

OPINION NO. 84-056**Syllabus:**

1. The Director of the Ohio State Lottery Commission is not required to deny licensure to an individual applicant for a license as a lottery sales agent on the basis that the corporation with which the applicant is affiliated or plans to affiliate, or one or more of the corporation's directors, officers, or controlling shareholders, has been convicted of a crime involving moral turpitude or has been found guilty of fraud or misrepresentation.
2. Conviction of a violation of the Sherman Anti-Trust Act, 15 U.S.C. §1, constitutes being "convicted of a crime involving moral turpitude" and being "found guilty of fraud or misrepresentation in any connection" within the meaning of R.C. 3770.05(B)(1) and (3), respectively, so that, pursuant to R.C. 3770.05(B) and/or R.C. 3770.05(C)(1), the Director of the Ohio State Lottery Commission is required to suspend or revoke the lottery sales agent license of a corporation if he finds, after a hearing, that the corporation or any of its directors, officers, or controlling shareholders have been found guilty of violating 15 U.S.C. §1.

**To: Thomas V. Chema, Executive Director, Ohio State Lottery Commission,
Cleveland, Ohio**

By: Anthony J. Celebrezze, Jr., Attorney General, October 18, 1984

I have before me your request for my opinion concerning the duties of the State Lottery Commission in the event that certain of its licensed sales agents are

convicted of crimes. Specifically, you have inquired about a factual situation in which certain individuals and corporations were convicted of violations of 15 U.S.C. §1, part of the Sherman Anti-Trust Act. The convictions were based upon findings of guilt after pleas of nolo contendere were entered. The defendants had been charged with conspiring to fix prices of grocery products, thereby unreasonably restraining trade in those products.

You have advised me that at least two of the convicted defendants are incorporated supermarket chains which are licensed sales agents of the Ohio Lottery Commission, pursuant to R.C. 3770.05. With regard to these corporations, you have inquired as to whether the Lottery Commission may license new applicants for either of these chains, and whether the Lottery Commission may continue to have these chains as sales agents.

The answers to your inquiries are dependent upon an interpretation of R.C. 3770.05, which states in pertinent part:

As used in this section "person" means any person, association, corporation, partnership, club, trust, estate, society, receiver, trustee, person acting in a fiduciary or representative capacity, instrumentality of the state or any of its political subdivisions, or any other combination of individuals meeting the requirements set forth in this section or established by rule or order of the commission.

The director of the state lottery commission may license any person as a lottery sales agent. No license shall be issued to any person or group of persons to engage in the sale of lottery tickets as his sole occupation or business.

(A) Before issuing any license to a lottery sales agent the director shall consider:

- (1) The financial responsibility and security of the person and his business or activity;
- (2) The accessibility of his place of business or activity to the public;
- (3) The sufficiency of existing licensed agents to serve the public interest;
- (4) The volume of expected sales by the applicant;
- (5) Any other factors pertaining to the public interest, convenience, or trust.

(B) The director shall refuse to grant, or shall suspend, or revoke a license if the applicant or licensee:

- (1) Has been convicted of a crime involving moral turpitude;
- (2) Has been engaging in gambling as a significant source of income;
- (3) Has been found guilty of fraud or misrepresentation in any connection;
- (4) Has been found to have violated any rule or order of the state lottery commission.

(C) The director shall refuse to grant, or shall suspend, or revoke a license if the applicant or licensee is a corporation:

- (1) Any of whose directors, officers, or controlling shareholders have been found guilty of any of the activities specified in divisions (B)(1) to (4) of this section. . . . (Emphasis added.)

Although you have posed your questions in terms of the powers of the Lottery Commission itself, R.C. 3770.05 refers to the licensing authority of its Director. Pursuant to R.C. 3770.05, the Director of the Commission is the person who is authorized to issue, revoke, and suspend lottery sales agent licenses. R.C. 3770.02, however, must also be considered. R.C. 3770.02 establishes the authority of the Director, and states in pertinent part:

The director shall license lottery sales agents pursuant to section 3770.05 of the Revised Code, and when necessary recommend to the commission the suspension or revocation of any license so issued. The

commission may on its own initiative revoke or suspend the license of any lottery sales agent when such action is deemed necessary.

