



OHIO ETHICS COMMISSION

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May 15, 1998

Informal Opinion 1998-INF-0515-3

James R. Silver, Law Director
City of Kent

Dear Mr. Silver:

In a letter received by the Commission via fax on January 30, 1998, you ask whether the Ohio Ethics Laws and related statutes prohibit a corporation called the West Shore Development LLC from purchasing property from the Kent Downtown Community Urban Redevelopment Corporation (DKC) in light of the fact that the city's former Economic Development Coordinator, Jack Crews, is a partner/owner of West Shore Development LLC.

As explained below, Jack Crews is subject to R.C. 2921.42(A)(3), which prohibits him, as a partner/owner of the West Shore Development LLC, from occupying a position of profit in the acquisition of the Kemp property by West Shore Development LLC until one year after the date that he terminated his service with the city as its Economic Development Coordinator.

Facts

You state that the city and J. Christopher Enterprises, Inc. entered into a Consulting Agreement under which J. Christopher Enterprises, Inc. provided the services of Jack Crews to the city to serve as its Economic Development Coordinator. You state that this arrangement lasted from January, 1992 through June, 1997. You have provided copies of the contracts for the years 1992 and 1997. In these contracts, the city specifically refers to J. Christopher Enterprises, Inc. as "Consultant" and refers to its status as being that of an independent contractor.

The 1992 contract referred to Jack Crews as the Redevelopment Community Coordinator for the city; the 1997 contract lists his title as Economic Development Coordinator. The duties of the position in the two contracts also differ. The 1997 contract charges him with the duty to provide "direct assistance in the implementation" of both the West River Neighborhood Redevelopment Project and overall economic development for the city in conjunction with Kent State University.

One means that Crews used to achieve this goal was through the use of DKC, an independent corporation that is funded by loans from several local banks; the loans are guaranteed by the city. The purpose of DKC is to purchase real estate in the city for resale to developers who will improve the property. City council is required to approve any purchase or sale of real estate

by DKC. However, city council cannot unreasonably withhold its approval. After the request was submitted, you stated, in a telephone conversation with a member of the Ethics Commission's staff, that Jack Crews did not participate in the creation of the DKC and that DKC was in existence before he served the city. In another telephone call, you stated that DKC was established specifically for the West River Neighborhood Redevelopment Project and that the Kemp property is in the West River Neighborhood Redevelopment Project

DKC purchased property that is known as the Kemp property. In January 1998, a corporation called West Shore Development LLC expressed a desire to purchase the Kemp property from DKC. Jack Crews, the city's former Economic Development Coordinator, is a partner/owner of West Shore Development LLC.

Jurisdiction of the Ethics Commission

The Ethics Commission is empowered to administer, interpret, and enforce Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code. R.C. 102.02, 102.06, and 102.08. These provisions include Ohio's financial disclosure law, as well as prohibitions against public officials and employees misusing their official position for their own personal benefit or the benefit of their family members or business associates. Whether a person is subject to a particular prohibition imposed by a statute under the Commission's jurisdiction is determined by the definitional sections in R.C. Chapters 102. and 2921.

R.C. 102.01(B) defines the term "public official or employee" for purposes of Chapter 102. of the Revised Code as "any person who is elected or appointed to an office or is an employee of any public agency." R.C. 102.01(C) defines the term "public agency" as:

[T]he general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a court, city, village, township, and the five state retirement systems, or any other governmental entity.

R.C. 2921.01(A) defines the term "public official" for purposes of R.C. Chapter 2921. as:

[A]ny elected or appointed officer, or employee, or agent of the state or any political subdivision thereof, whether in a temporary or permanent capacity, and including without limitation legislators, judges and law enforcement officers.

R.C. 102.03(D) and (E)--Conflict of Interest Prohibitions

Your attention is first directed to R.C. 102.03(D) and (E), which read:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to

manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is an employee of a political subdivision. R.C. 102.01(B) and (C). Ohio Ethics Commission Advisory Opinion No. 92-015.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money, an interest in real estate, and every other thing of value. R.C. 1.03, 102.01 (G).

