

STATE OF OHIO, TRUMBULL COUNTY

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

STATE OF OHIO ex rel. TRUMBULL )  
COUNTY BOARD OF ELECTIONS, )  
et al., )

RELATORS-APPELLANTS, )

- VS - )

TRUMBULL COUNTY BOARD OF )  
COMMISSIONERS, et al., )

RESPONDENTS-APPELLEES. )

CASE NO. 2009 TR 85

O P I N I O N

CHARACTER OF PROCEEDINGS:

Civil Appeal from Common Pleas Court,  
Case No. 08CV1548.

JUDGMENT:

Reversed and Remanded.

APPEARANCES:

For Relators-Appellants:

Attorney Donald McTigue  
Attorney Mark McGinnis  
Attorney J. Corey Colombo  
550 East Walnut Street  
Columbus, Ohio 43215

For Respondents-Appellees:

Attorney Charles Richards  
Attorney Jason Toth  
8600 East Market Street, Suite 1  
Warren, Ohio 44484

JUDGES:

Hon. Joseph J. Vukovich,  
Judge of the Seventh District Court  
Of Appeals, Sitting By Assignment  
Hon. Cheryl L. Waite,  
Judge of the Seventh District Court  
Of Appeals, Sitting By Assignment  
Hon. Mary DeGenaro,  
Judge of the Seventh District Court  
Of Appeals, Sitting By Assignment.

Dated:

VUKOVICH, P.J.

¶{1} Relator-appellant Trumbull County Board of Elections appeals the decision of the Trumbull County Common Pleas Court which denied its request for appointment of outside counsel where respondent-appellee prosecutor had a conflict of interest and refused to file an application for appointment of outside counsel. The issue is whether the Board of Elections was statutorily entitled to outside counsel to assist in its dispute with respondent-appellee Trumbull County Board of Commissioners regarding the discontinuation of health insurance coverage for members of the Board of Elections.

¶{2} For the following reasons, we hold that the trial court's decision was erroneous. Both the prosecutor and the Board of Commissioners had conflicts of interest with the Board of Elections. The Board of Elections is statutorily entitled to representation in matters of public business and/or in actions in which they have an interest in their official capacities. The right to the appointment of outside counsel was not dependent on the ultimate disposition of the issue raised by the Board of Elections. As such, we hereby reverse the trial court's denial of outside counsel, order the appointment of outside counsel, and remand for a determination of attorney fees.

#### STATEMENT OF THE CASE

¶{3} Members of the Board of Elections previously were entitled to health insurance coverage. For instance, when member Craig Bonar began his first term as a Board of Elections member in March of 2004, he was provided health insurance. At that time, R.C. 3501.141 stated:

¶{4} "The board of elections of any county may procure and pay all or any part of group hospitalization, surgical, major medical, or sickness and accident insurance or a combination of any of the foregoing types of insurance or coverage for the members appointed to the board of elections under 3501.06 of the Revised Code and their immediate dependents when each member's term begins \* \* \*."

¶{5} On September 29, 2005, the statute was amended to add, "with the approval of the board of county commissioners," between the words "county" and "may procure". See R.C. 3501.141(B). This amendment was made in conjunction with a change to R.C. 305.171 to specifically permit a board of county commissioners to include a member or employee of the county board of elections in its group plan for

county officers and employees (as opposed to the past practice of the Board of Elections separately procuring it for its members and full-time employee).

¶{6} The Board of Commissioners read the change to R.C. 3501.141 to mean that no Board of Elections members will have health insurance at the start of their new term as the Commissioners would not be providing their “approval” at the beginning of said term. In February 2008, the director of the county’s human resources department notified the Board of Elections that, effective February 29, 2008, health coverage for members of the Board of Elections would cease.

¶{7} The Board of Elections asked the Trumbull County Prosecutor’s Office for a legal opinion on the health insurance matter. The prosecutor’s response set forth the prior and current versions of R.C. 3501.141. The prosecutor opined that at the new term, beginning March 1, 2008, members of the Board of Elections would automatically have no insurance because the Board of County Commissioners did not act in any way to approve insurance. The prosecutor then advised the Board of Elections about the possibility of obtaining outside counsel.

