OPINION NO. 78-010

Syllabus:

1. The Ohio Civil Rights Commission has a statutory duty, pursuant to R.C. 4112.04 (A) (6), to act upon all charges of unlawful discriminatory practice filed by a complaining party in accordance with R.C. 4112.05 (B). The Commission may not delegate such duty to a third party.

2. The Ohio Civil Rights Commission has the authority, pursuant to R.C. 4112.04 (A) (5), to formulate a policy of cooperation and coordination with the United States Equal Employment Opportunity Commission. If authorized, pursuant to R.C. 107.17, the Ohio Civil Rights Commission may enter into a written agreement with the United States Equal Employment Commission whereby the Ohio Civil Rights Commission agrees to establish certain internal procedures designed to expedite case handling, provided that the terms of such agreement do not abrogate the Commission's statutory duty to act upon all charges properly filed with it pursuant to R.C. 4112.05 (B).

To: Ellis L. Ross, Executive Director, Ohio Civil Rights Commission, Columbus, Ohio

By: William J. Brown, Attorney General, April 11, 1978

I have before me your request for my opinion as to the authority of the Ohio Civil Rights Commission to perform under a proposed Work Sharing Agreement with the United States Equal Employment Opportunity Commission. Your explanation of the intent of the proposed agreement is as follows:

> The Ohio Civil Rights Commission is part of a nationwide program wherein state and local civil rights agencies receive Equal Employment Opportunity Funds and agree, first, to establish certain internal procedures designed to expedite case handling and, secondly, that either the Equal Employment Opportunity Commission or the state or local agency, but not both, investigate or otherwise process charges of unlawful discrimination within the jurisdiction of both against certain specified employers, thus considerably reducing duplication of effort and waste of resource caused by the prior practice in which two agencies separately enforced essentially identical substantive law. The purpose of the program is to dramatically improve the delivery of service in securing relief in employment discrimination matters and in eliminating unlawful discrimination.
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> [The Work Sharing Agreement] provides, inter alia, that, when charges of unlawful employment discrimination against certain Ohio employers are presented to the Ohio Civil Rights Commission, these charges will be im-

> mediately referred, without further action, to the Equal Employment Opportunity Commission, enabling the Equal Employment Opportunity Commission to proceed immediately pursuant to Title VII of the Civil Rights Act of 1964, as amended, without waiting for the expiration of the sixty day deferral period provided therein.

Your specific question is:

> In view of the foregoing premises and noting that, as provided by Section 4112.05 (B), Revised Code, Commission response to the filing of charges of unlawful discrimination appears to be discretionary, does the Commission have the power to waive its right to proceed in any matter and refer the same to the United States Equal Employment Opportunity Commission?

Your question asks me to take note of the Commission's apparently discretionary duty under R.C. 4112.05 (B) to respond to the filing of charges of unlawful discrimination. R.C. 4112.05 (B) states in pertinent part as follows:

> Whenever it is charged in writing and under oath by a person, referred to as the complainant, that any person, referred to as the respondent, has engaged or is engaging in unlawful discriminatory practices, or upon its own initiative in matters relating to any of the unlawful discriminatory practices enumerated in division (A), (B), (C), (D), (E), (F), (I), or (J) of section 4112.02, or section 4112.021 [4112.02.1] of the Revised Code, the commission may initiate a preliminary investigation . . . If it determines after such investigation that it is not probable that unlawful discriminatory practices have been or are being engaged in, it shall notify the complainant that it has so determined and that it will not issue a complaint in the matter. If it determines after such investigation that it is probable that unlawful discriminatory practices have been or are being engaged in, it shall endeavor to eliminate such practices by informal methods of conference, conciliation, and persuasion. (Emphasis added.)