Generally, the Ethics Commission has held that R.C. 102.03(D) and (E) prohibit a public official or employee from receiving a financial benefit from a private source for services rendered on projects that he recommended in his official position while serving as a public official or employee. Adv. Ops. No. 80-07, 84-012, 84-013, and 85-013. It is apparent that you are familiar with these Ethics Commission decisions, because you are concerned that the Mr. Crew's participation as the city's former Economic Development Coordinator in the process that used the services of DKC and resulted in DKC's purchase of the Kemp property may limit his ability to receive a financial benefit as a partner/owner of West Shore Development LLC through the purchase of the Kemp property from DKC.

Jack Crews—Position as Independent Contractor

As explained above, the Ethics Commission has held that an employee of a city is a "public official or employee" for purposes of Chapter 102. and subject to the prohibitions therein. However, the Ethics Commission has determined that a distinction exists between independent contractors of public agencies and employees of public agencies. Adv. Ops. No. 75-010, 75-012, 75-016, 77-008, 89-003, and 89-009. The rationale of distinguishing between public employees and independent contractors is that the employees of a public entity share in the responsibilities of the public trust exercised by their elected and appointed superiors, but independent contractors do not exercise the public trust. Adv. Ops. No. 75-012 and 89-003.

The Ethics Commission, in Advisory Opinion No. 75-012, applied the following criteria, set forth in Gillum v. Industrial Commission, 141 Ohio St. 373, 381-82 (1943), to distinguish employees from independent contractors:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;

- (c) the kind of occupation, with reference to whether, in that locality the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instruments, tools and the place of work for the person doing the work;
- (f) length of time for which the person is employed;
- (g) the method of payment, whether by time or by job;
- (h) whether or not the work is a part of the regular business of the employer; and,
- (i) whether or not the parties believe they are creating a relationship of master and servant.

The Commission has held that the primary test is whether one is engaged in a distinct occupation or business but that this test, standing alone, seldom controls and the other tests must be also examined and balanced. Adv. Ops. No. 75-028 and 77-008.

Some of the criteria listed above are not applicable to the situation at hand. However, the sample contracts that you have provided show that the services of Jack Crews through the Consulting Agreement with J. Christopher Enterprises, Inc. were retained by the city for limited periods of time, although the total length of service was approximately 6 years. Also, the city made payments to J. Christopher Enterprises according to a specified hourly rate in addition to actual and necessary expenses as fixed by the contract. Finally, and most importantly, the Consulting Agreement expressly states the city is retaining J. Christopher Enterprises, Inc. as an independent contractor and not as a city employee and that the city has no obligations with respect to liability for unemployment compensation, paid holidays, or other benefits that it gives to city employees. Therefore, under the facts presented, Jack Crews served the city as an independent contractor and not as an employee for purposes of R.C. 102.03(D) and (E).

There may be an issue of whether Jack Crews served as an "officer" of the city. The Ethics Commission has held that an individual or business entity that is hired as an independent contractor to fulfill the duties of a public office is subject to the prohibitions of the Ethics Law. Adv. Ops. No. 77-004 (individual serving as part-time village engineer) and 78-004 (a corporation serving as city engineer). However, because Jack Crews is subject to the restrictions imposed by R.C. 2921.42(A)(3), set forth below, the issue of whether he is an officer of the city for purposes of R.C. 102.03, need not be addressed further.

Prohibition Imposed by R.C. 2921.42(A)(3)

Your attention is also directed to R.C. 2921.42(A)(3), which reads as follows:

- (A) No public official shall knowingly do any of the following:
 - (3) During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder.

The Ethics Commission has held that a public official, legislative body, commission, or board will be deemed to have "authorized" a public contract for purposes of R.C. 2921.42(A)(3) where the contract could not have been awarded without the public official's or body's approval. Adv. Ops. No. 87-004, 88-008, 89-006, and 89-008. The prohibition of R.C. 2921.42(A)(3) applies to a public official during his term of office and for one year after he leaves his public position.

