



OHIO ETHICS COMMISSION

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Advisory Opinion

No. 76-010

May 11, 1976

Syllabus by the Ohio Ethics Commission:

- 1) A member of an Institution Advisory Council, created pursuant to Executive Order G-12 (Revised January, 1976) of the Ohio Department of Mental Health and Mental Retardation is not a person elected or appointed to an office of or employed by an instrumentality of the state, and therefore, is not subject to the provisions of Sections 102.03 (A) and 102.04 (A) of the Revised Code.
- 2) A member of an Institution Advisory Council, created pursuant to Executive Order G-12 (Revised January, 1976) of the Ohio Department of Mental Health and Mental Retardation is not a "public official or employee" as that term is defined in Section 102.01 (B) of the Revised Code and, therefore, is not subject to the provisions of Divisions (B), (C), and (D) of Section 102.03 of the Revised Code.

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Your request for an advisory opinion asks whether a violation of the ethics law would occur if an attorney served as a member of the Central Ohio Psychiatric Hospital Institution Advisory Council. You state that the Central Ohio Psychiatric Hospital Advisory Council was created pursuant to Executive Order G-12 (Revised January, 1976) of the Ohio Department of Mental Health and Mental Retardation.

No violation of Chapter 102 of the Revised Code, the ethics law, would occur per se when an attorney serves as a member of an Institution Advisory Council. However, Sections 102.03 and 102.04 of the Revised Code prohibit persons who hold public office or who are public employees from engaging in certain types of activities.

Section 102.04 (A) of the Revised Code applies to any "person elected or appointed to an office of or employed by . . . any . . . instrumentality . . . of the state . . ." Section 102.03 (A) of the Revised Code applies to "state officials and employees."

Ohio Ethics Commission Advisory Opinion 76-008 defined the term "state official or employee" to include "persons elected or appointed to an office of or employed by . . . any . . . instrumentality of the state . . ." Thus, Section 102.03 (A) of the Revised Code has been interpreted to apply to the same class of persons as Section 102.04 (A) of the Revised Code.

Executive Order G-12 (Revised January, 1976) of the Ohio Department of Mental Health and Mental Retardation, which created Institution Advisory Councils pursuant to the power vested in that Department to promulgate department rules and regulations by Section 111.15 of the Revised Code, must be reviewed to determine if a member of an Institution Advisory Council is a "person elected or appointed to an office of or employed by . . . any . . . instrumentality of the state . . . "

The term "instrumentality" is defined in Ohio Ethics Commission Advisory Opinion No. 75-004 as "any agency or organizational unit of government." Thus, "any . . . instrumentality of the state . . . " is any agency or organizational unit of the state.

Since the Executive Order which created the Institution Advisory Councils was promulgated by a state department, the Department of Mental Health and Mental Retardation, and since the Institution Advisory Councils are financed by and established to advise state hospitals, institutes, mental health centers, and other facilities under the management of the Department of Mental Health and Mental Retardation, the Institution Advisory Councils are an "instrumentality of the state."

To determine if a member of an Institution Advisory Council is "a person elected or appointed to an office of or employed by . . . any . . . instrumentality of the state . . . " it is necessary to review the provisions of the Executive Order creating the Councils.

Section V, B, 1 of the Executive Order provides that two-thirds of the members of Institution Advisory Councils are appointed by the Mental Health and Mental Retardation Advisory Council and the remaining one-third are appointed by the Institution Advisory Council members appointed by the Mental Health and Mental Retardation Advisory Council. That Section further provides that the members shall serve two year terms. Section V, B, 13 of the Executive Order provides that the members receive no salary and are entitled only to the reimbursement for travel and meals.

Section V, A of the Executive Order describes the duties and functions of the Institution Advisory Council:

"V. SUBJECT CONTENT

A. Description

The Institution Advisory Council shall advise and assist the Managing Officer of the institution and the directors of its various departments in any or all matters pertaining to the planning, administration, and governing of the institution. The matters may include but shall not be limited to:

1. advising the institution of the community's needs for services;
2. advising the institution as to the appropriateness of, but not the professional structure of, various institutional programs;
3. advising the institution of community attitudes toward the institution;
4. communicating to the community institutional needs and programs involving adequate transitional and aftercare programs;
5. being available to the institution's management in the event that difficult problems arise;
6. advising in the areas of personnel problems, budgetary matters, systems and procedures within the institution, institutional policies, and programmatic elements and changes;
7. reviewing any rules or regulations of the institution and advising the Managing Officer and Commissioner as to the appropriateness, content, or wording of such rules and regulations;
8. submitting an annual report of the Institution Advisory Council's activities to the appropriate Commissioner;
9. consulting with regard to the selection, appointment, or removal of the Managing Officer;
10. recommending service priorities for future program development based on unfulfilled client and community needs;
11. serving as advocate for clients and their families and providing a method for serving in this capacity; and
12. communicating, if deemed necessary, with the District Manager, Governor, Legislature, 648 Board(s), 169 Board(s), and Department." (Emphasis added)

From the above quoted Section of Executive Order G-12 (Revised January, 1976) it is clear members of Institution Advisory Councils are not elected.

