

February 11, 2019

The Honorable William C. Hayes
Licking County Prosecuting Attorney
20 South Second Street
Newark, Ohio 43055

SYLLABUS:

2019-005

1. R.C. 511.13 prohibits a township fiscal officer from being employed as the township cemetery sexton or caretaker and being compensated for services provided as cemetery sexton or caretaker. (1937 Op. Att’y Gen. No. 714, vol. II, p. 1278; 1919 Op. Att’y Gen. No. 798, vol. II, p. 1474; 1918 Op. Att’y Gen. No. 1206, vol. I, p. 683; and 1916 Op. Att’y Gen. No. 1462, vol. I, p. 633, overruled; 1949 Op. Att’y Gen. No. 1284, p. 911, modified.)
2. A township fiscal officer may not receive additional compensation for maintaining the cemetery plat for the township pursuant to R.C. 517.06 or for recording cemetery deeds for the township pursuant to R.C. 517.07.



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OPINION NO. 2019-005

The Honorable William C. Hayes
Licking County Prosecuting Attorney
20 South Second Street
Newark, Ohio 43055

Dear Prosecutor Hayes:

You ask two questions regarding the legality of a township fiscal officer's employment as township cemetery sexton or caretaker, and whether a township fiscal officer may receive additional compensation for the performance of certain statutory duties. First, you ask whether a township fiscal officer may be employed as the cemetery sexton or caretaker for the township cemetery, and receive compensation for providing services as cemetery sexton or caretaker. You ask us to reconsider the advice provided in 1937 Op. Att'y Gen. No. 714, vol. II, p. 1278, which concluded that a township clerk (now fiscal officer) may be paid for services as the cemetery sexton in addition to the services provided as township clerk. Second, you ask whether a township fiscal officer may receive additional compensation for maintaining the cemetery plat for the township and recording cemetery deeds in the plat book, duties which are imposed upon the township fiscal officer by R.C. 517.06 and R.C. 517.07.

R.C. 511.13 Prohibits a Township Fiscal Officer from Employment as Township Cemetery Sexton or Caretaker

Your first question is whether a township fiscal officer may be employed as the township's cemetery sexton or caretaker.¹ R.C. 511.13 prohibits a township trustee or officer from having any

¹ Historically, a cemetery sexton was a church officer or employee tasked with the maintenance of church property. Duties might include "ringing the church bells and digging graves in the churchyard." *See Webster's New World College Dictionary* 1332 (5th ed. 2014). The terms "sexton" and "gravedigger" were once viewed as synonymous. For example, in the graveyard scene in "Hamlet" by William Shakespeare, Hamlet asks a Clown how long he has been a grave-maker, and the Clown answers, referring to himself as a sexton:

interest in a contract entered into by the board of township trustees, unless the trustee or officer meets the narrow exception set forth in the statute. *See* 1982 Op. Att’y Gen. No. 82-008 (syllabus). R.C. 511.13 states, in relevant part:

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....

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.

A township fiscal officer is an “officer” for purposes of R.C. 511.13. *See* 1982 Op. Att’y Gen. No. 82-008, at 2-28. There is no indication that the exception in R.C. 511.13 applies to the township fiscal officer in question.

HAMLET

How long hast thou been a grave-maker?

CLOWN

Of all the days i' th' year, I came to't that day that our last king Hamlet overcame Fortinbras.

HAMLET

How long is that since?

...

CLOWN

...

I have been *sexton* here, man and boy, thirty years.

William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, 5.1.144-148, 163-164 (Sylvan Barnet ed., Signet Classic rev. ed. 1998) (emphasis added). We will use the terms cemetery sexton and caretaker interchangeably to refer to someone who maintains the grounds of a cemetery, including the pathways, plots, lanes, and landscaping of the cemetery, rather than someone who digs graves. It is our assumption that a person or entity other than the cemetery caretaker is physically responsible for digging the graves in the township cemetery.

