



OHIO ETHICS COMMISSION

150 EAST BROAD STREET

COLUMBUS 43215

(614) 466-7090

Advisory Opinion

No. 75-023

August 19, 1975

Syllabus by the Ohio Ethics Commission:

- 1) Section 102.03 (C) of the Revised Code does not prohibit per se a person from serving as Director of the Ohio Department of Agriculture when he also owns and operates one farm and owns a majority interest in a corporation for which he operates another farm when the Director, personally, and the corporation-owned farm receive licenses from the Ohio Department of Agriculture.
- 2) Section 102.03 (C) of the Revised Code does not prohibit the Director of the Ohio Department of Agriculture from issuing licenses to a corporation to which he and his immediate family have sold goods and services, unless such sale is in excess of \$1000 in the year preceding the license application.

* * * * *

Your request asks whether Section 102.03 (C) of the Revised Code prohibits a person who owns and operates one farm and owns a majority interest in a corporation for which he operates another farm from serving as Director of the Ohio Department of Agriculture (hereinafter Department) when that person, and the corporation-owned farm receive licenses through the Department.

The request states the Director personally holds a grain dealer's license, issued annually through the Department as authorized by Section 926.06 of the Revised Code. The corporation-owned farm operates with a seed dealer's license issued annually through the Department as authorized by Section 907.10 of the Revised Code.

As you state, Section 102.03 (C) of the Revised Code is pertinent to public officials with authority to issue licenses:

"No public official or employee shall participate by a substantial and material exercise of administrative discretion in any license or rate-making proceeding which directly affects the license or rates of any person to whom the official or employee or his immediate family, or a partnership, trust, business trust, corporation or association of which he or his family owns or controls more than five percent, has sold goods or services totaling more than one thousand dollars during the preceding year, unless the official or employee has filed

a written statement acknowledging such sale with the clerk or secretary of the state agency and the statement is entered in any public record of the agency's proceedings. . . . "

To determine if the Director of the Department is within the purview of Section 102.03 (C) of the Revised Code it must be determined whether he is a "public official or employee" as that phrase is defined in Section 102.01 (B) of the Revised Code:

"Public official or employee means any person who is elected or appointed to an elective office or employed by any public agency. . . . "

The Director of the Department is not elected or appointed to an elective office. The question remains, is he an employee of a public agency. The Ohio Ethics Commission in Advisory Opinion No. 75-022 established four tests to determine whether an employer-employee relation exists. They were:

- 1) the selection and engagement of the employee,
- 2) the payment of salary or wages,
- 3) the power of dismissal, and
- 4) the power of control of the employee's conduct.

That Advisory Opinion further stated that none of these tests alone is controlling and must be applied in a balancing manner, although the test of control of the employee's conduct is essential to the employee-employer relationship.

Section 121.03 of the Revised Code provides the Director of the Department ". . . shall be appointed by the governor, with advice and consent of the senate, and shall hold . . . [his] office[s] during the term of the appointing governor but subject to removal at the pleasure of the governor"

Section 121.12 of the Revised Code provides the Director of the Department shall receive a salary, and actual and necessary expenses.

Section 121.07 of the Revised Code provides:

". . . With the approval of the governor, the director of each department shall establish divisions within his department, and distribute the work of the department among such divisions. . . . "

This section along with the governor's power to remove the Director implies the significant amount of control exercised by the governor over the Director.

Thus, the Director of the Department is an employee of a public agency for purposes of Section 102.01 (B) of the Revised Code and therefore within the purview of Section 102.03 (C) of the Revised Code.

Section 102.03 (C) of the Revised Code applies only to a license or rate-making proceeding which directly affects a person to whom the official or employee, or his immediate family or business associations have sold goods or services in excess of \$1000 in the year preceding the license or rate-making proceeding.

The grain dealer's license is not issued to a person to whom the Director, his immediate family or business associates have sold goods or services in excess of \$1000 in the year preceding the license or rate-making proceeding. Thus, the proceeding to issue the grain dealer's license to the Director would not fall within those types of license proceedings controlled by Section 102.03 (C) of the Revised Code.

To determine if the proceeding to issue the seed dealer's license to the corporation-owned farm is within the purview of Section 102.03 (C) it must be determined if the Director, his family or business associations sold goods or services to the corporation in excess of \$1000 in the year preceding the license application.

The Director, as operator of the corporation-owned farm, received less than \$1000 for his services in 1974. However, as owners of the farmland, the Director and his wife received in excess of \$1000 from the corporation in 1974 under the terms of a standard crop-share agreement for the use of the land. Compensation received from the rental of real estate is not compensation received from the sale of goods or services as that term is commonly understood. A rental agreement is not a sale. Thus, neither the Director, his family, nor his business associates sold goods or services in excess of \$1000 to the corporation-owned farm in 1974. Therefore, the corporation-owned farm's seed dealer's license proceeding is not within the purview of Section 102.03 (C) of the Revised Code.

If, however, as suggested in correspondence, the Director receives in excess of \$1000 for his services, from the corporation-owned farm, in 1975, the 1976 proceeding to issue the corporation-owned farm's license would be within the purview of Section 102.03 (C) of the Revised Code. Therefore, the Director could not participate by a substantial and material exercise of administrative discretion in any license or rate-making proceeding which directly affects the license or rates of the corporation-owned farm in 1976, as he would have sold the corporation services in excess of \$1000 in 1975. Section 102.03 (C) of the Revised Code does provide that the official or employee can participate in the license proceeding if a written statement acknowledging the sale of goods or services is filed with the Department and that statement is entered in a public record of the Department's proceedings.

Even though Section 102.03 (C) of the Revised Code does not prohibit the Director from participating in a proceeding to issue a license to himself or a proceeding to issue a license to the corporation-owned farm which he controls and operates, the Ohio Ethics Commission directs your attention to Section 102.03 (D) of the Revised Code. Because of the lack of facts

bearing on this particular inquiry, the Ohio Ethics Commission expresses no opinion with regard to Section 102.03 (D) of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission and you are so advised that Section 102.03 (C) of the Revised Code does not prohibit per se a person from serving as director of the Ohio Department of Agriculture when he also owns and operates one farm and owns a majority interest in a corporation for which he operates another farm when the Director, personally, and the corporation-owned farm receive licenses from the Ohio Department of Agriculture; and, that Section 102.03 (C) of the Revised Code does not prohibit the Director of the Ohio Department of Agriculture from issuing licenses to a corporation to which he and his immediate family have sold goods and services unless such sale is in excess of \$1000 in the year preceding the license application.


OHIO ETHICS COMMISSION

(Mrs) Barbara H. Rawson, Chairman