



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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June 15, 1988

Informal Opinion 1988-INF-0615

Vincent J. Lombardi, Director
Department of Community Development

Dear Mr. Lombardi:

You have asked the Ethics Commission to review a number of housing programs which are administered through the city Department of Community Development, to determine the extent to which city employees may participate in such programs under the Ohio Ethics Law and related statutes. You have stated that, at this time, the city has excluded all of the employees of the Department of Community Development from participating in the programs.

It must be noted initially that any question or issue as to what qualifications an individual must meet in order to participate in a program, the purposes for which assistance may be used, and the areas of the city which are targeted for rehabilitation are matters which are strictly within the purview of the city and federal regulations. The Ethics Commission has no authority to render advice on these matters, and is limited to a review of whether city employees are prohibited by the Ohio Ethics Law and related statutes from participating in a particular program, as that program has been developed by the city.

In Ohio Ethics Commission Advisory Opinion No. 83-005, the Ethics Commission addressed the issue whether R.C. 2921.42 prohibits a city employee from receiving a federally funded grant or loan for housing rehabilitation from the city department of community development. Division (A)(4) of Section 2921.42 provides:

(A) No public official shall knowingly do any of the following:

...

(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.

The term "public official" is defined for purposes of R.C. 2921.42 to include any elected or appointed officer, or employee of a political subdivision. See R.C. 2921.01(A). The term "public contract" is defined for purposes of R.C. 2921.42 to include the purchase or acquisition, or a contract for the purchase or acquisition of property or services by or for the use of a political subdivision. See R.C. 2921.42(E)(1). Advisory Opinion No. 83-005 noted that an employee of a city is a "public official" under R.C. 2921.42, and that a loan or grant from the city division of community development is a "public contract" as defined in R.C. 2921.42(E)(1) "because housing rehabilitation and community development services are being purchased or acquired 'by or for the use of the city.'" See also

Advisory Opinions No. 85-002 and 85-011. The opinion concluded that a city employee is prohibited by R.C. 2921.42(A)(4) from receiving a loan or grant from the city division of community development.

This conclusion was affirmed in Advisory Opinion No. 84-011. However, the opinion went on to examine the exception to the prohibition of Division (A)(4) of Section 2921.42, which is found in Division (C) of that Section, and which reads:

- (C) This section does not apply to a public contract in which a public servant, member of his family, or one of his 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 servant'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 servant, member of his family, or business associate, and the public servant takes no part in the deliberations or decision of the political subdivision or governmental agency or instrumentality with respect to the public contract.

With regard to the first and third criteria, the opinion stated that housing rehabilitation was necessary to the city, and the city employee would have no other customers or clients in similar transactions. As to the fourth criterion, the transaction would be conducted at arm's length where the city employee is not employed by the city department issuing the grants or loans, or otherwise employed in a decision-making role with regard to the housing program. The city must also have full knowledge of the city employee's interest. The opinion also stated that the procedures for designating the area of the city to be rehabilitated, notice to prospective applicants, and the selection of qualified applicants must be fair and objective, and that no preference can be given to city employees.

With regard to the second criterion, the opinion states:

The question that remains is whether the services that are the subject of the contract, the rehabilitation of property in the target area, are unobtainable elsewhere for the same or lower cost. The criterion that the goods or services be "unobtainable elsewhere for the same or lower cost"

requires that a public official or employee be at a disadvantage when attempting to do business with his governmental entity, and that an equally qualified applicant who is not a city employee must receive preference. Thus, it is only when all qualified persons who are not city employees have received grants or loans and funds are still available that the rehabilitation of the city employee's property is "unobtainable elsewhere for the same or lower cost."

In concluding that the employee met the requirements of Division (C)(2), the opinion noted that: (1) there were sufficient funds available; (2) all of the qualified applicants in the target area had received grants or loans, except the city employee; and (3) the funds would have lapsed if not used in the target area within a specified period of time. The opinion also noted that the employee met the criteria for the grant and would have been unable to rehabilitate his property without the grant, so that the city would have been unable to achieve its goal of rehabilitating all qualified homes in the target area, unless the employee received the grant.

The opinion concluded by stating: "The Commission wishes to emphasize that this narrow exemption [of Division (C)] is strictly applied, and the burden is upon the public official or employee seeking the grant or loan to demonstrate to the Commission and the city that the exemption is applicable."

