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THE STATE DEPARTMENT OF HEALTH AND THE VARIOUS GENERAL CITY HEALTH DISTRICTS DO NOT FALL WITHIN THE DEFINITION OF "PERSONS" AND ARE NOT SUBJECT TO LICENSING UNDER THE "DANGEROUS DRUG ACT"—A WHOLESALER, MANUFACTURER, OR DISTRIBUTOR MAY SELL DANGEROUS DRUGS TO SUCH AGENCIES WITHOUT BEING SUBJECT TO PROSECUTION AND FINE—THE FEDERAL GOVERNMENT IS NOT A "PERSON" AND THEREFORE IS NOT SUBJECT TO PROVISIONS OF THE "DANGEROUS DRUG ACT"—§§4729.50 (A) 1.02 (B), 4729.50 (I), 4729.54, 4729.51 (G), 4112.01, 5739.01 (A), REVISED CODE, 51 (G).

SYLLABUS:

1. The state department of health and the various general and city health districts do not fall within the definition of "person" as set forth in Section 4729.50 (A), Revised Code, and thus not being made specifically subject to the provisions of Sections 4729.50 to 4729.66, inclusive, Revised Code, are not required to comply with such sections.

2. The department of health and general and city health districts, not being subject to the provisions of said Sections 4729.50 to 4729.66, inclusive, a wholesaler, manufacturer, or distributor may sell dangerous drugs to such agencies without being subject to prosecution and fine under those provisions of law.

3. The federal government is not a "person" as that term is defined in Section 4729.50 (A), Revised Code, and agencies of the federal government are not subject to the provisions of Sections 4729.50 to 4729.66, inclusive, Revised Code.

Columbus, Ohio, January 24, 1962

Ralph E. Dwork, M.D., Director
Department of Health
Ohio Departments Building,, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

"This Department has received a number of requests from city and general health districts concerning their status under the 'Dangerous Drug Act,' sections 4729.50 to 4729.66, inclusive, of the Revised Code, which was enacted at the last session of the General Assembly.

“In the normal course of their operations, our local health districts receive, purchase, and distribute and/or use these ‘dangerous drugs.’ The same is true with regard to this Department. It might be noted that neither this Department nor local departments sell such drugs.

“We have contacted the Executive Secretary of the Ohio State Board of Pharmacy who has advised us that this Department and boards of health of city and general health districts must be registered or licensed, and otherwise comply with sections 4729.50 to 4729.66, inclusive, of the Revised Code. Since we and many local boards of health feel that this law is not applicable to us as a department of state government, or to our local health districts, which have been categorized in numerous court decisions and attorney general opinions as ‘agencies of the state,’ we respectfully request your opinion as follows:

- “1. Must our Department register with or be licensed by the Board of Pharmacy, and otherwise comply with sections 4729.50 to 4729.66, inclusive, of the Revised Code?
- “2. Must boards of health of city and general health districts register with or be licensed by the Board of Pharmacy, and otherwise comply with sections 4729.50 to 4729.66, inclusive, of the Revised Code?
- “3. Would a manufacturer, wholesaler, or distributor of ‘dangerous drugs’ be subject to prosecution and fine under sections 4729.50 to 4729.66, inclusive, of the Revised Code, if he were to sell ‘dangerous drugs’ to our Department or to a board of health of a city or general health district in the event neither our Department nor such board of health was registered or licensed under the provisions of section 4729.50 to 4729.66, inclusive, of the Revised Code?

“We wholeheartedly support the concept of this law, but we are concerned that there will be unauthorized expenditures of public funds if we should pay registration fees and it is determined that the law is not applicable to our respective governmental agencies.

“In discussing the above questions with the Executive Secretary of the Board of Pharmacy, we are advised that the Board is desirous of knowing whether federal institutions are required to be licensed or registered under sections 4729.50 to 4729.66, inclusive, of the Revised Code, and if they are to be so licensed if it is necessary for them to pay the registration fee. Although we have no direct interest in this query, it is incorporated herein to avoid request from two state agencies concerning the same law.

“Sections 4729.50 to 4729.66, inclusive, of the Revised Code, became effective on January 1, 1962, and drug companies have demonstrated a reluctance to sell to us and to boards of health unless we are registered or licensed under those provisions. We are thus threatened with a disruption of public health programs throughout the state of Ohio unless the foregoing queries are promptly settled.”

The first two questions presented by your request ask that I determine whether the state department of health, and city or general health districts, are subject to the provisions of Sections 4729.50 to 4729.66, inclusive, Revised Code.

