



OHIO ETHICS COMMISSION

150 EAST BROAD STREET

COLUMBUS 43215

(614) 466-7090

Advisory Opinion

No. 75-004

February 26, 1975

Syllabus by the Ohio Ethics Commission:

Members of the Ohio Organized Crime Prevention Council are not, by virtue of that position, prohibited by Section 102.04 (A) of the Revised Code from receiving or agreeing to receive directly or indirectly compensation other than from the agency with which they serve, for services rendered or to be rendered by them personally, in any case, proceeding, application or other matter which is before the General Assembly, or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

* * * * *

Your request for an advisory opinion asks advice as to the propriety of your continued service on the Ohio Organized Crime Prevention Council. You state, by way of history, that you are a lawyer, and in such capacity, you regularly appear before state boards and agencies.

The pertinent Section of Chapter 102 is Section 102.04 (A) of the Revised Code:

"No person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission or bureau of the state, excluding the courts, shall receive or agree to receive directly or indirectly compensation other than from the agency with which he serves for any service rendered or to be rendered by him personally in any case, proceeding, application, or other matter which is before the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts."

The question thus becomes, is a person who serves as a member of the Ohio Organized Crime Prevention Council within the purview of the language of Section 102.04 (A) of the Revised Code wherein it states that "no person elected or appointed to an office of or employed by the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state" The question contains two issues. The first is, whether a "member" is one who is appointed to an "office." The second is whether having been appointed to an "office," is that "office of" the general assembly or any department, division, institution, instrumentality, board, commission, or bureau of the state.

To answer the latter question first, it is necessary to define the terms general assembly, department, division, institution, instrumentality, board, commission or bureau of the state.

The General Assembly, as provided in Article II Section I of the Ohio Constitution, consists of the House of Representatives and the Senate. Thus, one who is a member of the Ohio Organized Crime Prevention Council is not, at least by virtue of holding that position, a member of the General Assembly.

Department is defined in Section 121.01 (A) of the Revised Code as "the several departments of state administration enumerated in Section 121.02 of the Revised Code." Those departments are: the Office of Budget and Management, the Department of Commerce, the Department of Administrative Services, the Department of Transportation, the Department of Agriculture, the Department of Natural Resources, the Department of Health, the Department of Industrial Relations, the Department of Public Welfare, the Department of Liquor Control, the Department of Highway Safety, the Department of Mental Health and Mental Retardation, the Department of Insurance, the Department of Economic and Community Development, the Youth Commission, the Department of Rehabilitation and Correction, and the Environmental Protection Agency. The Ohio Organized Crime Prevention Council is not one of those statutorily enumerated departments.

Division is defined in Section 121.01 (B) of the Revised Code as "a part of a department established as provided in Section 121.07 of the Revised Code for the convenient performance of one or more of the functions committed to a department." The Ohio Organized Crime Prevention Council does not operate within a department, therefore, it cannot be considered a division of one of the administrative departments of the state.

Institution is defined in Section 121.01 (C) of the Revised Code as "departments, offices, and institutions include every organized body, office and agency established by the Constitution and laws of the state for the exercise of any function of the state government, and every institution or organization which receives any support from the state." (Emphasis added). Such a definition is not tenable as it is applied to Chapter 102 of the Revised Code. For example, if such a definition were applied, counties and municipalities who receive state funding would be therefore, a state institution. Furthermore, Section 102.04 (B) of the Revised Code deals specifically with prohibitions placed upon persons who are "elected or appointed to an office or employed by a county, township, municipal corporation, or any governmental entity." It seems reasonable to conclude that there would be no specific subdivision of that section to deal with local institutions, if all local institutions were included in Section 102.04 (A) of the Revised Code, as state institutions, Webster's New World Dictionary, defines institution as "an organization having a social, educational or religious purpose, as a school, church, hospital or reformatory, etc." This definition includes the types of governmental organizations that are popularly considered to be institutions, e.g., universities and hospitals. It would seem correct to apply such a descriptive definition to the term "institution" as it is used in Chapter 102 of the Revised Code.