The prohibition in R.C. 511.13 against a township officer having an interest in a township contract is broad. “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.” 2007 Op. Att’y Gen. No. 2007-044, at 2-439. We have previously concluded that “any interest” as used in R.C. 511.13 is “broad in its sweeping prohibition.” 1973 Op. Att’y Gen. No. 73-043, at 2-167. Indeed, “[i]t has been held in Ohio and elsewhere that an officer may be interested in a contract although he makes no profit” from such contract. 1949 Op. Att’y Gen. No. 1284, p. 911, at 912. An arrangement to provide services for the township of which a person serves as the elected fiscal officer in exchange for compensation is a clear interest in a contract with the township because the fiscal officer receives a financial benefit from the arrangement. *See, e.g.*, 2007 Op. Att’y Gen. No. 2007-044, at 2-439 (a township trustee has a prohibited interest in a contract with the township when he receives \$2,000 per month for providing garage storage facilities to the township). Therefore, we conclude that a township fiscal officer may not serve as the township cemetery sexton or caretaker and receive compensation for those services.²

Our conclusion requires us to overrule several opinions of prior Attorneys General. In 1937, the Attorney General advised that a cemetery sexton and township clerk (now fiscal officer) were compatible and the clerk may be paid for services as sexton in addition to the services provided as township clerk. 1937 Op. Att’y Gen. No. 714, vol. II, p. 1278, at 1279. The reasoning behind this conclusion was based on language in former General Code sections 12910 and 12912, which, among other things, prohibited a township trustee from having an interest in “a contract for the purchase of property, supplies or fire insurance.” *See* 1919 Op. Att’y Gen. No. 798, vol. II, p. 1474, at 1475. The opinion did not consider a statute analogous to current R.C. 511.13, which was located at section 3410-8 of the General Code and provided as follows: “No member of the board of township trustees or any officer or employee thereof shall be interested in any contract entered into by said board.” Throckmorton’s Ohio Code Annotated – Baldwin’s 1936 Certified Revision 1335; *see also* 1919 Ohio Laws, Part I, 542, 545 (Am. S.B. 112, filed June 6, 1919). It is unclear why this provision was not considered. Whatever the reason, it is clear that the state of the law in Ohio has changed since the issuance of 1937 Op. Att’y Gen. No. 714. As noted above, since the issuance of that opinion, R.C. 511.13 has been broadly interpreted to prohibit a township officer from having any interest in a township contract, no matter how slight. *See, e.g.*, 2000 Op. Att’y Gen. No. 2000-015, at 2-85; 1973 Op. Att’y Gen. No. 73-043, at 2-167. Therefore, we overrule the advice provided in 1937 Op. Att’y Gen. No. 714.

² In your letter, you note that R.C. 2921.42 may also impact the legality of a township fiscal officer receiving compensation for serving as the township cemetery caretaker. R.C. 2921.42 imposes criminal penalties when a public official has an unlawful interest in certain government contracts. The Ohio Ethics Commission, rather than the Attorney General, has been granted the authority to render opinions on R.C. 2921.42. Accordingly, we decline to interpret R.C. 2921.42 in this opinion. *See, e.g.*, 2011 Op. Att’y Gen. No. 2011-026, at 2-222 to 2-223 n.11.

For the same reasons, we also overrule the following opinions to the extent the advice provided in the opinions is inconsistent with the advice in this opinion: 1919 Op. Att’y Gen. No. 798, vol. II, p. 1474 (township clerk may provide personal services on township road work, ditch work, and miscellaneous work and receive compensation for such services); 1918 Op. Att’y Gen. No. 1206, vol. I, p. 683 (township clerk may serve as janitor for the township and receive payment for janitorial services); and 1916 Op. Att’y Gen. No. 1462, vol. I, p. 633 (township treasurer responsible for disbursing wages to the cemetery sexton may also serve as cemetery sexton and receive compensation for serving as sexton). We also modify 1949 Op. Att’y Gen. No. 1284, p. 911. That opinion concluded that, although a township trustee is prohibited from voting on a contract between the township and the trustee’s employer, the trustee may continue working for the employer and simultaneously serve as trustee. R.C. 511.13 prohibits such an arrangement and we modify 1949 Op. Att’y Gen. No. 1284 accordingly.

