

OPINION NO. 94-016**Syllabus:**

1. The requirements relative to bonds and oaths of office in R.C. 121.11 are not applicable to the Ohio Retirement Study Commission.
2. The provisions prescribing a centralized system of state purchasing, competitive bidding requirements and procedures, annual inventories of state property, and the payment of state moneys to the Treasurer of State set forth in R.C. 113.08, R.C. 125.01-.11, R.C. 125.16, R.C. 127.16, and 2 Ohio Admin. Code Chapter 123:5-1 are applicable to the Ohio Retirement Study Commission.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: Lee Fisher, Attorney General, April 8, 1994

You have requested an opinion relating to the duties of the Ohio Retirement Study Commission ("ORSC"). Specifically, you ask whether the provisions of R.C. 113.08, R.C. 121.11, R.C. 125.01-.11, R.C. 125.16, R.C. 127.16, and 2 Ohio Admin. Code Chapter 123:5-1 are applicable to the ORSC.¹

I. R.C. 121.11 Is Not Applicable to the ORSC

R.C. 121.11, which concerns bonds and oaths of office, provides:

Each officer whose office is created by sections 121.02, 121.04, and 121.05 of the Revised Code shall, before entering upon the duties of his office, take and subscribe an oath of office as provided by law and give bond, conditioned according to law, with security to be approved by the governor in such penal sum, not less than ten thousand dollars, as is fixed by the governor. Such bond and oath shall be filed in the office of the secretary of state.

The director of each department may, with the approval of the governor, require any chief of a division, or any officer or employee in his department, to give bond in such amount as the governor prescribes. Such bond or bonds may, in the discretion of the director, be individual, schedule, or blanket bonds. The premium on any bond required or authorized by this section may be paid from the state treasury.

¹ You have also asked whether the employees of the Ohio Retirement Study Commission ("ORSC") are required to comply with the provisions of R.C. 102.02. Pursuant to R.C. 102.08, the authority to render advisory opinions on the provisions set forth in R.C. Chapter 102 is vested in the Ohio Ethics Commission. Because R.C. 102.08 grants the Ohio Ethics Commission authority to render advisory opinions interpreting R.C. 102.02, the Attorney General will not also render opinions construing R.C. 102.02. *See generally* 1987 Op. Att'y Gen. No. 87-033 (syllabus, paragraph three) ("[t]he Attorney General will abstain from rendering an opinion where another governmental entity has been granted the authority to render advisory opinions concerning the relevant subject matter").

R.C. 121.01(A) defines "department," as used in R.C. 121.01-.20, in the following manner: "'Department' means the several departments of state administration enumerated in section 121.02 of the Revised Code." Thus, if the ORSC is one of the several departments of state administration enumerated in R.C. 121.02 or if any of the offices of the ORSC are created under R.C. 121.02, R.C. 121.04, or R.C. 121.05, R.C. 121.11 is applicable to the ORSC.

R.C. 121.02 creates the following departments: The Office of Budget and Management, Commerce, Administrative Services, Transportation, Agriculture, Natural Resources, Health, Industrial Relations, Human Services, Liquor Control, Public Safety, Mental Health, Mental Retardation and Developmental Disabilities, Insurance, Development, Youth Services, Rehabilitation and Correction, Environmental Protection Agency, Aging, and Alcohol and Drug Addiction Services. In addition, R.C. 121.02 and R.C. 121.05 create, respectively, the offices of director and assistant director in the aforementioned departments, while R.C. 121.04 creates other various offices within the departments of Commerce, Administrative Services, Agriculture, Natural Resources, Industrial Relations, Liquor Control, and Insurance. Therefore, since the ORSC is not one of the several departments of state administration enumerated in R.C. 121.02 and none of the offices of the ORSC is created under R.C. 121.02, R.C. 121.04, or R.C. 121.05, R.C. 121.11 is not applicable to the ORSC. *See generally State ex rel. Boda v. Brown*, 157 Ohio St. 368, 372, 105 N.E.2d 643, 646 (1952) ("the express mention of but one class of persons in a statute implies the exclusion of all others").

II. R.C. 125.01-.11, R.C. 125.16, R.C. 127.16, and 2 Ohio Admin. Code Chapter 123:5-1 Are Applicable to the ORSC

R.C. 125.01-.11, R.C. 125.16, R.C. 127.16, and 2 Ohio Admin. Code Chapter 123:5-1, in general, prescribe a centralized system of state purchasing, competitive bidding requirements and procedures, and annual inventories of state property. Pursuant to R.C. 125.02,

[e]xcept as to the adjutant general, the department of rehabilitation and correction as specified in division (C) of section 125.04 of the Revised Code, the general assembly, the bureau of workers' compensation, and institutions administered by boards of trustees, the department of administrative services ["DAS"] may purchase supplies and services² for the use of *state agencies*.

(Emphasis and footnote added.)

² As used in R.C. Chapter 125, the terms "services" and "supplies" are defined as follows:

(G) "Services" means the furnishing of labor, time, or effort by a person, not involving the delivery of a specific end product other than a report which, if provided, is merely incidental to the required performance. "Services" does not include services furnished pursuant to employment agreements or collective bargaining agreements.

