



Phil Mullin

## *Bill Analysis*

*Legislative Service Commission*

### **H.B. 219**

123rd General Assembly  
(As Introduced)

**Reps. Householder, Buchy, Willamowski, Ogg, Mottley, Olman, Cates, Padgett, Williams, Womer Benjamin, Krebs, Jolivette, Clancy, Young, Taylor, Amstutz, Van Vyven, Calvert, Schuck, Evans, Netzley, Roman, Schuler, Jacobson, Peterson, Jordan, Callender, Carey**

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### **BILL SUMMARY**

- Creates the Ohio Private Enterprise Review Commission within the Department of Development to review commercial activities of state agencies.
- Requires the Commission to adopt rules defining commercial activities that are "inappropriate" for state agencies to perform.
- Requires the Commission to investigate complaints from any person concerning state agencies that may be performing inappropriate commercial activities, and to issue rulings against that performance or approval letters when these activities are appropriate for state agencies to perform.
- Terminates these provisions on December 31, 2002.

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### **CONTENT AND OPERATION**

#### **Ohio Private Enterprise Review Commission: composition and terms**

The bill creates within the Department of Development the Ohio Private Enterprise Review Commission. The Commission consists of nine members, five of them to be appointed by the Governor with Senate advice and consent, and two members of each house of the General Assembly, not of the same political party, to be appointed by the presiding officer of that house. Of the members to be appointed by the Governor, one must represent public employee labor organizations, one must represent the interests of employers in the state with 100 or fewer employees, two must be directors of state agencies (or their designees)

and serve as ex officio members, and one must represent the general public. The legislative members must serve as nonvoting, ex officio members of the Commission. (Sec. 121.81(A).)

After staggered initial terms of one, two, and three years, the Commission members appointed by the Governor must serve for three-year terms. The legislative members of the Commission may serve only during their terms of office in the General Assembly. A vacancy on the Commission must be filled in the same manner as an original appointment. Commission members must serve without compensation but will be reimbursed for their actual and necessary expenses. (Sec. 121.81(B) and (D).)

The Commission must elect a member appointed by the Governor as its chairperson. Five Commission members constitute a quorum, and the Commission may take no action without the concurrence of at least three voting members. The Department of Development must furnish office space, office equipment and supplies, technical, clerical, and professional staff support, and research material to and otherwise support the Commission. (Sec. 121.81(C), (D), and (E).)

The Commission may accept for its use gifts and grants of money and real and personal property. All money received must be deposited into the state treasury and be available to the Commission to pay any part of the costs of administering the bill. (Sec. 121.81(F).)

### **Commission's evaluation of state agencies' commercial activities**

#### **Rules**

The Commission must adopt, and may amend or rescind, rules in accordance with the Administrative Procedure Act defining the particular types of commercial activities (see "**Definitions**," below) that are "inappropriate" for state agencies (see "**Definitions**," below) to perform. In adopting these rules, the Commission must make a thorough and careful study of the commercial activities being performed by state agencies and the statutes governing the agencies. The bill requires that the Commission be guided by the presumption that, although commercial activities may be performed by state agencies, the performance of commercial activities by state agencies is generally not appropriate. No Commission rule or ruling (see below) may construe a commercial activity as inappropriate if the agency involved is required by law to perform the activity. (Sec. 121.82(A) and (B).)

The bill's Commission provisions do not apply to a nonprofit organization exempt from federal income taxation and described in subsection 501(c)(3) of the



Internal Revenue Code, and those provisions cannot be construed as prohibiting a state agency from contracting with nonprofit organizations.<sup>1</sup> (Sec. 121.82(C).)

### **State agency considerations and review letter requests**

The bill directs state agencies to "carefully consider" the appropriateness of any commercial activity that they intend to perform prior to commencing the activity. If the agency concludes that the activity is not required by law and may be inappropriately competitive with private enterprise, the agency must request in writing a letter from the Commission reviewing the appropriateness of the activity before its commencement. In addition, any state agency that is performing a commercial activity not required by law and that has reason to believe that the activity is inappropriately competitive with private enterprise may request a letter from the Commission reviewing the appropriateness of the activity and otherwise may consult with the Commission about ways in which the activity might be modified so as to reduce competition with private enterprise or about the establishment of a schedule according to which it will phase out the activity. (Sec. 121.83(A) and (B).)

### **Commission investigations and reviews**

Whenever the Commission receives a *complaint* alleging an agency's performance of an inappropriate commercial activity, which any person may submit, or a *request for review* from a state agency, it must investigate the complaint or review the commercial activity that is being or that will be performed and then issue either an *approval letter* confirming that the activity is appropriate or a *ruling* informing the state agency that it is or would be performing an inappropriate commercial activity. The Commission may compel any person to comply with subpoenas for the production of witnesses or documents it may issue in the course of its investigations, by application to a court of common pleas for an order compelling compliance. (Secs. 121.83(C), 121.84, and 121.85.)

### **Approval letters and rulings**

If an approval letter is issued, a copy of the letter must be sent to the state agency involved by personal service or ordinary mail, and, if applicable, to a person who submitted a complaint by ordinary mail, informing the agency and, if

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<sup>1</sup> *Subsection 501(c)(3) of the Internal Revenue Code concerns corporations, and any community chest, fund, or foundation, organized and operated exclusively (1) for religious, charitable, scientific, testing for public safety, literary, or educational purposes, (2) for the prevention of cruelty to animals or children, or (3) for the fostering of national or international sports competition.*

applicable, person of the Commission's conclusion and the reason why a ruling was not issued (sec. 121.85(A)(2)).

