

# OHIO ETHICS COMMISSION

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November 14, 2001

Informal Opinion 2001-INF-1114

Fay D. Dupuis  
City Solicitor  
City of Cincinnati

Dear Ms. Dupuis:

In your letter to the Ethics Commission, you ask whether the Ohio Ethics Law and related statutes prohibit police officers and other employees of the City of Cincinnati (City) from participating in a program that has been proposed to encourage City employees, including police officers, to purchase single-family homes as their primary residences within the City.

## **Brief Answer**

As explained below, the Ohio Ethics Law and related statutes do not prohibit police officers and other employees of the City from participating in a program that has been proposed to encourage City employees to purchase single-family homes as their primary residences within the City. The promise or offer of the proposed financial incentives, under the program qualifications and restrictions that you described, does not appear to manifest a substantial and improper influence upon City employees with respect to their duties. In addition, the financial incentives are not being promised or offered in exchange or return for some obligation by the City employees in the performance of their official duties. The conclusions in this opinion are based on the Commission's understanding that City elected officials, and any City employees with specific duties regarding the administration of the program, will not be eligible for the incentives.

## **Facts**

You state that under the proposed incentive program, the City will not directly provide any financial incentives; instead, one or more private banks and lending institutions will provide financial incentives to City employees, including police officers, in connection with mortgages for the purchase of single-family homes within the City. You state that these incentives may take the form of "down-payment grants," reduced closing costs, interest rate reductions, and perhaps college credit for completing a required training course. You state that the goal of the program would be to promote single-family home ownership by City employees within the City to address declining population trends, and help create safe neighborhoods when the participating employees are police officers.

You state that City Council would enact an ordinance to define, authorize, and establish the operation of the proposed program. You state that the eligibility requirements would include strict adherence to the exemption criteria of R.C. 2921.42(D), which enables a public employee to participate in his political subdivision's housing programs funded by public moneys if the public employee can objectively show that he meets the exception. Thus, by incorporating the criteria of R.C. 2921.42(D) into the eligibility requirement of the proposed program, it would be available only to City employees for their primary residence and the employees will be prohibited from using the authority or influence of their employment to secure benefits from the program. Therefore, the incentives would not be available to any person serving in an elected or appointed city office, or on a city board or commission, or to any person whose job duties include administration of the program.

Finally, you state that some of the private banks and lending institutions that desire to participate in the program may provide financial services to the City on unrelated matters.

#### **Having an Interest in a Public Contract—R.C. 2921.42(A)(4)**

At the outset, you have stated that this program will adhere to the criteria of R.C. 2921.42(D), which is an exception to the public contract law set forth in R.C. 2921.42(A)(4). The relevant provision of the law, R.C. 2921.42(A)(4), provides that no public official shall have an interest in a "public contract" entered into by the public agency he serves. All city employees are public officials for purposes of R.C. 2921.42(A)(4). R.C. 2921.42(G)(1)(a). This opinion must first determine whether a city employee's participation in the program is governed by the public contract law.

It is apparent from the information you have provided that, while the proposed program will provide a definite and direct pecuniary benefit to property owners, it is not funded by public moneys. Because the proposed program is neither funded by, nor dependent upon, the expenditure of public moneys, it cannot fall within the definition of "public contract" for purposes of R.C. 2921.42.

Therefore, the prohibition imposed by R.C. 2921.42(A)(4) is not applicable to your question. However, the incorporation of the exemption criteria of R.C. 2921.42(D) into the eligibility requirements for the proposed program will aid in the ability of the City employees to meet the requirements imposed by other provisions of the Ohio Ethics Law and related statutes. In order to meet the exception provided by R.C. 2921.42(D) and participate in a housing program administered by his public agency, 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.

#### **Promising or Giving Anything of Value**

As stated above, the City does not propose to directly provide any financial incentives to City employees; rather, the City Council will approve an ordinance that defines, authorizes, and establishes the operation of the proposed program to enable one or more private banks and lending institutions to

provide various financial incentives to City employees. The provision of a definite and direct pecuniary benefit from a private entity to employees of a political subdivision implicates those provisions of the Ohio Ethics Law and related statutes that generally prohibit public officials and employees from receiving either improper things of value or supplemental compensation.

Your attention is directed to R.C. 102.03(F), which reads:

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.

The term "person" is defined to include any individual, corporation, partnership, association, or other similar entity. R.C. 1.59. A private bank or lending institution is a "person," subject to the prohibitions in R.C. 102.03(F). Adv. Op. No. 90-001. The term "public official or employee" is defined, for purposes of R.C. 102.03, to include any person who is elected or appointed to an office or is an employee of any political subdivision. R.C. 102.01(B) and (C).

