

December 13, 2007

The Honorable Kenneth W. Oswalt
Licking County Prosecuting Attorney
20 South Second Street
Newark, Ohio 43055

SYLLABUS:

2007-044

1. R.C. 511.13 is not dependent upon R.C. 2921.42 and must be construed and applied separately. R.C. 511.13 provides a broader prohibition than R.C. 2921.42 but, unlike R.C. 2921.42, provides no criminal sanctions. (1982 Op. Att’y Gen. No. 82-008, approved and followed.)
2. If a person enters into an ongoing multi-year contract to supply a township with garage storage facilities for a number of years in the future and is subsequently elected to the office of township trustee, the person is prohibited by R.C. 511.13 from serving as township trustee and continuing to have an interest in that preexisting multi-year contract. To avoid the prohibited conflict, the person may refuse the office of township trustee or, prior to taking office as trustee, divest himself or herself of the interest in the contract. R.C. 511.13 does not impose upon the other trustees the legal duty to take steps to set aside the contract.



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December 13, 2007

OPINION NO. 2007-044

The Honorable Kenneth W. Oswald
Licking County Prosecuting Attorney
20 South Second Street
Newark, Ohio 43055

Dear Prosecutor Oswald:

We have received your request for an opinion concerning a situation in which a candidate for township trustee has an interest in a prior ongoing contract with the township. You have asked the following questions:

(1) If a person is elected to office as a Township Trustee, and prior to his taking office he is party to an ongoing multi-year contract to supply the Township with garage storage facilities for a number of years in the future, may he continue to benefit from that pre-existing multi-year contract after taking office? If not, do the other Township Trustees have a legal duty to take steps to set aside that contract to avoid paying the newly-elected Trustee payments that would otherwise be due under that pre-existing contract?

(2) What effect do the provisions of R.C. § 2921.42(C)(1) through (4), and R.C. § 2921.42(F)(1) through (4) have on this situation? Since division (F) [now division (G)] is specific to Township Trustees, does it take precedence over division (C) by virtue of the rules of construction contained in R.C. § 1.51 that address specific or local provisions taking precedence over general provisions, or may Township Trustees seek to use the exceptions in *either* division (C) *or* (F)?

(3) What effect do the provisions of R.C. § 511.13 have on this situation since it does not contain similar exceptions to those contained in R.C. 2921.42(C) or (F)? Does R.C. § 511.13 render the exceptions in R.C. §

2921.42(C) or (F) largely ineffectual? Or since it is the oldest statutory provision, may R.C. § 511.13 be deemed to be superseded by these newer enactments by virtue of the rules of construction contained in R.C. § 1.51(A) that make the latest enactment controlling when statutes are irreconcilable? Or is R.C. § 511.13 to be read as a third exception to a Township Trustee doing business with the Township (with R.C. § 2921.42(C) and § 2921.42(F) being the first two exceptions) compliance with any of the three exceptions then making the contract valid? (Footnote omitted.)

You have addressed the same questions to the Ohio Ethics Commission. Because the Ohio Ethics Commission has jurisdiction over questions involving ethics, conflicts of interest, or financial disclosure under R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43, we defer to the Ethics Commission on questions pertaining to those provisions and address only the issues pertaining to R.C. 511.13. *See* R.C. 102.01; R.C. 102.08.

For the reasons discussed below, we approve and follow 1982 Op. Att’y Gen. No. 82-008 and conclude that R.C. 511.13 is not dependent upon R.C. 2921.42 and must be construed and applied separately. R.C. 511.13 provides a broader prohibition than R.C. 2921.42 but, unlike R.C. 2921.42, provides no criminal sanctions. We conclude, further, that if a person enters into an ongoing multi-year contract to supply a township with garage storage facilities for a number of years in the future and is subsequently elected to the office of township trustee, the person is prohibited by R.C. 511.13 from serving as township trustee and continuing to have an interest in that preexisting multi-year contract. To avoid the prohibited conflict, the person may refuse the office of township trustee or, prior to taking office as trustee, divest himself or herself of the interest in the contract. R.C. 511.13 does not impose upon the other trustees the legal duty to take steps to set aside the contract.