Instrumentality is not defined in the Revised Code. Ohio Jurisprudence, 2nd Volume 12, Corporations, Page 344, quoting from Merriam Webster's New International Dictionary describes instrumentality in terms of "a quality or state of being instrumental." Ohio case law does not offer a definition of instrumentality. Webster's New World Dictionary's definition of instrumentality is "the condition, quality or fact of being instrumental, serving as a means or agency." The term instrumentality, therefore is very broad and seems to include within its breadth, almost any agency or organizational unit of government.

Board, commission and bureau are terms which have no distinct, separate meanings and are used interchangeably in the Revised Code. For example, in Section 5109.01 of the Revised Code, which has recently been repealed, but serves as an example of legislative style, there appears: ". . . there shall be a board known as a commission for the blind, consisting of seven members." (Emphasis added). In Section 5109.04 of the Revised Code the words commission and bureau are used interchangeably: "The commission for the blind shall act as a bureau of information . . ." (Emphasis added). These are two examples that can be found in the Revised Code where the words commission, board, and bureau seem to be used without regard to any special distinctions applied to the individual terms. For that reason it can be determined that "a board, commission or bureau" is any organizational unit of government to which one of those names has been applied.

The terms "General Assembly," "department," "division," "institution," "board, commission and bureau" do not seem, from their definitions or usage to include the term "council," as it is used in "Ohio Organized Crime Prevention Council." However, the term "instrumentality," which in essence means to serve as a means or agency, is very broad and comprehends any organizational unit of government. "Council" is defined in Black's Law Dictionary, as "the legislative body in the government of cities or bureaus; the advisory body selected to aid the executive; . . . a body appointed to advise and assist the governor in his executive or judicial capacities or both." "Council" is defined in Webster's New World Dictionary as "a group of people called together for consultation, discussion, advice; an administrative, advisory or legislative assembly, or, as an organization or society, or one of its levels of governing bodies." The term "council," therefore, is included in the ordinary usage of the term of "instrumentality" -- and in the term "instrumentality" in Section 102.04 (A) of the Revised Code.

Having determined that a "council," such as the Ohio Organized Crime Prevention Council, would fall within one of the terms in the list set out in Section 102.04 (A) of the Revised Code -- General Assembly, department, division, institution, instrumentality, board, commission, or bureau, it now becomes necessary to determine whether or not a "member" of that council is a person who is "appointed to an office," so as to be included within Section 102.04 (A) of the Revised Code.

Advisory Opinion No. 74-007 determined that a member of a board of elections is an officer and applied certain tests to make that determination. Among those were (1) was he appointed, (2) does he have a title, (3) does he exercise functions of government concerning the public, and (4) is he not subject to a contract of employment. A member of the Ohio Organized Crime Prevention Council is appointed by the governor and does have the title of "member of the Ohio Organized Crime Prevention Council." He is also not subject to a contract of employment. As stated in Advisory Opinion No. 74-007, when referring to the above list of conditions, "no one indicium is determinant all of the time. Generally there exists a combination of factors. Sometimes the exclusion of others not listed is the basis for the determination of holding an 'office.'" Such must also be the case herein. Under the above analysis, a member does appear to be an officer, however, it may be beneficial to examine the concept of holding "office."

The Supreme Court of Ohio in State ex rel Herbert v. Ferguson, Auditor, 142 Ohio St. 496, (1944) held that "a public office of a civil nature, as defined by Ohio Cases, is a charge or trust conferred by public authority for a public purpose, with independent and continuing duties involving in their performance the exercise of sovereign power."

There are several aspects of the above definition which deserve particular attention. One of the most important of these is that an office is conferred by public authority. It is easy to conclude that an Executive Order issued by the Governor is a matter performed with public authority. Supreme executive power is vested in the governor by Article III Section 5 of the Constitution of Ohio.

