

**OPINION NO. 70-108****Syllabus:**

The Ohio Civil Rights Commission may file an affidavit to cause the prosecution of a suspected violator of Sections 4112.02 (H), 4112.07 or 4112.11, Revised Code, at such time as the Commission has a knowledge of the facts, but only the trial judge of a court of competent jurisdiction may impose the penalties as provided by Section 4112.99, Revised Code, after the trial and conviction of an accused violator.

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**To: Ellis L. Ross, Director, Ohio Civil Rights Commission, Columbus, Ohio**  
**By: Paul W. Brown, Attorney General, August 26, 1970**

Your request for my opinion regarding Section 4112.99, Revised Code, as it relates to the Commission procedure in employing said section in terms of imposing the fines provided, presents the following inquiries:

"1. Who may impose such penalties as provided by law?

"2. Does the law give the Commission authority to impose fines for criminal or civil violations?

"3. Does the Commission have to petition the courts to have such fines imposed?

"4. At what point would it be proper (if at all) for the Commission to move or petition for the imposition of fines for the above referenced violations?

"a. Immediately upon a finding of Probable Cause?

"b. Immediately upon the issuance of a Cease and Desist Order?

"c. Only after ultimate support by the courts (i.e., Common Pleas, Appellate, Supreme)?"

Section 4112.99, Revised Code, provides that:

"Whoever violates division (H) of section 4112.02, section 4112.07, or 4112.11 of the Revised Code shall be fined not less than one hundred nor more than five hundred dollars."

The answers to the first two questions presented in your request require an analysis of the nature of the penalty provided by Section 4112.99, supra. The Supreme Court of Ohio held in *State v. Schlattenbeck*, 39 Ohio St. 268, 270, (1883), that conduct which is prohibited by a legislative enactment is punishable as a crime. The "not less than one hundred nor more than five hundred dollars" prescribed by Section 4112.99, supra, as the penalty for violations of Sections 4112.02 (H), 4112.07, or 4112.11, Revised Code, is determinative of the fact that the offenses described by these sections are misdemeanors according to the definition of a misdemeanor found in Section 1.06, Revised Code. "Offenses which may be punished by death or by imprisonment in the penitentiary are felonies; all other offenses are misdemeanors." Because the offenses in question are criminal, they must be tried in a court of competent jurisdiction.

Section 2945.17, Revised Code, provides that:

"At any trial, in any court, for the violation of any statute of this state, or any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of fifty dollars, the accused has the right to be tried by a jury."

Thus, in answer to your first two questions, the fine imposed by Section 4112.99, supra, may be imposed, not by the Ohio Civil Rights Commission, but by a court of competent jurisdiction, upon the conviction of the accused after a full trial. The procedures prescribed in Section 4112.06, Revised Code, for the enforcement of a final order of the Commission would not, if that order included the imposition of such a fine, be adequate to preserve to the defendant his right to a jury trial as guaranteed by Sections 5 and 10, Article I of the Constitution of Ohio, and Section 2945.17, supra, when the possible penalty exceeds, as it does in this case, the fifty dollar standard. The law (Section 4112.99, supra), does not

give the Commission authority to impose fines for criminal or civil violations.

In the event that the object of the Commission, in dealing with a suspected violator, is to have a fine imposed against him, the only avenue available is to proceed pursuant to Section 2935.09, Revised Code, which provides:

"In all cases not provided by sections 2935.02 to 2935.08, inclusive, of the Revised Code, in order to cause the arrest or prosecution of a person charged with committing an offense in this state, a peace officer, or a private citizen having knowledge of the fact, shall file with the judge or clerk of a court of record, or with a magistrate, an affidavit charging the offense committed, or shall file such affidavit with the prosecuting attorney or attorney charged by law with the prosecution of offenses in court or before such magistrate, for the purpose of having a complaint filed by such prosecuting or other authorized attorney."

To instigate the prosecution of a suspected violator, either the Commission or the complainant may file an affidavit in accordance with the above section. Investigators of the Commission will be held to qualify as "peace officers" within the meaning of the statute. See State v. Calvin, 19 Ohio St. 2d 86 at 92, 93 (1969). Section 2935.09, supra, requires only that one who files an affidavit have "knowledge of the facts." The Commission would have sufficient knowledge of the facts to file an affidavit after a finding of probable cause; however, the policy of endeavoring to eliminate illegal practices by informal methods as dictated by Section 4112.05, Revised Code, would indicate that the filing of the affidavit might more appropriately be delayed until the issuance of a final order. Postponing the filing of an affidavit until after hearing will tend to insure against wrongful prosecution and thereby further the interests of judicial economy by not burdening the courts with what might prove to be unnecessary litigation.

Thus, in answer to your third and fourth inquiries, the Commission, in order to have a fine imposed, must file an affidavit to launch a criminal prosecution and see the accused convicted. It should be pointed out that the penalty to be imposed after the conviction of the accused is left to the discretion of the trial judge and is subject only to the statutory limitation. Therefore, it would, at all stages of the prosecution, be improper for the Commission to move or petition for the direct imposition of fines for violations of Sections 4112.02 (H), 4112.07, or 4112.11, Revised Code.

In conclusion, it is my opinion and you are hereby advised that the Ohio Civil Rights Commission may file an affidavit to cause the prosecution of a suspected violator of Sections 4112.02 (H), 4112.07 or 4112.11, Revised Code, at such time as the Commission has a knowledge of the facts, but only the trial judge of a court of competent jurisdiction may impose the penalties as provided by Section 4112.99, Revised Code, after the trial and conviction of an accused violator.