Township Fiscal Officer may not Receive Additional Compensation for Maintaining Township Cemetery Plat Book or Recording Deeds in the Plat Book

You next ask whether a township fiscal officer may receive compensation in addition to her statutory salary for maintaining the township cemetery plat book and recording deeds in the plat book. R.C. 517.06 requires the township fiscal officer to maintain the township cemetery plat. The statute states that “[t]he board of township trustees shall have the cemetery laid out in lots, avenues, and paths, shall number the lots, and shall have a suitable plat of the lots made, *which plat shall be carefully kept by the township fiscal officer.*” (Emphasis added.) R.C. 517.07 requires the township fiscal officer to record the deeds of all cemetery lots that the board of township trustees sells. That statute reads, in part:

Upon application, the board of township trustees shall sell at a reasonable price the number of lots as public wants demand for burial purposes. Purchasers of lots or other interment rights, upon complying with the terms of sale, may receive deeds for the lots or rights which the board shall execute *and which shall be recorded by the township fiscal officer in a book for that purpose.* The expense of the recording shall be paid by the person receiving the deed.

R.C. 517.07 (emphasis added). Therefore, the Revised Code requires a township fiscal officer to maintain the township cemetery plat book and record deeds in the plat book in a township that maintains a cemetery.

We have previously concluded that a township fiscal officer may not receive extra compensation for performing statutory duties. In 2011, we advised that “[a] township fiscal officer who performs duties with regard to the collection and disbursement of building permit fees imposed pursuant to R.C. 3781.102(E) is not entitled to a portion of the fees as extra compensation.” 2011 Op. Att’y Gen. No. 2011-026 (syllabus, paragraph 3). Although other statutes authorized a township fiscal officer to receive additional compensation under certain circumstances, there was no authority to pay the fiscal officer any additional compensation for collecting building permit fees pursuant to R.C. 3781.102(E). *Id.* at 2-220 to 2-222. This conclusion followed well-established law in Ohio. For

instance, the Ohio Supreme Court has declared that county officers may not receive any other “emolument from their offices than the definite salary prescribed by law.” *See State ex rel. Lyne v. Kennedy*, 90 Ohio St. 75, 86, 106 N.E. 773 (1914). The Supreme Court has further noted that “[i]t is a familiar rule that when a public officer takes office he undertakes to perform all of its duties, although some of them may be called into activity for the first time by legislation passed after he enters upon his term.” *Donahey v. State ex rel. Marshall*, 101 Ohio St. 473, 476, 129 N.E. 591 (1920). Indeed, “where a service for the benefit of the public is required by law, and no provision for its payment is made, it must be regarded as gratuitous, and no claim for compensation can be enforced.” *Jones v. Comm’rs of Lucas Cnty.*, 57 Ohio St. 189, 209, 48 N.E. 882 (1887) (citation omitted). Here, R.C. 517.06 and R.C. 517.07 require a township fiscal officer to perform the duties of maintaining a cemetery plat book for the township cemetery and recording deeds in the plat book. There is no statutory authority for a township fiscal officer to receive additional compensation for the performance of these statutory duties. Therefore, we conclude that a township fiscal officer is not entitled to additional compensation for performing those duties.

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. R.C. 511.13 prohibits a township fiscal officer from being employed as the township cemetery sexton or caretaker and being compensated for services provided as cemetery sexton or caretaker. (1937 Op. Att’y Gen. No. 714, vol. II, p. 1278; 1919 Op. Att’y Gen. No. 798, vol. II, p. 1474; 1918 Op. Att’y Gen. No. 1206, vol. I, p. 683; and 1916 Op. Att’y Gen. No. 1462, vol. I, p. 633, overruled; 1949 Op. Att’y Gen. No. 1284, p. 911, modified.)
2. A township fiscal officer may not receive additional compensation for maintaining the cemetery plat for the township pursuant to R.C. 517.06 or for recording cemetery deeds for the township pursuant to R.C. 517.07.

Respectfully,



DAVE YOST
Ohio Attorney General