

OPINION NO. 779

Syllabus:

The Director of Agriculture has authority to accept applications filed pursuant to Section 3769.082 (E), but received by the Director after the first day of November of any year.

To: John M. Stackhouse, Director of Agriculture, Columbus, Ohio
By: William B. Saxbe, Attorney General, January 13, 1964

I have before me your request for my opinion in which you ask the following question:

"Section 3769.082 of the Revised Code creates the 'Ohio Fairs Fund' and sets forth the conditions for the distribution of moneys to county and independent agricultural societies. Paragraph 'E' of this section states a date requirement that leaves some doubt in my mind as to the strictness of interpretation that should be given to the word 'shall.'

"I would appreciate receiving from you an informal opinion as to the mandatory, or discretionary requirements of this paragraph. Must I strictly follow the first day of November thereby processing only applications received on or before that date, or may I use discretion?"

Section 3769.082, Revised Code, provides:

"There is hereby created in the state treasury a fund to be known as the 'Ohio fairs fund'. Moneys to the credit of the 'Ohio fairs fund' shall be distributed by the auditor of state on order of the director of agriculture annually on or before the first day of March, beginning with the year 1958, as follows:

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"(C) To each county agricultural society and each independent agricultural society conducting horse races during their annual fair, the sum of two thousand five hundred dollars to be used as purse money for horse races in accordance with the provisions of this section, and the additional sum of five hundred dollars to each of such county agricultural societies and independent agricultural societies to be used for race track maintenance and other expenses necessary for the conducting of such horse races or colt stakes.

"To at least fifty per cent of those county agricultural societies and independent agricultural societies, as designated by the director of agriculture, conducting horse races at their annual fair, the additional sum of two thousand dollars each, which sum shall be used for the purpose of conducting four stake races for two-year

old and three-year old colts and fillies, with the minimum purse offered for each race to be not less than one thousand dollars, exclusive of entrance fees. Such stake races shall be distributed as evenly as possible throughout the racing season.

"(D) In the event that the moneys available on the first day of March of any year, beginning with the year 1958, are less than that required to carry out the provisions of divisions (A), (B), and (C) of this section, the moneys so available in said 'Ohio fairs fund' shall be prorated equally to the items set forth in divisions (A), (B), and (C). In the event that the moneys available on the first day of March of any year, beginning with the year 1958, are in excess of that required to carry out the provisions of divisions (A), (B), and (C) of this section, such excess shall be distributed equally to those county agricultural societies and independent agricultural societies conducting stake races, such excess to be added to the stake races conducted under the provisions of division (C) of this section.

"(E) County agricultural societies and independent agricultural societies participating under division (C) of this section shall, on or before the first day of November in the year immediately preceding the year in which said moneys are to be distributed, make application for participation in such distribution to the director of agriculture.

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To properly interpret the word "shall" as used in Section 3769.082 (E), it must first be determined whether the legislature in adopting this term intended it to have its customary meaning or whether it was intended to be merely directory in nature.

In 50 Ohio Jurisprudence 2d, Statutes, Section 18, it is stated at pages 27 and 28:

"It is fairly clear, however, that in determining the mandatory or directory nature of a statute or provision, certain factors or aspects are relevant and certain others are irrelevant. Thus, whether a statute or provision is mandatory or directory does not depend upon its form, but rather upon the intention of the legislature, to be ascertained from a consideration of all the terms and provisions of the act and from a consideration of its nature and character; its reason, object, or purpose; its subject matter and language; its effect;

and the consequences which will result from construing it either as mandatory or as directory. * * *

The Supreme Court has held in Bauman v. Buckenberger, 148 Ohio St., 292 at page 297:

"It is a well established rule that a statute providing the time or manner in which a public official shall act is directory, unless the statute contains words importing that such duties shall not be done at any other time, or where such interpretation would impair rights involved. Provisions as to time limitation, imposed merely with a view to the prompt and orderly conduct of business, are generally regarded as directory, not mandatory."

(Emphasis added)

Again in The State ex rel. Alcorn v. Mittendorf, et al., 102 Ohio St., 229, 232:

"* * *There are a very great many statutes commanding public officials to perform acts at certain fixed times where time is not of the essence of the matter, and in such instances the provisions are directory merely."

In State ex rel. Jones v. Farrar, 146 Ohio St., 467, the Supreme Court held:

"Whether a statute is mandatory or directory is to be ascertained from a consideration of the entire act, its nature, its effect and the consequences which would result from construing it one way or another. In each instance, it is necessary to look to the subject matter of the statute and consider the importance of the provision which has been disregarded and the relation of that provision to the general object intended to be secured by the act.

"As a general rule, a statute which provides a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure; and, unless the object or purpose of a statutory provision requiring some act to be performed within a specified period of time is discernible from the language employed, the statute is directory and not mandatory." State ex rel. Smith v. Barnell, Dir., 109 Ohio St., 246, 254, 142 N.E., 611.

In substance Section 3769.082, Revised Code, creates an "Ohio Fairs Fund" and provides for the distribution of the moneys of the fund. Divisions (E) through (K) of this section establish application requirements, restrictions and conditions, and grant certain authority to the Director of Agriculture and are, in general, provisions of a regulatory nature to insure that the intent and purposes of the legislature, as specified in Divisions (A) through (D), are carried out.

"Shall" as used in Section 3769.082 (E), Revised Code, must be interpreted in light of the legislative intent as evidenced by this section in its entirety. A determination must also be made of the effect and consequences which would result from construing it either as mandatory or directory, and whether the imposed time limit is "imposed merely with a view to the prompt and orderly conduct of business."

I believe that the word "shall" as used in Section 3769.082 (E), Revised Code, was intended to be directory in nature; any other interpretation would thwart the intent of the law as specified in Divisions (C) and (D). Division (E) does specify a day certain for applications to be filed, but it appears that the imposed time limit was in fact established "merely with a view to the prompt and orderly conduct of business." The funds applied for under Division (C) are not to be distributed until the first day of March, a full five months after the time for filing of applications. A time lapse between the dates for filing of applications and distribution of the fund is necessary, but I see no reason to insist that an absolute five month separation of dates is essential.

In direct response to your query, therefore it is my opinion that the Director of Agriculture has authority to accept applications filed pursuant to Section 3769.082 (E), but received by the Director after the first day of November of any year.