



OHIO ETHICS COMMISSION

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May 9, 1996

Informal Opinion 1996-INF-0509-1

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



Dear Mr. Feheley:

You have asked whether the Ohio Ethics Law and related statutes prohibit a board member of the Noble Metropolitan Housing Authority (NMHA), Dennis Gerst, from selling real property, in which he has a one-third ownership interest, to a non-profit corporation that is affiliated with the Cambridge Metropolitan Housing Authority (CMHA) in light of the fact that NMHA purchases administrative and management services from CMHA.

As explained below, Mr. Gerst is not prohibited from selling real property, in which he has a one-third ownership interest, to a non-profit corporation that is affiliated with CMHA provided that he withdraw from any matter pending before NMHA that would affect the interests of CMHA.

Facts

You state that CMHA is affiliated with the Cambridge Management Corporation (Corporation). The Corporation is a non-profit 501 (c)(3) corporation that develops and manages low-income housing. The Corporation is governed by a three member board of trustees.

One member of the Corporation's board of trustees, Don Houston, also serves on CMHA's board of commissioners. You state that Don Houston serves on the Corporation's board in his "official capacity" as a member of CMHA's board of commissioners.

While Mr. Houston's position with the Corporation is not germane to the issue involving Mr. Gerst, it should be noted that the Ethics Commission has previously explained in its Advisory Opinions that whenever a public official serves on the board of directors of a non-profit corporation in his official capacity, "there would not be a dual interest in which private considerations would distract from his serving the public interest." Advisory Op. No. 84-001. In Advisory Opinion No. 84-001, the Commission set forth four criteria that must be met in order for a public official to be deemed to serve in his official capacity:

- (1) the governmental entity must create or be a participant in the non-profit corporation;
- (2) any public official or employee connected with the jurisdiction . . . may be designated to serve on the non-profit corporation, but the elected legislative authority or the appointing governing body must formally designate the office or position to represent the governmental entity;
- (3) the public official or employee must be formally instructed to represent the governmental entity and its interests;
- (4) there must be no other conflict of interest on the part of the designated representative.

See also Advisory Ops. No. 82-004 and 83-010; Att'y Gen. Op. No. 91-007. The above criteria must be met in order for Mr. Houston's service with the Corporation to be in his "official capacity."

You state that Mr. Gerst is one of two owners of 125 acres that the Corporation desires to purchase to develop low-income housing. Mr. Gerst owns one-third of an interest in the 125 acres and the other individual owns the remaining two-thirds interest.

R.C. 2921.42 (A)(4) - Having an Interest in a Public Contract

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

The term "public official" is defined for purposes of Section 2921.42 in Section 2921.01(A) to include any appointed official or employee of any political subdivision of the state. A board member of a metropolitan housing authority is a public official for purposes of R.C. 2921.42. Advisory Op. No. 89-011.

The term "public contract" is defined for purposes of Section 2921.42 in Division (E) of that Section to include the purchase or acquisition, or a contract for the purchase or acquisition, of property or services by or for the use of a political subdivision. As explained below, there are two public contracts in the instant situation.

The proposed purchase of the 125 acres by the Corporation is a public contract for purposes of R.C. 2921.42. Despite the fact that CMHA is not purchasing the property, the Corporation's purchase of the 125 acres will enable CMHA to provide low-income housing and thus, CMHA will be acquiring property or services. Also, the management services contract between CMHA and NMHA is a public contract for purposes of R.C. 2921.42 because NMHA is purchasing management services from CMHA. The issue becomes whether Mr. Gerst has an interest in these public contracts.

An "interest" which is prohibited must be definite and direct, and may be pecuniary or fiduciary in nature. Advisory Ops. No. 81-003 and 81-008. Because Mr. Gerst has a one-third ownership interest in the 125 acres that the Corporation desires to purchase, he would have an interest in the proposed purchase of the 125 acres by the Corporation. Accordingly, if the Corporation purchases the 125 acres for the development of low income housing for CMHA, Mr. Gerst would have an interest a public contract between CMHA and the Corporation.

Although Mr. Gerst would be deemed to have an interest in the contract between CMHA and the Corporation, the question remains, whether this interest would be a prohibited interest for purposes of R.C. 2921.42 (A)(4).

As set forth above, 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 or governmental agency or instrumentality with which he is connected." See also Advisory Ops. No. 87-002, 89-004, 89-012, 91-005, and 92-006. As stated above, NMHA purchases administrative and management services from CMHA. However, whether NMHA is "connected" with CMHA, for purposes of R.C. 2921.42 (A)(4), because NMHA purchases management services from CMHA must be examined.

In Advisory Opinion No. 89-004, the Ethics Commission held that a county commissioner is connected, for purposes of R.C. 2921.42 (A)(4), with a regional transit authority to which the county belongs. The Commission explained that a connection existed because: (1) the board of county commissioners participated in the creation of the transit authority; (2) the boundaries of the transit authority were coextensive with the county; (3) the board of county commissioners appointed three members of the transit authority's board of trustees; and (4) the county provided financial and other assistance to the transit authority. See also Advisory Ops. 87-002 (a member of a county board of elections is connected with the county with which he serves) and No. 89-012 (a city law director is connected with a coextensive port authority). The Commission's precedent on this issue indicates that a "connection" between political subdivisions or governmental agencies or instrumentalities, for purposes of R.C. 2921.42 (A)(4), involves more than a contractual relationship between the political subdivisions or governmental agencies or instrumentalities.