Background Information

You have described the situation with which you are concerned as follows:

A candidate on the ballot this November for the office of Township Trustee has had a prior on-going contract with that Township to supply garage storage services for the Township’s equipment. This contractual relationship has been in existence for a number of years and involves the expenditure of approximately \$2,000 a month from the Township for these services. Earlier this year, this contractual relationship was extended for a period of five years. As a result, should this candidate win election and thereafter take office in January, 2008, the Township will be contractually obligated to pay him/her on this contract. It has been represented to me that due to the size of the Township’s garage storage needs, there is no other readily available comparable garage facility for use by the Township.

Your questions concern the application of R.C. 511.3 and R.C. 2921.42 to this situation.

Provisions of R.C. 511.13

R.C. 511.13 states that “[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.”¹ R.C. 511.13 provides an exception if a person is a shareholder of a corporation (but not an officer or director) and owns not more than five percent of the stock of the corporation of a value not in excess of five hundred dollars. Another exception is created by R.C. 505.011, which permits a member of a board of township trustees to receive compensation as a member of a private fire company that has entered into an agreement to furnish fire protection for the township. *See* 1990 Op. Att’y Gen. No. 90-037, at 2-152 to 2-155. No statutory exception is provided for the situation you have described.

R.C. 511.13 and its predecessor provisions have long been part of Ohio law and have been the subject of opinions of various Attorneys General. The opinions have consistently read R.C. 511.13 according to its terms and have found that it prohibits a member of the board of township trustees or an officer or employee of a township from having an interest in any contract entered into by the board of township trustees, except in the limited circumstances directly addressed by statute. *See, e.g.,* 1990 Op. Att’y Gen. No. 90-078; 1990 Op. Att’y Gen. No. 90-040, at 2-162; 1990 Op. Att’y Gen. No. 90-037; 1982 Op. Att’y Gen. No. 82-008. A township trustee who is party to a contract to provide garage storage facilities to the township for a charge of \$2,000 per month would clearly have an interest that is prohibited by R.C. 511.13.

Provisions of R.C. 2921.42

R.C. 2921.42 is a criminal statute that prohibits a public official from having certain interests in public contracts or from taking certain actions that might favor the official, a family

¹ R.C. 511.13 states in full:

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.)

member, or a business associate. The portion of R.C. 2921.42 that most closely parallels R.C. 511.13 states that no public official shall knowingly “[h]ave 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 the public official is connected.” R.C. 2921.42(A)(4). Divisions (C) and (G) of R.C. 2921.42 identify situations in which an interest in a contract is not subject to the provisions of R.C. 2921.42.² Division (E) establishes criminal penalties for

² Divisions (C) and (G) of R.C. 2921.42 state:

(C) This section does not apply to a public contract in which a public official, member of a public official’s family, or one of a public official’s business associates has an interest, when all of the following apply:

(1) The subject of the public contract is necessary supplies or services for the political subdivision or governmental agency or instrumentality involved;

(2) The supplies or services are unobtainable elsewhere for the same or lower cost, or are being furnished to the political subdivision or governmental agency or instrumentality as part of a continuing course of dealing established prior to the public official’s becoming associated with the political subdivision or governmental agency or instrumentality involved;

(3) The treatment accorded the political subdivision or governmental agency or instrumentality is either preferential to or the same as that accorded other customers or clients in similar transactions;

(4) The entire transaction is conducted at arm’s length, with full knowledge by the political subdivision or governmental agency or instrumentality involved, of the interest of the public official, member of the public official’s family, or business associate, and the public official takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

....

(G) This section does not apply to a public contract in which a township trustee in a township with a population of five thousand or less in its unincorporated area, a member of the township trustee’s family, or one of the township trustee’s business associates has an interest, if all of the following apply:

(1) The subject of the public contract is necessary supplies or services for the township and the amount of the contract is less than five thousand dollars per year;

(2) The supplies or services are being furnished to the township as part of a continuing course of dealing established before the township trustee held that office with the township;

(3) The treatment accorded the township is either preferential to or the same as that accorded other customers or clients in similar transactions;

violations of R.C. 2921.42. Division (H) provides that certain contracts that are violative of R.C. 2921.42 are void and unenforceable, stating in part: “Any public contract in which a public official, a member of the public official’s family, or any of the public official’s business associates has an interest in violation of this section is void and unenforceable.”

