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IT IS DUTY OF ATTORNEY GENERAL TO SEE THAT A PROPER AFFIDAVIT IS FILED IN A COURT OF COMPETENT JURISDICTION IN ALL CASES WHERE EVIDENCE IS RECEIVED BY HIM INDICATING A VIOLATION OF SECTIONS 3721.02, 3721.05 or 3721.06, REVISED CODE—§§3721.99, 3721.02, 3721.05, 3721.06, R.C.

SYLLABUS:

Section 3721.99, Revised Code, imposes a duty upon the attorney general to see that a proper affidavit is filed in a court of competent jurisdiction in all cases where evidence is received by him indicating a violation of Sections 3721.02, 3721.05 or 3721.06, Revised Code.

Columbus, Ohio, June 22, 1961

Hon. Ralph E. Dwork, M.D., Director of Health
Department of Health, 306 Ohio Departments Building
Columbus 15, Ohio

Dear Sir:

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

“We have experienced some difficulty in establishing the proper procedure to be followed in the enforcement of sections 3721.01 to 3721.09, inclusive, and 3721.99 of the Revised Code,

due to what appears to us to be a rather unusual provision in section 3721.99, Revised Code.

“Section 3721.99 of the Ohio Revised Code provides as follows:

“ ‘Whoever violates sections 3721.02, 3721.05, or 3721.06 of the Revised Code, or opens, manages, maintains, or operates an institution subject to the provisions of this chapter without a license from the director of health shall be fined one hundred dollars. Each day such violation occurs constitutes a separate offense. *The attorney general shall institute action to enforce the provisions of this section.*’ (Emphasis added)

“Our experience has indicated that the general procedure followed in the prosecution of misdemeanor cases is that the person having personal knowledge of the facts files an affidavit with the court, and at the trial the city attorney or county prosecutor represents the State.

“We respectfully request your opinion as to whether the last sentence of Section 3721.99 of the Revised Code requires a variance from this procedure and, if so, the procedure to be followed in such cases.”

Under Section 3721.99, Revised Code, which is correctly quoted in your letter of request, the operation of an institution without the proper license is a misdemeanor. Thus, under Section 2938.13, Revised Code, the municipal corporation solicitor and the county prosecutor are given the duty to prosecute violations of said Section 3721.99. The Attorney General does not, of course, have any authority to prosecute misdemeanor cases, and I do not believe that he is given such authority in this instance.

The answer to your question depends upon the meaning of the word, “institute.” The Court of Appeals for Hamilton County in *Cincinnati v. Hawkins*, 81 Ohio App., 459, at page 460, stated in this regard:

“According to Webster’s New International Dictionary, the word, ‘institute,’ is derived from a Latin word meaning ‘to place in.’ It is defined as meaning ‘to set up; to originate and establish; to cause to be; to found.’

“In the Shorter Oxford English Dictionary (1933), the word is defined, ‘to set up, establish, found, ordain, to introduce, bring into use or practice, to set on foot, initiate, start.’ ”

Thus, it would appear that the attorney general is charged with the responsibility of beginning or starting actions against persons who violate Sections 3721.02, 3721.05 or 3721.06, Revised Code. And it follows, of

course, that the attorney general can take steps to institute action only where he has knowledge of a violation.

Section 2935.09, Revised Code, provides :

“In all cases not provided by sections 2935.02 to 2935.08, inclusive, of the Revised Code, in order to cause the arrest or prosecution of a person charged with committing an offense in this state, a peace officer, or a private citizen having knowledge of the facts, shall file with the judge or clerk of a court of record, or with a magistrate, an affidavit charging the offense committed, or shall file such affidavit with the prosecuting attorney or attorney charged by law with the prosecution of offenses in court or before such magistrate, for the purpose of having a complaint filed by such prosecuting or other authorized attorney.”

A consideration of Section 2935.09, *supra*, indicates that the attorney general, upon receiving sufficient evidence of a violation of Sections 3721.02, 3721.05 or 3721.06, Revised Code, from the director of health, his agents, or any individual should cause the affidavit of the director of health, his agent, or an individual to be filed in the proper court. It would appear to be the proper procedure for the attorney general to then take steps to inform the city solicitor or county prosecutor of such action, since Section 2938.13, Revised Code, requires said officers to prosecute such matters in court.

There is, of course, no provision which would prohibit the director of health, his agents, or an individual from filing an affidavit in the proper court without the assistance of the attorney general, as such is clearly proper under Section 2935.09, *supra*. In view of the various statutes dealing with the prosecution of misdemeanor cases, the intent of the duty given the attorney general in Section 3721.99, *supra*, appears to be to give the director of health, his agents, and the public, an additional public official to assist in the enforcement of the rest home and nursing home statutes.

Accordingly, it is my opinion and you are advised that Section 3721.99, Revised Code, imposes a duty upon the attorney general to see that a proper affidavit is filed in a court of competent jurisdiction in all cases where evidence is received by him indicating a violation of Sections 3721.02, 3721.05 or 3721.06, Revised Code.

Respectfully,

MARK McELROY

Attorney General