In the instant situation, the facts that you have presented indicate that the only relationship between CMHA and NMHA is NMHA's purchase of administrative and management services from CMHA. As explained above, absent additional relationships, a political subdivision that contracts with another political subdivision for the purchase of services is not "connected" with the other political subdivision for purposes of R.C. 2921.42 (A)(4). Accordingly, Dennis Gerst, as a board member of NMHA, is not "connected" with CMHA, for purposes of R.C. 2921.42 (A)(4) and, therefore, the sale of the 125 acres to the Corporation will not constitute a prohibited interest in a public contract for purposes of R.C. 2921.42 (A)(4).

Prohibition Imposed by R.C. 102.03 (D) and (E)

However, your attention is directed to R.C. 102.03 (D) and (E), which read:

- (D) No public official or employee shall use or authorize the use of the authority or influence of his office or employment to secure anything of value or the promise or offer of anything of value that is of such character as to manifest a substantial and improper influence upon him with respect to his 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 him with/ respect to his duties.

A member of the board of a metropolitan housing authority is a "public official or employee" for purposes of R.C. 102.03 (D) and (E) and subject to the prohibitions contained therein. Advisory Op. No. 89-011.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money and every other thing of value. R.C. 1.03, 102.01 (G). The Ethics Commission has held that the proceeds from the sale of property and the ability to sell property at a profit is a thing of value for purposes of R.C. 102.03. Advisory Ops. No. 79-003, 79-008, and 80-007.

R.C. 102.03 (D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his official position to secure anything of value if the thing of value could manifest a substantial and improper influence upon him with respect to his duties. Advisory Op. No. 90-003. R.C. 102.03 (D) and (E) must be examined to determine whether Mr. Gerst's resulting financial gain from the sale of the 125 acres to the Corporation is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

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The Ethics Commission has held that R.C. 102.03 (D) and (E) prohibit a public official or employee from soliciting, accepting, or using the authority or influence of his office to secure a thing of value if it could manifest a substantial and improper influence upon him with respect to his duties.

The issue becomes whether the payment Mr. Gerst would receive from the Corporation for the proposed sale of the 125 acres could be of such a character as to manifest an improper influence upon him with respect to his duties as a member of the board of NMHA.

The Ethics Commission has held that R.C. 102.03 (D) prohibits a public official or employee from using the authority or influence of his office or employment to secure anything of value where there is conflict of interest between his private interest and his public duties. The Commission has held that a conflict between private interests and public duties exists whenever a public official derives a financial gain in a transaction that affects a party that is doing business with his own public agency.

Because NMHA purchases administrative and management services from CMHA, it is apparent that CMHA is doing business with NMHA. Despite the fact that the 125 acres will be sold to the Corporation, rather than CMHA, because the Corporation will use the land to develop low-income housing for the benefit of CMHA, the sale of the 125 acres to the Corporation is a matter that will affect the interests of CMHA. Therefore, R.C. 102.03 (D) prohibits Mr. Gerst from using the authority or influence of his office to secure the sale of the 125 acres to the Corporation.

In the instant situation, it is assumed that the impetus of the proposed transaction between CMHA and the Corporation is the location of the 125 acres. Assuming that Mr. Gerst does not use the authority or influence of his office to secure the sale of the 125 acres to the Corporation, the issue becomes whether his resulting financial gain from the sale of the 125 acres would be such a character as to manifest a substantial and improper influence upon him with respect to his duties.

R.C. 102.03 (E) prohibits a public official or employee from accepting anything of value in a situation where the receipt of such a thing of value could impair his objectivity and independence of judgment with regard to his official decisions and responsibilities. Advisory Ops. No. 86-011 and 89-006. The application of R.C. 102.03 (E) is dependent upon the facts and circumstances of each individual situation. Advisory Ops. No. 87-007 and 89-003.

As a member of the board of NMHA, Mr. Gerst is in a position to affect the contract for management services that exists between CMHA and NMHA. The potential to realize a financial gain from a transaction that affects CMHA could impair Mr. Gerst's objectivity and independence of judgment in deciding matters with regard to NMHA's purchase of services from CMHA.

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The Ethics Commission has held, in some circumstances, a public official or employee is not prohibited from engaging in a private transaction provided that he withdraw from consideration of matters which would pose a conflict of interest. Advisory Ops. No. 89-006 (Ohio Department of Mental Health officials and employees accepting employment from colleges or universities which receive grants from ODMH), 89-010 (a Department of Agriculture employee selling services to a state institution which is regulated by the Department of Agriculture), and 90-002 (a Department of Agriculture employee owning and operating a plant which is regulated by the Department of Agriculture). However, the Commission has held that such a withdrawal: (1) may not interfere with the official's or employee's performance of his duties; and (2) must be approved by the appropriate officials at his public agency. Id

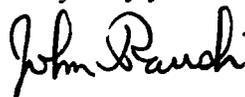
In the instant situation, Mr. Gerst is prohibited from engaging in a real estate transaction with the Corporation unless he withdraws as a NMHA board member on all matters that would affect the vendor-purchaser relationship between CHMA and NMHA. It is possible that matters may not arise before the board of NMHA concerning the management services contract with CMHA during the pendency of the sale of the 125 acres to the Corporation, however, if they do arise, then Mr. Gerst must withdraw from all matters pertaining to the contract. If Mr. Gerst withdraws from all matters that affect the interests of CMHA, during the pendency of the transaction, then the proceeds from the sale will not be of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

Conclusion

As explained above, Mr. Gerst is not prohibited from selling real property, in which he has a one-third ownership interest, to a non-profit corporation that is affiliated with CMHA provided that he withdraw from any matter pending before NMHA that would affect the interests of CMHA.

This informal advisory opinion was approved by the Ethics Commission at its meeting on May 9, 1996. 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 further questions, please feel free to contact this Office again.

Very truly yours,



John Rawski
Staff Attorney