¶{8} A subsequent letter from the prosecutor to the Board of Elections acknowledged their prior meeting and noted the prosecutor’s report thereon to the Board of Commissioners. The letter acknowledged that the Board of Elections had requested outside counsel. The prosecutor admitted: “Since my office is statutory counsel for your Board and the Board of Commissioners, I obviously have a conflict of interest.” However, the prosecutor refused to file an application to have substitute counsel appointed due to his opinion that the issue was unrelated to a matter necessary to the conduct of elections and his opinion that the Board of Commissioners properly followed the law.

¶{9} On May 28, 2008, the Board of Elections filed a special statutory proceeding under R.C. 3501.17 and a petition for a writ of mandamus against the Board of Commissioners and the prosecutor. In the R.C. 3501.17 complaint, the Board of Elections asked the court to appropriate \$11,059 to provide for its necessary and proper expenses. The complaint noted that R.C. 3501.141 does not define “approval” and pointed out that the Board of Commissioners itself officially took no affirmative action to discontinue health coverage. The complaint explained that the Board of Commissioners approved a life and health insurance budget of \$135,000 when \$146,059 was requested without explaining that this lower amount was due to

some discontinuation of prior coverage for members. It was also noted that this could be seen as an across-the-board lowering of the budget in each category as the Board of Commissioners had approved a total budget for the Board of Elections in the amount of \$1,537,483 when \$1,747,622 was requested.

¶{10} The complaint pointed out that R.C. 305.171 allowed the Board of Commissioners to provide county health care for county officers and employees, that it in fact elected to provide health insurance for county officers and employees, and that Board of Elections members are now defined as county officers under this statute. It was also alleged that HB 66 (which amended R.C. 3501.141 among other statutes) violated the one-subject rule and violated the equal protection clause of the constitution.

¶{11} In seeking a writ of mandamus, the petition noted that the prosecutor admitted that he had an obvious conflict of interest. Since the prosecutor and Board of Commissioners refused to file the joint application required for court-appointment of outside counsel and since both have a conflict of interest here, the Board of Elections asked the court to order respondents to file the application for appointment of outside counsel or to simply appoint the McTigue Law Group.

¶{12} The parties filed cross-motions for summary judgment. On August 12, 2009, the visiting trial judge ruled in favor of respondents. First, the court stated that health insurance is not an activity that pertains to the “conduct of elections” as that term is used in R.C. 3501.17(A) and thus the Board of Elections was not entitled to file the special statutory action. Second, the court stated that members of the Board of Elections could only procure health insurance with the approval of the Board of Commissioners and that the Board of Commissioners here never gave its approval for the 2008 term. The trial court thus concluded that the Board of Elections was not entitled to a writ of mandamus because it had no clear legal right to an order requiring health insurance. Lastly, the court stated that the Board of Elections was not entitled to attorney fees because they failed to prevail.

¶{13} The Board of Elections filed a timely appeal to the Eleventh District Court of Appeals. The case was thereafter reassigned to a visiting panel from the Seventh District Court of Appeals. In their brief, the Board of Elections raises no issues regarding the merit decision by the trial court on the health insurance issues. Rather, the only issue raised concerns the failure to appoint outside counsel for the Board of

Elections, which was represented by the McTigue Law Firm throughout the proceedings.

#### ASSIGNMENT OF ERROR

¶{14} The sole assignment of error set forth by the Board of Elections provides:

¶{15} “THE TRIAL COURT ERRED BY FAILING TO APPOINT LEGAL COUNSEL FOR THE TRUMBULL COUNTY BOARD OF ELECTIONS AND BY NOT ORDERING PAYMENT OF ATTORNEYS’ FEES AND EXPENSES PURSUANT TO R.C. 305.14 AND 309.09 WHEN TRUMBULL COUNTY PROSECUTOR HAD A CONFLICT OF INTEREST.”

¶{16} The Board of Elections urges that whether they prevailed on the merits of their argument is not the test for determining whether outside counsel should have been appointed at county expense. They urge that where the prosecutor refuses to file an application for appointment of outside counsel for a county board for whom he is the statutory legal counsel, where such board wishes legal advice and court intervention in a dispute, and where the prosecutor admits that he has a conflict of interest because he is also the statutory legal counsel for the potential defendant in the desired suit, the court must grant mandamus and can appoint outside counsel in the absence of an application by the prosecutor and the board of commissioners.

¶{17} Appellees respond that the Board of Elections was only entitled to have counsel appointed if they had a clear legal right to the relief requested on the underlying claim they wished to bring. Appellees essentially contend that if the arguments which the Board of Elections wished to make in a lawsuit are without merit, then the Board is not entitled to outside counsel.