The authority to interpret R.C. 2921.42 as it applies to township trustees and various other public officials has been given to the Ohio Ethics Commission, which is empowered to render opinions involving ethics, conflicts of interest, or financial disclosure under R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43. R.C. 102.08; *see also* 2007 Op. Att’y Gen. No. 2007-011, at 2-83 n.1; 2006 Op. Att’y Gen. No. 2006-036, at 2-329 n.1. An opinion of the Ohio Ethics Commission provides immunity from criminal prosecutions, civil suits, or actions for removal for a violation of R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43 based on facts and circumstances covered by the opinion. R.C. 102.08. Therefore, this office refrains from rendering opinions with regard to prohibitions under R.C. 2921.42, and your questions concerning the manner in which R.C. 2921.42 applies in this situation must be addressed by the Ohio Ethics Commission. *See, e.g.*, 2006 Op. Att’y Gen. No. 2006-036, at 2-329 n.1; 2004 Op. Att’y Gen. No. 2004-025, at 2-224 n.6; 1989 Op. Att’y Gen. No. 89-030, at 2-124 n.1; 1987 Op. Att’y Gen. No. 87-025 (syllabus, paragraph 3) (“[b]ecause R.C. 102.08 grants the Ohio Ethics Commission the authority to render advisory opinions interpreting R.C. 2921.42, the Attorney General will not also render opinions construing R.C. 2921.42”).

It is important to note, however, that it has been established by both the Ohio Attorney General and the Ohio Ethics Commission that R.C. 511.13 is an independent provision, applied separately from R.C. 2921.42, and that the exceptions set forth in R.C. 2921.42 are not applicable to R.C. 511.13. The reason is that R.C. 2921.42 is a criminal statute that defines criminal acts and establishes penalties. In contrast, R.C. 511.13 is a broader remedial statute intended to further safeguard the public interest. The distinction was described in 1982 Op. Att’y Gen. No. 82-008, at 2-30, as follows:

The difference between R.C. 511.13 and R.C. 2921.42 may be explained by the differing nature and purpose of the two statutes. R.C. 2921.42 is part of the Criminal Code. The legislature did not wish to impose penal sanctions under R.C. 2921.42 for dealings in which the public officials’ personal interest would be very remote or clearly aboveboard. Committee Comment, Am. H.B. No. 511, 109th Gen’l Assembly (1972). In contrast, R.C. 511.13 is a remedial statute. See State ex rel. National Mutual Insurance Co. v. Conn, 115 Ohio St. 607, 620, 155 N.E. 138, 142 (1927) (a statute which safeguards the public interests or remedies a public evil is a remedial statute); In re Arnold, 8 Ohio N.P. 112, 115 (Hamilton

(4) The entire transaction is conducted with full knowledge by the township of the interest of the township trustee, member of the township trustee’s family, or the township trustee’s business associate.

County Common Pleas 1900), rev'd on different grounds sub nom. Board of County Commissioners v. Arnold, 65 Ohio St. 479, 63 N.E. 89 (1902) (remedial statutes have for their object the introduction of some regulation conducive to the public good). Like other statutes which forbid public officers to have an interest in public contracts, R.C. 511.13 is intended to introduce a regulation which will safeguard the public interest. Cf. Doll v. State, 45 Ohio St. 445, 449, 15 N.E. 293, 295 (1887) (“To permit those holding offices of trust or profit to become interested in contracts for the purchase of property for the use of the state, county, or municipality of which they are officers, might encourage favoritism, and fraudulent combinations and practices. . . . The surest means of preventing this, was to prohibit all such contracts. . .”). Thus, it appears that R.C. 511.13 provides a broader prohibition than R.C. 2921.42, although it provides no criminal sanctions.