Cleveland Action to Support Housing

With the analyses and conclusions of Advisory Opinions No. 83-005 and 84-011 in mind, I turn first to the Cleveland Action to Support Housing (CASH) Rehabilitation Loan Program. Under this program, the city contracts with CASH, a nonprofit housing corporation, whereby the city grants to CASH, Community Development Block Grant (CDBG) funds to administer a city-wide rehabilitation program. Loan applicants who are approved by CASH contract with participating financial institutions for housing rehabilitation loans. The financial institution lends its money to borrowers who meet its financial qualifications at below the market interest rate in exchange for CASH's contract with the financial institution to deposit a sum of money equal to fifty percent of the loan into a non-interest bearing account for a specified period of time. You state that applications are received year-round and are processed on a first-come, first-serve basis. You also state that during the ten years of CASH's operation, the demand for housing rehabilitation has never exceeded the availability of funds.

CDBG funds must, pursuant to federal law, be used for certain purposes, such as the development of decent housing for persons of low and moderate income and the prevention or elimination of slums or blight. See 42 USC §5305; 24 C.F.R. §570.200. The city or other recipient of funds must then choose for which of the eligible activities it will expend block grant funds, so as to best serve these primary objectives. See 42 USC §§5301-5307; 24 C.F.R. §§570.200-570.207. Therefore, the grant of CDBG funds from the city to CASH is a "public contract," since it constitutes the purchase or acquisition of rehabilitation services by or for the use of the city. The subsequent contract between CASH and the financial institution is deemed to be a sub-contract. See Advisory Opinions No. 82-007 and 84-008. A subcontract between CASH and the financial institution qualifies as a "public contract" since it, like the primary grant, is for the purchase or acquisition of housing rehabilitation services by or for the use of the city. See Advisory Opinion No. 87-003. See also 24 C.F.R. §570.204.

In order to be prohibited under R.C. 2921.42, an interest must be definite and direct, and may be pecuniary or fiduciary in nature. See Advisory Opinions No. 78-005 and 81-008. In this instance, the moneys which are deposited by CASH in a financial institution are not passed directly on to borrowers. A borrower does not enter into a subcontract under, or become a party to, the contract between CASH and the financial institution. Rather, the financial institution lends its moneys at a low rate of interest to qualified borrowers in consideration for CASH's deposit of CDBG funds with the institution in a non-interest bearing account. While CASH initially screens applicants to ensure that they are qualified under federal and city requirements to participate in the program, it is the financial institution which makes the final determination whether an individual applicant is financially qualified to receive a loan, and will ultimately receive a low-interest loan. Although a loan applicant would have an indirect interest in CASH's deposit of funds with a financial institution, in that it would enable him to receive a loan at a lower rate of interest, assuming that he otherwise meets the institution's requirements, the applicant's interest is not so definite and direct that it would constitute a prohibited interest under R.C. 2921.42. See generally Advisory Opinions No. 85-002 and 85-011. Therefore, city employees are not prohibited from participating in the CASH Rehabilitation Loan Program.

Under the CASH New Construction Program, the city enters into a contract with CASH and a neighborhood-based nonprofit organization to lower the cost of mortgages to purchasers of new homes. Under the contract, the city provides CDBG funds to the neighborhood organization in an amount equal to fifty percent of a mortgage. The organization passes the CDBG funds to CASH to establish an account with a lending institution to secure a mortgage at a below-market interest rate. The lending institution then loans moneys to the borrower at this lower rate. There are two categories of applicants: those applicants whose income is low or moderate may build anywhere in the city, and those applicants whose income exceeds prescribed guidelines may construct only in targeted neighborhoods. Again, applications are received year-round and are processed on a first-come, first-serve basis. You have stated that the program is not currently accepting applications due to the unavailability of funds, and that at this time, the demand for loans exceeds available funds. The executive director of CASH has subsequently indicated that additional allocations have been received, and applications are again being accepted. However, only a limited number of houses can be financed through these new funds, and he predicts that the moneys will be depleted by the end of the funding year, although the program is expected to be re-funded in subsequent years.

As in the CASH Rehabilitation Loan Program, block grant moneys are not passed to borrowers, and borrowers do not enter into a subcontract under, or become a party to, the contract between CASH and the financial institution. Again, it is the financial institution which finally approves applicants for a loan. As discussed above, city employees would not have a definite and direct interest in the deposit of funds by CASH in a financial institution for purposes of R.C. 2921.42. Therefore, city employees are not prohibited by R.C. 2921.42 from participating in the CASH New Construction Program.