The term "anything of value" is defined, for purposes of R.C. 102.03, to include money and every other thing of value. R.C. 1.03; 102.01(G). The Ethics Commission has held that a discount on the sale of an item constitutes a thing of value for purposes of R.C. 102.03. Adv. Op. No. 92-015. In the instant situation, private banks and lending institutions will provide financial incentives in the form of "down-payment grants," reduced closing costs, interest rate reductions, and perhaps college credit for completing a required training course. While the goal of the program would be to promote single-family home ownership by City employees within the City to address declining population trends, and create safe neighborhoods when the participating employees are police officers, the financial incentives are things of value for purposes of R.C. 102.03(F).

The issue becomes whether the financial incentives are things of value that are 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 for purposes of R.C. 102.03(F).

For purposes of R.C. 102.03(F), the Ethics Commission has held that a party that is interested in matters before, regulated by, or doing or seeking to do business with, a public agency is an improper source to provide things of value to officials and employees of that public agency. Adv. Op. No. 95-001. In Advisory Opinion No. 84-010, the Ethics Commission explained the inherent conflict confronting a public official or employee who receives a thing of value from an improper source. In that opinion, the Commission held:

The receipt of something of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with the agency with which the public official or employee serves is of such [a] character as to manifest a substantial or improper influence upon the public official or employee with respect to his official duties, because it could impair his independence of judgment in the performance of his duties and affect subsequent decisions in matters involving the donor of the thing of value. (Emphasis added.)

However, the Ethics Commission has determined that, in some narrow circumstances, an official or employee may be able to withdraw from consideration of matters concerning parties who are interested in matters before, regulated by, or doing or seeking to do business with his own public agency, if the withdrawal is approved by the official's or employee's appropriate supervisor and does not result in a hardship for the public agency. If such a withdrawal is possible, it may allow the official or employee to accept something of value that would ordinarily be of such a character as to manifest a substantial and improper influence upon the official or employee with respect to his duties, and therefore prohibited by R.C. 102.03(E). See Adv. Ops. No. 89-006 and 93-015.

As stated above, some of the private banks and lending institutions that desire to participate in the program may provide financial services to the City on unrelated matters. Because the financial incentives will be available to all City employees, including police officers, some City employees or the public agencies they serve, will possess the authority to participate in decisions regarding either the expenditure of public funds to purchase services from, or the deposit of public funds in, the private banks and lending institutions that will participate in the program. Also, due to their location within the City, the private banks and lending institutions that are the sources of the financial incentives being made available to City employees will be in a continuous regulatory relationship with the City regarding such matters as building and safety codes, zoning, and public infrastructure maintenance and improvements. Therefore, private banks and lending institutions that will participate in the program are generally "prohibited sources" of financial incentives offered to City employees.

However, in this situation, the financial incentives are not being offered on a selective basis to specific employees with whom the banking and lending institutions have dealings. As stated above, the benefits are offered to an entire class of City personnel—all City employees. It is clear that the offer of the proposed financial incentives is unrelated to the performance of the public duties entrusted to these public employees; rather, the financial incentives are intended to promote single-family home ownership by City employees within the City to address declining population trends, and create safe neighborhoods when the participating employees are police officers. See R.C. 2921.43(A) (set forth below). Further, it appears that the financial incentives are fixed and identical for all City employees, and the City employees that decide matters affecting the banks and lending institutions that participate in the program would not receive selective, differential, or disproportionate financial benefits to the benefits provided to all other City employees in the class.

Thus, the promise or offer of the proposed financial incentives could not manifest a substantial and improper influence upon City employees with respect to their duties. Therefore, R.C. 102.03(F) does not prohibit private banks and lending institutions from offering financial incentives to any City employee—even an employee who performs public duties that affect decisions involving the private banks and lending institutions—because they are members of a large class that comprises all City employees. In addition, R.C. 102.03(E) does not generally prohibit any City employee—including an employee who performs public duties that affect decisions involving the private banks and lending institutions—from soliciting or accepting a financial incentive under the proposed program as long as the employee does not use his or her authority over these private parties in any way to secure the incentive.

It must be stressed, however, that a promise or offer of a financial incentive that is limited or specifically directed to an individual City employee who has public duties and responsibilities that affect the interests of the private bank or lending institution that is the source of the incentive, or that is selective, differential, or in disproportion to the benefits provided to all other City employees who comprise the eligible class, is a promise or offer of a thing of value that could manifest a substantial and improper influence upon the City employee with respect to his duties. See Adv. Op. No. 82-005. In such a situation, R.C. 102.03(F) would prohibit the private bank or lending institution from offering such incentives and R.C. 102.03(E) would prohibit those City employees from accepting them.