When R.C. 3770.02 and 3770.05 are read in pari materia, it appears that the power to revoke or suspend a lottery sales agent license may be exercised by the full Commission as well as its Director. In actual practice, however, this authority has been exercised exclusively by the Director, as reflected in the Commission's own rules. See, e.g., 3 Ohio Admin. Code 3770-3-01; 3 Ohio Admin. Code 3770:1-3-01. Therefore, I shall restrict my analysis herein to the question of the Director's duties under R.C. 3770.05.

R.C. 3770.05 indicates that both individuals and corporations, among others, are eligible for licensure as lottery sales agents. The first aspect of your inquiry involves whether the Director of the Lottery Commission may refuse to grant licenses to new applicants who are, or who plan to become, affiliated in some manner with a corporation which has, or any of whose directors, officers, or controlling shareholders have, been convicted of a crime involving moral turpitude or been found guilty of fraud or misrepresentation.

As a public officer, whose position is statutorily created, the Director of the Lottery Commission has only such powers as are expressly delegated to him by statute, or are necessarily implied from those so delegated. See State ex rel. Clarke v. Cook, 103 Ohio St. 465, 134 N.E. 655 (1921) (boards of education are limited in the exercise of their powers to such as are clearly and distinctly granted); State ex rel. Locher v. Menning, 95 Ohio St. 97, 115 N.E. 571 (1916) (county commissioners are invested with only limited powers by statute); Green v. Western Reserve Psychiatric Habilitation Center, 3 Ohio App. 3d 218, 444 N.E.2d 442 (Summit County 1981) (State Personnel Board of Review's authority is limited to the jurisdiction and powers conferred upon it by its enabling statute).

R.C. 3770.05(B) states that the Director of the Lottery Commission "shall refuse to grant" a license if the applicant has been found to have been engaged in any of the proscribed activities enumerated in divisions (1) through (4). The use of the word "shall" indicates that the Director has a mandatory duty to deny licensure if one of the four grounds for denial listed in R.C. 3770.05(B) is met. See Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (the use of the word "shall" in a statute renders its provisions mandatory). If none of these grounds for denial is present, however, the Director is not required to deny licensure. Thus, the Director is not required to deny licensure to a qualified applicant on the basis that the corporation with which the applicant is affiliated or plans to affiliate, or one or more of the corporation's directors, officers, or controlling shareholders, has been convicted of a crime involving moral turpitude or has been found guilty of fraud or misrepresentation, since such a basis is not statutorily specified as grounds for denial of licensure. Therefore, in answer to your first question, it is my opinion that the Director of the Ohio State Lottery Commission is not required to deny licensure to an individual applicant for a lottery sales agent license on the basis that the corporation with which the applicant is affiliated or plans to affiliate, or one or more of the corporation's directors, officers, or controlling shareholders, has been convicted of a crime involving moral turpitude or has been found guilty of fraud or misrepresentation.

You have also asked whether the Director may continue to retain a corporate entity as a licensed sales agent in the event that the corporation or any of its directors, officers, or controlling shareholders have been found guilty of any of the activities specified in R.C. 3770.05(B)(1) through (4).

A two-step analysis of this question is necessary. First, R.C. 3770.05(C) indicates, in pertinent part, that the Director of the Commission "shall suspend, or revoke a license" if the licensee is a corporation and if any of its directors, officers, or controlling shareholders have been found to have been engaged in any of the activities proscribed in R.C. 3770.05(B)(1) through (4). Similarly, R.C. 3770.05(B) indicates that the Director shall suspend or revoke the license of a "licensee," which may in fact be a corporation, which has engaged in the proscribed activities. As noted above, the use of the word "shall" indicates that a mandatory

duty to suspend or revoke has been placed upon the Director.¹ See Dorrian v. Scioto Conservancy District.

The second part of this inquiry involves whether any of the activities set forth in R.C. 3770.05(B) have occurred. Your specific inquiry involves whether a conviction of violating 15 U.S.C. §1 constitutes being "convicted of a crime involving moral turpitude" and/or being "found guilty of fraud or misrepresentation in any connection," under R.C. 3770.05(B)(1) and (3), respectively. I conclude that such a conviction does fall within R.C. 3770.05(B)(1) and (3), and that the Director is therefore under a duty to suspend or revoke the licenses of the corporations involved.