The rule in regard to the application of general statutes to the state is clearly stated in 49 Ohio Jurisprudence, 2d, 653, State of Ohio, Section 4, as follows:

“Since Ohio is a sovereign state which can make and unmake laws, it is the accepted doctrine that the state, in prescribing general laws, intends thereby to regulate, not its own conduct, but that of its subjects. In other words, the state is not bound by the terms of a general statute unless it is so expressly enacted. This is especially true where it is sought to enforce a direct liability against the state or where any of the prerogatives, rights, titles, or interests of the state are sought to be divested. Of course, however, if the statute expressly provides that the state shall be bound, the state is bound, except as limited and restricted by the Constitution of the United States.”

Sections 4729.50 through 4729.66, Revised Code, are of general nature and uniform application throughout the state and must, therefore, be considered general laws. 50 Ohio Jurisprudence, 2d, 19, Statutes, Section 9.

The state department of health is clearly an arm of the state government created by the legislature to assist in the preservation and protection of the public health. 26 Ohio Jurisprudence, 2d, 665, Health, Section 5.

The legislature has by virtue of Chapter 3709., Revised Code, provided for the creation of general and city health districts and such districts are agencies of the state created by the legislature to aid and promote the protection of public health on the local level. *State, ex rel. Mower v. Underwood*, 137 Ohio St., 1, *David Davies v. Sensenbrenner*, 76 O.L.A. 33, 156 N.E., 2d, 202, 168 Ohio St., 356, dismissed for want of debatable constitutional question.

Thus it would appear that the "state" should be excluded from the operation of Sections 4729.50 through 4729.66, Revised Code, unless specifically made subject to the law; and here it becomes necessary to consider whether the state is included within the definition set forth in Section 4729.50 (A), Revised Code, or by other specific provisions.

Section 4729.50 (A), Revised Code, provides in part:

"As used in sections 4729.50 to 4729.66, inclusive, of the Revised Code:

"(A) 'Person' includes any corporation, association, or partnership of one or more individuals.

"* * *

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* * *"

A consideration of the definition of "person" set forth in Section 4729.50 (A), Revised Code, clearly indicates that the legislature did not specifically include any agency, department or division of the state government.

It might appear, however, that Section 4729.50 (A), Revised Code, is meant to include corporations, associations and partnerships as well as all other "persons." One might also argue that Section 1.02 (B), Revised Code, should be considered in determining whether the department of health and general or city health districts are to be considered "persons" as used in Section 4729.50 through 4729.66, Revised Code.

Section 1.02 (B), Revised Code, provides:

"As used in the Revised Code, unless the context otherwise requires:

"* * *

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* * *

"(B) 'Person' includes a private corporation; and, when used to designate the owner of property which is the subject of an offense, includes not only natural persons but also every other owner of property.

"* * *

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* * *"

The legislature, however, is generally assumed to have selected the meaning of a word where such definition is set forth in the act, but in this regard a legislative definition does not always exclude a consideration of other appropriate meanings. 50 Ohio Jurisprudence, 154, Statutes 178. In this respect I have not been able to find any Ohio cases which indicate the word "person" in its ordinary sense includes the state. However,

the general rule in regard to the inclusion of the state within the meaning of the word "person" is set forth in 82 Corpus Juris Secundum 557, Statutes 317, as follows:

"In general, the word 'person' used in a statute will not be construed so as to include the sovereign, whether the United States, or a state, or an agency thereof, or a city or town. However, it may include the sovereign where the legislative intent to do so is manifest; and whether the word 'person' as used in a statute includes a state or the United States depends on its legislative environment, that is, the context or the connection in which the word is found; and aids in determining such question include the purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute. * * *

Also to be considered is the rule that requires penal statutes to be strictly construed and it is evident that such rule applies in this instance. 15 Ohio Jurisprudence, 2d, 257, Criminal Law, Section 257.

The Supreme Court of the United States in *U. S. v. Cooper Corporation*, 312 U.S., 600 at page 604 of its opinion stated:

"Since, in common usage, the term 'person' does not include the sovereign, statutes, employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law."

Thus, it is apparent that even if we are to look beyond the words of Section 4729.50 (A), Revised Code, or contemplate whether the state is a "corporation, association or partnership" we must turn to the statute in order to ascertain the legislative intent; and here we must consider carefully the purpose of Sections 4729.50 to 4729.66, inclusive, Revised Code, also the language, the subject matter, the context and the general ramification of this law.

