



OHIO ETHICS COMMISSION
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Advisory Opinion Number 95-007
November 17, 1995

Syllabus by the Commission:

- (1) Division (D) of Section 2921.42 of the Revised Code allows a public employee to benefit from a housing program funded by public moneys and administered by his own political subdivision provided that he: (a) qualifies for the program; (b) does not use the authority or influence of his office or employment to secure benefits from the program; and (c) uses the moneys derived from the program for the benefit of his primary residence;
- (2) The exception provided by Division (D) of Section 2921.42 of the Revised Code does not apply to an elected public official;
- (3) The exception provided by Division (D) of Section 2921.42 of the Revised Code does not alter the definition of the term "public contract", or otherwise alter the application of R.C. 2921.42 to a public contract; the restrictions of R.C. 2921.42 that protect against conflicting interests in public contracts continue to apply to community development or urban renewal services through the use of low-interest loans or grants to property owners by a governmental agency or political subdivision.

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You have asked whether the Ohio Ethics Law and related statutes prohibit a city employee from participating in a First-Time Home Buyers Program (Program) that the city is administering through its department of community development. You have also asked about the application of the Ethics Law to the Program for a participant who is a member of city council. You have asked the Ethics Commission to address these questions in light of the amendment made to R.C. 2921.42 by Sub. H.B. 150, which is contained in Division (D) and became effective on June 23, 1994. Division (D) provides an additional exception to R.C. 2921.42 (A)(4), which prohibits a public employee from receiving a loan from his own political subdivision through urban revitalization and community development loan programs.

As explained below, due to the exception provided by Division (D), the Ohio Ethics Law and related statutes do not prohibit an employee of the city from benefiting from the Program under the circumstances described below. However, the exception of Division (D) does not apply to a member of city council. Further, R.C. 2921.2(A)(3) prohibits a member of city council serving on a body that authorizes Program applications from benefitting from the Program.

The First-Time Home Buyers Program

You seek advice regarding the Program, which is designed to encourage home ownership within the city by individuals with low and moderate incomes who may otherwise have difficulty in securing conventional financing. Under the Program, the city provides Community Development Block Grant (CDBG) funds to first-time homeowners who qualify within established income limitations, at a below-market interest rate. The homeowner assumes a loan obligation to the city. The homeowner agrees to live in the house that he has purchased for a minimum of five years in order to realize the favorable interest rate. This restriction is designed to avoid speculation and encourage owner-occupied housing within the city. If a homeowner sells his house before the end of five years, then he must pay back-interest to the city retroactive to the time of purchase. The amount of back-interest is determined by the market rate of interest at the inception of the loan. If a homeowner sells his house after living in it for five years, then he is obligated to repay the principal of the loan, but owes no interest.

The city's First-Time-Home-Buyers Committee (Committee) has the authority to approve or disapprove applications for participation in the Program. The Committee is comprised of the finance committee of city council, the director of the department of community development, and a review board comprised of individuals from the community.

The City Employee - Facts

The city employee who desires to participate in the Program is employed in the Sanitation Division of the Department of Public Works. The employee meets the income qualification for participation in the Program. The employee has no responsibility for the operation of the Program or authority to approve or disapprove applications for participation in the Program.

The City Council Member - Facts

The city council member, who desires to participate in the Program, also serves on the finance committee of city council. The city council member meets the income qualification for participation in the Program. The council member states that he will abstain from participation in matters regarding his own application to the Committee, if that is necessary.

Participation in a Publicly Funded Housing Program

The Ethics Commission has issued several advisory opinions that apply the Ohio Ethics Law and related statutes to the issue of public officials and employees participating in their municipality's federally funded housing and neighborhood revitalization programs. See Advisory Ops. No. 83-005, 84-011, 85-002, 88-006, and 91-011. These advisory opinions hold 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 constitutes a "public contract" for purposes of R.C. 2921.42, because a grant or loan is the purchase or acquisition of property or services by or for the use of the public agency. Advisory Op. No. 82-004. As a result, the Ethics Commission has determined that a public official or employee who desires to

participate in publicly funded housing and neighborhood revitalization programs of the municipality he serves, must meet the pre-existing exception provided by Division (C) of R.C. 2921.42.