Although the statute states that the Commission "may initiate" a preliminary investigation, the use of the term is not conclusive. State, ex rel. Meyers v. Board of Education, 95 Ohio St. 367 (1917). Under the rules of statutory construction "may" may refer to either permissive or obligatory conduct depending upon the context in which the word is used. Hanton v. Frankel Bros. Realty, 117 Ohio St. 345 (1927); Sifford v. Beaty, 12 Ohio St. 189 (1861). The context of R.C. 4112.05 (B) and related provisions in R.C. Chapter 4112 indicate that the General Assembly intended to impose an imperative obligation on the Commission to act upon charges alleging unlawful discriminatory practices. Following the statement that the Commission may initiate a preliminary investigation, R.C. 4112.05 (B) sets forth the alternatives for Commission action based upon its findings in the preliminary investigation. If the Commission determines after such investigation that it is not probable that unlawful discriminatory practices have occurred, the statute directs the Commission to notify the complainant that it will not issue a complaint in the matter. If the investigation indicates that it is probable that such practices have occurred, the Commission is directed to undertake informal methods of conciliation and persuasion to eliminate such practice. The statute does not, however, address the complainant's rights or the Commission's duty in a situation where there has been no preliminary investigation by the Commission. Because of this omission, the context of R.C. 4112.05 (B) suggests that the General Assembly intended the Commission to undertake a preliminary investigation of all charges properly filed. There are, in addition, related provisions in R.C. 4112 that indicate that the Commission has a duty to act upon all charges filed with it. The most persuasive of

these related provisions is R.C. 4112.04 (A) (6) which states that "[t]he Ohio Civil Rights Commission shall . . . [r]eceive, investigate and pass upon written charges made under oath of practices prohibited by sections 4112.02 and 4112.021 of the Revised Code."

For these reasons, it is my opinion that by enacting R.C. Chapter 4112 the General Assembly intended to place an imperative duty on the Ohio Civil Rights Commission to act upon written charges of unlawful discriminatory employment practices. The Commission does have some discretion to determine the manner in which it will act. See R.C. 4112.04 (A) (4) (Commission has rule making authority); R.C. 4112.04 (A) (5) (Commission may formulate policies to effectuate the purposes of R.C. 4112.01 to 4112.11). Thus, the Commission may determine the amount and type of investigation necessary to determine if it is probable that unlawful discriminatory practices have occurred and may set standards and procedures for such investigations. This discretion does not, however, permit the Commission to abrogate its statutory duty by choosing not to act in certain cases.

Since the performance of the Commission's duty to act upon charges requires the exercise of judgement and discretion on the part of the Commission members, it is also impermissible for the Commission to delegate its duty to act to a third party such as the EEOC. Where the proper execution of a public office requires that the officer exercise his own judgment or discretion, the presumption is that the particular officer was chosen because he was deemed fit and competent to exercise that judgment or discretion. In such cases, the officer may not delegate his duties to another, unless the power to so substitute another in his place has been expressly or impliedly granted to the officer. Reike v. Hogan, 34 Ohio L. Abs. 311 (1940); State, ex rel Finding v. Kohler, 11 N.P. (n.s.) 497 (1911); 1977 Op. Att'y Gen. No. 77-064; 1973 Op. Att'y Gen. No. 73-126. Thus the Commission does not perform its statutory duty if it merely refers a charge to the EEOC and then adopts the EEOC's findings and resolution as its own without investigation.

That the Ohio Civil Rights Commission may neither abrogate nor delegate its statutory duties by referring certain charges to the EEOC is also supported by federal case law. In Brewer v. Republican Steel Corp., 513 F.2d 1222 (6th Cir., 1975) the court upheld the denial of a motion by the Ohio Civil Rights Commission to intervene in a private employment discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 USC §2000e et seq. ,because the Commission could not show a direct, substantial interest in the litigation. In the court's view, set forth at 1223 and below, the state and federal civil rights law require independent enforcement.

> The Commission's duty - and its interest - lies in enforcing the Ohio civil rights statutes, not the parallel federal laws. The federal and state provisions relating to employment discrimination overlap in application. Nevertheless, they do provide separate and independent avenues of relief that were not designed to be pursued through a unitary enforcement procedure. See Alexander v. Gardner Denver Co., 415 U.S. 36, 47-49, 94 S. Ct. 1011, 39 L. Ed.2d 147 (1974); Cooper v. Phillip Morris, Inc., 464 F.2d 9 (6th Cir. 1972).