**Supplemental Compensation—R.C. 2921.43(A)**

Also relevant to your question is R.C. 2921.43(A), which provides:

- (A) No public servant shall knowingly solicit or accept and no person shall knowingly promise or give to a public servant either of the following:
  - (1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform his official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation;
  - (2) Additional or greater fees or costs than are allowed by law to perform his official duties.

The term "public servant" is defined for purposes of R.C. 2921.43 to include any elected or appointed officer, employee, or agent of the state or any political subdivision, or anyone performing ad hoc a governmental function. Thus, elected and appointed City officers and employees are subject to the prohibitions of R.C. 2921.43. The term "person" is defined to include any individual, corporation, partnership, association, or other similar entity. R.C. 1.59. Therefore, a private bank or lending institution is subject to the prohibition imposed by R.C. 2921.43(A)(1).

R.C. 2921.43(A)(1) prohibits any person from promising or giving to public servants "compensation," other than as allowed by R.C. 102.03(G) through (I) or other provision of law, for: (1) performing any duty, act, or service required in their official capacity as public servants; (2) the general performance of their public duties; or (3) as a supplement to their public compensation. Adv. Op. No. 90-001. The exceptions set forth in R.C. 102.03(G) through (I) concern campaign contributions, and under certain circumstances, honoraria and travel, meal, and lodging expenses incurred in connection with a personal appearance or speech, or attendance at conferences, seminars, and similar events.

Since 1986, the Ethics Commission has interpreted this section in several advisory opinions. In Advisory Opinion No. 89-012, the Commission held that R.C. 2921.43(A) prohibits a city law director from receiving supplemental compensation to represent the city school district, because the law director is statutorily required to represent the city school district as a part of his duties. In Advisory Opinion No. 89-013, the Commission stated that state employees are prohibited from receiving travel, meal, and lodging expenses from a vendor, because the expense payments would constitute supplemental compensation for the employees traveling to conduct state business. Also, in Advisory Opinion No. 91-010, the Commission stated that a public official or employee is prohibited from using frequent flyer benefits earned through travel on state business, because the benefits would constitute additional compensation for the official or employee.

By comparison, the Commission concluded, in Advisory Opinion No. 92-014, that a public servant is not prohibited from accepting rideshare incentives purchased with grant money provided by a regional planning commission to his public employer since the incentives are provided for the public servant's commute to and from work and are not given for the performance of his official duties, for the performance of any act or service within his public capacity, or for the general performance of the duties of his public employment. See also State v. Capko (March 28, 1990), Cuyahoga App. No. 56814, unreported, 1990 Ohio App. LEXIS 1287) (R.C. 2921.43(A) prohibits a public servant from receiving things of value for properly performing his public duties).

The issue becomes whether the financial incentives offered to City employees under the proposed program could be considered additional compensation for the performance of official duties of the City employees to which they are offered.

As set forth above, the goal of the program is to promote single-family home ownership by City employees within the City to address declining population trends, and create safe neighborhoods when the participating employees are police officers. As the program you have described is structured, it does not appear that the financial incentives are being promised or offered in exchange or return for some obligation by the City employees in the performance of their official duties. Therefore, R.C. 2921.43(A) does not prohibit private banks and lending institutions from offering financial incentives to any City employee. In addition, R.C. 2921.43(A) does not prohibit any City employee—including an employee who performs public duties that affect decisions involving the private banks and lending institutions—from soliciting or accepting a financial incentive under the proposed program.

### **Conclusion**

As explained above, the Ohio Ethics Law and related statutes do not prohibit police officers and other employees of the City from participating in a program that has been proposed to encourage City employees to purchase single-family homes as their primary residences within the City. The promise or offer of the proposed financial incentives, under the program qualifications and restrictions that you described, does not appear to manifest a substantial and improper influence upon City employees with respect to their duties. In addition, the financial incentives are not being promised or offered in exchange or return for some obligation by the City employees in the performance of their official duties. The conclusions in this opinion are based on the Commission's

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understanding that City elected officials, and any City employees with specific duties regarding the administration of the program, will not be eligible for the incentives.

This informal advisory opinion embodies the decision of the Ohio Ethics Commission at its meeting on October 12, 2001. The Commission commends you for requesting guidance, on behalf of the City, before any actions could be taken that are prohibited by the Ethics Law.

The opinion is based on the facts presented and 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 questions or desire additional information, please contact this Office again.

Sincerely,

A handwritten signature in black ink that reads "John Rawski". The signature is written in a cursive style with a prominent initial "J" and a distinct "R".

John Rawski  
Staff Attorney