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EXAMINERS AND REFEREES—HEARING—MEMBERS OF BOARD OF LIQUOR CONTROL—§§119.09 and 4301.04 R.C.—ATTORNEY MEMBER OF BOARD—HEARING FOR MAKING A RECORD.

SYLLABUS:

Section 119.09, Revised Code, does not authorize the board of liquor control to appoint one of its members who is an attorney as its referee or examiner to conduct a hearing and report to the board his findings of fact, conclusions of law, and recommendation of board action, but such board is authorized by Section 4301.04, Revised Code, to designate any member of such board to conduct a hearing and to make up a record of the evidence, therein adduced, for review by the board as a whole.

Columbus, Ohio, August 25, 1958

Hon. Esther R. Hardy, Chairman
Ohio Board of Liquor Control, Columbus, Ohio

Dear Madam:

Your request for my opinion reads as follows:

“May an attorney member of the Board of Liquor Control act as referee or examiner within the meaning of Section 119.09, Revised Code, and conduct hearings pertaining to violations under the Liquor Control Act?”

Section 119.09, Revised Code, reads in part as follows:

“* * * In any adjudication hearing required by sections 119.01 to 119.13, inclusive, of the Revised Code, the agency may appoint a referee or examiner to conduct said hearing. He shall have the same powers and authority in conducting said hearing as granted to the agency. Such referee or examiner shall have been admitted to the practice of law in the state and be possessed of such additional qualifications as the agency requires. The referee or examiner shall submit to the agency a written report setting forth his findings of fact and conclusions of law and a recommendation of the action to be taken by the agency. A copy of such written report and recommendation of the referee or examiner shall within five days of the date of filing thereof, be served upon the party or his attorney or other representative of record, by registered mail. The party may, within ten days of receipt of such copy of such written report and recommendation, file with the agency written objections to the report and recommendation,

which objections shall be considered by the agency before approving, modifying, or disapproving the recommendation. The agency may grant extensions of time to the party within which to file such objections. No recommendation of the referee or examiner shall be approved, modified, or disapproved by the agency until after ten days after service of such report and recommendation as provided in this section. The agency may order additional testimony to be taken or permit the introduction of further documentary evidence. The recommendation of the referee or examiner may be approved, modified, or disapproved by the agency, and the order of the agency based on such report, recommendation, transcript of testimony and evidence, or objections of the parties, and additional testimony and evidence shall have the same effect as if such hearing had been conducted by the agency. No such recommendation shall be final until confirmed and approved by the agency as indicated by the order entered on its record of proceedings, and if the agency modifies or disapproves the recommendations of the referee or examiner it shall include in the record of its proceedings the reasons for such modification or disapproval.
* * * *

It is at once evident that a referee or examiner thus "appointed" is an employee of the agency concerned. Such employment by an agency by one of its members would, in my opinion, be wholly incompatible and against public policy since the individual concerned would in effect be both employer and employee. In this connection, in Opinion No. 1742, Opinions of the Attorney General for 1958, p. 93, I pointed out:

"* * * The control the board may exercise over employees of the hospital makes it readily apparent that there is subordination of one to the other. There can be no doubt that the power to remove is a complete check of one upon the other. It seems quite certain that a person may not act both as employer and employee and retain compatibility. * * *"

It is to be noted also that a referee thus appointed is authorized not only to conduct a hearing as agent of the agency but is required to make a written report containing (1) findings of fact, (2) conclusions of law, and (3) his recommendation of agency action. In the ordinary situation the full membership of the agency reviews such report and determines whether such recommendation is to be followed. If such recommendation should be made by a member of the agency, he would be in the position of reviewing his own recommendation, a task in which he could scarcely be expected to be wholly impartial.

Finally, it will be seen that Section 4301.04, Revised Code, contains the following provisions:

“* * * (C) The board may consider, hear, and determine all appeals authorized by Chapters 4301. and 4303. of the Revised Code, to be taken from any decision, determination, or order of the department, and all complaints for the revocation of permits. The board shall accord a hearing to any person appealing or complaining against, at which such person has the right to be present, to be represented by counsel, to offer evidence, and to require the attendance of witnesses.

“(H) For the purpose of any hearing or investigation which they are respectively authorized or required by such chapters to conduct, the board, any member of the board, the director, or any agent of the department, designated in writing for that purpose, may administer oaths, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, records, documents, and testimony. * * *”

This statute makes no express provision on the point of how the evidence thus adduced at a hearing conducted by a member is to be brought to the attention of the full board, but in view of the necessity of preparing a record of the agency's proceedings for use in appeals as provided in Section 119.12, Revised Code, it is fairly to be implied that such member must cause a record to be made of such evidence for review by the board as a whole. Such a record would enable all members to consider the same evidence as was heard by the member who conducted the hearing, rather than to consider the findings, conclusions, and recommendations of a single member. Because members of boards, *etc.*, are not mentioned in Section 119.09, Revised Code, in connection with referees or examiners, and because of the provision in Section 4301.04, *supra*, authorizing one member to conduct a hearing, it may be concluded, under the maxim *expressio unius*, that such provision is the full extent of a member's authority so to act.

I conclude, therefore, in specific answer to your query that Section 119.09, Revised Code, does not authorize the board of liquor control to appoint one of its members who is an attorney as its referee or examiner to conduct a hearing and report to the board his findings of fact, conclusions of law, and recommendation of board action, but such board is authorized by Section 4301.04, Revised Code, to designate any member of such board to conduct a hearing to make up a record of the evidence, therein adduced, for review by the board as a whole.

Respectfully,
WILLIAM SAXBE
Attorney General