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March 10, 2010

Informal Opinion 2010-INF-0310-3

Melvin House
[REDACTED]

Dear Mr. House:

On December 14, 2009, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that you are the Operations Division Director (Division Director) of the Ohio Emergency Management Agency (Agency). You explained that the Agency recently hired an employee who had to relocate from the Dayton area to Lake County. You stated that the Agency employee works in your division but that he does not work directly for you. His position is three layers below yours in the Agency.

The Agency employee is living in a motel and needs an affordable place to live. You asked whether the Ethics Law and related statutes prohibit you from renting a vacant condominium that you own to the Agency employee. You stated that the rental would be temporary in nature but, depending upon the situation, the Agency employee could remain as your tenant for a year or more.

Brief Answer

As explained below, you are not prohibited from renting your condominium to the Agency employee provided that he rents the condominium from you for fair market value as the result of an arm's length transaction pursuant to a lease with ordinary and customary terms for the area where it is located. However, once you begin to negotiate or enter into a landlord-tenant relationship with the Agency employee, you are prohibited from participating in matters affecting the Agency employee's continued employment with the Agency.

Conflict of Interest

Ohio's conflict of interest law protects the public by prohibiting a public employee from using his position to secure a benefit, or from accepting a benefit, in situations where he cannot

exercise the authority of his position as it affects the source of the benefit in an unbiased and impartial manner. Whenever a public employee enters a private economic relationship with a subordinate employee of the same public agency, the conflict of interest law is implicated. Ohio Ethics Commission Advisory Opinion No. 93-014.

As Agency employees, both you and the potential tenant are public employees subject to R.C. 102.03(D), (E), and (F), which provide:

- (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.
- (F) No person shall promise or give to a public official or employee 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.

"Anything of value" includes money, goods and chattels, and every other thing of value. R.C. 1.03; 102.01(G). Adv. Ops. No. 82-002 and 89-003. The proceeds from renting property are within the definition of anything of value. Adv. Op. No. 88-003.

R.C. 102.03(D) and (E) prohibit a public employee from soliciting, accepting, or using his position to secure a thing of value if the thing of value is of such a character as to manifest a substantial and improper influence upon the public employee with respect to his duties. A thing of value manifests a substantial and improper influence on a public employee if it could impair his objectivity and independence of judgment in matters affecting the source of the thing of value. Adv. Ops. No. 91-010 and 95-001.

R.C. 102.03(D) prohibits a public employee from using his position to secure these things of value; R.C. 102.03(E) prohibits a public employee from merely soliciting or accepting these things of value even if the employee has not used his authority to secure them. Adv. Op. No. 96-002. R.C. 102.03(F) prohibits any person from promising or giving such a thing of value to a public employee, even if the public employee has not used his position to secure the thing of value.

In your situation, the thing of value for you, as the property owner, would be the proceeds you would receive from renting your condominium to the Agency employee. Generally, R.C. 102.03(D) and (E) prohibit a public employee, who is also engaged in private business activity, from accepting or soliciting anything of value from a "prohibited source." A prohibited source is any person or entity that is doing or seeking to do business with, interested in matters before, or regulated by, his public agency. Adv. Op. No. 96-004. The Agency employee is a "prohibited source" because, as an employee who is subordinate to you, he is regulated by and interested in matters before the Agency.

In Advisory Opinion No. 93-014, the Ethics Commission held that a superior's sale of products to a subordinate employee, and the solicitation of a subordinate to purchase a product from the superior's private employer, creates conditions of inherent coercion and impropriety. The Ethics Commission determined that due to a school board member's position of power and authority over school district employees, employees would be placed in an untenable situation if solicited by the board member to purchase annuities from his employing insurance company.

The Ethics Commission explained that any participation by the board member in an action by the board of education that adversely affects an employee he solicited or discussed business with could result in the board member's employer losing continued deposits in the annuity and the board member losing commissions. The potential for the board member and his employer to incur these losses would subject the board member to an inherent conflict of interest or divided loyalties such that his independence of judgment could be impaired with respect to acting upon the employee's employment with the school district. Adv. Op. No. 93-014. See also Adv. Ops No. 89-015 (a subordinate of a city law director cannot handle a case where a member of the city law director's law firm represents a client against the city) and 92-009 (the Executive Director of the Ohio State Barber Board is prohibited from owning and operating a barber shop because employees under the Director's supervision would be required to inspect the shop). Accordingly, in Advisory Opinion No. 93-014, the Ethics Commission held that R.C. 102.03(D) and (E) would prohibit a member of a board of education who is a sales representative for an insurance company that sells tax sheltered annuities to school district employees from selling annuities to school district employees, soliciting school district employees to purchase the annuities, participating in sales discussions with school district employees in response to their inquiries concerning the annuities, or servicing the accounts of school district employees.

