



OHIO ETHICS COMMISSION

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Advisory Opinion No. 75-027

September 24, 1975

Syllabus by the Ohio Ethics Commission:

- 1) A faculty member who is employed by Ohio State University is prohibited by Section 102.04 (A) of the Revised Code from receiving compensation, other than from Ohio State University, for preparing and presenting testimony in a rate-making proceeding before the Public Utilities Commission of Ohio.
- 2) A faculty member who is employed by the University of Cincinnati is not an employee of a state institution and, therefore, not prohibited by Section 102.04 of the Revised Code from receiving compensation for preparing and presenting testimony in a rate-making proceeding which is before the Public Utilities Commission of Ohio.

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Your request for an advisory opinion asks whether a professor from Ohio State University (hereinafter OSU) and a professor from the University of Cincinnati (hereinafter UC) may prepare and render testimony before the Public Utilities Commission of Ohio (hereinafter PUCO) in rate-making proceedings without violating the provisions of Chapter 102 of the Revised Code.

You state that Cincinnati Bell, Inc. utilizes the services of two professors as expert witnesses in PUCO rate-making proceedings held pursuant to Chapter 4909 of the Revised Code. One is a professor at OSU and the second is a professor at UC.

The pertinent provisions of the Ohio ethics law is Section 102.04 (A) and (B) of the Revised Code:

"(A) 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.

(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."

The issue is whether a professor at OSU and a professor at UC is a person comprehended by Division (A) of Section 102.04 of the Revised Code.

Ohio Ethics Commission Advisory opinion No. 75-015 determined that a faculty member of the University of Toledo is an employee of a state university for purposes of Section 102.04 (A) of the Revised Code. Under parallel circumstances outlined in your request it is important to determine whether the institutions employing the professors are state or municipal institutions to answer the question whether the persons are "employed by . . . any . . . institution . . . of the state . . ." and therefore within the purview of Section 102.04 (A) of the Revised Code, or "employed by a . . . municipal corporation . . ." and therefore within the purview of Section 102.04 (B) of the Revised Code.

OSU is established statutorily in Chapter 3335 of the Revised Code. Section 3335.01 of the Revised Code designates the name of the educational institution as "The Ohio State University." The appointment of the nine members of the Board of Trustees by the Governor is provided for in Section 3335.02 of the Revised Code. Section 3345.011 of the Revised Code provides that:

"'State University' means a public institution of higher education which is a body politic and corporate. Each of the following institutions of higher education shall be recognized as a state university: . . . Ohio State University....." (Emphasis added)

Thus, OSU is a state institution and persons employed by OSU would fall within the purview of Section 102.04 (A) of the Revised Code.

The next issue is whether the professor at OSU, as a person "employed by" OSU, is an independent contractor or an employee.

Ohio Ethics Commission Advisory Opinion No. 75-012 held that independent contractors are not comprehended within the term "employed by" as that phrase is used in Section 102.04 of the Revised Code. The Opinion stated that certain tests are applied to distinguish independent contractors and employees:

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

That opinion further holds that "the primary test for purposes of the ethics legislation is (b) whether the one employed is engaged in a distinct occupation or business. . . . Seldom does this test, standing alone, control, however, and the others must be examined as well."

The Ohio Ethics Commission in Advisory Opinion No. 75-015 examined the employment status of a faculty member of the University of Toledo, a state institution. The examination of employment status consisted of a review of the faculty member's certificate of appointment, the By-laws and established policies of the Board of Trustees, and the rules of the University. After scrutinizing the terms of employment set out in these documents and applying the tests used to distinguish an independent contractor from an employee, it was determined that the faculty member was an employee. After examining parallel documents pertinent to the circumstances herein, the Ohio Ethics Commission determines that the terms of employment, as reflected in the Notice of Appointment and the Rules of the University Faculty of OSU, are substantially the same as those discussed in Ohio Ethics Commission Advisory opinion No. 75-015. Therefore, the result is the same and a faculty member at OSU is an employee of an institution of the state within the purview of Section 102.04 (A) of the Revised Code.

The original correspondence requesting an advisory opinion notes that the OSU professor has obtained tenure status, a fact pointed out to reflect a position more akin to an independent contractor. The Rules of the University Faculty, at page 12, describes tenure in Rule 21.05 as: ". . . an attribute of all academic ranks, subject to a period of probation . . . It is terminable only by voluntary formal resignation, by retirement, by death, or for incompetence, grave misconduct or for causes set forth in Rule 21.03. . . ." Thus, the status of tenure given a faculty member is a more open-ended employment situation, which is typically an attribute of an employee.

Faculty members as employees of an instrumentality of the state would be prohibited from receiving compensation in connection with representation of a client other than the state, on a consulting basis in hearings before, or in formal conferences with, state agencies, if such representation constitutes rendering service in a "case, proceeding, application, or other matter" as that phrase is used in Section 102.04 (A) of the Revised Code. The quoted phrase, discussed in Ohio Ethics Commission Advisory Opinion No. 75-006, describes the activities as quasi-judicial, less than court activities but more than ministerial functions, which are being considered by a state instrumentality.

The Ohio Ethics Commission in Advisory opinion No. 75-017 described the extent to which the exemption for ministerial functions would apply to an application made to the PUCO:

". . . once the application for a permit or license is filed it is being considered by, judged by, decided by, in the presence of, and within the official purview of the Public Utilities Commission of Ohio and therefore is an 'application . . . before' as that phrase was defined in Ohio Ethics Commission Advisory Opinion No. 75-006. Therefore, the receipt

of compensation for services rendered after the application for a permit or license is filed is prohibited by Section 102.04 (A) of the Revised Code. . . ."