Prior to 1974 and the enactment of Pub. L. 93-528, 88 Stat. 1706, a violation of 15 U.S.C. §1² was a misdemeanor, punishable by a fine up to \$50,000.00, and/or up to one year's imprisonment. Pub. L. 93-528 increased these penalties. A corporation that has violated 15 U.S.C. §1 now faces a fine of up to \$1,000,000.00. An individual may be fined up to \$100,000.00 and/or imprisoned for as long as three years. It has been said that the primary reason for these increased penalties was their deterrent effect. United States v. McKinnon Bridge Co. Inc., 514 F. Supp. 546 (M.D. Tenn. 1981).

In light of the nature of a Sherman Anti-Trust Act violation, I am willing to conclude that such a violation involves moral turpitude. This conclusion is not without precedent. It has been held that where two or more persons act together and enter into a scheme which has for its purpose violations of the laws of the land, moral turpitude is involved. United States ex rel. Berlandi v. Reimer, 30 F. Supp. 767 (S.D.N.Y. 1939), aff'd, 113 F.2d 429 (2d Cir. 1940).

Perhaps the most persuasive authority for my conclusion is that the Supreme Court of Ohio recently addressed the issue in the context of the same events which led to your inquiry. In Bar Association of Greater Cleveland v. Bogomolny, 10 Ohio St. 3d 110, 461 N.E.2d 1294 (1984), the court indefinitely suspended one of the individual defendants in the price-fixing scheme from the practice of law. The court specifically concluded that: "Under the facts presented, a finding of guilty on two counts of violating the Sherman Act constitutes misconduct under DR 1-102(A)(3) and (A)(4). The fact that the respondent entered a plea of nolo contendere to the allegations makes it no less a violation under the Disciplinary Rules." 10 Ohio St. 3d at 111, 461 N.E.2d at 1295. The Disciplinary Rules of the Code of Professional Responsibility which the respondent was found to have violated were DR 1-102(A)(3) and (A)(4) which state that a lawyer shall not "[e]ngage in illegal conduct involving moral turpitude" or "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation," respectively.

In Bogomolny, the court decided that the Sherman Anti-Trust Act violations constituted crimes involving moral turpitude, and acts of fraud and misrepresentation. As a result, the respondent's license to practice law was suspended. I conclude that there is no reason to apply a different analysis to a

¹ Although I find that the duty to revoke or suspend in this instance is mandatory, it is not to be exercised arbitrarily. The Director of the Ohio State Lottery Commission is an "agency" within the meaning of R.C. 119.01(A), which defines "agency" in part as inclusive of "the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses." (Emphasis added.) As a result, such suspension or revocation may only be accomplished on the basis of evidence presented at an administrative hearing conducted pursuant to R.C. Chapter 119. This has been recognized in the Commission's rules. See 3 Ohio Admin. Code 3770:1-2-05.

² 15 U.S.C. §1 states in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

involving a lottery sales agent's license. The convictions therefore fall within the framework of R.C. 3770.05(B)(1) and (3).

In conclusion, it is my opinion, and you are advised, that:

1. The Director of the Ohio State Lottery Commission is not required to deny licensure to an individual applicant for a license as a lottery sales agent on the basis that the corporation with which the applicant is affiliated or plans to affiliate, or one or more of the corporation's directors, officers, or controlling shareholders, has been convicted of a crime involving moral turpitude or has been found guilty of fraud or misrepresentation.

2. Conviction of a violation of the Sherman Anti-Trust Act, 15 U.S.C. §1, constitutes being "convicted of a crime involving moral turpitude" and being "found guilty of fraud or misrepresentation in any connection" within the meaning of R.C. 3770.05(B)(1) and (3), respectively, so that, pursuant to R.C. 3770.05(B) and/or R.C. 3770.05(C)(1), the Director of the Ohio State Lottery Commission is required to suspend or revoke the lottery sales agent license of a corporation if he finds, after a hearing, that the corporation or any of its directors, officers, or controlling shareholders have been found guilty of violating 15 U.S.C. §1.