OPINION NO. 82-033

Syllabus:

1. The licensing requirement derived from R.C. 4729.51(E) does not apply to the corporate or business headquarters of a corporation which is licensed as a terminal distributor of dangerous drugs when only administrative decisions are made at that location.

2. An out-of-state pharmacy operating in Ohio may not be required to obtain a terminal distributor's license for a location in another state.

To: Franklin Z. Wickham, Executive Director, Ohio State Board of Pharmacy, Columbus, Ohio
By: William J. Brown, Attorney General, May 4, 1982

I have before me your request for clarification of 1980 Op. Att'y Gen. No. 80-001. I have, based on information provided by your office, rephrased your questions, in part, as follows:

1. Does the licensing requirement derived from R.C. 4729.51(E) apply to the corporate or business headquarters of a corporation, which is licensed as a terminal distributor of dangerous drugs, at which administrative decisions are made?

2. If the answer to question one is yes, does this also apply to corporations or businesses whose headquarters are located outside the state of Ohio?

3. If such business or corporate headquarters must obtain a license, to what level in the business structure does the licensing requirement extend?

4. Is an out-of-state pharmacy required to obtain a terminal distributor's license for an out-of-state location if they are transferring drugs from their pharmacy to a place or establishment in the state of Ohio which is under their control and supervision and where dangerous drugs are maintained for "purposes other than their own use or consumption."

In Op. No. 80-001 I opined that a licensed terminal distributor must possess a license for each location at which he engages in the distribution of dangerous drugs. As you note in your request, however, the definition of a "terminal distributor of dangerous drugs" is not limited to persons who engage in the sale of dangerous drugs. R.C. 4729.02(Q) includes within the definition of a terminal distributor of dangerous drugs "any person other than a wholesale distributor or a pharmacist who has in his possession, custody, or control dangerous drugs for any purpose other than for his own use and consumption. . . ." The statutory provisions upon which I based my conclusion in Op. No. 80-001 apply with equal force to persons who fall within this latter part of R.C. 4729.02(Q). R.C. 4729.51(E) provides, in part, as follows:

> No licensed terminal distributor of dangerous drugs shall. . .maintain in his possession, custody, or control dangerous drugs for any purpose other than for his own use or consumption at any establishment or place other than that described in the license issued by the board of pharmacy to such terminal distributor.

Similarly, R.C. 4729.54 provides, in part, that "[n]o such license shall authorize or permit the terminal distributor of dangerous drugs named therein. . .to maintain possession, custody, or control of dangerous drugs for any purpose other than for his own use or consumption at any establishment or place other than that described in such license." Accordingly, a licensed terminal distributor of dangerous drugs must possess a license for each location at which he maintains possession, custody, or control of dangerous drugs for any purpose other than for his own use or consumption, as well as for each location at which he engages in the distribution of such drugs.

You have stated, in conversations with a member of my staff, that, with respect to your first three questions, you are primarily concerned with a corporation which already possesses licenses for those locations at which it distributes dangerous drugs, but which has not secured a license for its corporate headquarters, at which location only administrative decisions are made. The question, therefore, becomes whether a corporate or business headquarters at which administrative decisions are made is a location at which the corporation maintains possession, custody, or control of dangerous drugs.

It is my understanding, based on information furnished by your office, that the drugs are never actually present at the corporate headquarters. Thus, the corporation could not be said to have possession or custody of the dangerous drugs at its headquarters. A resolution of your question, therefore, depends on whether the corporation "controls" the dangerous drugs within the meaning of R.C. 4729.51(E). The term "control" is not defined for purposes of R.C. Chapter 4729. Consequently, it becomes necessary to turn to aids in statutory construction to determine whether "control" includes administrative decisions made at the headquarters of a corporation.

The initial consideration in statutory construction is to examine the plain meaning of the language employed. In this instance, however, the plain meaning of the word "control" does not shed any light on its proper interpretation. "Control" is commonly used as a synonym for possession, denoting physical dominion over a particular object. See generally Herrman v. Folkerts, 202 Kan. 116, 446 P.2d 834 (1968); Crist v. Potomac Ins. Co., 243 Or. 254, 413 P.2d 407 (1966); Bank of Monroe v. Gifford, 79 Iowa 300, 44 N.W. 558 (1890). It is, however, with equal frequency, used to refer to general supervision over an object, without actual possession. See generally P & M Stone Co. v. Hartford Accident & Indemnity Co., 251 Iowa 243, 100 N.W.2d 28 (1959); Fitzgerald v. Fitzgerald, 194 Va. 925, 76 S.E.2d 204 (1953). Consequently, the plain language test does not adequately define the word "control" as it appears in R.C. 4729.51(E).

