



OHIO ETHICS COMMISSION

THE ATLAS BUILDING
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Advisory Opinion Number 85-005
June 20, 1984

Syllabus by the Commission:

A member of the Technical Advisory Committee to the Coal Development Office of the Department of Development is not a "public official or employee" for purposes of Chapter 102. and Section 2921.42 of the Revised Code.

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You asked whether the Ohio Ethics Law and related statutes would prohibit an officer of a subsidiary of an electric power company from serving as a member of the Technical Advisory Committee to the Coal Development Office of the Department of Development, if the subsidiary will be submitting research and development proposals to the committee for review and recommendation.

You stated, by way of history, that you are the assistant vice president for mechanical engineering of a subsidiary of an electric power company. You stated further that you have been appointed as a member of the Technical Advisory Committee (hereinafter Committee), which advises the Coal Development Office of the Department of Development (hereinafter Department) on a number of matters, including research and development projects. You indicated that the Committee only has an advisory role, and that the Director of the Coal Development Office has the power to make decisions. You asked whether the Ohio Ethics Law and related statutes would prohibit you from serving on the Committee, provided that you refrain from participating in any committee or subcommittee discussion or vote concerning a proposal submitted by your firm.

The threshold question is whether a member of the Committee is a "public official or employee" subject to the prohibitions of the Ohio Ethics Law and related statutes. Division (B) of Section 102.01 of the Revised Code provides, in pertinent part:

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

Division (A) of Section 2921.01 of the Revised Code provides the following:

"Public official" means any elected or appointed officer, or employee, or agent of the state or any political subdivision thereof, whether in a temporary or permanent capacity, and including without limitation legislators, judges, and law enforcement officers.

Members of the Committee are appointed by the Director of the Coal Development Office, the Speaker of the House of Representatives, and the President of the Senate pursuant to Section 1551.35 of the Revised Code. Therefore, it is important to determine whether they are appointed to an office of the state.

Under Ohio law, a person who holds an "office" is an "officer." In the case of Muskingum County Democratic Executive Committee v. Burrier, 31 Ohio Op. 570 (C.P. Muskingum 1945), the Court held the following:

The terms "officer" and "office" are paronymous, and in their original and proper sense, are to be regarded as strictly correlative The thought running through every definition of an officer is that he shall perform some service or owe some duty to the government, state, or municipal corporation, and not merely to those who appoint or elect him. His tenure must be defined, fixed, and certain, and not arising out of a mere contract of employment. *Id.* at 572.

Thus, an officer has a fixed tenure, and he performs a service or owes a duty to the government.

In addition, there are a number of other factors in determining whether a position is a public office. In State ex rel. Landis v. Butler, 95 Ohio St. 157 (1917), the Supreme Court of Ohio stated the following:

The usual criteria in determining whether a position is a public office are durability of tenure, oath, bond, emoluments, the independency of the functions exercised by the appointee, and the character of the duties imposed upon him. But it has been held by this court that while an oath, bond and compensation are usually elements in determining whether a position is public office, they are not always necessary The chief and most decisive characteristic of a public office is determined by the quality of the duties with which the employee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment. *Id.* at 159.

Consequently, it appears that among the many factors, the essential requirement is that the law confers on an officer certain duties that involve the exercise of the "sovereign power" of the state. In its opinion, the Court provides a more explicit discussion of the concept:

If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with the independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessary act through an official agency, then such functions are a part of the sovereignty of the state. *Id.* at 160.

Therefore, the Court identified certain activities undertaken on behalf of the state or a political subdivision that involve the exercise of "sovereign power."

This opinion is supported by other cases and advisory opinions. In State ex rel. Herbert v. Ferguson, 142 Ohio St. 496 (1944), the Supreme Court of Ohio stated that "a public office of a civil nature, as defined by Ohio cases, is a charge or trust conferred by public authority for a public purpose, with independent and continuing duties involving in their performance the exercise of sovereign power." In Advisory Opinion No. 75-004, the Commission cited this case and others in discussing the concept of sovereign power:

As the various cases are reviewed, it becomes apparent that "sovereign power" is a concept meant to imply that the exercise of duty entrusted to one by virtue of statute or some other public authority. These duties are not merely clerical but involve some discretionary, decision-making qualities.

Pursuant to Section 1551.35 of the Revised Code, Committee members do not have a fixed tenure; they serve at the pleasure of their appointing authorities. Also, the Committee members appointed by the Director of the Coal Development Office, which include the individual in question, are uncompensated, except for actual and necessary expenses in the performance of their duties. However, the crucial factor is the nature of the powers and duties exercised by the Committee.

Division (B) of Section 1551.33 of the Revised Code provides, in pertinent part:

(B) The director of the office shall:

...

(8) review, with the assistance of the technical advisory committee, research and development projects submitted to the office by public utilities for the purposes of division (H) of section 4909.05 and section 4909.157 [4904.15.71 of the Revised Code. If the director and the advisory committee determine that any such project has as its purpose the enhanced use of Ohio coal in an environmentally acceptable, cost effective manner, promotes energy conservation, is cost effective, and is environmentally sound, the director shall approve the project for the purposes of division (H) of section 4909.05 and section 4909.157 [4909.15.7] of the Revised Code.

Although both the director and the TAC must determine that a project has merit under the statute, final approval is by the director. Also, Section 1551.35 provides that TAC shall review and make recommendations on the coal development agenda, project proposals under Section 1554.34 of the Revised Code, research and development projects, and other topics that the director considers appropriate. Based on these powers and duties, we conclude that the Committee's role is advisory and not the exercise of the sovereign power of the state. Thus, a Committee member is not "appointed to an office of the state."

In addition, a Committee member is not an employee of the Department or any agency of the state because he does not sell his services or serve under an employment contract with the state. He is not an "agent" because the state has not delegated the Committee the authority to act on its behalf, and the state cannot be bound without the authorization of the Director of the Coal

Development Office. As a result, a Committee member is not a "public official or employee" as defined in Division (B) of Section 102.01 and Division (A) of Section 2921.01 of the Revised Code, and the prohibitions of Chapter 102. and Section 2921.42 of the Revised Code would not apply.

It should be noted that the Committee, as well as a number of other boards and commissions created by the General Assembly in recent years, is required to have representation of certain business, labor, governmental, educational, and environmental interests that can provide necessary support, expertise, or resources to the Department. Many times, these individuals represent institutions that are likely to seek participation in the same programs on which their representatives advise the government. This may create an inherent conflict of interest, particularly when the board or commission is required to recommend the expenditure of public funds in the form of loans or grants. It would create the appearance of impropriety for a Committee member to participate in formal or informal discussions or vote on any proposal in which he or his institution has an interest. In addition, it may appear to the general public or to unsuccessful applicants competing for funds that Committee members or their institutions receiving funding from the Coal Development Office or the Department of Development had an unfair advantage in the process.

The conclusions of this opinion are based on the facts presented, and are limited to questions arising under Chapter 102. and Section 2921.42 of the Revised Code.

Therefore, it is the opinion of the Commission, and you are so advised, that: A member of the Technical Advisory Committee to the Coal Development Office of the Department of Development is not a "public official or employee" for purposes of Chapter 102. and Section 2921.42 of the Revised Code.


Robert Y. Farrington, Chairman
OHIO ETHICS COMMISSION