As explained below, the amendment made to R.C. 2921.42 by H.B. 150, and contained within Division (D), does not alter the fundamental determination by the Ethics Commission 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, constitutes a "public contract" for purposes of R.C. 2921.42. But, R.C. 2921.42 (D) provides an additional exception to the prohibition imposed by R.C. 2921.42 (A)(4). If the additional exception provided by R.C. 2921.42 (D) cannot be met, the previously issued advisory opinions provide advice to municipal officials and employees who desire to participate in publicly funded housing and neighborhood revitalization programs.

Prohibition Imposed by R.C. 2921.42 (A)(4)

Your attention is first directed to Division (A)(4) of Section 2921.42 of the Revised Code, which reads as follows:

(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.

R.C. 2921.42 (A)(4) prohibits a public official from having an interest in a public contract entered into by or for the use of the political subdivision with which he is connected. R.C. 2921.01 (A) defines the term "public official" for purposes of R.C. 2921.42 as:

"Any elected or appointed officer, or employee, or agent of the state or any political subdivision thereof, whether in a temporary or permanent capacity"

The statutory definition includes an elected officer and all public employees. Under this statutory definition, part-time employees are "public officials" for purposes of R.C. 2921.42. Advisory Ops. No. 83-005 and 84-011. In the instant situation, the sanitation department employee and the city council member are both "public officials" for purposes of R.C. 2921.42, and are subject to the provisions therein.

R.C. 2921.42 (G)(1) defines the term "public contract" 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 any public entity, including the employment of an individual by any public entity. As explained above, 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, 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. Advisory Ops. No. 83-005, 84-011, and 85-002.

The Commission has also held that a political subdivision's purchase or acquisition of community development or urban revitalization services through land reutilization programs and tax abatements falls within the definition of "public contract" under R.C. 2921.42. Advisory Ops. No. 88-006 and 89-008, respectively. See also Advisory Op. No. 92-013 (an infrastructure improvement made as part of an urban revitalization project is a "public contract"). In the instant situation, therefore, the Program falls within the definition of "public contract" for purposes of R.C. 2921.42.

For purposes of the prohibitions imposed by R.C. 2921.42, prohibited "interest" must be definite and direct and may be either pecuniary or fiduciary in nature. Advisory Op. No. 81-008. The Ethics Commission has held that a property owner who participates in a political subdivision's urban revitalization and community development loan program has a definite and direct interest in, and directly profits from, a public contract because the loan or grant goes directly to the property owner and the property owner provides the urban revitalization and community development services to the political subdivision. Advisory Op. No. 92-013. See also Advisory Ops. No. 83-005, 84-011, 85-002, 88-006 and 91-001. In the instant situation, any individual participating in the Program will have a definite and direct interest in the grant of CDBG funds from the city.

Exception Provided by R.C. 2921.42 (C)

Until the enactment of Division (D) of R.C. 2921.42, a public official or employee was prohibited from participating in his political subdivision's urban revitalization and community development loan programs unless he or she could demonstrate compliance with the exception of Division (C). Advisory Ops. No. 84-011, 88-006, and 91-011. See also Advisory Op. No. 83-005. In Advisory Opinion No. 84-011, the Ethics Commission examined the exception to the R.C. 2921.42(A)(4) prohibition, which is found in Division (C). Briefly, Division (C) is comprised of four criteria, all of which must be met by the public official or employee who desires to avail himself of the exception. However, the exception of Division (C) is inapplicable to the issue in the instant situation and need not be addressed.

Exception Provided by R.C. 2921.42 (D)

In Sub. H.B. 150, 120th Gen. A. (eff. June 23, 1994), the General Assembly enacted an additional exception to the R.C. 2921.42 (A)(4) prohibition against a public employee participating in his political subdivision's urban revitalization and community development loan program.

R.C. 2921.42 (D) reads:

Division (A)(4) of this section does not prohibit participation by a public employee in any housing program funded by public moneys if the public employee otherwise qualifies for the program and does not use the authority or influence of his office or employment to secure benefits from the program and if the moneys are to be used on the primary residence of the public employee. Such participation does not constitute having an unlawful interest in a public contract. (Emphasis added.)