Another aid in determining the meaning of a statute is the purpose sought to be achieved by its enactment. Humphrys v. Winous Co., 165 Ohio St. 45, 133 N.E.2d 780 (1956). The regulatory scheme set out in R.C. Chapter 4729 was obviously intended to ensure that the dispensation of dangerous drugs would be carried out in a safe manner, under the supervision of a qualified pharmacist or practitioner. In determining whether it was the intent of the legislature to require the licensure of facilities where purely administrative decisions are made, it is useful to examine the standards which were created for licensure. R.C. 4729.55 sets forth the areas of concern as follows:

> No license shall be issued to a terminal distributor of dangerous drugs unless and until the applicant therefor has furnished satisfactory proof to the board of pharmacy that:
>
> (A) The applicant is equipped as to land, buildings, and equipment to properly carry on the business of a terminal distributor of dangerous drugs.
>
> (B) A pharmacist or practitioner shall maintain supervision and control over the possession and custody of such dangerous drugs that may be acquired by or on behalf of the applicant.
>
> (C) Adequate safeguards are assured to prevent the sale or other distribution of dangerous drugs by any person other than a pharmacist or practitioner.
>
> (D) If the applicant, or any agent or employee of the applicant, has been found guilty of violating section 4729.51 of the Revised Code, the "Federal Food, Drug and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C. 301, the federal narcotic law, sections 3715.01 to 3715.72, or Chapter 3719. or 4729. of the Revised Code, or any rule or regulation of the board, adequate safeguards are assured to prevent the recurrence of such violation.

I note that the first three subsections of R.C. 4729.55 deal with concerns which are applicable only to facilities at which drugs are kept. They require that the physical facilities be adequate to safeguard the drugs and that the dispensation of drugs shall be undertaken and supervised only by qualified personnel. Thus, it appears that the standards for licensure are primarily concerned with the actual possession and dispensation of dangerous drugs. These standards would have no relevance when applied to a facility at which administrative decisions are made and at which dangerous drugs are never stored or dispensed. Therefore, it does not appear, from the purpose for which R.C. Chapter 4729 was enacted, that the word "control" as used in R.C. 4729.51(E) was meant to apply to administrative decisions made at a corporate or business headquarters of a licensed terminal distributor.

Moreover, I note that a violation of R.C. 4729.51(E) results in a criminal penalty. See R.C. 4729.99(D) ("[w]hoever violates division (A), (B), (D), or (E) of section 4729.51 of the Revised Code is guilty of a misdemeanor of the first degree".) It is a well-established principle that statutes of a penal nature are to be "strictly construed and their scope cannot be extended to include limitations not therein clearly prescribed." State ex rel. Moore Oil Co. v. Dauben, 99 Ohio St. 406, 411, 124 N.E. 232, 233 (1919). That a penal statute must be:

> sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

Connally v. General Construction Co., 269 U.S. 385, 391 (1926). Thus, in a case where doubt exists as to whether a particular activity falls within a limiting statute, the doubt must be resolved in favor of the activity and against the limitation.

R.C. 4729.51(E) does not specifically require that there be a license for a location at which administrative decisions are made. It may not, therefore, be interpreted to encompass such activity in its licensing requirement. To interpret R.C. 4729.51(E) as applying to a location at which only administrative decisions relating to dangerous drugs are made would incorporate within that statute an unacceptable degree of vagueness. Such an interpretation would require corporations, and individuals, to determine whether the actions they are taking rise to the level of control, thereby necessitating a license. R.C. 4729.51(E) does not offer any guidelines on deciding when control takes place. Consequently, those persons subject to the requirements of R.C. 4729.51(E) would be unsure what conduct on their part would bring them within the penalties of R.C. 4729.99. Also, it may often be the case that administrative decisions relating to dangerous drugs are made at a location away from any existing corporate facility. For instance, decisions on the purchase and allocation of drugs might be made during the course of a business meeting at the factory or laboratory of a drug manufacturer, or in a hotel conference room. An interpretation of R.C. 4729.51(E) which places administrative decisions within the term "control" would require a corporation to obtain a license, in advance, for any location at which they might possibly make such a decision. This would obviously be an unworkable, and certainly an unintended, result. See R.C. 1.47(C) and (D) (in enacting statutes, the General Assembly intends reasonable results, feasible of execution).

