



OHIO ETHICS COMMISSION

150 EAST BROAD STREET

COLUMBUS 43215

(614) 466-7090

Advisory Opinion

No. 76-001

January 29, 1976

Syllabus by the Ohio Ethics Commission:

A member of a county public defender commission is appointed to a county office and, therefore, within the purview of Section 102.04 (B) of the Revised Code and thus is prohibited from receiving or agreeing 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 any agency, excluding the courts, of the county of which he is an officer.

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Your request for an advisory opinion asks whether an attorney appointed to a county public defender commission would be in violation of Section 102.04 (B) of the Revised Code if he practices before other agencies of the same county.

Section 102.04 (B) of the Revised Code states:

"(B) No person who is elected or appointed to an office of or employed by a county, township, municipal corporation, or any other governmental entity, 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 any agency, department, board, bureau, commission, or other instrumentality, excluding the courts, of the entity of which he is an officer or employee." (Emphasis added)

The issue is whether a person appointed to a newly created county public defender commission would be "appointed to an office of . . . a county" for purposes of Section 102.04 (B) of the Revised Code.

The Ohio Ethics Commission in Advisory Opinion No. 75-004, used several tests to determine whether a person has been appointed to an "office" for purposes of Section 102.04 (A) of the Revised Code: (1) was he appointed; (2) does he have a title; (3) does he exercise functions of government concerning the public; (4) is he not subject to a contract of employment; and, (5) does he exercise sovereign power.

Sovereign power is " . . . a concept meant to imply the exercise of a duty entrusted to one by virtue of statute or some public authority. Those duties are not merely clerical but involve some discretionary, decision-making qualities." That Advisory Opinion held that finding facts, assisting in the formulation of plans and the making of recommendations was not an exercise of sovereign power.

Ohio Ethics Commission Advisory Opinion No. 75-007 applied these same tests to determine "offices" which fall within the purview of Division (B) of Section 102.04 of the Revised Code.

In order to apply these tests to the position of member of a county public defender commission it is necessary to examine the statute establishing the commission. Pursuant to Section 120.13 of the Revised Code the county commissioners may establish a county public defender commission:

"(A) The county commissioners in any county may establish a county public defender commission. The commission shall have five members, three of whom shall be appointed by the board of county commissioners, and two by the judge, or the presiding judge if there is one, of the court of common pleas of the county. At least one member appointed by each of these appointing bodies shall be an attorney admitted to the practice of law in this state. . . .

(C) Of the initial appointments made to the county public defender commission, two appointments by the county commissioners and one appointment by the court shall be for a term of two years ending two years after the date the commission is established, and one appointment by each of the appointing bodies shall be for a term ending four years after the date the commission is established. Thereafter, terms of office shall be of four years . . . "

Section 120.14 of the Revised Code sets out the powers and duties of the commission:

"(A) The county public defender commission shall appoint the county public defender and may remove him from office only for good cause.

(B) The commission shall determine the qualifications and size of the supporting staff and facilities and other requirements needed to maintain and operate the office of the county public defender.

(C) In administering the office of county public defender, the commission shall:

- (1) Recommend to the county commissioners an annual operating budget which is subject to the review, amendment, and approval of the county commissioners;
- (2) Make an annual report to the county commissioners and the Ohio public defender commission on the operation of the county public defender's office, including complete and detailed information on finances and costs, and any other data and information requested by the state public defender.

(3) Cooperate with the Ohio public defender commission in maintaining the standards established by rules of the Ohio public defender commission pursuant to division (B) of section 120.03 of the Revised Code and in its programs providing technical aid and assistance to county systems.

(D) The commission may accept the services of volunteer workers and consultants at no compensation except reimbursement for actual and necessary expenses.

(E) The commission may contract with any municipal corporation, within the county served by the county public defender, for the county public defender to provide legal representation for indigent persons who are charged with a violation of the ordinances of the municipal corporation."

From the above cited Sections, it is clear that members of a county public defender commission meet the tests established to determine if persons are "appointed to an office," since they: (1) are appointed by the County Commissioners; (2) have a title of member of the county public defender commission; (3) exercise a function of government concerning the public -- the establishment and operation of the public defender service for indigents; and (4) are not subject to a contract of employment, but rather serve a specific term of office.

The sovereign power test is met since the Constitutional guarantee to counsel established by the Sixth Amendment of the United States Constitution and applied to the states by the Fourteenth Amendment of the United States Constitution and reaffirmed in Article I, Section 10 of the Ohio Constitution has been interpreted to require government to provide legal counsel to indigents charged with violation of law. Thus, the duty of providing legal counsel to indigents is the exercise of sovereign power delegated by Chapter 120 of the Revised Code to the public defender commissions. Therefore, the public defender commission meets the fifth test of exercising a sovereign power.

The position of member of a county public defender commission meets all five tests established to determine whether the members are appointed to "an office" for purposes of Section 102.04 (B) of the Revised Code, and therefore, the members are appointed to "an office."

In order to determine if the office of member of a county public defender commission is a county office, it is necessary to examine the source and territorial jurisdiction of the commission's power and authority. A review of Sections 120.13 and 120.14 of the Revised Code discloses that county public defender commissioners derive their authority by virtue of their appointment to office by elected county officials -- the county commissioners and a judge of the court of common pleas of the county in which they serve.

The territorial jurisdiction of the county public defender commission is limited to the boundaries of the county which creates the commission and whose elected officials appoint the members. Further, Section 120.18 of the Revised Code provides that the expenses of the county public defender's office shall be audited

and approved by the county commissioners and the county auditor and that except for a fifty per cent reimbursement by the state, the county is responsible for funding the county public defender's office through county funds, gifts, contracts or grants.

Thus, the county public defender commission operates within the structure of and under the supervision of the county government. Therefore, a member of the county public defender commission is a "person . . . appointed to an office of . . . a county" (emphasis added) for purposes of Section 102.04 (B) of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that a member of a county public defender commission is appointed to a county office and, therefore, within the purview of Section 102.04 (B) of the Revised Code and thus is prohibited from receiving or agreeing 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 any agency, excluding the courts, of the county of which he is an officer.



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(Mrs) Barbara H. Rawson, Chairman