R.C. 2921.42(G)(1)(a) defines the term "public contract" as 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 or any of its agencies or instrumentalities. The Ethics Commission has held that a political subdivision's purchase or acquisition of community development or urban revitalization services, through the use of low-interest loans or grants to property owners, land reutilization programs, and tax abatements, constitutes a "public contract" for purposes of R.C. 2921.42, regardless of whether the loans or grants are funded through local or federal moneys. Adv. Ops. No. 83-005, 85-002, 89-008, and 95-007. In the instant situation, the city's guarantee of the loans that fund DKC and the city council's approval of the sale of the Kemp property by DKC to West Shore Development LLC fall within the definition of "public contract" for purposes of R.C. 2921.42 because these actions result in the purchase or acquisition of community development or urban revitalization services for the city.

The Ethics Commission has held that a public official who recommends that a superior authority enter into a public contract will be deemed to have "authorized" the public contract for purposes of R.C. 2921.42(A)(3) even if the public official does not have the ultimate, discretionary, decision-making authority to enter into the contract. Adv. Op. No. 87-004. For example, in Advisory Opinion No. 89-006, the Ethics Commission held that an Ohio Department of Mental Health grant to a college or university was considered to be "authorized" by an ODMH official or employee who served on a four-person review committee that evaluated all proposals and made recommendations as to the award of funds to the Director of ODMH who had the final authority to award the grants.

It must be noted that in Advisory Opinion No. 89-006 the individuals who served on the review committee were subject to the restrictions imposed by R.C. 2921.42(A)(3) because they were unquestionably employees of ODMH. In the situation you have presented, the status of Jack Crews is not as clear. If Jack Crews is a "public official" as that term is defined for purposes of

R.C. Chapter 2921., then he is subject to the restrictions imposed by R.C. 2921.42(A)(3) and any recommendation that he made regarding DKC's purchase of the Kemp property would constitute "authorization" of a public contract from which he could not occupy a position of profit for a period of one year.

You have stated that Jack Crews served in the position of Economic Development Coordinator through June 1997. If Mr. Crews was a "public official," for purposes of the prohibitions imposed by R.C. 2921.42(A)(3), he would be prohibited from profiting from decisions he made as Economic Development Coordinator for one year after leaving his position. As stated above, R.C. 2921.01(A) defines the term "public official" for purposes of R.C. Chapter 2921. to include "any . . . agent of . . . any political subdivision . . . whether in a temporary or permanent capacity." The issue, then, is whether, as an independent contractor, Jack Crews was an "agent" of the city.

Precedent--Agents of the State

Because the word "agent" is not statutorily defined for purposes of R.C. 2921.42, the Ethics Commission has applied the definition of the word "agent" that has been used in judicial decisions. The Ethics Commission has held that an individual is an "agent" of the state when the state has empowered him, or the board upon which he serves, to act on the state's behalf and to bind the state. Adv. Ops. No. 85-005, 92-001, and 92-007. In Advisory Opinion No. 92-001, the Ethics Commission held:

A person is an "agent of the state," and thus, a "public official" as defined in Division (A) of Section R.C. 2921.01 of the Revised Code, when: (a) the person has the power to act on behalf of and bind the state by his actions (b) the state has the right to control the actions of the person; and (c) the actions of the person are directed toward the attainment of an objective sought by the state.

An agreement creating the agency relationship may be express or implied. Ross v. Burgan, 163 Ohio St. 211 (1955).

Application of Agency Precedent

It must be noted that the issue is not whether Jack Crews became a public "officer" or "employee" because he performed public functions, but rather whether, in his capacity of Economic Development Coordinator, he acted as an agent of the city.

The relationship between the city and Jack Crews was established by contract. As stated in the contract from 1997, Jack Crews was given the title of Economic Development Coordinator for the city. Jack Crews' contracted duties included both the "direct assistance in the implementation of an overall economic development for the City of Kent, in conjunction with Kent State University" and "direct assistance in the implementation of the West River Neighborhood Project." These duties are different from the duties described in the 1992 contract. The city, through the 1997 contract, empowered Jack Crews to identify himself as the city's Economic Development

Coordinator and, while acting under the color of this title, engage in activity that would achieve economic development for the city.

