



OHIO ETHICS COMMISSION

150 EAST BROAD STREET

COLUMBUS 43215

(614) 466-7090

Advisory Opinion

No. 75-012

July 1, 1975

Syllabus by the Ohio Ethics Commission:

- 1) Members of the Ohio Constitutional Revision Commission 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, 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.
- 2) Independent contractors of the Ohio Constitutional Revision Commission are not prohibited per se by Section 102.04 (A) of the Revised Code from receiving or agreeing to receive compensation directly or indirectly, for services rendered or to be rendered by them personally in a 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.

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Your request for an advisory opinion asks whether members of the Ohio Constitutional Revision Commission come within the purview of Section 102.04 (A) of the Revised Code. You further ask whether consultants who are employed by the Commission would fall within the purview of Section 102.04 (A) of the Revised Code.

You state by way of history that the Ohio Constitutional Revision Commission was created pursuant to Section 103.51 of the Revised Code for the purpose of studying the Constitution and making recommendations for amendments. You state that it consists of thirty-two persons; twelve legislators and the twenty other public members appointed by the legislative members. Members of the Commission, you comment, do not receive compensation for their services; but are reimbursed for expenses.

The first issue is whether members of the Ohio Constitutional Revision Commission are "appointed to an office of . . . any . . . commission . . . of the state . . ." for purposes of Section 102.04 (A) of the Revised Code. The Ohio Ethics Commission in Advisory Opinion No. 75-004 discusses criteria to be applied in determining whether one has been "appointed to an office." The criteria are: (1) was he appointed; (2) does he have a title; (3) does he exercise a function of government concerning the public; (4) is he not subject to a contract of employment, and; (5) does he exercise "sovereign power." The most significant of these tests is the exercise of sovereign power.

The Advisory Opinion relies on the decision of the Supreme Court of Ohio in State ex rel Herbert v. Ferguson, Auditor, 27 Ohio Op. 415 (1944), at page 417, in which it was determined 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 some portion of the sovereign power." The case involved the Post War Program Commission which explored the possibility of development of new state parks. The Commission explored the possibility of new state parks by finding facts and assisting in the formulation of plans and making recommendations concerning the state parks. The court held that these activities do not constitute the exercise of sovereign power.

A similar conclusion must be reached in regard to the duties of the Ohio Constitutional Revision Commission. Section 103.52 of the Revised Code prescribes the duties of the Commission:

"The members of the Ohio constitutional revision commission shall meet for the purpose of:

- (A) studying the constitution of Ohio;
- (B) promoting an exchange of experiences and suggestions respecting desired changes in the constitution;
- (C) considering the problems pertaining to the amendment of the constitution;
- (D) making recommendations from time to time to the general assembly for the amendment of the constitution. . . ."

The function of reporting to the General Assembly again is mentioned in Section 103.55 of the Revised Code which states:

"The Ohio constitutional revision commission shall make its first report to the general assembly no later than January 1, 1971. Thereafter, it shall report at least every two years until its work is completed."

Since the Ohio Constitutional Revision Commission serves only to study, promote, consider and make recommendations, and also to report to the General Assembly, they do not perform functions which constitute an exercise of sovereign power of the state. Therefore, members of the Ohio Constitutional Revision Commission are not persons who are appointed to an office of a commission of the state for purposes of falling within the purview of Section 102.04 (A) of the Revised Code.

The second issue is whether consultants employed by the Ohio Constitutional Revision Commission fall within the purview of Section 102.04 (A) of the Revised Code. You state that the consultants are attorneys and that three are compensated on an hourly basis for work done for the commission and a fourth receives a fixed fee, paid quarterly. The question regarding these consultants turns upon whether they are "persons . . . employed by . . . any . . . commission . . . of the state . . ." as that phrase is used in Section 102.04 (A) of the Revised Code.

The Ohio Ethics Commission has determined that independent contractors of public agencies are not included in that class of persons described by the phrase "employed by" as used in Section 102.04 of the Revised Code. The rationale is that employees of public entities share in the responsibilities of the public trust exercised principally by their elected and appointed superiors. In this manner employees gain influence and this influence may be used for individual gain which most often is detrimental to the public concern. The more distant a person is from the public trust invested in public officials or public agencies the less likely he is to share in their influence. Therefore, a point must be established beyond which the opportunity to peddle influence is significantly reduced. The Ohio Ethics Commission has determined that when a person is no longer considered an employee, but rather an independent contractor, the point of departure for purposes of influence peddling is reached.

The traditional tests used to distinguish employees from independent contractors are set forth in Gillum v. The Industrial Commission, 25 Ohio Op. 531 (1943), at page 534:

- "(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 or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) 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."

