

OHIO ETHICS COMMISSION

Santiago Feliciano, Jr.
Commission Chair

David E. Freel
Executive Director



8 East Long Street, 10th Floor
Columbus, Ohio 43215
Telephone: (614) 466-7090
Fax: (614) 466-8368

Website: <http://www.ethics.state.oh.us>

April 14, 2000

Informal Opinion 2000-INF-0414-1

John F. Shirey
City Manager
City of Cincinnati

Dear Mr. Shirey:

In your letter to the Ethics Commission you ask whether the Ohio Ethics Law and related statutes prohibit police officers employed by the City of Cincinnati (City) from participating in the Housing and Urban Development (HUD) Officer Next Door Sales Program.

As explained below, City police officers are prohibited from participating in the HUD Officer Next Door Sales Program unless the officers who elect to participate in the program are able to affirmatively demonstrate that they are able to meet the requirements of the exemption provided by Division (D) of R.C. Section 2921.42. Based upon the information you have presented, the HUD Officer Next Door Program does qualify as a program eligible for the exemption in Division (D). However, the City must determine whether an individual applicant otherwise meets the criteria set forth under Division (D).

Facts—The HUD Officer Next Door Program

HUD has created the Officer Next Door Program to encourage law enforcement officers to reside in HUD-acquired single-family homes as a means of promoting safe neighborhoods in the community they serve. The HUD Officer Next Door Program enables law enforcement officers to purchase HUD-owned single-family homes at a 50% discount from HUD's standard sales procedure. The discount is available only for single-family homes that are either located in HUD-designated Revitalization Areas or, if outside a Revitalization Area, meet another HUD-determined exception. The Officer Next Door Program requires that the law enforcement officer desiring to purchase the home through the Officer Next Door Program agree to occupy the home as his primary residence for three years after the date of closing.

The Officer Next Door Program enables a law enforcement officer to purchase a home that meets the necessary criteria for inclusion in the Officer Next Door Program through a FHA-insured mortgage for a down-payment of one hundred dollars. A law enforcement officer purchasing property from HUD that is either outside of a Revitalization Area or does not meet the exception necessary for inclusion in the Officer Next Door Program must use HUD's standard sales procedure without a discount.

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

In order to provide answers to your questions, we must first examine provisions of the state's public contract statute that are contained in R.C. 2921.42. Within that statute, R.C. 2921.42(A)(4) provides that no public official shall knowingly:

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, in R.C. 2921.01(A), for purposes of R.C. 2921.42, to include an elected or appointed officer or employee of a political subdivision of the state. R.C. 2921.01(A) defines the term "public official" for purposes of R.C. 2921.42 to include all public employees, whether in a temporary or permanent capacity. Under this statutory definition, municipal law enforcement officers are "public officials" for purposes of R.C. 2921.42 and are subject to the provisions therein. Ohio Ethics Commission Advisory Opinion No. 83-006.

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. 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. Adv. Ops. No. 83-005, 84-011, and 85-002. In addition, 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. Adv. Ops. No. 88-006 and 89-008, respectively. See also Adv. Op. No. 92-013 (an infrastructure improvement made as part of an urban revitalization project is a "public contract").

The General Assembly concurred with this conclusion because it subsequently created a narrow exemption from the public contract prohibition that is found in Division (D) of R.C. 2921.42, and is later discussed herein, without altering the definition of the term "public contract" or otherwise changing the prohibition imposed by R.C. 2921.42(A)(4). Ad. Op. No. 95-007. In the instant situation, therefore, a HUD housing 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, a prohibited "interest" must be definite and direct and may be either pecuniary or fiduciary in nature. Adv. 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 programs has a definite and direct interest in, and directly profits from, a public contract because the financial benefit of participating in the program is directly realized by the property owner and the property owner provides the urban revitalization and community development services to the political subdivision. Adv. Op. No. 92-013. See also Adv. Ops. No. 83-005, 84-011, 85-002, 88-006, and 91-001. In the instant situation, any city employee, including a city law enforcement officer, participating in any HUD housing program within the city that he serves will have a definite and direct interest in a public contract with his own political subdivision for purposes of R.C. 2921.42(A)(4).

Housing Program 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 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. Until the enactment of Division (D) of R.C. 2921.42, a public official was prohibited from participating in his political subdivision's urban revitalization and community development loan programs unless he could demonstrate compliance with the more extensive components of the exception contained in Division (C) of R.C. 2921.42. Adv. Ops. No. 84-011, 88-006, and 91-011. See also Adv. Op. No. 83-005.

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, because of the exception provided by R.C. 2921.42(D), the exception of Division (C) is inapplicable to the issue in the instant situation and need not be addressed.

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. Division (D) of R.C. 2921.42 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 broader exception provided by R.C. 2921.42(C). Adv. Op. No. 95-007.

Participation in the Housing Program by City Law Enforcement Officers

It must be noted that the Officer Next Door Program is a special housing program for law enforcement officers within HUD's general housing program. As explained above, it provides law enforcement officers with a 50% discount from HUD's standard sales procedure for HUD-owned single family homes within a Revitalization Area or homes that otherwise meet the exception necessary for inclusion in the Officer Next Door Program.

While you have not asked the question, it must be noted that law enforcement officers purchasing property from HUD through HUD's standard sales procedure without the discount provided by the Officer Next Door Program must also meet the exception of Division (D) of R.C. 2921.42. The City police officers must therefore demonstrate that they: (1) qualify to purchase HUD-owned single-family homes through HUD's standard sales procedure; (2) do not use the authority or influence of their office or employment to secure benefits from the program; and (3) occupy the home as their primary residence.