The next issue to be determined is whether the members are "appointed to an office of an instrumentality of the state" or "employed by an instrumentality of the state" and thus within the purview of Section 102.03 (A) and 102.04 (A) 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 described in that Advisory Opinion as, ". . . 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 went on to hold that finding facts, assisting in the formulation of plans and the making of recommendations was not the exercise of sovereign power.

From the Sections of the Executive Order discussed above, it is clear a member of an Institution Advisory Council is 1) appointed; 2) has the title of member of an Institution Advisory Council; 3) exercise a function of government concerning the public; and, 4) is not subject to a contract of employment.

After reviewing the duties and functions of the Institution Advisory Councils established by Section V, A it is also clear that the members of the Institution Advisory Councils functions only in an advisory or consulting capacity and, therefore, do not exercise sovereign power. Thus, although the members of Institution Advisory Councils meet the first four tests of being appointed to an "office," since Institution Advisory Councils do not exercise sovereign power the members are not "appointed to an office" for purposes of Sections 102.03 (A) and 102.04 (A) of the Revised Code.

Having determined that members of Institution Advisory Councils are not elected or appointed to an office of an instrumentality of the state, it remains to be determined if they are employed by an instrumentality of the state and, thus, subject to Sections 102.03 (A) and 102.04 (A) of the Revised Code.

Ohio Ethics Commission Advisory Opinion No. 75-022 established four tests to determine if an employee-employer relationship exists:

- 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 went on to hold that "these tests are applied in a balancing manner and no single test is determinative, although the test of 'control of the employee's conduct' is essential to an employer-employee relationship."

Reviewing Executive Order G-12 (Revised January, 1976) and applying the employee-employer relationship tests set out above, it may be determined that:

- 1) the members of the Institution Advisory Councils are selected and engaged either by the Department of Mental Health and Mental Retardation Council or by the members of the Institution Advisory Council itself;
- 2) The members do not receive a salary or wages;
- 3) the members may be dismissed from the Council only for their failure to attend three consecutive meetings; and,
- 4) the Department of Mental Health and Mental Retardation exercises no control over the manner in which the members of Institution Advisory Councils perform those duties and functions prescribed in Section V, of the Executive Order other than to provide in Section V, B, 4 and 5 of the Executive Order that the meetings of the Institution Advisory Council be held once every two months with 10 days notice to the members prior to every meeting except special meetings in which case 10 days notice is not required and that the meetings shall be open to the public.

The requirements of regular meetings are procedural and are not an indication of control by the Department of Mental Health and Mental Retardation over an Institution Advisory Council member's conduct in the performance of his duties.

Thus, members of Institution Advisory Councils clearly do not meet three of the four tests of an employee-employer relationship; they do not receive wages or a salary, they are not subject to dismissal at the discretion of the Department of Mental Health and Mental Retardation, and the Department does not exercise control over the Institution Advisory Council members in the performance of their duties and functions. Since three of the four employee-employer tests are not met, members of Institution Advisory Councils are not employees of an instrumentality of the state.

A member of an Institution Advisory Council is not a "person elected or appointed to an office of or employed by . . . any . . . instrumentality . . . of the state . . ." (Emphasis added) Therefore, a member of an Institution Advisory Council is not of the class of persons to which Sections 102.03 (A) and 102.04 (A) of the Revised Code apply.

The three other Divisions of Chapter 102 of the Revised Code which affect the conduct of certain persons holding public office or employed by a public agency are Divisions (B), (C), and (D) of Section 102.03 of the Revised Code.

These Divisions of Section 102.03 of the Revised Code apply to "public officials and employees" as that term 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." (Emphasis added)

As determined in the previous discussion of Executive Order G-12 (Revised January, 1976), members of Institution Advisory Councils are not elected to an office of, nor are they employed by, any public agency of the state. The members are not appointed to an elective office since the position of member of an Institution Advisory Council is one which may only be obtained through an appointment, not an election.

Thus, an Institution Advisory Council member is not a "public official or employee" as that term is defined in Section 102.01 (B) of the Revised Code and not of the class of persons to which Divisions (B), (C), and (D) of Section 102.03 applies.

Therefore, it is the opinion of the Ohio Ethics Commission and you are so advised that a member of an Institution Advisory Council, created pursuant to Executive Order G-12 (Revised January, 1976) of the Ohio Department of Mental Health and Mental Retardation is not a person elected or appointed to an office of or employed by an instrumentality of the state and, therefore, is not subject to the provisions of Section 102.03 (A) and 102.04 (A) of the Revised Code; and that a member of an Institution Advisory Council, created pursuant to Executive Order G-12 (Revised January, 1976) of the Ohio Department of Mental Health and Mental Retardation is not a "public official or employee" as that term is defined in Section 102.01 (B) of the Revised Code and, therefore, is not subject to the provisions of Divisions (B), (C), and (D) of Section 102.03 of the Revised Code.

Merom Brachman

OHIO ETHICS COMMISSION

Merom Brachman, Chairman