Among those listed above, the primary test for purposes of the ethics legislation is (b) whether the one employed is engaged in a distinct occupation or business. If the person employed has a distinct occupation or business, his association with the employing public authority or agency

and its public trust is obviously distant. Seldom does this test, standing alone, control, however, and the others must be examined as well.

Along with the request for an advisory opinion, you forwarded us a copy of the contract for consultant services used by your commission.

Contract for Consultant Services

The Ohio Constitutional Revision Commission agrees to engage _____, who agrees to render services as a consultant to the Commission on the following terms:

Description of Services

The consultant shall perform such services as are assigned to him by the Director of the Commission, including but not limited to studies of portions of the Ohio Constitution dealing with _____.

Compensation

The consultant shall be paid at the rate of \$ _____ per hour, and shall submit a statement for services rendered each month in which he performs services for the Commission, showing the number of hours worked and the nature of the services performed.

Testimony before Committees; Conflict of Interest

During the term of this contract, except with the advance consent of the Director, the consultant shall not appear before any committee of the General Assembly or either house thereof and testify with respect to any matter dealing with the subject matter of this contract or any subject on which the consultant has worked or is working for the Commission. During the term of this contract, except with the approval of the Director, the consultant shall not be registered with the Secretary of State pursuant to sections 101.71 to 101.78, inclusive, of the Revised Code. The consultant shall notify the Director promptly of any conflict of interest which may occur between services being performed under this contract and services rendered by the consultant to clients in his law practice.

Termination

This contract shall terminate at the completion of studies assigned to the consultant by the Director. The Director or the consultant may terminate this contract at any time prior to termination by giving (7) seven days' notice of termination to the other party.

Date Ohio Constitutional Revision Commission

Date Consultant

It is necessary, therefore, to apply the tests listed above to the contract:

(a) Extent of Control.

The director of the Commission assigns the services to be performed by the consultant. The director must consent to appearances before the General Assembly concerning matters of contract or any subject on which the consultant has worked or is working for the Commission. Consultants are not allowed to be registered lobbyists. The director of the Commission may terminate the contract with 7 days notice.

(b) Distinct occupation or business.

The consultants herein are, as you state, attorneys. The contract implies that they are engaged in the practice of law when it refers to the consultants "clients in his law practice." Therefore, they do indeed have a distinct occupation, that of the practice of law.

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

Nothing in the contract indicates whether the work being done by the consultants is the work typically done by the employees of the commission under supervision, or work done by a specialist without supervision.

(d) Skill required.

Since consultants are hired for their expertise, it would be reasonable to conclude they have a particular skill which is required.

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

This criteria is not applicable to the situation at hand.

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

The contract indicates that termination is based upon completion of the assignment.

(g) Method of payment.

The consultants are paid hourly, not by assignment.

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

It must be assumed that the work done by the consultants, the study of portions of the Ohio Constitution, is the regular business of the Ohio Constitutional Revision Commission.

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

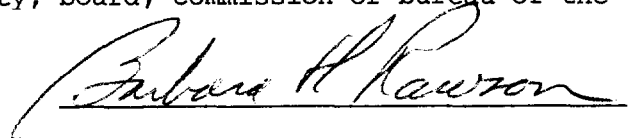
By way of a telephone conversation, Director of the Ohio Constitutional Revision Commission informed the staff of the Ohio Ethics Commission that all parties to the "Contract for Consultant Services" set forth above believed that by entering into said contract they were creating the relationship of employer-independent contractor rather than master-servant. Therefore it must be concluded that the parties do not believe they are creating an employer-employee relationship.

In reviewing the criteria above it seems determinative to note that the consultants are engaged in a distinct occupation, that of attorney, practicing law. Furthermore, no control is exercised over the manner of how a study is conducted by the consultants. The only authority exercised is the assignment of the particular study. The consultant is employed for the length of a particular study only. Thus, the consultants of the Ohio Constitutional Revision Commission are independent contractors. Therefore, in situations where the contract included with your request for an Advisory Opinion is used, consultants of the Ohio Constitutional Revision Commission are independent contractors and do not fall within the purview of Section 102.04 (A) of the Revised Code.

The Commission would be remiss in not mentioning that some of the criteria examined above point to an employer-employee relationship rather than the employer-independent contractor relationship. Some examples are; that the consultants are paid hourly, and that the work to be done is part of the regular work of the agency. These are usually indicia of an employer-employee relationship. In balancing some tests against others, the Ohio Ethics Commission concludes that the weight of the facts requires a determination that consultants, under the contract, are independent contractors.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that members of the Ohio Constitutional Revision Commission 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 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.

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OHIO ETHICS COMMISSION

(Mrs.) Barbara H. Rawson, Chairman