In Alexander v. Gardner Denver Co., supra, at 47-49, the United States Supreme Court espoused its view on the independence of federal and state civil rights remedies as follows:

> In addition, legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination. In the Civil Rights Act of 1964, 42 U.S.C. §2000a et seq., Congress indicated that it considered the policy against discrimination to be of the "highest priority." . . . Consistent with this view, Title VII provides for consideration of

> employment-discrimination claims in several forums . . . And, in general, submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination. (Footnotes and citations omitted.)

Thus, in specific response to your question, it is my opinion that the Ohio Civil Rights Commission may not waive or delegate its duty to act upon a charge properly filed with the Commission by referring such charge to the Equal Employment Opportunity Commission. The Commission's statutory duty to act, however, extends only to charges filed with the Commission by the complainant within six months after the alleged unlawful discriminatory practice is committed. The Commission has no duty under Ohio law to act upon charges filed with the EEOC by parties within the jurisdiction of the Ohio Commission.

The proposed Work Sharing Agreement distinguishes between charges received initially by the Ohio Civil Rights Commission and those received initially by the EEOC. It also identifies certain charges for which it is desirable to have the Ohio Commission assume primary jurisdiction and those for which the EEOC will assume primary jurisdiction. This latter distinction does not depend upon where a charge is first filed. One stated purpose of the agreement is to enable the EEOC to assume immediate primary jurisdiction with respect to certain types of charges and charges involving certain respondents.

As concluded above, the Ohio Civil Rights Commission has an absolute duty to act whenever it receives a properly filed charge. The Commission may, however, pursuant to its powers set forth in R.C. 4112.04(A), formulate procedures it will follow in processing charges that are also filed with the EEOC, provided such procedures do not impair the Commission's ability to act in full compliance with R.C. 4112.05(B).

Whether the EEOC may assume immediate primary jurisdiction with respect to certain predetermined charges depends upon the requirements of the federal civil rights laws. It is not within my statutory authority to opine on matters of federal law and the obligations and powers of federal agencies. I shall, however, take the liberty to point out more explicitly the applicability of federal law to certain parts of the agreement in order that my conclusions herein will not be misconstrued as negating those portions of the proposed agreement controlled by federal law.

Pursuant to 42 USC §2000e-5 (c) the EEOC may not act upon a charge unless the complaining party has commenced a proceeding under any applicable state or local law and sixty days have expired since such proceedings were commenced or such proceedings have been terminated. There may, therefore, be little substantive significance to the distinction made in the proposed agreement on the basis of where the charge is first received, since all charges must be filed first with the Ohio Commission, unless the EEOC is authorized to waive the local filing requirements in 42 USC §2000e-5 (c). The EEOC's authority to waive the local filing requirements appears to depend upon the applicability of 42 USC 2000e-8 (b). This section, which gives the EEOC general authority to cooperate with state and local agencies, provides as follows:

> The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the

> limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter. (Emphasis added.)

If the EEOC has, therefore, the authority pursuant to this section to relieve a complaining party of the local filing requirements in §2000e-5(c), supra, the EEOC may assume immediate jurisdiction with respect to charges initially received by the EEOC. It would also appear that the EEOC may pursuant to this section refrain from processing charges when such charges are being effectively handled by a state or local enforcement agency.

Again it would be inappropriate for me to interpret these federal statutes or to attempt to reconcile the EEOC's apparent authority under §2000e-8(b) with the judicial views of the independence of federal and state civil rights enforcement discussed previously. I leave, therefore, to the appropriate federal legal officer the determination of whether charges initially received by the EEOC must be referred to the state enforcement agency and when the EEOC may assume jurisdiction. Since the existence of a written cooperative agreement with a state or local agency is a condition precedent to the EEOC's authority to refrain from acting or to waive the requirements of §2000e, I must, nevertheless, further clarify the extent to which my previous conclusion limits the authority of the Ohio Civil Rights Commission to enter into such an agreement.

