officer or employee from serving as a trustee of such parent corporation.