Accord Ohio Ethics Comm’n, Advisory Op. No. 84-006, at *8 (R.C. 511.13 “prohibits a township trustee from having an interest in any contract entered into by the board of township trustees, unless the interested trustee meets the criteria for a permissible interest specifically set forth in that Section”); *see also* 1948 Op. Att’y Gen. No. 3075, p. 197, at 201; Ohio Ethics Comm’n, Advisory Op. No. 91-001, at *16; *cf.* 1999 Op. Att’y Gen. No. 99-023, at 2-158 to 2-160 (discussing and declining to follow *Board of Education of the Boardman Local School District v. Ferguson*, No. 74 C.A. 82, 1974 Ohio App. LEXIS 2859 (Ct. App. Mahoning County Dec. 30, 1974), which holds that R.C. 2921.42 and R.C. 3313.33 (prohibiting school board members from having interests in contracts) relate to the same subject matter, have the same purpose, and are in *pari materia* when applied to the same facts); Ohio Ethics Comm’n, Advisory Op. No. 78-006.

Therefore, R.C. 511.13 is not dependent upon R.C. 2921.42 and must be construed and applied separately. R.C. 511.13 provides a broader prohibition than R.C. 2921.42 but, unlike R.C. 2921.42, provides no criminal sanctions. In reaching this conclusion, we approve and follow 1982 Op. Att’y Gen. No. 82-008.³

³ Divisions (C) and (G) of R.C. 2921.42 do not change this conclusion. *See* note 2, *supra*. These divisions state that R.C. 2921.42 “does not apply” to a public contract in which certain public officials or their family members or business associates have “an interest” if various listed conditions apply. It is thus understood that in the situations described in divisions (C) and (G) the officials, family members, or business associates have an interest in the contract, but R.C. 2921.42’s criminal penalties and provisions rendering contracts void and unenforceable are not applicable. In contrast with R.C. 2921.42, R.C. 511.13 does not impose criminal penalties or expressly render contracts void and unenforceable, but rather prohibits a township trustee, officer, or employee from having an interest in a contract, subject to the exceptions in R.C. 511.13 and R.C. 505.011.

If a board of township trustees enters into a contract that meets all the requirements set forth in division (C) or (G), the provisions of R.C. 2921.42 will not apply to the contract, no one will be guilty of a crime under R.C. 2921.42(E), and the contract will not become void and unenforceable under R.C. 2921.42(H). However, a trustee, officer, or employee of the township may still have an interest in the contract under R.C. 511.13 and, if so, those persons and the township will be subject to whatever consequences result from entering into a contract in violation of R.C. 511.13.

Division (G) applies specifically to certain contracts of a township. According to a news summary of testimony about the bill, the enactment of that provision, then known as division (F) of R.C. 2921.42, was intended to allow a township trustee who also owns a gas station to fill up fire trucks when there were no stations open in his town. *See* Capitol Connection Bill History for HB285, 120th Gen. A., House Finance and Appropriations (June 29, 1993); *see also* 1993-1994 Ohio Laws, Part III, 5295, 5313-14 (Am. Sub. H.B. 285, eff. Mar. 2, 1994). Thus, it might have been assumed that division (G) [then division (F)] would operate as an exception to the prohibition of R.C. 511.13 against interests in township contracts. *Cf., e.g.,* 2007 Op. Att’y Gen. No. 2007-011, at 2-85 to 2-86 (amendment to R.C. 3313.33 enacted exceptions that are similar, but not identical to, exceptions appearing in R.C. 2921.42). This reading of R.C. 2921.42, however, is countered by the plain language of division (G) limiting the exception to “[t]his section,” namely R.C. 2921.42. *See* Ohio Legislative Service Comm’n, 120-HB285 Analysis, Am. Sub. H.B. 285 (Preliminary Summary) at 12 (Feb. 25, 1994) (“[t]he act provides that the criminal statute that prohibits having an unlawful interest in public contracts does not apply” to township contracts described in division (F) [now division (G)]); *see also State ex rel. Nimberger v. Bushnell*, 95 Ohio St. 203, 116 N.E. 464 (1917) (syllabus, paragraph four) (“[w]hen the meaning of the language employed in a statute is clear, the fact that its application works an inconvenience or accomplishes a result not anticipated or desired should be taken cognizance of by the legislative body, for such consequence can be avoided only by a change of the law itself, which must be made by legislative enactment and not by judicial construction”); *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902) (syllabus, paragraph two) (“the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction”); *accord State v. Hairston*, 101 Ohio St. 3d 308, 2004-Ohio-969, 804 N.E.2d 471, at ¶12 (2004).