While the Ohio General Assembly has not expressly provided for cooperative efforts between the Ohio Civil Rights Commission and its federal counterpart, the Commission may validly adopt, pursuant to R.C. 4112.04 (A) (6), a policy of cooperating with the EEOC, if it determines that such policy will better effectuate the provisions of R.C. Chapter 4112. While the Commission does not have the authority to commit the State to participation in a federal program or to accept federal funds, the governor may, pursuant to R.C. 107.17, commit the state to participation in any federal program not authorized by existing state law for a one year period.

It would appear, therefore, that reasonable cooperative efforts between the state and federal enforcement agencies that will enhance the effective execution of their respective duties are permissible. In searching for illustrations of what might constitute acceptable cooperative efforts, I noted several in your proposed contract with the EEOC. Among these are the development of compatible employment discrimination charge forms and processing terminology, the development of compatible procedural and substantive standards, the development of inventory reduction systems and progress monitoring mechanisms, the identification of necessary legislative changes and the training of Commission personnel in the rapid charge processing procedures developed by the EEOC. Activities such as these if initiated by the Commission would clearly fall within its power to adopt rules and to formulate policies to effectuate the provisions of Chapter 4112. Such

activities are not rendered impermissible merely because they are done in cooperation with the EEOC.

It is, therefore, my opinion that the Ohio Civil Rights Commission may enter into a cooperative agreement with the Equal Employment Opportunity Commission and may agree to establish certain internal procedures designed to expedite case handling, provided that the terms of such agreement do not abrogate the Commission's statutory duty to act upon all charges properly filed with it pursuant to R.C. 4112.05 (B). Pursuant to its authority under R.C. 4112.14 (A) (5), the Commission may, by entering into such an agreement, waive any right it may have under federal law to exclusive sixty day jurisdiction over charges filed with it, if such right can be waived under federal law without termination of the local proceeding.

You also have submitted a second opinion request which raises two additional questions concerning the execution of the proposed work sharing agreement. Your first question in the second request asks for clarification of the rights of a complainant and the corresponding duties of the Commission upon the submission to the Commission of a proper affidavit charging a respondent with a violation of R.C. Chapter 4112. I believe my analysis herein has adequately explored the rights and duties arising from the submission of a complaint with the Commission. Your second question states as follows:

> In the event that an employment charge is received from a complainant by the Commission and referred without further action to the EEOC, and the EEOC proceeds with the matter in a manner which is negligent or adversely affects the rights of the complainant as they might have been prosecuted under Ohio law by the Ohio Civil Rights Commission, does that complainant have any right of action against the Ohio Civil Rights Commission by reason of its referral of the matter to the EEOC pursuant to the provisions of the Work Sharing Agreement referred to in our request of March 16, 1978?

Since I have concluded that the Commission may not refer a charge received by it from a complainant to the EEOC without action, there is no need for me to address your second question.

Thus, it is my opinion and you are so advised that:

1. The Ohio Civil Rights Commission has a statutory duty, pursuant to R.C. 4112.04 (A)(6), to act upon all charges of unlawful discriminatory practice filed by a complaining party in accordance with R.C. 4112.05 (B). The Commission may not delegate such duty to a third party.

2. The Ohio Civil Rights Commission has the authority, pursuant to R.C. 4112.04 (A) (5), to formulate a policy of cooperation and coordination with the United States Equal Employment Opportunity Commission. If authorized, pursuant to R.C. 107.17, the Ohio Civil Rights Commission may enter into a written agreement with the United States Equal Employment Opportunity Commission whereby the Ohio Civil Rights Commission agrees to establish certain internal procedures designed to expedite case handling, provided that the terms of such agreement do not abrogate the Commission's statutory duty to act upon all charges properly filed with it pursuant to R.C. 4112.05 (B).