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Paul M. Nick
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April 4, 2013

Informal Opinion 2013-INF-0404

Lawrence F. Feheley, Esq.
Kegler Brown Hill & Ritter

Dear Attorney Feheley:

On February 19, 2013, the Ohio Ethics Commission received your letter requesting an advisory opinion. In your letter, you explained that your firm represents the Columbus Metropolitan Housing Authority (CMHA). You have asked whether the President and CEO (president) of CMHA can lease a unit, at market rate, in a CMHA housing development. Of the twenty-eight units in the development, twenty-six will be offered at market rates. The other two units will be offered at below-market rates to qualified tenants. Your letter states that the president will:

1. Receive no preferential treatment or special benefit;
2. Sign a lease that is identical to the leases binding all other tenants; and
3. Pay the same rent that will be paid by all other tenants in market-rate units.

Brief Answer

As explained below, the president is not prohibited from leasing the unit, within the parameters you have described, provided that he:

1. Meets all qualifications that are required of any other tenant in a market-rate unit;
2. Conforms to the rules and procedures that are required of any other tenant in a market-rate unit;
3. Withdraws from matters affecting the lease agreement; and
4. Does not participate, in any way, in matters affecting the development that arise after he becomes a tenant.

Key Facts

- CMHA has acquired and is rehabilitating a partially completed housing development to further its statutory purposes of slum clearance and neighborhood revitalization.
- CMHA took title to the property subject to mortgage loans from both the City of Columbus and the Affordable Housing Trust for Columbus and Franklin County.
- After the housing units are constructed, CMHA will endeavor to obtain permanent financing and pay the mortgage loans from the proceeds of the financing.

Public Employee Participating in a Government–Sponsored Program

The Ethics Law does not absolutely prohibit a public employee from participating in a program offered by his own public agency, provided that he meets all qualifications, and conforms with all rules and procedures, that are required of others participants in the program.¹ However, the conflict of interest law does prohibit a public employee who participates in a program offered by his agency from:

1. Using his public position to secure benefits from the public agency that are not available to any other person; and
2. Participating, in any way, in matters before the agency affecting the program if he will receive a definite and direct benefit or avoid a definite and direct detriment from the matter.²

Conflicts of Interest—R.C. 102.03(D) and (E)

A metropolitan housing authority employee is subject to the conflict of interest prohibitions of R.C. 102.03 (D) and (E).³ These statutes 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.

“Anything of value” includes any interest in realty and every other thing of value.⁴

R.C. 102.03(D) prohibits a public employee from participating in a public agency's decision on a matter if he would receive a definite and direct benefit of a substantial nature from the decision.⁵ The benefit could have an improper influence upon him with respect to his duties by

impairing his objectivity and independence of judgment.⁶ R.C. 102.03(E) prohibits a public employee from merely soliciting or accepting anything of value that could have an improper influence upon him with respect to his duties. Unlike R.C. 102.03(D), the prohibition in R.C. 102.03(E) applies to a public employee even if he does not use his official authority or influence to secure the thing of value.⁷ A determination of whether a thing of value could manifest a substantial and improper influence upon a public employee with respect to his duties is dependent upon the facts and circumstances of each individual situation.⁸

Application to the President

In your letter, you described the parameters under which the president would lease the unit. Within those parameters, the president can show that he meets the qualifications, and conforms to the rules and procedures, that are required of other tenants.

The president must also withdraw from all matters before the CMHA that would affect the relationship between CHMA and its tenants. If matters concerning the lease come before CMHA, the president must withdraw from these matters.

Further, as a tenant in a CMHA property, the president will have an ongoing relationship with CMHA. For that reason, the president must withdraw from any matters that are before the CMHA that affect the property.⁹ In order for the president's withdrawal to be effective, the CMHA must:

1. Determine that the president's withdrawal from these matters will not interfere with the overall performance of his duties;
2. Approve his withdrawal from matters affecting the lease agreement or the property;¹⁰ and
3. Assign matters from which he has withdrawn to another CMHA employee who would report directly to the board on those matters.

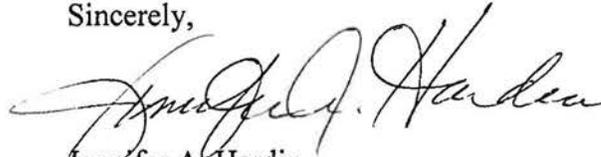
Other Provisions

In your letter, you asked about the application of the R.C. 2921.42 and 3735.29 to your question. The Commission's authority is limited to the restrictions in R.C. Chapter 102 and Sections 2921.42 and 2921.43. For that reason, the Commission has no authority to interpret R.C. 3735.29.

The restrictions in R.C. 2921.42 apply to "public contracts." R.C. 2921.42(I)(1)(a) defines public contract to include "any purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of the state or any of its political subdivisions."¹¹ Because the situation you have described involves the lease of property from a public agency, rather than an acquisition of goods or services by the agency, it does not fall within the definition of "public contract." Accordingly, the restrictions in R.C. 2921.42 do not apply to the CMHA president.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 3, 2013. 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

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's Web site: www.ethics.ohio.gov.

¹ Ohio Ethics Commission Advisory Opinion No. 2009-04.

² *Id.*

³ R.C. 102.01(B) and (C); Adv. Op. No. 89-011.

⁴ R.C. 1.03 and 102.01(G).

⁵ Adv. Op. No. 91-004.

⁶ *Id.*

⁷ Adv. Op. No. 90-004.

⁸ Adv. Ops. No. 87-007 and 89-003.

⁹ In a conversation with Commission staff, you stated that the president performed duties for the CMHA board regarding its decision to acquire and rehabilitate the housing development. This part activity is not a sufficient reason to disqualify him from leasing a unit in the development. Adv. Ops. No. 85-006 and 88-004.

¹⁰ *Id.*

¹¹ R.C. 2921.42(I)(1)(a).