Section 4729.50 (I), Revised Code, reads in part:

"As used in sections 4729.50 to 4729.66, inclusive, of the Revised Code:

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* * *

"(I) 'Terminal distributor of dangerous drugs' means a person other than a practitioner who is engaged in the sale of

dangerous drugs at retail, or any person other than a wholesale distributor or a pharmacist who has in his possession, custody, or control dangerous drugs for any purpose other than for his own use and consumption, and includes pharmacies, hospitals, nursing homes, laboratories, and all other persons who procure dangerous drugs for sale or other distribution by or under the supervision of a pharmacist or practitioner.”
Section 4729.54, Revised Code, provides in part:

“A person desiring to be registered as a licensed terminal distributor of dangerous drugs shall file with the secretary of the board of pharmacy a verified application containing such information as the board may require of the applicant relative to the qualifications for a terminal distributor of dangerous drugs as set forth in section 4729.55 of the Revised Code. The board shall issue a license to sell dangerous drugs at retail at the establishment or place described in the application therefor to each person who has submitted an application therefor and has paid the required license fee if the board determines that such applicant meets the requirements set forth in section 4729.55 of the Revised Code.

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“The fee required for the issuance of a license shall be ten dollars and shall accompany each application for a license. The fee required for the renewal of a license shall be ten dollars and shall accompany each renewal application for a license.”

A consideration of Section 4729.50 (I), Revised Code, indicates the registration of a person results in the authorization to sell as well as to possess dangerous drugs. The state does not sell drugs but does have custody of, and controls, “dangerous drugs” in carrying out governmental functions authorized by the legislature. These functions and activities, however, cannot be included within the broad general terms of the statute unless a specific intent appears in the statute. There is nothing contained in the definition set forth in Section 4729.50, Revised Code, which can be said to indicate such an intention. Considering further, Sections 4729.50 to 4729.66, inclusive, I find, however, that Section 4729.51 (G), Revised Code, provides:

“(G) Nothing in this section shall be construed to interfere with any law enforcement official authorized by city, county, state or federal law to collect samples of any drug, regardless of its nature or in whose possession it may be, in the performance of his official duties.”

It might be argued that the above provision indicates that the state is subject to the operation of Sections 4729.50 to 4729.66, inclusive, Revised Code, since such language would otherwise be unnecessary. It is a well established principle that the legislature is presumed not to have included provisions which are meaningless. The language of Section 4729.51 (G), however, is couched in terms which make it a guide to interpretation of the law rather than an exemption. And here it would appear that the intent of the legislature was to indicate quite clearly that the provisions of Section 4729.50 through 4729.66, inclusive, are not to be extended to the sovereign in any of its various fields of endeavor. Enforcement agents act in a different capacity from the department of health and the various local health departments, and in many cases the authorization for enforcement agents to handle such drugs is not clearly defined.

In this respect I am not unmindful that one of my predecessors in Opinion No. 3700, Opinions of the Attorney General for 1954, page 181, ruled that the state was subject to the provisions of Chapter 3732., Revised Code, concerning food service operations where the legislature indicated its intention by providing reduced fees for government institutions. However, that case is easily distinguished from the present situation since there a specific fee was prescribed for governmental institutions indicating that such institutions were subject to the law, while in the instant matter there is only an indirect reference to specified individuals not necessarily connected with the state agencies here concerned.

It is further to be noted that the Court of Common Pleas of Hamilton County, Ohio, in *Rich v. Page*, 20 Ohio Opinions, 155, 6 Ohio Supp., 104, stated that the state is not a person within the meaning of Section 1.02, Revised Code. Also to be considered in this regard is Opinion No. 4294, Opinions of the Attorney General for 1955, page 486, wherein one of my predecessors ruled that neither the turnpike commission nor a municipal corporation is a "person" within the meaning of Section 1.02, Revised Code.

Further, where the legislature intends that the state be governed by a particular law, it generally makes the state so subject by clear and unambiguous language. For example, relating to the law administered by the civil rights commission, Chapter 4112., Revised Code, division (B) of Section 4112.01, Revised Code, reads :

“As used in sections 4112.01 to 4112.08, inclusive, of the Revised Code:

“* * *

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* * *

“(B) ‘Employer’ includes the state, or any political or civil subdivision thereof, any person employing four or more persons within the state, and any person acting in the interest of an employer, directly or indirectly.”