Division (D) of R.C. 2921.42 provides a limited exemption from the prohibition imposed by R.C. 2921.42 (A)(4), but only for public employees. Division (D) enables a public employee to participate in housing programs funded by public moneys if the public employee can objectively show that he can meet the narrow exception. In order to meet the exception provided by R.C. 2921.42 (D), a public employee must demonstrate that he: (1) qualifies for the program; (2) does not use the authority or influence of his office or employment to secure benefits from the program; and (3) uses the moneys derived from participating in the program for the benefit of his primary residence.

R.C. 2921.42 (D) enables a public employee to secure housing program funding for his residence, in the same manner as other citizens, without being required to meet the exception provided by R.C. 2921.42 (C). This legislation was enacted in response to a situation where a part-time employee, who had no decision-making authority in a federally funded community development program, was barred from securing a loan to renovate her home because she was unable to meet the exception provided by R.C. 2921.42 (C).

It is important to note that the General Assembly, in enacting Division (D), did not alter the definition of the term "public contract" or otherwise change R.C. 2921.42. Therefore, the restrictions of R.C. 2921.42, which protect against conflicting interests in public contracts, continue to apply to the purchase or acquisition of community development or urban renewal services through the use of low-interest loans or grants to property owners by a governmental agency or political subdivision.

The reenactment or amendment of a statute without modification after administrative or judicial interpretation is an indication of implied legislative approval of such interpretation. Laufman v. Oakley Building and Loan Company, 408 F. Supp. 489 (S.D. Ohio 1976). See also Seeley v. Expert, Inc. 26 Ohio St. 61 (1971). Accordingly, prior advisory opinions of the Ethics Commission, which apply the prohibition imposed by R.C. 2921.42 in situations involving the participation of a public official in his political subdivision's community development or urban revitalization services programs funded by public moneys, are still valid if the public official cannot meet the exception provided by Division (D).

Furthermore, it must be noted that R.C. 2921.42 (D) uses the word "public employee" rather than the term "public official." R.C. 2921.01 (A) defines the term "public official" for purposes of R.C. Chapter 2921. to include an "employee . . . of . . . any political subdivision." The General Assembly's use of the word "employee" in R.C. 2921.42 (D) specifically characterizes a narrower class of individuals than the defined term of "public official." See Dougherty v. Torrence, 2 Ohio St. 3d 69, 70 (1982) (effect must be given to words used in a statute); Dungan v. Kline, 81 Ohio St. 371, 380-81 (the presumption is that every word in a statute is designed to have effect); Advisory Op. No. 74-001 ("it is to be assumed that the Legislature used the language contained in a statute advisedly and intelligently and expressed its intent by the use of the words found in the statute"). As explained above, impetus for the enactment of R.C. 2921.42 (D) was a situation where a part-time public employee, who had no decision-making authority in the municipality's federally funded community development program, was barred from securing a loan from her public employer for home renovations, because she was unable to meet the exception provided by R.C. 2921.42 (C).

Therefore, in light of the language that the General Assembly used in R.C. 2921.42 (D), this Commission determines that the exception provided by R.C. 2921.42 (D) does not apply to an elected public official. In the instant situation, the city employee is eligible to utilize the exception provided by R.C. 2921.42 (D) to participate in the city's First-Time Home Buyers Program. However, the council member, who is an elected public official, is not eligible to utilize the exception provided by R.C. 2921.42 (D). Whether the city council members could otherwise be eligible for participation in the Program will be discussed below.

The City Employee - Participation in the Program

In the instant situation, the city employee must objectively demonstrate that he meets the criteria of Division (D) to participate in the city's First-Time Home Buyers Program. In addressing the exemptions to the R.C. 2921.42 (A)(4) prohibition, it must be noted that the Ethics Commission has held that its function in rendering advisory opinions is not a fact-finding process. Advisory Ops. No. 75-037, 90-013, and 92-013. The Ethics Commission cannot determine in an advisory opinion whether certain facts exist, but must rely on the accuracy and completeness of the facts presented in the request for an opinion. Advisory Op. No. 75-037. An advisory opinion explains the prohibitions imposed by the Ethics Law and related statutes and sets forth the standards and criteria that must be observed in order to avoid a violation of the law. Advisory Ops. No. 75-037 and 90-013. Therefore, this advisory opinion cannot determine whether the exception of Division (D) is established factually and as a matter of law, but will provide the standards that must be met for the exception to be established.