Another concept which may deserve special attention, in that it seems to reach the heart of the matter, is that there must be the exercise of "sovereign power." The concept of sovereign power originates with the idea that the office is created by public authority, be it executive order, or the Constitution or some statute. Furthermore, it has been held that "if a man is placed in a position which is continuous and permanent and has certain powers which, under the law, only he can exercise; then he has some sovereign power delegated to him." Shaw v. Jones, 40 O.N.P. 372 (1897). A further example of the exercise of sovereign power is contained in the case of State ex rel Milburn et al v. Pethel, 153 Ohio St. 1 (1950) which held that "if a person is empowered to act in those multitudinous cases involving business or political dealings with individuals in the public, wherein the latter must necessarily act through an official agency then such functions are a part of the sovereignty of the state." (Emphasis added) It has been held that the acts which constitute sovereign power are more than mere clerical acts. State ex rel Landis v. Board of Commissioners of Butler County et al, 95 Ohio St. 157 (1917). As the various cases are reviewed, it becomes apparent that "sovereign power" is a concept meant to imply the exercise of duty entrusted to one by virtue of statute or some other public authority. Those duties are not merely clerical but involve some discretionary, decision-making qualities.

It becomes necessary, therefore, to examine the types of duties entrusted to a member of the Ohio Organized Crime Prevention Council in order to determine whether the duties might be classified as an exercise of "sovereign power."

The executive order establishing the Ohio Crime Prevention Council mandates the following duties.

"The duties of the Council shall be:

- (a) develop a clear picture of the nature of organized crime in Ohio, including its pervasive influence in any area of commerce, government, or other activities in which organized crime may be involved. No such activity in Ohio is beyond the purview of this Council;
- (b) evaluate the cause and danger which activities of organized crime represents to the people of Ohio;
- (c) describe conditions from which organized crime breeds and recommend ways to limit those conditions;
- (d) assess the existing capabilities of Ohio law enforcement agencies to deal adequately with the threat of organized crime, and if such capabilities are insufficient, recommend ways to improve;
- (e) develop a comprehensive plan and program development for the suppression of any organized crime presently existing in Ohio and prevention of such crime in the future;
- (f) develop effective means to increase public awareness of the organized crime problem and methods to prevent its spread."
(Emphasis added)

From a review of the duties listed above, the function of the Ohio Organized Crime Prevention Council is to make recommendations. It is given the responsibility to develop a clear picture of the nature of organized crime in Ohio; evaluate the cause and danger which organized crime represents; describe the conditions from which organized crime breeds; assess the capabilities of Ohio law enforcement agencies to develop a plan to suppress organized crime, and develop effective means to increase public awareness. Nowhere in the list of duties is placed the responsibility for implementation of whatever plan the Council may develop. In short, the Council has authority only to recommend and make suggestions.

Reference is made to the case of State ex rel Herbert v. Ferguson supra, which dealt with a commission called the Post War Program Commission, which

among its functions, looked into the development of new state parks. Part of the job of exploring the possibility of new state parks consisted of finding facts and assisting in the formulation of plans and the making of recommendations. In that case the Supreme Court of Ohio held that with regard to these duties, "surely, this cannot be said to constitute the exercise of sovereign power." A similar conclusion must be reached as to the duties performed by the Ohio Organized Crime Prevention Council.

Since, among the current responsibilities of the Ohio Organized Crime Prevention Council there appears to be no exercise of sovereign power, we must conclude that the members of the council have not been appointed to an "office" of the state for purposes of Section 102.04 (A) of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission and you are so advised, that members of the Ohio Organized Crime Prevention Council are not, by virtue of holding that position, prohibited by Section 102.04 (A) of the Revised Code from receiving or agreeing to receive directly or indirectly compensation other than from the agency with which they serve for services rendered or to be rendered by them personally, in any case, proceeding, application, or other matter which is before the General Assembly, or any department, division, institution, instrumentality, board, commission, or bureau of the state, excluding the courts.

Barbara H. Rawson

THE OHIO ETHICS COMMISSION

by (Mrs) Barbara H. Rawson, Chairman