If the Commission rules that a state agency is or would be performing an inappropriate commercial activity, the Commission's ruling must do all of the following (sec. 121.85(A)(1) and (B)):

--identify the inappropriate commercial activity;

--cite the rule of the Commission defining the activity as inappropriate;

--order the agency to cease and desist performing the commercial activity or to make modifications in its performance of it. The ruling must contain sufficient advice to enable the agency to make suggested modifications.

The Commission must send a copy of a ruling (1) to the state agency involved by personal service or by certified mail, return receipt requested, and (2), if applicable, to a person who submitted a complaint by ordinary mail (sec. 121.85(A)(1)).

#### **Post-rulings action**

State agencies that receive a ruling must carefully review the ruling and their performance of the commercial activity identified in it and consider whether the ruling should be implemented or appealed. Within 30 days after the ruling's issuance, they must file a notice of appeal with the Commission or respond to the Commission in writing that they intend to comply, stating how and according to what time schedule (sec. 121.85(C)). The Commission may consult with and otherwise assist state agencies in modifying commercial activities so as to reduce competition with private enterprise and in developing schedules for their phasing out performance of inappropriate commercial activities (sec. 121.86).

#### **Appeals of Commission rulings to Governor or a court of common pleas**

Any interested party may appeal a ruling by the Commission that a commercial activity *is being inappropriately performed* by filing, within 30 days after issuance of the ruling, with the Commission a notice that it will appeal the ruling to either the Court of Common Pleas of Franklin County or the Governor. Making an appeal to either the Court or the Governor precludes making an appeal to the other. The filing of a notice of appeal suspends the Commission's ruling until a final determination is made on appeal. Within 30 days after receiving a notice of appeal, the Commission must prepare and certify to the Court or the Governor a complete record of the proceedings in the case. (Sec. 121.87(A).)



### **Appeals to the Court**

If an appeal is filed with the Court of Common Pleas of Franklin County, the Court is confined to the record as certified to it by the Commission, unless the Court grants a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained during the Commission's investigation. The Court's hearing must proceed as in the trial of a civil action and in accordance with the Rules of Civil Procedure. At the hearing, counsel may be heard on oral argument, briefs may be submitted, and evidence may be introduced only if the Court has granted a request for the admission of additional evidence. (Sec. 121.87(B).)

The Court may affirm the Commission's ruling if it finds, upon consideration of the entire record and any additional evidence the Court has admitted, that the ruling is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of that finding, it may reverse, vacate, or modify the ruling or make another ruling that is supported by reliable, probative, and substantial evidence and is in accordance with law. The Court's judgment is final and conclusive unless reversed, vacated, or modified on appeal. An appeal from the Court's judgment may be taken by the Commission or any party to the action and must proceed as in the case of appeals in civil actions and in accordance with the Rules of Appellate Procedure and, to the extent not in conflict with those Rules, the Procedure on Appeal Law. (Sec. 121.87(B).)

An appeal from the Court's judgment taken by the Commission must be taken on questions of law relating to the constitutionality, construction, or interpretation of statutes and rules of the Commission. The court of appeals also may review and determine the correctness of the Court's decision whether the ruling of the Commission is or is not supported by any reliable, probative, or substantial evidence. The court of appeals must certify its judgment to the Commission or take other action necessary to give its judgment effect. (Sec. 121.87(B).)

### **Appeals to the Governor**

Like the Court of Common Pleas of Franklin County, the Governor may affirm, reverse, vacate, or modify a Commission ruling on appeal. The Governor must do so by executive order within 45 days after receiving the appeal, and, in doing so, the Governor must consider the record as certified by the Commission and may consider any other relevant information submitted by any party to the appeal. An executive order from the Governor is final and conclusive unless reversed, vacated, or modified by an appeal to the Court of Common Pleas of



Franklin County on questions of law relating to the constitutionality, construction, or interpretation of statutes and rules of the Commission. The bill requires the Governor to certify a copy of the executive order to the Commission upon its issuance, and to deposit the original of that order with the Secretary of State. No appeal may be taken on the correctness of that order. If the Governor does not issue an executive order within 45 days after an appeal is filed, the ruling of the Commission is deemed to be upheld. (Sec. 121.87(C).)

### **Commission's biennial reports**

The Commission must submit a biennial report by February 1 of each odd-numbered year to the Governor, the Office of Budget and Management, and the chairpersons of the standing committees of the Senate and the House of Representatives having jurisdiction over finance and appropriations. However, the Commission must file its first report on February 1, 2000, covering the period between the bill's effective date through December 31, 1999. Each report must include a summary of the Commission's rule-making activities; an analysis of requests for review received from state agencies and of complaints received and a summary of the number and kinds of requests and complaints that resulted in the issuance of approval letters or rulings; a summary of Commission investigations, including the number of investigations made and an assessment of agency cooperation with the investigations; the full text of each Commission ruling; an assessment of implementation of rulings by state agencies; and recommendations for statutory changes and other ways in which to promote a policy of state government noncompetition with private enterprise. (Sec. 121.88; Section 2 of the bill.)

### **Commission's repeal date**

The bill repeals its provisions on December 31, 2002 (Section 3 of the bill).

### **Definitions**

The bill defines "commercial activity" as the manufacture, processing, offering for sale, sale, rental, lease, delivery, dispensing, distribution, or advertising, in whole or in part, of any goods, property, or services; "state agency" as every organized body, office, agency, or other instrumentality established by the laws of the state for the exercise of any function of state government, other than the General Assembly or any legislative body or agency, any primary or secondary educational institution, any state correctional institution, or any facility or institution for children committed to the legal custody of the Department of Youth Services; and "private enterprise" as any form of nonpublic and nonpolitical business organization (sec. 121.80).



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## HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	03-02-99	pp. 240-241

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