For the foregoing reasons, I conclude that the licensing requirement derived from R.C. 4729.51(E) does not apply to the corporate headquarters of a licensed terminal distributor at which only administrative decisions are made.

Your second and third questions are triggered by an affirmative response to your first question. Since I have concluded that the first question must be answered in the negative, it is unnecessary to address the second and third questions.

Your fourth question asks whether an out-of-state pharmacy may be required to obtain a terminal distributor's license for an out-of-state location if such pharmacy is transferring dangerous drugs from that location to an Ohio facility where control of the drugs is maintained. Since the pharmacy is in possession of dangerous drugs in Ohio, it must obtain a license as a terminal distributor for any location in Ohio at which it maintains or sells the drugs. R.C. 4729.51(E). Your question, however, deals with the necessity for the pharmacy to obtain a license for the out-of-state location.

R.C. 4729.51(D) provides that a licensed terminal distributor having more than one establishment may transfer dangerous drugs from one location to another provided that each such location is properly licensed. The statute would, therefore, appear to require that a license be obtained in the situation about which you have

inquired. I recently had occasion to consider, however, the extent to which similar provisions set forth in R.C. Chapter 4729 could be applied to corporations involved in interstate commerce. In 1982 Op. Att'y Gen. No. 82-032, I discussed at length the limitations imposed upon the state's ability to regulate interstate drug transactions by the Federal Commerce Clause, U.S. Const. art. I, §8. The limitations noted therein must also be considered in determining whether R.C. 4729.51(E) may constitutionally be read to require the licensure of out-of-state locations from which drugs are transferred into this state.

The transfer of dangerous drugs by an out-of-state pharmacy to a location in Ohio where the control of such drugs is maintained clearly constitutes interstate commerce. See 1982 Op. Att'y Gen. No. 82-032. It is true that, through its police power, Ohio may enact legislation to protect the health and safety of its citizens, and that such legislation may have an indirect effect on interstate commerce. See Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963). The legislation may not, however, place a burden on interstate commerce which outweighs the benefits to be derived from such regulation. "Regulation rises to the level of an undue burden if it may seriously interfere with or 'impede substantially' the free flow of commerce between the states" (citations omitted). Panhandle Eastern Pipe Line Co. v. P.U.C., 56 Ohio St. 2d 334, 339, 383 N.E.2d 1163, 1166 (1978). Ohio is currently able through its licensing process to regulate, as intrastate commerce, those actions of the out-of-state pharmacy which take place in Ohio and which affect Ohio citizens. In this manner, the protection of the health and safety of Ohio's citizens is ensured. The licensure of an out-of-state location would not appear to add substantially to this protection. Such licensure may, however, discourage out-of-state pharmacies from transferring drugs into the state of Ohio, thus impeding the free flow of commerce. In this instance it does not appear that the benefits to be derived from requiring an out-of-state pharmacy to license a location in another state justify the burden that such a requirement would place on interstate commerce.

Additionally, I note that "the Due Process Clause of the Fourteenth Amendment limits the power of a State to extend the effects of its laws beyond its borders." Aldens, Inc. v. Ryan, 454 F.Supp. 465 (W.D. Okla., 1976), aff'd, 571 F.2d 1159 (10th Cir. 1978). "[A] state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere." Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 80-81 (1938). See also New York Life Insurance Co. v. Head, 234 U.S. 149 (1949); State of Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) (dissenting opinion, J. Roberts). As was previously discussed, Ohio is currently regulating the activities of the pharmacy in Ohio and the effect those activities have on Ohio citizens. To extend Ohio's licensing requirements to an out-of-state location would be an obvious effort to make Ohio law control in a geographical area outside the confines of this state. Such an extension would arguably be in violation of the Due Process Clause of the United States Constitution.

It must be assumed that the General Assembly intended a constitutional result when it enacted R.C. Chapter 4729. See R.C. 1.47. As I discussed in the above paragraphs, it would appear that the application of the licensing requirement contained in R.C. 4729.51 to an out-of-state location would violate both the Due Process Clause and the Commerce Clause of the United States Constitution. Thus, pursuant to R.C. 1.47, I must conclude that an out-of-state pharmacy operating in Ohio may not be required to obtain a terminal distributor's license for an out-of-state location.

Therefore, it is my opinion, and you are advised, that:

1. The licensing requirement derived from R.C. 4729.51(E) does not apply to the corporate or business headquarters of a corporation which is licensed as a terminal distributor of dangerous drugs when only administrative decisions are made at that location.

2. An out-of-state pharmacy operating in Ohio may not be required to obtain a terminal distributor's license for a location in another state.