



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion No. 84-013
December 13, 1984

Syllabus by the Commission:

(1) Division (D) of Section 102.03 of the Revised Code prohibits a city employee from using his official position to market computer software that was developed and licensed by a computer software firm under a contract with the city.

(2) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a city employee from knowingly authorizing or using the authority or influence of his office to secure approval of a contract between the city and a computer software firm with which he is associated.

(3) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a city employee from knowingly soliciting or receiving a commission, payment, or fee, or having any other interest in the profits or benefits of a contract between the city and a computer software firm with which he is associated.

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You asked whether the Ohio Ethics Law and related statutes would prohibit a city employee from marketing a computer software program that he helped a computer software firm to develop under a contract with the city to computerize police and fire reporting and dispatching.

You stated, by way of history, that the city began to develop computer systems for the use of the police and fire departments approximately two and a half years ago. Subsequently, the city purchased computer hardware and contracted with a private computer software firm to develop software programs, initially for police and fire reporting and later for computer aided dispatching (hereinafter CAD). You indicated that the police chief, a police sergeant, the fire chief, and a fire battalion chief used both city and personal time to work with the computer software firm, particularly in developing the CAD. You also indicated that this software program, which was not available in retail stores, was written and licensed to the city at a considerably lower cost because of the direct involvement of the city safety personnel. The licensing agreement was approved by the city council upon the recommendation of city officials, including the city safety personnel.

During the course of work, the potential commercial value of the software program became apparent to the firm and the city safety personnel. Consequently, the city safety personnel filed articles of incorporation with the Secretary of State within a few days after a licensing agreement between the city and the computer software firm was approved by the city

council. You stated that the immediate purpose of the corporation is to market the software to other jurisdictions on behalf of the computer software firm once the program is completely functional. Under the licensing agreement, the city has the right to use the software program, but the computer software firm retains all other proprietary rights. You indicated that the articles of incorporation were approved, and that the computer software firm has completed its work for the city. You asked whether the Ohio Ethics Law and related statutes would restrict or prohibit the city safety personnel from marketing the computer software program.

Division (D) of Section 102.03 of the Revised Code provides the following:

No public official or employee shall use or attempt to use his official position to secure anything of value for himself that would not ordinarily accrue to him in the performance of his official duties, which thing is of such character as to manifest a substantial and improper influence upon him with respect to his duties.

The elements of Division (D) of Section 102.03 of the Revised Code are: (1) a public official or employee; (2) is prohibited from using or attempting to use his official position; (3) to secure anything of value for himself; (4) the thing of value would not ordinarily accrue to him in the performance of his official duties; and (5) the thing of value is of such character as to manifest a substantial and improper influence upon him with respect to his duties.

A city police chief, police sergeant, fire chief, or fire battalion chief is a "public official or employee" as defined in Division (B) of Section 102.01 of the Revised Code. The computer software program is within the definition of "anything of value" in Section 1.03 of the Revised Code, but the licensing agreement states that the proprietary rights to the program are retained by the computer software firm and do not accrue to the city or the city safety personnel. However, commissions, payments or fees obtained from a private business marketing the software program are also within the definition of "anything of value," and such funds clearly would accrue to the city safety personnel. Thus, the crucial determination is whether these commissions, payments, or fees would not ordinarily accrue to them in the performance of their official duties and would be of such character as to have a substantial and improper influence on the performance of their official duties.

In Ohio Ethics Commission Advisory Opinion No. 84-008, the Commission held that Division (D) of Section 102.03 of the Revised Code prohibits an employee of a state commission from using his official position to secure finders' fees or other payments from a manufacturer or agent of a computer service that sells the system to the state commission or other government or private agencies. In that case, an employee of the Rehabilitation Services Commission (hereinafter RSC) was a private subscriber to a computer service and served on the RSC task force making recommendations on computerization. The Commission concluded that a satisfied customer who had no other financial interest in a particular computer firm or service may advocate or recommend computer technology to the RSC, or to other government agencies, professional organizations, or contract agencies in the field of vocational rehabilitation. However, the Commission held that once the employee became associated in business with the manufacturer of the computer service or its agent and began receiving finders' fees or other payments for contracts, such fees or payments would have a substantial and improper influence

upon him with respect to his official duties as a member of the RSC computerization task force. Thus, Division (D) of Section 102.03 of the Revised Code prohibited him from receiving such fees or payments if he were serving on the RSC computerization task force.

In the instant case, once the city safety personnel become associated in private business with the computer software firm and begin to receive commissions, payments or fees for marketing the software program, they are prohibited from using their official positions to recommend or advocate computer technology or services to the city. Such commissions, payments, or fees from licensees would not ordinarily accrue to the safety personnel in the performance of their official duties for the city. Also, their personal, pecuniary interest in the particular software program marketed by the firm would have a substantial and improper influence on the city safety personnel regarding any future recommendations they would make to the city on software programs to be used by the police and fire departments. Thus, the city safety personnel are prohibited by Division (D) of Section 102.03 of the Revised Code from receiving commissions, payments, or fees from the computer software firm if their official positions involve making further recommendations on computer software programs for the city with which they serve.