With regard to the interaction between division (C) and division (G), a simple reading of the statute discloses that division (G) codifies a situation that comes within division (C). Indeed, this sentiment was expressed in testimony of the Director of the Ohio Ethics Commission when division (G) [then division (F)] was enacted. *See* Capitol Connection Bill History for HB285,

Interpretation and Application of R.C. 511.13

R.C. 511.13 sets forth a clear prohibition against a trustee, officer, or employee of a township having an interest in a contract entered into by the board of township trustees. A party contracting to provide garage storage facilities to the township for a charge of \$2,000 per month would have an interest in a contract under this provision. Thus, R.C. 511.13 prohibits a township trustee from being a party to such a contract.

R.C. 511.13 does not directly address the situation you have described, in which a person and a township enter into a contract that is not in violation of R.C. 511.13 when it is executed, and the person is subsequently elected township trustee. Regardless of the situation, however, R.C. 511.13 prohibits any person from serving as a township trustee, officer, or employee and having an interest in a contract entered into by the township.⁴

120th Gen. A., Campaign Finance Reform Task Force, Senate (Oct. 26, 1993). Division (C) already applied to townships, and the enactment of division (F) [now division (G)] did not expand the scope of the exception. Therefore, it might be argued that for division (G) to have any meaning, its application must extend not only to R.C. 2921.42 but also to any other provisions limiting the authority of a township trustee to have an interest in a public contract – specifically, to R.C. 511.13. This argument would support incorporating the exceptions of division (G) of R.C. 2921.42 into R.C. 511.13. This argument is subject to question for the reasons discussed above. Even if it were adopted, however, and division (G) were found to establish an exception to R.C. 511.13, the limited scope of division (G) would not encompass the contract in question and would not change the conclusions reached in this opinion.

⁴ By its terms, R.C. 511.13 prohibits a “member of the board of township trustees or any officer or employee thereof” from being interested in any contract entered into “by such board.” It might be argued that use of the word “such” means that a trustee is prohibited from having an interest in the contract only if the board that enters into the contract is the same board on which the trustee serves – that is, that the reference is to the board of trustees at such time as the particular trustee is part of the board. We find, instead, that the reference is more appropriately construed to apply generally to the board of trustees of the particular township (in contrast with the board of trustees of a different township), regardless of the membership of the board at a particular time. The broader reference is appropriate because the prohibition extends to any officer or employee (who will not be in a position to act upon a proposal for the township to enter into a contract), as well as to a trustee, and because the established interpretation of R.C. 511.13 and similar provisions applies to the holding of interests in contracts and not only to participation in entering into contracts. *See, e.g.*, 1959 Op. Att’y Gen. No. 51, p. 29, at 32 (“[t]he plain purpose of all of these statutes 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”); 1931 Op. Att’y Gen. No. 3845, vol. III, p. 1498; *cf.* 1949 Op. Att’y Gen. No. 1284, p. 911 (syllabus) (“[a] township trustee is disqualified from voting on a

Therefore, if a person enters into an ongoing multi-year contract to supply a township with garage storage facilities for a number of years in the future and is subsequently elected to the office of township trustee, the person is prohibited by R.C. 511.13 from serving as township trustee and continuing to have an interest in that preexisting multi-year contract. To avoid the prohibited conflict, the person may refuse the office of township trustee or, prior to taking office as trustee, divest himself or herself of the interest in the contract. R.C. 511.13 does not impose upon the other trustees the legal duty to take steps to set aside the contract. *See, e.g.*, R.C. 503.27 (failure to accept office); *Stone v. Osborn*, 24 Ohio App. 251, 157 N.E. 410 (Adams County 1927) and 1959 Op. Att’y Gen. No. 51, p. 29, at 31 (sale of municipal light plant to member of the municipal board was permissible where member had entirely terminated his position before submitting bid to purchase the property).

Duties of Other Township Trustees

You have asked specifically if the other trustees have a legal duty to take steps to set aside the contract to avoid paying the newly-elected trustee amounts that would otherwise be due under that preexisting contract. Although it appears that there would be a violation of R.C. 511.13 if the newly-elected trustee received payments from the township under a contract to supply garage storage facilities, we are unable to determine that R.C. 511.13 imposes upon the other trustees the legal duty to take steps to set aside the contract.