Also, pertaining to the sales tax law, Chapter 5739., Revised Code, division (A) of Section 5739.01, Revised Code, reads:

“As used in sections 5739.01 to 5739.31, inclusive, of the Revised Code:

“(A) ‘Person’ includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, the state and its political subdivisions, and combinations of individuals of any form.”

If it had been the intention of the legislature to make the “dangerous drug” law applicable to the state and its agencies, it would appear that a provision such as found in Sections 4112.01 and 5739.01, *supra*, would have been made a part of the new law.

In view of the foregoing, I am of the opinion that the state is not included in the definition of “person” in Section 4729.50, Revised Code, nor is there any specific indication that an ordinary interpretation of the word “person” would include the state. It is also apparent that there is no specific provision in Sections 4729.50 through 4729.66, inclusive, Revised Code, which specifically makes the state subject to the operation of this law. I conclude, therefore, that Sections 4729.50 to 4729.66, inclusive, Revised Code, do not apply to the department of health or to a general or city health district.

I come now to your third question concerning whether a manufacturer, wholesaler or distributor of dangerous drugs may be subject to fine or penalty for selling dangerous drugs to the department of health or to the boards of city or general health districts.

Since I have determined that the department of health and city and general health districts are not subject to the provisions of Sections 4729.50 to 4729.66, inclusive, Revised Code, it follows that the provisions which preclude a wholesale distributor from processing for sale or selling to

certain enumerated classes, Section 4729.51, Revised Code, and the requirement that the registered wholesale distributor obtain a certificate indicating that the purchaser is a licensed terminal distributor, do not apply when sales are made to such agencies. This conclusion seems obvious in view of the fact that enforcement of Sections 4729.51 and 4729.60, Revised Code, would in effect compel the federal authorities to comply with the law since these agencies must of necessity continue to handle and dispense so-called "dangerous drugs." In support of such conclusion, one of my predecessors in Opinion No. 4294, Opinions of the Attorney General for 1954, page 486, ruled that a manufacturer of motor vehicles might sell directly to the turnpike commission and municipal corporation without a dealer's license since these units were not "persons" within the meaning of Chapter 4517., Revised Code. This same reasoning would seem applicable to the situation here concerned.

Therefore, it is my opinion and you are accordingly advised that Chapter 4729., Revised Code, does not preclude a manufacturer, distributor or wholesaler from selling "dangerous drugs" to the department of health or to a city or general health district, since the provisions of Sections 4729.50 through 4729.66, Revised Code, have no application to the state.

Your fourth question concerns the application of Sections 4729.50 through 4729.66, Revised Code, to agencies of the federal government.

In this respect the Court of Appeals of Noble County in the case of *In re the estate of George McLaughlin*, Unreported Case No. 142, June 30, 1961, ruled that the federal government is not a "person," "institution or corporation" as those terms are used in Section 5731.02, Revised Code, (pertaining to the levy of the state inheritance tax). Also to be considered in ascertaining the intent of the legislature in this regard is the question of whether the state can validly regulate the federal government and impose a fee such as prescribed by Section 4729.54, Revised Code. The Supreme Court of the United States in *Nathan Mayo v. United States*, 319 U.S., 441, 87 L. Ed. (Adv.) 1504, 63 Sup. Ct. 1137, ruled that a state may not without congressional permission require the United States to pay a reasonable inspection fee for the inspection of fertilizer distributed to persons by the federal government. The opinion of that case, at page 1507, states:

“Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle. Article 6. A corollary to this principle is that the activities of the Federal Government are free from regulation by any state. No other adjustment of competing enactments or legal principles is possible.”

Thus, it appears that nothing in Sections 4729.50 to 4729.66, inclusive, Revised Code, may be construed to extend these sections to the federal government, or its agencies.

Accordingly, it is my opinion and you are advised:

1. The state department of health and the various general and city health districts do not fall within the definition of “person” as set forth in Section 4729.50 (A), Revised Code, and thus not being made specifically subject to the provisions of Sections 4729.50 to 4729.66, inclusive, Revised Code, are not required to comply with such sections.

2. The department of health and general and city health districts, not being subject to the provisions of said Sections 4729.50 to 4729.66, inclusive, a wholesaler, manufacturer, or distributor may sell dangerous drugs to such agencies without being subject to prosecution and fine under those provisions of law.

3. The federal government is not a “person” as that term is defined in Section 4729.50 (A), Revised Code, and agencies of the federal government are not subject to the provisions of Sections 4729.50 to 4729.66, inclusive, Revised Code.

Respectfully,

MARK McELROY

Attorney General