



## OHIO ETHICS COMMISSION

THE ATLAS BUILDING  
8 EAST LONG STREET, SUITE 210  
COLUMBUS, OHIO 43215  
(614) 466-7090

Advisory Opinion No. 84-011  
October 11, 1984

### Syllabus by the Commission:

(1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a city employee from receiving a federally funded housing rehabilitation grant or loan from the city, unless all the criteria for the exemption of Division (C) of Section 2921.42 of the Revised Code are met.

(2) The criteria for the exemption of Division (C) of Section 2921.42 of the Revised Code are strictly applied; the requirement of paragraph (C)(2) that the services that are the subject of the contract be "unobtainable elsewhere for the same or lower cost" must be demonstrated by some objective standard, based on the facts and circumstances of the particular case.

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You asked: (1) whether Division (A)(4) of Section 2921.42 of the Revised Code prohibits a city employee from receiving a federally funded grant or loan for housing rehabilitation from the city department of community development; and (2) if so, whether the exemption of Division (C) of Section 2921.42 of the Revised Code may be applicable to such a transaction.

You stated, by way of history, that the person in question is an hourly employee of the city street department. He seeks a grant or loan to rehabilitate his personal residence as part of a housing rehabilitation project funded through the city department of development by the federal Department of Housing and Urban Development under its Community Development Block Grant Program. Procedurally, the city identifies a target area, and then embarks on a program of systematic code enforcement, citing homeowners for code violations and advising them of the availability of the federal funds for repair and rehabilitation. The application process is based upon a variety of factors, including the geographic location of the housing and the financial need of the applicant. You stated further that the individual in question has no involvement with the selection of grantees or distribution of grants by the city and meets all of the criteria for the program, including financial need, except that he is employed by the city. Finally, you stated that all of the homes in the target area that qualify, except the home of the city employee in question, have been rehabilitated, and funds are still available. The funds will lapse if not used for housing rehabilitation in the target area within a specified period of time.

Division (A)(4) of Section 2921.42 of the Revised Code 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.

In Advisory Opinion No. 83-005, the Commission held that Division (A)(4) of Section 2921.42 of the Revised Code prohibits a city employee from receiving a federally funded loan or grant from a city department of community development. In that opinion, the Commission determined that a city employee is a "public official" as defined in Division (A) of Section 2921.01 of the Revised Code, and a loan or grant from the city is a "public contract" as defined in Division (E)(1) of Section 2921.42 of the Revised Code because housing rehabilitation and community development services are being purchased or acquired "by or for the use of" the city. In the instant case, the city employee is a "public official," and would have a definite, direct, pecuniary interest in a public contract for the rehabilitation of his property (See: Ohio Ethics Commission Advisory Opinion No. 78-005). Thus, the city employee is prohibited from receiving a loan or grant from the city department of community development unless the criteria for the exemption of Division (C) of Section 2921.42 of the Revised Code are applicable.

Division (C) of Section 2921.42 of the Revised Code provides:

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.

In Advisory Opinion No. 83-004, the Commission, in discussing the requirements of Division (C) of Section 2921.42 of the Revised Code, stated that:

These criteria are strictly applied, and the burden is on the public official claiming the exemption to demonstrate compliance. It is particularly important that the requirement that the goods or services are "unobtainable elsewhere for the same or lower cost" be demonstrated by some objective standard.

While the exemption is most readily applied to direct purchases of goods or services, the same principles are applicable to other public contracts, such as the rehabilitation grants or loans in the instant case. However, the application of the exemption must be consistent with the principle underlying Section 2921.42 of the Revised Code that a public official should not have an interest in a public contract with the governmental entity with which he serves unless the contract is the best or only alternative available to the governmental entity.

In the instant case, the city employee is a "public servant," as defined in Division (B)(1) of Section 2921.01 of the Revised Code, for purposes of Division (C) of Section 2921.42 of the Revised Code. The first and third criteria for the exemption of Division (C) of Section 2921.42 of the Revised Code are satisfied, since the subject of the contract, housing rehabilitation in the target area, is necessary to the city, and the city employee has no other customers or clients in similar transactions. With respect to the fourth criterion, the transaction will be conducted at arm's length, since the city employee is not in a decision-making capacity with the city or employed by the city department of community development, which issues the loans and grants. In addition, it must be demonstrated that the procedures for the designation of the target area, notice to prospective applicants, and the selection of qualified applicants are fair and objective, and that no preference is given to city employees. Finally, the city must have full knowledge of the interest of the public servant.

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 the instant case: (1) there are sufficient funds available; (2) all of the qualified applicants in the target area have received grants or loans, except the city employee in question; and (3) the funds will lapse if not used in the target area within a specified period of time. In addition, the city employee meets the criteria for the grant, including financial need, and will be unable to rehabilitate the property without the grant. Thus, the city will be unable to achieve the object of the housing rehabilitation project, rehabilitation of all qualified homes in the target area, unless the home of the city employee is rehabilitated. Therefore, we conclude that 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, and the exemption of Division (C) of Section 2921.42 of the Revised Code is applicable.

The Commission wishes to emphasize that this narrow exemption 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.

The conclusions of this opinion are based on the facts presented, and are rendered only with regard to questions arising under Chapter 102. and Section 2921.42 of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that:

- (1) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a city employee from receiving a federally funded housing rehabilitation grant or loan from the city, unless all the criteria for the exemption of Division (C) of Section 2921.42 of the Revised Code are met; and
- (2) the criteria for the exemption of Division (C) of Section 2921.42 of the Revised Code are strictly applied; the requirement of paragraph (C)(2) that the services that are the subject of the contract be "unobtainable elsewhere for the same or lower cost" must be demonstrated by some objective standard, based on the facts and circumstances of the particular case.

  
Richard D. Jackson, Chairman  
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