In a telephone conversation on May 13, 1998, you stated that Jack Crews' duty in the implementation of the West River Neighborhood Redevelopment Project consisted of acting as a liaison between DKC and the city. You explained that he would make recommendations to DKC that real estate be either purchased or sold, and would give advice to city council that they should approve the purchase or sale of real estate by DKC. Jack Crews, acting in his capacity as the city's Economic Development Coordinator, performed this activity on behalf of the city.

In the May 13, 1998, telephone conversation, you stated that Jack Crews had no authority to bind the city with regard to the purchase or sale of real estate by DKC and that the contracts for the sale and purchase of real estate were signed by the city manager. However, you have also noted that city council could not "unreasonably" withhold its approval of the purchase or sale of real estate by DKC. Because city council would have to meet a very high standard to withhold its approval, it is apparent that a recommendation by Jack Crews to DKC that real estate be either purchased or sold, and the rendering of his advice to city council that they should approve the purchase or sale of real estate by DKC, carried significant weight. Jack Crews recommendation would serve, therefore, to bind the city, unless city council had a reasonable cause to withhold its approval of the purchase or sale of real estate by DKC. The city exercised control over Jack Crews by setting forth his duties in the contract and by approving the purchase or sale of real estate by DKC. All of the activity undertaken by Jack Crews in his capacity as Economic Development Coordinator was directed toward the attainment of objectives sought by the city.

Therefore, the relationship between the city and Jack Crews is one of principal and agent as these terms have been judicially defined. Because Jack Crews acted as an "agent" of the city while he served as Economic Development Coordinator, he is subject to the restrictions imposed by R.C. 2921.42(A)(3). Any recommendation that he made regarding DKC's purchase of the Kemp property would constitute "authorization" of a public contract (the purchase) from which he cannot profit for a period of one year.

Application of R.C. 2921.42(A)(3)—Post-Service Restrictions

As set forth above, R.C. 2921.42(A)(3) prohibits a public official, during his public service and for one year after leaving public service, from occupying "any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, unless the contract was let by competitive bidding to the lowest and best bidder."

The Ethics Commission has held that a public official will be deemed to occupy a "position of profit" in the prosecution of a public contract with his former political subdivision for purposes of R.C. 2921.42(A)(3) where a public official would receive a pecuniary benefit that would directly result from a public contract authorized by him or by a legislative body, commission, or board of which he was a member. Adv. Ops. No. 87-004 (a state official seeking employment with a party that receives a grant from his state agency); 87-007 (a board of education member seeking to be

employed in a position that was created by his school board); 88-003 (a county officer or employee selling real estate to his county); 88-006 (a city officer or employee seeking to participate in his city's land reutilization program); 89-008 (a city council member who is an employee of a company that receives a tax abatement from his city); 89-011 (a board member of a metropolitan housing authority who has a financial interest in a corporation that sells services to the authority); 90-003 and 90-005 (board of education members selling goods to the school district with which they serve); and 91-001 (a township trustee who is employed by a private fire company that is under contract to provide fire protection services to his township).

Because Jack Crews recommended that city council approve DKC's purchase of the Kemp property, he "authorized" a public contract for purposes of R.C. 2921.42(A)(3). Had DKC not purchased the Kemp property subsequent to Crews' recommendation, then West Shore Development would not be a position to purchase the Kemp property from DKC. Therefore, as a partner/owner in West Shore Development LLC, he would occupy a position of profit in the purchase of the Kemp property from DKC. Accordingly, R.C. 2921.42(A)(3) prohibits the West Shore Development LLC from acquiring the Kemp property until one year after the date that Jack Crews terminated his service with the city as its Economic Development Coordinator.

Conclusion

As explained above, Jack Crews is subject to R.C. 2921.42(A)(3), which prohibits him, as a partner/owner of the West Shore Development LLC, from occupying a position of profit in the acquisition of the Kemp property by West Shore Development LLC until one year after the date that he terminated his service with the city as its Economic Development Coordinator.

This informal advisory opinion was approved by the Ethics Commission at its meeting on May 15, 1998. It represents the views of the undersigned, based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. If you have any further questions or desire additional information, please feel free to contact this Office again.

Very truly yours,



John Rawski
Staff Attorney