



OHIO ETHICS COMMISSION

150 EAST BROAD STREET

COLUMBUS 43215

(614) 466-7090

Advisory Opinion No. 75-015

July 1, 1975

Syllabus by the Ohio Ethics Commission:

- 1) A faculty member of the University of Toledo is an employee of a state university for purposes of Section 102.04 (A) of the Revised Code.
- 2) Section 102.04 (A) of the Revised Code does not prohibit an employee of a state institution from receiving compensation from more than one agency of the state.
- 3) Section 102.04 (A) of the Revised Code prohibits an employee of a state institution from receiving or agreeing to receive, directly or indirectly compensation from clients, other than state agencies, for any service rendered or to be rendered by him personally in any case, proceeding, application or other matter which is before any agency of the state, excluding the courts.

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Your request for an advisory opinion asks whether a faculty member of a state university may receive compensation as a consultant for a state administrative agency. You ask further if such faculty member may receive compensation for representation of a client, on a consulting basis, in hearings before or informal conferences with a state administrative agency, or from a private client for testimony presented to a committee of the General Assembly. You then ask whether a distinction can be made for activities performed in the summer months for faculty members who are employed pursuant to a nine month contract, or when such faculty members are on an unpaid leave of absence, but according to university practice are under contract for compensation of zero dollars.

By way of history, you state that you are a faculty member at the University of Toledo, teaching subjects involving problems of state administrative law.

The first question is whether you, as a faculty member of the University of Toledo, are a "person . . . employed by . . . any . . . institution . . . of the state" and consequently within the purview of Section 102.04 (A) of the Revised Code. The Ohio Ethics Commission in Advisory Opinion No. 75-004 determined that "institution" as used in Section 102.04 (A) of the Revised Code, contemplates governmental organizations such as hospitals and universities. Section 3360.01 of the Revised Code states:

"There is hereby created a state university to be known as 'The University of Toledo' . . ."

Ohio Ethics Commission Advisory Opinion No. 75-012 held that independent contractors are not included within the meaning of the term "employed by" as that phrase is used in Section 102.04 of the Revised Code. It stated further that certain tests are applied to distinguish between an independent contractor and an employee:

- "(a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in that locality the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) skill required in the particular occupation;
- (e) whether the employer of the workman supplies the instrumentalities, tools and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by time or by job;
- (h) whether or not the work is a part of the regular business of the employer; and
- (i) whether or not the parties believe they are creating a relationship of master and servant."

That opinion further holds that "the primary test for purposes of the ethics legislation is (b) whether the one employed is engaged in a distinct occupation or business. . . . Seldom does the test, standing alone, control, however, and the others must be examined as well."

As part of the request for an Advisory Opinion, you sent to the Commission a copy of the University of Toledo's Certificate of Appointment:

THE UNIVERSITY OF TOLEDO

CERTIFICATE OF APPOINTMENT

This is to certify that the Board of Trustees of The University of Toledo, at its meeting held on _____, appointed _____ to the University position of _____ at a salary of \$_____ for a period of _____, beginning on _____, and ending on _____. Except as otherwise noted herein, services are to be rendered in conformity with the published calendar of the University.

Services shall be rendered in accordance with pertinent provisions of the Revised Code of Ohio, the Bylaws and established policies of the Board of Trustees, the rules of the University, and such other special conditions, if any, specifically set forth below.

Payment of salaries is contingent upon the availability of funds set forth in the budget adopted by the Board of Trustees.

Special conditions of employment:

President

Date

Accepted: _____

Date: _____

Failure to sign and return this Certificate within thirty days of date shall render void the offer contained herein.

It is necessary, therefore, to apply the tests of an independent contractor to your specific employment situation:

(a) Extent of Control.

The Board of Trustees of the University of Toledo has the right to control the performance of services. The certificate indicates that the parties thereto agree that services are to be rendered in accordance with the bylaws and rules of the University, and under any special conditions the University may prescribe. Albeit the "academic freedom" of an instructor is guaranteed by the Policies and Procedures Manual for the University at Section 3;

"(a) Members of the university faculty and instructional staff are entitled to full freedom in research and in publication of its results, subject to the adequate performance of other academic duties . . .

(b) Any member of the university faculty and instructional staff is entitled to freedom in the classroom in discussing his subject. . . "

This freedom is necessary for maintaining an atmosphere of free exchange of thoughts. However, the procedural duties of conducting a certain number of classes, examining the students, submitting grades and the like, are the duties imposed by the University on a faculty member. Therefore, academic freedom does not negate an employer-employee relationship and thus the University reserves the right of control through its ability to enforce bylaws, rules, and special conditions of employment.

(b) Distinct occupation or business.