¶{18} However, this would require trying the potential merit case before the issue of entitlement to counsel is reached. Moreover, practically speaking, how would the Board of Elections in its official capacity know whether their case has merit or whether they have the ability to file a special statutory proceeding for an appropriation unless they receive services of counsel; counsel who does not admit to having a conflict of interest.

#### LAW & ANALYSIS

¶{19} The prosecutor shall be the legal adviser of all county officers and boards and is required to prosecute and defend all suits and actions which any such officer or board directs or to which it is a party. R.C. 309.09. The procedure for

employing other counsel at the county's expense is provided for in R.C. 305.14. Upon joint application of the prosecutor and the board of county commissioners, the trial court may authorize the board to employ legal counsel to assist any county officer in any matter of public business coming before the officer and in the prosecution of any action or proceeding in which the officer is a party or has an interest, in his official capacity. R.C. 305.14(A).

¶{20} Where there is a conflict of interest and a refusal to make an application for appointment of outside counsel, the lack of application constitutes an abuse of discretion and mandamus will lie to compel an application by both the prosecutor and the board of commissioners. *State ex rel. Hillyer v. Tuscarawas Cty. Bd. of Commrs.* (1994), 70 Ohio St.3d 94, 98. See, also, *State ex rel. Corrigan v. Seminatore* (1981), 66 Ohio St.2d 459, 463-464 (where either the prosecutor or the board of commissioners refuses to afford counsel, mandamus is an appropriate remedy to compel the prosecuting attorney and the board to make application). However, a trial court has also been permitted to authorize the appointment without ordering the joint application first. *State ex rel. Wilke v. Hamilton Cty. Bd. of Commrs.* (2000), 90 Ohio St.3d 55, 65 (where only prosecutor applied and board of commissioners refused). See, also, *Corrigan*, 66 Ohio St.2d at 464, 466 (where prosecutor opposed appointment of counsel and admitted conflict of interest).

¶{21} For instance, this joint application is not a prerequisite to a trial court's authorization of outside counsel if the prosecuting attorney has a conflict of interest. *Hillyer*, 70 Ohio St.3d at 98. Thus, where the prosecutor has a conflict of interest and the board of county commissioners also refuses to jointly apply for outside counsel for a county officer, the trial court can authorize appointment of such counsel and can order reimbursement of private counsel fees incurred in representing the county official. *Wilke*, 90 Ohio St.3d at 65

¶{22} Here, neither the prosecutor nor the Board of Commissioners would file the application for appointment of outside counsel. The Board of Commissioners was the opposing side and thus had a conflict of interest. The prosecutor was statutory counsel for the opposing side; the prosecutor attempted to mediate the dispute by delivering messages from one board to the other; the prosecutor sided with the position of the Board of Commissioners; the prosecutor refused to represent the Board of Elections; and, the prosecutor admitted that he had a conflict of interest.

¶{23} As per R.C. 309.09, the prosecutor shall prosecute all suits and actions which any county officer or board directs it to file. If there is a conflict of interest, then the prosecutor cannot fulfill this duty, at which point outside counsel can be appointed. Accordingly, a prosecutor cannot deny a county officer outside counsel on the basis that he believes the Board of Elections members are not entitled to health insurance.

¶{24} The ultimate decision on the merits of the issue raised by a county officer or board is not the standard for appointment of outside counsel where there is conflict of interest. Rather, appointment is based upon: (1) whether (a) the matter is one of public business coming before the county officer or (b) the county officer directs a prosecution or defense of an action or proceeding in which the county officer is a party or has an interest in his official capacity; and (2) whether the prosecutor has a conflict of interest. R.C. 305.14(A). Neither prong is contested here.

¶{25} Considering the prosecutor's conflict of interest and partiality and the fact that the suit was brought in the Board of Elections members' official capacities, the failure to file the application for appointment of outside counsel constitutes prejudice and partiality and thus an abuse of discretion. See *State ex rel. Stamps v. Automatic Data Processing Bd. of Montgomery Cty.* (1989), 42 Ohio St.3d 164, 167.

