



OHIO ETHICS COMMISSION

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Advisory Opinion
No. 75-028
November 5, 1975

Syllabus by the Ohio Ethics Commission:

Hearing examiners appointed by the Ohio Civil Rights Commission pursuant to Section 4112.04 (A) (3) of the Revised Code, are independent contractors and therefore not 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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Your request for an advisory opinion asks whether the acceptance of compensation for services rendered to clients in matters before state agencies, boards, and commissions would be violative of Section 102.04 (A) of the Revised Code in the event that you are engaged as a hearing officer for the Ohio Civil Rights Commission.

You state that you have recently been appointed to the roster of potential hearing examiners for the Ohio Civil Rights Commission. You state, also, that you are currently engaged in the general practice of law and represent a number of parties on matters before state agencies, boards, and commissions. Section 102.04 (A) of the Revised Code states:

"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."

Hearing examiners are not within the purview of Section 102.04 of the Revised Code by virtue of being "elected to an office" nor do they appear to be "appointed to an office" of a commission of the state. As stated in 44 O. Jur

2d Public Officers, Section 3, and adopted by the Ohio Ethics Commission in Advisory Opinion No. 75-016, one of the requisites of being "appointed to an office" is that the position to which the appointment is made must be a constitutionally or statutorily created office through which the appointee may exercise sovereign power. Section 4114.04 (A) (3) of the Revised Code enables the Ohio Civil Rights Commission to engage hearing officers and other employees:

"The Ohio Civil Rights Commission shall; . . . (3) appoint hearing examiners and other employees and agents as they deem necessary and prescribe their duties subject to the provisions of Section 124.01 to 124.64 of the Revised Code; . . . "

Thus, the hearing officers are not appointed to an office of a commission of the state but are rather engaged as agents of a commission of the state.

Section 4112.05 of the Revised Code provides that upon a valid complaint of unlawful discriminatory practices, which are not resolved by voluntary compliance eliminating such discriminatory practices, a "hearing before the commission, a member thereof, or a hearing examiner" shall be held. The section further provides that the Commission, members thereof, or a hearing examiner may amend the complaint prior to the hearing, and shall consider all reliable, probative and substantial evidence which tends to prove discriminatory practices. Only the Commission, however, may determine whether the respondent has engaged, or is engaging in an unlawful discriminatory practice and issue an order accordingly.

Rule 17.01 (B) of the Rules and Regulations of the Civil Rights Commission provides specifically:

"The Commission shall consider the written report and recommendation of the person or persons conducting the hearing at any regular or special meeting held not less than 15 days after the date of mailing of such report and recommendation upon all parties as required in Section 17.01 (A). At such time the Commission may order additional testimony to be taken or permit the introduction of additional documentary evidence, in which case all parties shall be notified and given the opportunity to be present in person or by an attorney, and be heard. The Commission may approve, modify or disapprove the recommendation of the person or persons conducting the hearing and shall issue its order accordingly." (Emphasis added)

Thus, hearing examiners of the Civil Rights Commission are not appointed to an office of a commission of the state for purposes of Section 102.04 (A) of the Revised Code, but rather are engaged by the Commission to find facts and recommend conclusions of law which the Commission may approve, modify or disapprove.

The issue of whether hearing officers fall within the purview of Section 102.04 (A) of the Revised Code, thus, 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 Ohio Ethics Commission in Advisory Opinion No. 75-012 applied the following tests to distinguish employees from independent contractors:

- "(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-servant."

The Ohio Ethics Commission in that Advisory Opinion went on to establish, for purposes of the ethics law, as the primary test, (B) whether the one employed is engaged in a distinct occupation or business. The Commission cautioned, however, that seldom does this test, standing alone, control, and other tests must also be examined.

It is necessary, therefore, to apply all of these tests to determine the relationship between the Ohio Civil Rights Commission and its hearing examiners as that relationship is established by three documents: a letter of Notification of Appointment as a hearing examiner; Guidelines of the Ohio Civil Rights Commission for the compensation of hearing examiners; and, a Guide for the conduct of Formal Hearings by Hearing Examiners.