The faculty and teaching staff are not engaged in an occupation which is distinct and independent from that of the University. Both are engaged in the business or occupation of educating. By contrast, a practicing attorney who contracts to teach one course in a law

college, while maintaining a private practice, would have a distinct and independent occupation -- the private practice of law. However, within the circumstances at hand, nothing indicates that this is the case.

(c) Kind of occupation, with reference to supervision.

As mentioned above, the occupation of a faculty member is educating and the business of the University is education. The area of a professor's concern may be a specialty; however, the art of teaching a specialty is not unique in an educational institution.

(d) Skill required.

The Ohio Ethics Commission recognizes that particular skill is essential-to teach within a college of law.

(e) Supplies, instrumentalities, tools and place of employment.

Ordinarily the faculty member does not provide his own tools and supplies, and conversely, the University ordinarily supplies the place of work -- classrooms and offices.

(f) Length of time for which the person is employed.

The term of employment is not discernible from the certificate of employment and consequently no opinion can be offered on this particular test.

(g) Method of payment.

This fact cannot be discerned from the certificate of appointment since it does not indicate whether payment is hourly, monthly, for the term, or whatever.

(h) Whether the work is part of the regular business of the employer.

As noted above, the business of both the teacher and the University is to educate students.

(i) Whether the parties believe they are creating the relationship of master-servant.

Your correspondence of January 28, 1975 reflects that you believe that you are not an employee of the University but rather an independent contractor with it. The opinion of the University administration is not easily discerned. However, in reviewing the circumstances enumerated above, it is reasonable to assume that the University administration who set out the terms of the appointment, believed they were creating the relationship of employer-employee. Therefore, from the information available no conclusion can be drawn indicating that both parties shared a similar opinion.

In reviewing the criteria it seems determinative that under the certificate of appointment and the Policies and Procedures Manual, a member of the faculty or teaching staff is not, per se,

engaged in an independent or distinct occupation, and is subject to the University's right to exercise control. Furthermore, education is the principal function of both teacher and university. Thus, teaching staff, appointed under the certificate of appointment, are "employed by" the University, as that phrase is used in Section 102.04 (A) of the Revised Code.

The Commission would be remiss in not mentioning that some criteria examined above indicate an employer-independent contractor relationship. Some examples are; that the faculty member is a highly skilled professional and has academic freedom within classrooms. In balancing the tests, the Commission concludes that the facts require a determination that faculty members and teaching staff, appointed pursuant to the certificate of appointment are employees of the University and thus fall within the purview of Section 102.04 (A) of the Revised Code. This conclusion applies to both full and part-time faculty members assuming no change in circumstances in the tests applied above.

As an employee of a state university, a faculty member is not prohibited by Section 102.04 (A) of the Revised Code from receiving compensation for rendering services as a consultant for a state agency. The Ohio Ethics Commission in Advisory opinion No. 75-010 explained that the phrase "other than from the agency with which he serves," as contained in Section 102.04 (A) of the Revised Code, may be interpreted with the word "agency" read in the plural by virtue of statutory rules of construction. Thus, a state employee may receive compensation from more than one agency of the state without violating the prohibitions of Section 102.04 (A) of the Revised Code.

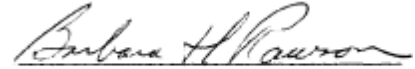
Faculty members as employees would be prohibited from receiving compensation in connection with representation of a private client on a consulting basis in hearings before, or in formal conferences with, state agencies, if such representation constitutes rendering service in a "case, proceeding, application, or other matter . . ." as that phrase is used in Section 102.04 (A) of the Revised Code. That phrase is discussed in Ohio Ethics Commission Advisory Opinion No. 75-006. That Advisory Opinion describes the activities contemplated as quasi-judicial, less than court activities but more than ministerial functions, which are being considered by a state agency.

Presenting testimony on behalf of a private client for compensation constitutes the rendering of service personally. Thus, the receipt of such compensation which is from a source other than the agency with which a person serves is not excepted and consequently is prohibited by Section 102.04 (A) of the Revised Code when that service is rendered before a state agency.

These prohibitions are placed upon a person by virtue of his being "employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state . . ." and continue to apply until the employment relationship is terminated.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised that; a faculty member of the University of Toledo is an employee of a state institution for purposes of Section 102.04 (A) of the Revised Code; Section 102.04 (A) of the Revised Code does not prohibit an employee of a state institution from receiving compensation from more than one agency of the state; Section 102.04 (A) of the Revised Code prohibits an employee of a state

institution from receiving or agreeing to receive, directly or indirectly, compensation from clients, other than state agencies, for any service rendered or to be rendered by him personally in any case, proceeding, application or other matter which is before any agency of the state, excluding the courts.

A handwritten signature in cursive script, reading "Barbara H. Rawson", is written over a horizontal line.

OHIO ETHICS COMMISSION

Barbara H. Rawson, Chairman