¶{26} It should be noted that the officials seeking counsel happened to file the merit action along with the mandamus action seeking appointment of outside counsel. In other cases, the county official may file only a mandamus action seeking appointment of outside counsel before the merit suit is actually filed. This observation further demonstrates why the court being asked to appoint outside counsel should not prejudge the merits of the issue on which the county officer seeks legal assistance as long as it is a matter within the officer's official capacity. See, also, *State ex rel. Cincinnati Enquirer v. Hamilton Cty. Commrs.* (Apr. 26, 2002), 1st Dist. No. C-010605, fn.3 (R.C. 305.14(A) is a non-adversarial proceeding which is merely a statutory condition to payment of outside counsel). Likewise, merely because the Board of Elections fails to appeal the merit issue does not mean that they were not entitled to counsel to represent them. (They may not have wanted to take the chance that they would personally owe even more attorney fees.)

¶{27} Notably, appellees merely contend that the health insurance issue is within the province of Board of Commissioners' unreviewable discretion<sup>1</sup> and that such topic does not deal with the conduct of elections as needed for a special statutory proceeding under R.C. 3105.17.<sup>2</sup> In fact, as outlined in the footnotes, the merit issue is not as clear cut as appellee makes them out to be, and there is no reason why the Board of Elections is not entitled to counsel to make the arguments that they are entitled to health insurance or that such is a necessary and proper expense in the conduct of elections. In any event, because the ultimate disposition of the issue wished to be raised by the Board of Elections is not the test for entitlement to outside counsel and because the Board of Elections does not raise these issues on appeal, these issues are irrelevant.

¶{28} The point is that a prosecutor with a conflict of interest should not be permitted to defeat the trial court's jurisdiction to authorize appointment of outside counsel by failing to file an application based merely upon his theory of the law. See, e.g., *Corrigan*, 66 Ohio St.3d at 465-466 (also noting "that the county should receive proper representation on both sides of the issue involved").

### CONCLUSION

¶{29} For the foregoing reasons, the trial court's decision was erroneous. The appointment of outside counsel is not dependent on the ultimate disposition of the issue on which the Board of Elections sought advice and representation. The health

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<sup>1</sup>Regardless of the special statutory action for appropriations, if the board of commissioners is violating a duty under a statute or withholding a benefit for which approval was given, then suit could be appropriate on this ground as well. There was a dispute over whether approval was given when the Board of Commissioners approved most of the Board of Elections budget without noting that health insurance would no longer be provided to Board members. There was also a dispute over whether having prior health insurance is approval of future health insurance until disapproval is officially (at a Board meeting as opposed to an announcement by a human resources officer) made. In addition, there was the alternative issue of whether the statutory amendment to R.C. 3501.141 in light of the related amendment to R.C. 305.171 merely meant that Board of Elections members would now receive coverage under the county's plan and could merely no longer procure their own without pre-approval by the Board of Commissioners.

<sup>2</sup>Pursuant to R.C. 3501.17(A), the board of elections can file a special statutory appropriation action for necessary and proper expenses. As applicable herein, the legislature amended this statute to add "pertaining to the conduct of elections" after "necessary and proper expenses." What pertains to the conduct of elections is not as clear as appellees contend. Notably, at the time of amendment, a rejected addition read, "pertaining to conduct of elections, *other than expenses for employee compensation and benefits incurred in the conduct of elections.*" It could be argued that by refusing to adopt this proposed addition, the legislature intended to allow an appropriation action for compensation and benefits. Case law prior to the "pertaining to conduct of elections" language allowed salary and insurance disputes to be litigated under R.C. 3501.171(A). See *Stauffer v. Miller* (Apr. 3, 1992), 4th Dist. No. 01CA2. Without counsel, the Board of Elections could not evaluate issues such as these.



insurance debate was a matter of public business coming before Board of Elections. See R.C. 305.14(A). Alternatively, the Board of Elections directed the prosecution of an action or proceeding in which the Board of Elections members were parties or had an interest in their official capacities. See id.

¶{30} Because the prosecutor had the duty to represent the Board of Elections but would not do so due to a disagreement over the proper application of the law and the resulting conflict of interest due to his representation of the Board of County Commissioners, the prosecutor's failure to seek appointment of outside counsel to assist the Board of Elections was an improper abuse of discretion. As such, we hereby reverse the trial court's denial of outside counsel, order the appointment of outside counsel, and remand for a determination of attorney fees.

Waite, J.,  
DeGenaro, J.,

APPROVED:

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JOSEPH J. VUKOVICH,  
PRESIDING JUDGE