Also, it must be noted that the advisory opinions that the Ethics Commission has rendered on the subject of municipal employees participating in the municipality's federally funded housing programs and neighborhood revitalization programs are limited to the issue of whether the Ohio Ethics Law and related statutes prohibit public employees from participating in these programs. The Ethics Commission has no authority to render advice on matters pertaining to the necessary qualifications for an individual to participate in such a program, the purposes for which assistance must be used, or the areas of a municipality targeted for rehabilitation. These issues are strictly within the purview of the municipality and federal regulations. You may also wish to consult federal law to determine any further restrictions on the ability of municipal employees to participate in programs funded in whole or in part with federal moneys. See, e.g., 24 CFR Sec. 570.611.

The City Council Member - Participation in the Program

As stated above, the finance committee of city council is a component of the city's First-Time Home Buyers Committee, which has the authority to approve or disapprove applications for participation in the Program. The city council member: (1) serves on the committee that approves or disapproves applications for participation in the Program; (2) meets the income qualification for participation in the Program; and (3) states that he will abstain from participation in matters regarding his own application.

As explained above, in light of the language used in R.C. 2921.42 (D), the exception provided by R.C. 2921.42 (D) does not apply to an elected public official. In situations where the

R.C. 2921.42(D) exception is unavailable, the exception of Division (C) may still be available. The application of Division (C) is explained in previous advisory opinions. However, under the facts and circumstances in the instant situation, the council member is also subject to the prohibition found at Division (A)(3) of R.C. 2921.42, which prohibits him from benefiting from his city's housing program.

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

Division (A)(3) of Section 2921.42 of the Revised Code provides that no public official shall knowingly:

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 contract will be deemed to have been "authorized" by a public official, legislative body, board, or commission for purposes of R.C. 2921.42 (A)(3), where the public contract could not have been awarded without the public official's or entity's approval. Advisory Ops. No. 87-004, 88-006, 89-008, 91-011, and 92-013.

A public official who is a member of a legislative body, commission, or board is bound by the prohibition imposed by R.C. 2921.42 (A)(3) even if he, as a member of the board, abstains from deliberating, voting upon, or otherwise authorizing the public contract. Advisory Ops. No. 87-004, 87-008, 88-006, 88-008, 89-008, 91-011, and 92-013. A person who receives a housing revitalization loan occupies a definite and direct position of profit in the prosecution of the public contract for purposes of R.C. 2921.42 (A)(3). Advisory Ops. No. 88-006, 89-008, 91-011, and 92-013.

In the instant situation, the city council member is also a member of the finance committee of city council, which is the component of the city's First-Time Home Buyers Committee that approves or disapproves applications for participation in the Program. Therefore, R.C. 2921.42 (A)(3) prohibits the council member, during his public service and for one year thereafter, from occupying a position of profit from CDBG funds awarded by the City even if, as a member of the Committee, he abstains from deliberating, voting upon, or otherwise authorizing the award of CDBG funds to himself. Advisory Op. No. 88-006 (R.C. 2921.42 (A)(3) prohibits a city officer or employee who must approve the sale of property under a land reutilization program, or who serves on a legislative body, board, or commission, which must approve the sale, including the board of control, from purchasing the property where there is no competitive bidding). Because R.C. 2921.42 (A)(3) prohibits the city council member from participating in the Program, the exception provided by R.C. 2921.42 (C) need not be addressed with regards to his situation. See Advisory Op. No. 92-002 (the exception of Division (C) does not apply to the prohibitions of (A)(3)).

This advisory opinion is 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.

Therefore, it is opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (D) of Section 2921.42 of the Revised Code allows a public employee to benefit from a housing program funded by public moneys and administered by his own political subdivision provided that he: (a) qualifies for the program; (b) does not use the authority or influence of his office or employment to secure benefits from the program; and (c) uses the moneys derived from the program for the benefit of his primary residence; (2) The exception provided by Division (D) of Section 2921.42 of the Revised Code does not apply to an elected public official; (3) The exception provided by Division (D) of Section 2921.42 of the Revised Code does not alter the definition of the term "public contract", or otherwise alter the application of R.C. 2921.42 to a public contract; the restrictions of R.C. 2921.42 that protect against conflicting interests in public contracts continue to apply to community development or urban renewal services through the use of low-interest loans or grants to property owners by a governmental agency or political subdivision.



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