Neighborhood Housing Services

Under this program, the city contracts with Neighborhood Housing Services (NHS), a nonprofit corporation, whereby the city provides CDBG money to establish a high-risk loan fund for residents in four designated neighborhoods. Homeowners who are in need of

assistance are referred to NHS by the Neighborhood Code Enforcement Partnership Program (NCEPP), which works in conjunction with the city Division of Building and Housing. NHS then refers persons to participating local lenders or directly provides assistance to persons.

Applicants who are eligible for conventional bank financing may be assisted by NHS in the preparation of specifications for rehabilitation and bid solicitations. It is my understanding that there is no contractual relationship between NHS and a borrower; rather the borrower contracts directly with the financial institution for a loan. While an applicant who is eligible for conventional financing may have an indirect interest in the contract between the city and NHS, in that he may receive help from NHS in preparing documents, such interest is not a definite and direct pecuniary or fiduciary interest such that it would constitute a prohibited interest under R.C. 2921.42. Therefore, city employees may participate in this assistance from NHS.

Those persons who are ineligible for conventional bank financing, but eligible for assistance through NHS may enter into a contract with NHS for rehabilitation assistance from the high-risk fund. Both the contract between the city and NHS and the subcontract between NHS and a borrower are public contracts under R.C. 2921.42, since they are contracts for the purchase or acquisition of rehabilitation services by or for the use of the city. See Advisory Opinions No. 84-011, 85-002, and 87-003. Further, a borrower would have a definite and direct interest in the contract he has entered with NHS. Therefore, a city employee would have, as a borrower of a loan from NHS, a definite and direct interest in a public contract entered into for the use of the city. Under R.C. 2921.42, such an interest is prohibited.

Turning to the exemption of Division (C), it is assumed for purposes of this program as well as programs subsequently discussed, that the housing services are necessary services, the city employee has no other customers or clients in similar transactions, the employee does not take part in the deliberations or decisions with regard to the grant or loan, and that the city is aware of the employee's interest. It is further assumed that the procedures for the designation of any target area or group, notice to prospective applicants, and the selection of qualified applicants are fair and objective, that no preference is given to city employees, and that the employees qualify to participate in the particular program.

In Advisory Opinion No. 84-011, the requirement of Division (C)(2) was met by a demonstration that all qualified applicants who were not city employees had received a grant or loan and funds were still available. However, under this program, applications are received year-round and are processed on a first-come, first-serve basis. You have also stated that during the lifetime of the program, there has never been a shortage of funds to service interested eligible clients. If the city can show that sufficient funds have historically been available to meet demand, and can reasonably project that sufficient funds are, and will be, available to fully serve all interested and qualified persons even if all eligible and interested city employees are permitted to participate, then the requirement of Division (C)(2) that the housing rehabilitation services are unavailable elsewhere for the same or lower cost will be met, and city employees may participate in the NHS Program.

It should be noted for purposes of this program and other programs that the requirement of Division (C)(2) can be met even if the employee cannot demonstrate that the services are unavailable elsewhere for the same or lower cost, if he can establish a

"continuing course of dealing" established prior to his becoming associated with the city. Therefore, an individual who receives a loan or grant prior to becoming a city employee, may retain the benefits of that loan or grant.

Rental Rehabilitation Program

Under this program, the city contracts with owners of rental property to provide rehabilitation loans. You state that there is a two-month application period, and historically the demand for loans has exceeded available funds. The contract or loan between the city and property owner would constitute a public contract, so that city employees would be prohibited by R.C. 2921.42(A)(4) from having an interest in a loan. However, a city employee may receive a loan if all other qualified persons who applied during the application period were served, although you have stated that historically, there has been a shortage of funds.

Section 312 Loan Program

Under this program, the federal Department of Housing and Urban Development directly loans funds to borrowers. The city screens applicants pursuant to federal guidelines, and forwards these applications to HUD for final approval. The city then assists successful applicants to prepare bid specifications and the contract for the rehabilitation of the borrower's home. HUD accepts applications from the city for a six-month period each year, and applications are processed by the city and HUD on a first-come, first-serve basis. Historically, demand has exceeded available funds.