The next question is whether the marketing venture would involve the use of the official positions of the city safety personnel. In Advisory Opinion No. 84-012, the Commission held that Division (D) of Section 102.03 of the Revised Code prohibits a service forester who is employed by the Division of Forestry of the Department of Natural Resources and who also owns a private tree service company from soliciting or receiving fees for services rendered on a project on which he provides, or is required to provide, technical assistance or advice in his official capacity. However, the Commission stated that the prohibition did not, per se, prohibit the service forester from operating a private tree service company, provided that he did not: (1) use state time, resources, or facilities to operate the company or solicit business; (2) receive compensation for services on projects that he has recommended in his official capacity; (3) render advice for a fee that is his duty to provide as a state employee; or (4) refrain from rendering advice or recommendations or otherwise performing his official duties in order to secure business for his tree company.

Similarly, Division (D) of Section 102.03 of the Revised Code does not, per se, prohibit the city safety personnel from marketing the computer software program. However, the city safety personnel may not engage in certain prohibited activities, which include, but are not limited to, the following: (1) using city time, facilities, or equipment to operate their private corporation or to solicit software business; (2) using their official titles on business cards or appearing in uniform while marketing the product; (3) soliciting or receiving payments or fees for services rendered by the computer software firm to the city with which they serve; (4) recommending or advocating computer software programs, including the CAD, to the city with which they serve; and (5) conducting demonstrations for potential clients on city computers.

Division (A) of Section 2921.42 of the Revised Code provides, in pertinent part:

(A) No public official shall knowingly do any of the following:

(1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest;

....

(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.

A police chief, police sergeant, fire chief, or fire battalion chief employed by a city is a "public official" as defined in Division (A) of Section 2921.01 of the Revised Code. A contract for the purchase or acquisition of software programs or other computer services by the city is a "public contract" as defined in Division (E)(1) of Section 2921.42 of the Revised Code. A commission, fee or payment received for marketing a computer software program to the city is an "interest" in a "public contract." Thus, the city safety personnel are prohibited by Division (A)(1) of Section 2921.42 of the Revised Code from knowingly authorizing, or otherwise using the authority or influence of their offices to secure approval of a contract between the computer software firm and the city with which they serve, if they have an "interest" in receiving a commission, payment or fee. Furthermore, even if they refrain from using their authority or influence, they are prohibited by Division (A)(4) of Section 2921.42 of the Revised Code from knowingly soliciting or receiving any commission, payment or fee from the software firm or having any other interest in the profits or benefits of a contract between the firm and the city (See: Advisory Opinion No. 84-008).

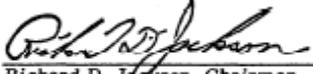
Assuming that the city safety personnel only receive commissions, payments, or fees for marketing the computer software outside their jurisdiction, the computer software firm still would be their "business associate" for purposes of Division (A)(1) of Section 2921.42 of the Revised Code (See: Advisory Opinions No. 78-006, 83-003, and 83-008). Therefore, Division (A)(1) of Section 2921.42 of the Revised Code prohibits the city safety personnel from knowingly authorizing, or otherwise using the authority or influence of their offices to secure approval of a contract between the city and the software firm, even if the city safety personnel do not receive a commission, fee or payment in relation to the contract. After the corporation and the software firm agree to a business association, the city safety personnel must refrain from participating in discussions, reviewing, recommending, or having any other involvement in a contract between the computer software firm and the city for computer software programs or services.

Although the marketing venture is not, per se, prohibited within the restrictions described above, the arrangement may create the appearance of impropriety. The city safety personnel and the software firm were working together under a city contract for a number of months while developing the computer software. During this period, the commercial value of the CAD became evident to the computer software firm and the city safety personnel. Therefore, even though the articles of incorporation for the private corporation were filed by the city safety personnel and approved by the Secretary of State after the licensing agreement was voted on by city council, the timing of the business venture and the close working relationship between the city safety

personnel and the computer software firm could create the appearance of a conflict of interest if they become business associates.

This advisory opinion is based on the facts presented and is limited 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 (D) of Section 102.03 of the Revised Code prohibits a city employee from using his official position to market computer software that was developed and licensed by a computer software firm under a contract with the city; (2) Division (A)(1) of Section 2921.42 of the Revised Code prohibits a city employee from knowingly authorizing or using the authority or influence of his office to secure approval of a contract between the city and a computer software firm with which he is associated; and (3) Division (A)(4) of Section 2921.42 of the Revised Code prohibits a city employee from knowingly soliciting or receiving a commission, payment, or fee, or having any other interest in the profits or benefits of a contract between the city and a computer software firm with which he is associated.


Richard D. Jackson, Chairman
OHIO ETHICS COMMISSION