As discussed above, it is appropriate for a person elected as township trustee to divest himself or herself of any prohibited interest in a contract with the township prior to taking office as trustee. R.C. 511.13 does not directly address the situation in which a newly-elected trustee proceeds to take office while retaining an interest in a contract with the township.

Although some statutes that prohibit interests in public contracts specify the consequences that follow if public officials have an interest in contracts of the public bodies that they serve,⁵ R.C. 511.13 does not specify the consequences of having an interest in a contract in

contract to purchase a maintainer, where such trustee is in the employ of the seller as a mechanic, because he would be acting on behalf of a public authority while having an interest in the contract”).

⁵ *See, 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. 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”); R.C. 308.04 (before entering upon official duties, a member of the board of trustees of a regional airport authority must take an oath or affirmation that, *inter alia*, “the member will not be interested directly or indirectly in any contract let by the regional airport authority. Any contract let by the regional airport authority in which a member of the board of

violation of R.C. 511.13. Because no consequences are prescribed by statute, the trustees, county prosecuting attorney, and courts may have some discretion in determining how to address the situation. Our research indicates that there are various consequences that might result if a newly-elected trustee were to attempt to serve as township trustee while retaining an interest in a contract with the township.

Prior opinions have considered situations in which a person with an interest in a contract with a public board was subsequently elected to the public board and have reached different conclusions. It has been found in some instances that the person was required to renounce or otherwise extinguish rights under the contract in order to qualify for the office. *See* 1933 Op. Att’y Gen. No. 1981, vol. III, p. 1891 (syllabus, paragraph 5) (“[w]here a contract is made by a board of education with a private corporation for the purchase of coal and the manager of such corporation, who is also a stockholder therein, is elected a member of such board of education, such manager and stockholder may not qualify as a member of such board of education unless he terminates his services with the said company and sells or otherwise disposes of his stock therein”) (overruled in part on other grounds in 1981 Op. Att’y Gen. No. 81-011); 1931 Op. Att’y Gen. No. 3845, vol. III, p. 1498 (syllabus, paragraph 1) (“[a] person who has been elected as a member of a board of education and has a contract with said board to transport pupils cannot legally qualify as a member thereof without surrendering his rights under the contract”). In other instances it was found that the person could accept membership on the board but, by doing so, the person forfeited and relinquished all rights under the contract and the contract became void. *See* 1918 Op. Att’y Gen. No. 911, vol. I, p. 20 (syllabus) (“[a] member of a board of education cannot have an interest in a contract for the transportation of pupils with the board of which he is such member. One who has a contract for transportation with a board of education relinquishes his interest in such contract when he qualifies and takes his place on such board after being elected thereto”);⁶ *see Grant v. Brouse*, 1 Ohio N.P. 145, 145 (C.P. Summit County 1894) (where

trustees is directly or indirectly interested is void and unenforceable”); R.C. 731.02 (“[e]ach member of the legislative authority [of a city] . . . shall not be interested in any contract with the city, and no such member may hold employment with said city. A member who ceases to possess any of such qualifications . . . shall forthwith forfeit the member’s office”); R.C. 731.12 (“[n]o member of the legislative authority [of a village] shall . . . be interested in any contract with the village Any member who ceases to possess any of such qualifications . . . shall forfeit the member’s office”); R.C. 3319.21 (“[w]henever 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”); *see also* R.C. 2921.42(E), (H).

⁶ 1918 Op. Att’y Gen. No. 911, vol. I, p. 20 addressed an instance in which a statute prohibited a member of a board of education from having an interest in a contract without prescribing the consequences, and a person who had a contract with the board of education to

board member had a prohibited interest in a contract, the board had no right to allow a bill under the contract or draw an order for its payment).