The issue becomes whether the Officer Next Door Program as a special housing program within HUD's general housing program for law enforcement officers is also subject to the exception of R.C. 2921.42(D).

As set forth above, the exception of R.C. 2921.42(D) applies to "any housing program funded by public moneys." The word "any" is not defined for purposes of R.C. 2921.42(D). The word "any" is defined as "every, all." Random House Unabridged Dictionary 96 (1987). Faced with a similar question, a Summit County Common Pleas Court in Motor Cargo, Inc. v. Board of Township Trustees, 52 Ohio Op. 257, 259 (Summit County 1953) stated that: "[I]n construing statutes the word 'any' is equivalent and the force of 'every' or 'all.'" By construing the word "any" in R.C. 2921.42(D) as "every" or "all," the exception of that section applies to every and all housing programs funded by public moneys including a special housing program for law enforcement officers within HUD's general housing program known as the Officer Next Door Program.

In the instant situation, law enforcement officers who elect to participate in the Officer Next Door Program must also affirmatively demonstrate that they are able to meet the requirements of the exemption provided by R.C. 2921.42(D). The officers must show that they: (1) qualify to purchase HUD-owned single-family homes at a 50% discount from HUD's standard sales procedure; (2) do not use the authority or influence of their office or employment to secure benefits from the program; and (3) occupy the home as their primary residence.

Prohibition Against Receiving Improper Compensation—R.C. 2921.43(A)(1)

You have asked whether participation in a housing program that benefits only law enforcement officers constitutes improper compensation for purposes of R.C. 2921.43(A)(1), which reads:

- (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.

The term "public servant" is defined for purposes of R.C. 2921.43 to include any employee of a political subdivision of the state. R.C. 2921.01(A) and (B)(1). Thus, a member of the city police department is a "public servant" who is subject to the prohibitions of R.C. 2921.43. Adv. Op. No. 92-015.

R.C. 2921.43(A)(1) prohibits a public servant from soliciting or accepting any "compensation," other than as allowed by R.C. 102.03(G)-(I) or other provisions of law, for: (1) performing any duty, act, or service required in his official capacity as a public servant; (2) the general performance of his duties; or (3) as a supplement to his public compensation. Adv. Op. No. 92-014.

In Advisory Opinion No. 92-015, the Ethics Commission held that, for purposes of R.C. Section 2921.43, "compensation" means "payment for services: esp., wages or remuneration." As stated above, HUD's goal for the Officer Next Door Program is to promote safer neighborhoods through increased presence and community involvement of law enforcement officers. It does not appear that the Officer Next Door Program was established to provide officers with supplemental compensation for the performance of their public service. However, this is an issue that needs not be discussed further, because even if participation in the Officer Next Door Program could be deemed "compensation" for purposes of R.C. 2921.43(A)(1), it must be noted that R.C. 2921.43(A)(1) does not prohibit the receipt of compensation "other than as allowed by R.C. 102.03(G)-(I) or other provisions of law."

Exception Provided by R.C. 2921.42(D)

R.C. 102.03(G)-(I) are not applicable in the instant situation and need not be addressed because they pertain to political campaign contributions and expenses for travel, meals, and lodging in connection with conferences, seminars, and similar events. However, R.C. 2921.43(A)(1) also uses the term "other provisions of law." As explained above, Division (D) of R.C. Section 2921.42 provides a narrow exception to the prohibition imposed by Division (A)(4) of R.C. Section 2921.42 against a public employee participating in a housing program within the city that he serves. Because, as explained above, Division (D) of R.C. Section 2921.42 allows the relationship between a city employee and his employing city to occur, Division (D) falls within the term "other provisions of law" as used in R.C. 2921.43(A)(1). In the instant situation, officers who elect to participate in the Officer Next Door Program and are able to affirmatively demonstrate that they are able to meet the requirements of the exemption of Division (D) of R.C. Section 2921.42 would not be soliciting or accepting improper compensation for purposes of R.C. 2921.43(A)(1).

Other Issues

It must be noted that the Ethics Commission has held that its function in rendering advisory opinions is not a fact-finding process. Adv. 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. Adv. 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. Adv. Ops. No. 75-037 and 90-013.

Therefore, while this advisory opinion can determine that the Officer Next Door Program is eligible for the exception provided by Division (D) of R.C. Section 2921.42, it cannot determine whether all of the criteria described within the exception of Division (D) are established factually and as a matter of law for all applicants and in any particular situation. It is a prerogative of the City to determine whether the officers who elect to participate in the program have affirmatively demonstrated that they are able to meet the requirements of the exemption of Division (D).

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.

As a final matter, it must be noted that this advisory opinion is limited to addressing the question that was presented to the Commission regarding the participation by law enforcement officers who are employed by the City in the Officer Next Door Program. As stated above, the exception provided by Division (D) of R.C. Section 2921.42 is available only to public employees. Adv. Op. No. 95-007. This opinion cannot be relied upon to permit the participation of law enforcement officers who serve the City in a senior appointive capacity, such as the Chief of Police.

Conclusion

As explained above, City police officers are prohibited from participating in the HUD Officer Next Door Sales Program unless the officers who elect to participate in the program are able to affirmatively demonstrate that they are able to meet the requirements of the exemption provided by Division (D) of R.C. Section 2921.42. Based upon the information you have presented, the HUD Officer Next Door Program does qualify as a program eligible for the exemption in Division (D). However, the City must determine whether an individual applicant otherwise meets the criteria set forth under Division (D).

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 14, 2000. 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