Thus, if an application has been filed, the ministerial function of "filing an application" has been accomplished. Activities which follow, unless they could also be described, in common parlance, as "ministerial," are the ones for which receipt of compensation is prohibited.

The preparation prior to the rendering of testimony during a quasi-judicial hearing before a state agency was held not to be a ministerial function in Ohio Ethics Commission Advisory Opinion No. 75-017 which held that:

"Such service is not rendered in a prescribed manner and without regard to exercise of the attorney's judgment."

Therefore, since a PUCO hearing is a quasi-judicial hearing, the preparation and rendering of testimony by a faculty member in a PUCO hearing is the type of activity which requires the same conclusion. Such services cannot be described as ministerial. Thus, the receipt of compensation for the rendering of those services from a source other than a state agency is prohibited by Section 102.04 (A) of the Revised Code.

The next issue is whether UC, like OSU, is a state institution.

UC is established under Article VI of the Charter of the City of Cincinnati. That article vests all "powers which are now or may hereafter be conferred upon them by the laws of the State of Ohio" on the nine member Board of Directors. This corresponds to statutory requirements set forth in Sections 3349.01 and 3349.02 of the Revised Code which direct that administration and management of municipal universities be vested in the nine members of a board of directors.

State universities, on the other hand, are those universities delineated in Section 3345.011 of the Revised Code, cited above, which does not include UC.

Thus, UC would appear to be a municipal university. However, the issue is clouded, somewhat, by the fact that the UC Board of Directors has entered into an agreement with the Ohio Board of Regents as provided in Section 3349.31 of the Revised Code. Such agreements allows for:

". . . the establishment and operation or . . . the continued operation by said board of directors, with the sponsorship and support of the state and the municipal corporation, of one or more, colleges, departments, or other instructional units, or portions thereof, referred to as 'affiliated units' in sections 3349.31 to 3349.55, inclusive, of the Revised Code, conditioned upon the continued provision of state financial aid to such municipal university. . . ."

The status of a university which enters into such an agreement requires further inspection because of Section 3349.33 of the Revised Code:

"The municipal university with which an agreement exists under sections 3349.31 to 3349.33, inclusive, of the Revised Code shall be deemed to be an instrumentality also of the state serving as a state-affiliated institution for the higher education of the people of the state. . ." (Emphasis added)

The question of the status of UC has arisen recently in light of new legislation, Section 3743.01 of the Revised Code, which establishes the Ohio Court of Claims to hear claims against the state and its institutions, which prior to this law enjoyed immunity from liability under the theory of sovereign immunity. The Attorney General of Ohio in 1974 Op. Att'y. Gen. No. 098 addressed the question of whether state universities may purchase liability insurance after the inception of the new claims procedures and noted the exception for UC as a municipal university:

"Therefore, except in those instances when the purchase of liability insurance is expressly authorized, the board of trustees of a state university may not purchase liability insurance for the university or its employees.

Although the foregoing conclusion applies to all state universities, it does not apply to those universities which are essentially municipal universities receiving substantial state aid. Because of the special status of municipal universities, they possess certain powers which are not available to other publicly supported universities

. . . Currently, the University of Cincinnati is the only municipal university in Ohio. It is clear, therefore, that the University of Cincinnati may purchase liability insurance for itself and its employees. . . ." (Emphasis added)

This conclusion by the Attorney General becomes more sound when all of Section 3349.33 of the Revised Code, which includes the language "instrumentality also of the state cited above, is examined in its entirety:

"The municipal university with which an agreement exists under sections 3349.31 to 3349.33, inclusive, of the Revised Code shall be deemed to be an instrumentality also of the state serving as a state-affiliated institution for the higher education of the people of the state, provided that the conduct of such university, including its affiliated units, shall in all respects continue to be under applicable provisions of the law governing municipal universities and without limitation of the foregoing. Section 3349.30 of the Revised Code is applicable to sections 3349.31 to 3349.33, inclusive, of the Revised Code, and agreements made thereunder." (Emphasis added)

The emphasized language above indicates, that, although there is some difficulty in drawing the distinction between state and municipal, the overall thrust of the section is to maintain the characterization of the university as a municipal institution.

Another point supporting this conclusion is that the legal representation of the university is provided by the Cincinnati City Solicitor's Office, as per Section 3349. of the Revised Code. State universities are not represented by city solicitors.

Finally, of the nine members of the Board of Directors of UC, five of them are appointed by the Mayor, while four are appointed by the Governor pursuant to Section 3349.02 of the Revised Code. Thus, the directors appointed by the Mayor, who must reside within Hamilton County, carry a majority vote on the board -- essentially controlling the board.

For all of the above reasons the Ohio Ethics Commission determines that, for purposes of Section 102.04 of the Revised Code, the University of Cincinnati is a municipal institution.

It is, therefore, not necessary to determine whether the professor who is teaching at UC is an employee of or an independent contractor of the University, since the activity for which he is seeking compensation is before an agency of the state, PUCO. Section 102.04 of the Revised Code does not prohibit a person who serves with a municipal institution from receiving compensation for rendering services on a matter before a state agency.

Therefore, it is the opinion of the Ohio Ethics Commission and you are so advised that: a faculty member who is employed by Ohio State University is prohibited by Section 102.04 (A) of the Revised Code from receiving compensation, other than from Ohio State University, for preparing and presenting testimony in a rate-making proceeding before the Public Utilities Commission of Ohio; and, a faculty member who is employed by the University of Cincinnati is not an employee of a state institution and, therefore, not prohibited by Section 102.04 of the Revised Code from receiving compensation for preparing and presenting testimony in a rate-making proceeding which is before the Public Utilities Commission of Ohio.

Barbara H. Rawson

OHIO ETHICS COMMISSION

by (Mrs) Barbara H. Rawson, Chairman