It has been stated as a general rule that “where a contract made by a public officer or board is tainted by violation of the statutes to which reference has been made [including R.C. 511.13], particularly those imposing criminal liability, it will have the effect of invalidating a contract so made.” 1959 Op. Att’y Gen. No. 51, p. 29, at 34.⁷ In the instant case, the contract

provide student transportation was elected to the board. The opinion found that the contract was an executory one, and that the part of the contract that had been performed or could be performed prior to the beginning of the terms of new members of the board was not affected. Turning its attention to the services to be performed and money to be paid after that date, the opinion found no statute that disqualified a person with an interest in a contract by that fact alone from becoming a member of the board. It went on to state:

If, then, there is no way to prevent the person who has a contract with the board from becoming a member of the board, and if the contract with the board would be an invalid one, then a person who has such contract and does so become a member of the board necessarily invalidates and makes void the contract to which he was a party prior to his becoming a member of the board.

1918 Op. Att’y Gen. No. 911, vol. I, p. 20, at 23.

⁷ In February of 2007, the Ohio Supreme Court considered a contract that had been entered into in violation of R.C. 308.04 (prohibiting a member of the board of trustees of a regional airport authority from having a direct or indirect interest in a contract of the board) and had been ratified by the board of county commissioners and fully performed by both parties for more than twenty years. The court held that the contract was not void, even though it was entered into in violation of R.C. 308.04 and R.C. 2921.42(A)(1). *Morrow County Airport Authority v. Whetstone Flyers, Ltd.*, 112 Ohio St. 3d 419, 2007-Ohio-255, 860 N.E.2d 733, at ¶11. R.C. 308.04 was subsequently amended to state that “[a]ny contract let by the regional airport authority in which a member of the board of trustees is directly or indirectly interested is void and unenforceable,” and R.C. 2921.42 was subsequently amended to include division (H), rendering contracts in which there is an interest prohibited under that section “void and unenforceable.” Am. Sub. H.B. 119, 127th Gen. A. (2007) (eff. June 30, 2007, with amendments to R.C. 308.04 and R.C. 2921.42 eff. Sept. 29, 2007).

When (as in R.C. 511.13) no statutory provision expressly renders void a contract in which there is an impermissible interest, it might be argued under the *Morrow County Airport Authority* case that the contract is not void. See also *Scherer v. Rock Hill Local Sch. Dist. Bd. of Educ.*, 63 Ohio App. 3d 555, 579 N.E.2d 525 (Lawrence County 1990) (finding that indirect benefit received by school board member where wife was employed by the board as an assistant

was entered into before the interested individual took office and was valid when executed. In applying R.C. 511.13 to the situation at issue, it is not clear whether or at what point the contract might become void, voidable, or unenforceable.

nurse did not constitute a pecuniary interest and was not violative of R.C. 3319.21 or R.C. 3313.33, and stating that a violation of R.C. 3313.33 does not result in the contract being void).

Earlier authorities reached varying conclusions on the question whether a contract in which there is a prohibited interest is void, voidable, or unenforceable. 1948 Op. Att’y Gen. No. 3075, p. 197, at 200-01 (“[t]he courts of our state have not been quite clear and unanimous in declaring whether a contract made in violation of these statutes [prohibiting interests in contracts] is absolutely void, but I think it may safely be stated that they are in all cases regarded as illegal”); 1959 Op. Att’y Gen. No. 51, p. 29, at 34; *see Walsh v. Bollas*, 82 Ohio App. 3d 588, 593, 612 N.E.2d 1252 (Lake County 1992) (finding that a contract under which a sheriff employed his son-in-law was void ab initio under R.C. 2921.42 and the son-in-law had no rights under an illegal contract); *Grant v. Brouse*, 1 Ohio N.P. 145 (C.P. Summit County 1894) (a contract between a board of education and a mercantile business firm is void when a member of the firm is a school board member even if the arrangement is favorable for the board, and any resident taxpayer of the school district may maintain an action to restrain the board from making payments on the contract); *Bellaire Goblet Co. v. City of Findlay*, 3 Ohio Cir. Dec. 205 (Hancock Cir. Ct. 1891); 1961 Op. Att’y Gen. No. 2466, p. 494 (contracts that are violative of R.C. 3313.33 are invalid); 1918 Op. Att’y Gen. No. 911, vol. I, p. 20, at 24 (“no order can be drawn by the board in favor of one of its members for any services which such member would perform, and especially in the face of a statute which specifically prohibits the board from entering into any contract with a member thereof”); 1915 Op. Att’y Gen. No. 139, vol. I, p. 267 (the president of the board of education, who was selling brick to a company that contracted with the board, had a prohibited interest in a contract of the board, but the board had no control over the contractor and was not at fault in making payments under the contract); *cf.* R.C. 3319.21 (certain contracts in which a local director or member of a board of education participates are void); 1999 Op. Att’y Gen. No. 99-023, at 2-154 (“[t]he language that prohibits a member of the board [of education] from having a pecuniary interest in a contract of the board has generally been read as rendering void, or at least illegal, any contract that grants such an interest”). *See generally City of Findlay v. Pertz*, 66 F. 427, 438 (6th Cir. 1895) (where city was not a party to an illegal, unlawful, or immoral agreement, the contract was enforceable by either party unless other conditions provided a ground for rescission); 1988 Op. Att’y Gen. No. 88-076 (syllabus, paragraph 1) (“[u]nless a statute provides to the contrary, the contracts of a governmental entity are governed by the same principles that apply to contracts between individuals”); 15 Ohio Jur. 3d *Civil Servants* §§ 374-375 (2006); 78 Ohio Jur. 3d *Public Works and Contracts* § 12 (2001 & Supp. 2007); 63C Am. Jur. 2d *Public Officers and Employees* §§ 260, 262 (1997). This opinion does not address the manner in which R.C. 2921.42 applies to the situation in question, leaving that issue to determination by the Ohio Ethics Commission.