(A) Extent of control.

Although the Ohio Civil Rights Commission provides a guide which establishes the format of the hearings, the determination of facts, conclusions of law and recommendations drawn from the hearings are exclusively within the discretion of the hearing examiners. No control is exercised by the Commission as to what conclusions the hearing examiner reaches or the rationale he uses to reach them.

(B) Distinct occupation or business.

You are an attorney actively engaged in the private practice of law. You therefore have a distinct occupation from that of the Ohio Civil Rights Commission whose duty it is to enforce provisions of Chapter 4112 of the Revised Code.

(C) Kind of occupation with reference to supervision.

All hearing examiners appointed to preside over hearings on complaints filed with the Ohio Civil Rights Commission are practicing attorneys appointed from a roster. They conduct individual hearings, subpoena witnesses, compel their attendance, administer oaths, take testimony, and do all other things relating to the conduct of hearings. The Commission does not monitor the performance of these duties. Furthermore, only attorneys assigned on a case-by-case basis are used as hearing examiners; no full-time employee fulfills this function.

(D) Skill required.

Since the hearing examiners, who are usually attorneys, are hired for their expertise in conducting a hearing, it would be reasonable to conclude that they have a particular skill which is required.

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

The Letter of Notification of Appointment indicates that the hearings are held in the regional offices of the Ohio Civil Rights Commission. The preparation of the report, however, is done after the hearing, and generally at the office of persons serving as hearing examiners. The guidelines for compensation indicate that clerical expenses are not subject to reimbursement. Because the Commission provides the site for the hearings but does not necessarily provide the supplies and instrumentalities needed to prepare the report, no conclusion can be reached with regard to this test.

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

Although the person's name is placed on a list of potential hearing examiners he is actually employed on a case-by-case basis with the amount of time required for each case determined by the length of the hearing and the time required to write an opinion.

(G) Method of payment.

The Guidelines of the Ohio Civil Rights Commission for Compensation of Hearing Examiners indicates that the hearing examiner shall be paid on a per day basis during the actual hearing, and at an hourly rate for preparation of the hearing examiner's report. This method of payment indicates, in general, that a hearing examiner is compensated on a "per job" rather than salary basis.

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

The hearings conducted by the hearing examiners are the regular business of the Commission and in fact a hearing may be conducted by the Commission or a member thereof as well as a hearing examiner.

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

You have indicated that you would not consider your position as hearing examiner that of an employee for but rather that of an independent contractor with the Ohio Civil Rights Commission. The Ohio Civil Rights Commission Letter of Notification of Appointment uses only the term "appointment" and does not indicate whether the Commission considers hearing examiners as employees or independent contractors.

In reviewing the above criteria, it is determinative to note that test (B), whether the one employed is engaged in a distinct occupation, is resolved, in favor of the independent contractor relationship; that is, the hearing examiner has a distinct occupation, as an attorney practicing law. Additional tests supporting the conclusion that the relationship is that of an independent contractor are: 1) there is an absence of control and the hearing examiner exercises total discretion in preparing a report on the case heard; 2) hearing examiners are compensated on a case-by-case basis, paid per day during the actual hearing and at an hourly rate for preparation of the hearing examiner's report, rather than on a salaried basis; and finally, 3) you do not believe that by serving as a hearing examiner, you would become an employee of the Ohio Civil Rights Commission.

The Ohio Ethics Commission, however, would be remiss in not mentioning that some of the criteria examined clearly indicate an employer-employee relationship. For instance, the place where the hearings are conducted is provided by the Ohio Civil Rights Commission, and the conduct of the hearings is a part of the regular business of the Ohio Civil Rights Commission.

Balancing the tests, however, the Ohio Ethics Commission concludes that under the above conditions hearing examiners of the Ohio Civil Rights Commission would be independent contractors.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised that hearing examiners appointed by the Ohio Civil Rights Commission pursuant to Section 4112.04 (A) (3) of the Revised Code, are independent contractors and therefore not 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.

Barbara H. Rawson

OHIO ETHICS COMMISSION

(Mrs) Barbara H. Rawson, Chairman