In this instance, the loan contract is between HUD and the individual borrower. While the city assists HUD to administer the funds, the city does not establish guidelines for eligibility, impose any additional restrictions or limitations on the use of the money, designate how the money is to be used, or have other decision-making authority with regard to the distribution of the moneys. The money is distributed directly from HUD to the borrower. Therefore, no "public contract" exists between the city and the borrower, and city employees are not prohibited by R.C. 2921.42 from participating in the program.

Tool Loan Program

The city contracts with a nonprofit corporation to purchase tools and pay for administrative expenses. Tools which are needed for home maintenance and repair are provided by the nonprofit organization free of charge in several designated neighborhoods. The tools are loaned on a first-come, first-serve basis, and there is a waiting list for certain tools.

The contract between the city and the nonprofit organization whereby the organization agrees to purchase tools and administer the program is a "public contract" for purposes of R.C. 2921.42. However, in order to be prohibited under R.C. 2921.42, a public official's "interest" in a public contract must be definite and direct, and either pecuniary or fiduciary in nature. In this instance, a city employee's ability to borrow tools from the nonprofit organization would not rise to the level of a definite and direct pecuniary interest in the public contract. Therefore, city employees are not prohibited by R.C. 2921.42(A)(4) from participating in the Tool Loan Program.

Paint Rebate Program

This program is administered by the city Community Development staff and provides reimbursement of up to two hundred dollars for paint and painting supplies to eligible city residents. There is a six-week application period, with applications being processed on a first-come, first-serve basis. Available funds exceed demand on an annual basis. Payments from the city to residents for paint and paint supplies constitute public contracts for purposes of R.C. 2921.42(A)(4). However, city employees may receive payments under the program if sufficient funds are available at the close of the application period.

No Cost/Low Cost Weatherization Program

The city contracts with two nonprofit organizations to administer this program, which is funded by CDBG moneys, foundation donations, and moneys from the Ohio Department of Development. There are two six-week application periods. Applications are approved by the city and forwarded to the nonprofit organizations to secure weatherization services with those funds granted for each individual. You state that, during the five years of the program's operation, the demand for services has never exceeded available funds.

A grant for weatherization services is a "public contract," and each applicant would have an interest in such grant. However, city employees may receive a weatherization grant if funds are available after all qualified applicants have been served at the end of the application period.

Home Weatherization Assistance Program

The state Department of Development contracts with the city to provide grants to low income persons for weatherization services. The city in turn contracts with five nonprofit organizations to administer the program for eligible residents. The resident then contracts with either a private contractor or with one of the nonprofit organizations to secure weatherization services. Applications are received year-round, and historically, available funds have exceeded demand. The grants which are received from the state by the city are public contracts and the subgrants distributed by the nonprofit corporation to residents are also "public contracts." See Advisory Opinion No. 82-004. However, if it can be reasonably projected that all interested and eligible residents can receive funds even if interested and eligible city employees participate, then city employees may receive grants under this program.

Commercial Improvement Program

The city contracts with twenty-two local development corporations (LDC) to administer two commercial renovation programs. The city provides CDBG funds to each LDC to renovate targeted commercial districts. The LDC establishes a revolving fund and contracts with commercial property owners to provide loans or rebates for commercial improvement. The LDC identifies commercial strips in need of renovation, and the city issues violations for structures within that strip that are not within the Building and Housing Code. Although a limited amount of funds are available annually for each strip, the program's goal is to eventually renovate each strip completely. At this time, available funds exceed demand.

Vincent J. Lombardi
June 15, 1988
Page 8

The loans and rebates are public contracts for purposes of R.C. 2921.42. If, at this time, funds exceed demand, then city employees may participate in the program. However, if there should come a time when the demand for funds should exceed availability, then city employees would be required to wait until all other interested and eligible applicants for a particular commercial strip had been served before they would be permitted to receive assistance under the program.

This informal staff opinion has been approved by the members of the Ethics Commission. The opinion is based on the facts presented, and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. This informal opinion is based on an interpretation of the Ohio Ethics Law, and does not purport to interpret other laws or rules. You may wish to consult federal law to determine any further restrictions on the ability of city employees to participate in programs funded in whole or in part with federal moneys. See, e.g., 24 CFR §570.611. If you have questions, or wish to request a formal advisory opinion from the Commission, please contact me.

Sincerely,



Melissa A. Warheit
Executive Director

MW/pg