Other possible consequences of having a prohibited interest in a contract may include forfeiture of one's position or of the receipts from the contract. *See* note 5, *supra*. Action might be taken to challenge the individual's right to hold the office or to remove the individual from the office. *See* R.C. 2733.01 (a civil action in quo warranto may be brought in the name of the state against, *inter alia*, a person who unlawfully holds or exercises a public office or a public officer who does or suffers an act that by law works a forfeiture of the office); *State ex rel. Corrigan v. Hensel*, 2 Ohio St. 2d 96, 206 N.E.2d 563 (1965) (syllabus) (“[a] person . . . will not be ousted from . . . elective office [as a member of a local board of education] by quo warranto, on the ground that by reason of his private occupation he *might possibly or could* secure 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”); *Mason v. State ex rel. McCoy*, 58 Ohio St. 30, 52-53, 50 N.E. 6 (1898) (distinguishing between an action challenging title to an office and an action to remove an officer for misconduct in office); 2006 Op. Att’y Gen. No. 2006-015, at 2-122 n.1; 2001 Op. Att’y Gen. No. 2001-004 (discussing removal from or forfeiture of office); 1990 Op. Att’y Gen. No. 90-083; 1985 Op. Att’y Gen. No. 85-006; 1961 Op. Att’y Gen. No. 2466, p. 494.

In the situation you have described, there are various means by which a violation of R.C. 511.13 might be avoided. It is clear that the newly-elected township trustee is not permitted to serve as trustee while receiving payments from the township under a contract to supply garage storage facilities, and it appears that the responsibility for avoiding a violation rests in the first instance with the newly-elected trustee. R.C. 511.13 does not impose upon the other trustees the legal duty to take steps to set aside the contract.

Conclusions

For the reasons discussed above, it is my opinion and you are advised as follows:

1. R.C. 511.13 is not dependent upon R.C. 2921.42 and must be construed and applied separately. R.C. 511.13 provides a broader prohibition than R.C. 2921.42 but, unlike R.C. 2921.42, provides no criminal sanctions. (1982 Op. Att’y Gen. No. 82-008, approved and followed.)
2. If a person enters into an ongoing multi-year contract to supply a township with garage storage facilities for a number of years in the future and is subsequently elected to the office of township trustee, the person is prohibited by R.C. 511.13 from serving as township trustee and continuing to have an interest in that preexisting multi-year contract. To avoid the prohibited conflict, the person may refuse the office of township trustee

or, prior to taking office as trustee, divest himself or herself of the interest in the contract. R.C. 511.13 does not impose upon the other trustees the legal duty to take steps to set aside the contract.

Respectfully,

A handwritten signature in black ink, appearing to read "Marc Dann". The signature is fluid and cursive, with a large initial "M" and a distinct "D" at the end.

MARC DANN
Attorney General