Application to Presented Facts

Conflicts of interest could also arise if there were a landlord-tenant relationship between you and the Agency employee. The rental of property is an ongoing business and financial relationship, where the lessee pays the lessor for the use of a property. The lessee and lessor have legal responsibilities to one another, involving the use, maintenance, and other aspects of the property. In your situation, the proceeds that you would receive from the proposed transaction would be of such a character as to manifest a substantial and improper influence upon you with respect to your duties as the Agency's Division Director.

Therefore, R.C. 102.03(D) prohibits you from using your position to secure a thing of value in the form of the proceeds you would receive from renting the condominium to the Agency employee. R.C. 102.03(E) prohibits you, unless you can show that you will be able to withdraw from matters affecting the source of rental payments to you, from merely soliciting or accepting proceeds from renting the condominium to the Agency employee even if you have not used your authority to secure the rental. R.C. 102.03(F) prohibits the Agency employee from promising or giving you a thing of value in the form of rental payments for your condominium. However, if you can fully withdraw, as the Agency's Division Director, from any matters that affect the subordinate employee should you negotiate or enter into a rental agreement with him, you can rent the property to him.

Withdrawal

The Ethics Commission has held that, in some instances, a public official or employee who desires to engage in private business activity with a person where he is soliciting or accepting anything of value from the person *may* do so provided that he fully withdraws from the performance of his public duties that affect the person. Adv. Op. No. 96-004. However, the Ethics Commission has held that the withdrawal by the public official or employee from consideration of issues concerning parties who are interested in matters before, regulated by, or doing or seeking to do business with his own public agency may be accomplished only if such a withdrawal: (1) does not interfere with the employee's performance of his assigned duties; and (2) is approved by his employing agency. Adv. Op. No. 90-002. In order to obtain approval, the public official or employee must review his proposed withdrawal with his supervisor and the chief counsel at his public agency. Adv. Op. No. 96-004. If necessary, the supervisor must reassign matters from which the official or employee has withdrawn to other personnel at the agency who report to the supervisor.

The Ethics Commission has held that an employee of a public agency owes his responsibility to the exercise of the public trust by performing the tasks assigned to him by the agency. Adv. Op. No. 89-010. The Ethics Commission stated: "This duty must not be impaired by a public employee's concern for his own personal interests." *Id.* A public agency may, in some instances, be willing to accommodate the personal financial interests of its employees, but it is within the discretion of the agency to determine whether it is possible or desirable to make that accommodation. *Id.* An advisory opinion from the Ethics Commission does not compel any public agency to accommodate the private financial interests of its employees. Adv. Op. No. 90-002.

In order to rent your condominium to the Agency employee, you will be required to withdraw from the performance of your public duties in matters before the Agency that directly affect his employment. Your withdrawal must begin when you are negotiating the rental agreement with the employee. For example, if the Agency is considering removing or transferring the Agency employee who is your tenant, your financial interests in the rental proceeds that you receive from him would definitely and directly be affected by the decision. In

such a situation, you would be prohibited from participating as Division Director, in any way, in such a decision.

In instances where you are prohibited from participating in matters affecting the Agency employee, those matters must be reviewed and decided by Agency officials who are superior to you on the chain of command at the Agency and who will not report to you regarding the matters from which you are required to withdraw. You cannot withdraw from a matter by delegating it to a person who is subordinate to you. Adv. Op. No. 92-004.

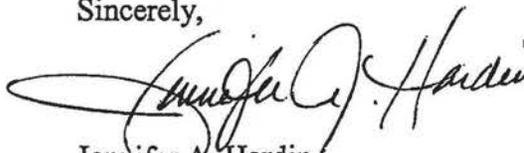
If you can effectively withdraw from matters affecting the Agency employee then you must demonstrate that you have not used or authorized the use of the authority or influence of your position as a superior employee to secure the renting of your vacant condominium to the subordinate Agency employee. To demonstrate this, the condominium must be rented for fair market value as the result of an arm's length transaction under a contract with ordinary and customary terms for the area where it is located. In order to assure that the terms and conditions of the lease relationship are clearly documented, there should be a written lease between you and the employee.

Conclusion

As explained above, you are not prohibited from renting your condominium to the Agency employee provided that he rents the condominium from you for fair market value as the result of an arm's length transaction pursuant to a lease with ordinary and customary terms for the area where it is located. However, once you begin to negotiate or enter into a landlord-tenant relationship with the Agency employee, you are prohibited from participating in matters affecting the Agency employee's continued employment with the Agency.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on March 9, 2010. The opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,



Jennifer A. Hardin
Chief Advisory Attorney