(H) "Supplies" means all property, including but not limited to equipment, materials, insurance, and leases of real property, but excluding land or a permanent interest in land.

R.C. 125.05 further provides:

No state agency shall purchase any supplies or services except as provided in divisions (A) to (C) of this section.

(A) Any state agency may, without competitive selection, make any purchase of services that cost twenty-five thousand dollars or less or any purchase of supplies that cost ten thousand dollars or less. The agency may make the purchase directly or may make the purchase from or through the department of administrative services, whichever the agency determines.

(B) A state agency wanting to purchase services that cost more than twenty-five thousand dollars or supplies that cost more than ten thousand dollars shall, unless otherwise authorized by law, make the purchase from or through the department. Except where the purchase will be made from another state agency or is required to be made in accordance with sections 4115.31 to 4115.35 of the Revised Code, the department shall make the purchase by competitive sealed bidding under section 125.07 of the Revised Code or with controlling board approval. If the director determines that it is not possible or not advantageous to the state for the department to make the purchase, the department shall grant the agency a release and permit under section 125.06 of the Revised Code to make the purchase.

(C) An agency that has been granted a release and permit to make a purchase may make the purchase without competitive selection if after making the purchase the cumulative purchase threshold as computed under division (F) of section 127.16 of the Revised Code would:

- (1) Be exceeded and the controlling board approves the purchase;
- (2) Not be exceeded and the department of administrative services approves the purchase.

In addition, other provisions within R.C. 125.01-.11 set forth specific duties concerning the purchase of services and supplies by state agencies. *E.g.*, R.C. 125.021 (DAS "may make contracts for, operate, and superintend the telephone, other telecommunication, and computer services for state agencies"); R.C. 125.04(A) (DAS "shall determine what supplies and services are purchased by or for state agencies"); R.C. 125.081(B) (requiring that a state agency set aside a number of purchases for bidding only by minority business enterprises). R.C. 125.16 and R.C. 127.16 also delegate certain responsibilities to state agencies. R.C. 125.16 requires each state agency to conduct an annual inventory, and R.C. 127.16 requires that each state agency make its purchases by competitive selection or with the approval of the controlling board.

In addition to the foregoing, DAS is required to "prescribe uniform rules governing forms of specifications, advertisements for proposals, the opening of bids, the making of awards and contracts, and the purchase of supplies and performance of work." R.C. 125.02. Pursuant to this grant of authority, DAS has promulgated 2 Ohio Admin. Code Chapter 123:5-1. Like the provisions of R.C. 125.01-.11, the rules in 2 Ohio Admin. Code Chapter 123:5-1 apply to state agencies. *E.g.*, 2 Ohio Admin. Code 123:5-1-02 ("[t]he administrator of the state purchasing section shall have full authority to procure all supplies, materials and equipment and services costing more than one thousand dollars for the maintenance of all state agencies"); 2 Ohio Admin. Code 123:5-1-04 ("[n]o state agency other than those excepted in [R.C. 125.04] and rule 123:5-1-02 of the Administrative Code shall procure or purchase any materials, services, supplies, or equipment other than from or through the state purchasing section"). The provisions of R.C. 125.01-.11, R.C. 125.16, R.C. 127.16, and 2 Ohio Admin. Code Chapter 123:5-1 are thus applicable to state agencies.

A. The Definition of "State Agency" under R.C. 1.60 and 2 Ohio Admin. Code 123:5-1-01(A)

For purposes of the various provisions of R.C. 125.01-.11, R.C. 125.16, R.C. 127.16, and 2 Ohio Admin. Code Chapter 123:5-1, the dispositive inquiry is whether the ORSC is a "state agency." R.C. 1.60 and 2 Ohio Admin. Code 123:5-1-01(A) define, for purposes of R.C. Title I and 2 Ohio Admin. Code Chapter 123:5-1, respectively, the terms "state agency" and "agency." The term "state agency," except as otherwise provided in R.C. Title I, "means every organized *body*, office, or agency established by the laws of the state for the exercise of any function of state government." R.C. 1.60 (emphasis added). *Webster's New World Dictionary* 155 (3rd college ed. 1988) in turn defines "body" as "a group of people or things regarded or functioning as a unit." See generally R.C. 1.42 ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"). Clearly, a commission established by the laws of this state is an organized "body," as that word is commonly understood. See generally *Webster's New World Dictionary* at 280 (defining "commission" as "a group of people officially appointed to perform specified duties"). Similarly, the term "agency" "means any state department, office, institution, board, or *commission*." Rule 123:5-1-01(A) (emphasis added). The terms "state agency" and "agency" thus include within their purview an appointive commission established by the laws of the state for the exercise of a function of state government.

Because an appointive commission established by the laws of the state for the exercise of a function of state government is a "state agency" and an "agency," for purposes of R.C. Title I and 2 Ohio Admin. Code Chapter 123:5-1, respectively, the provisions of R.C. 125.01-.11, R.C. 125.16, and R.C. 127.16 that use the term "state agency" and the provisions of 2 Ohio Admin. Code Chapter 123:5-1 that use the word "agency" are applicable to such commissions. Accordingly, if the ORSC is an appointive commission established by the laws of the state for the exercise of a function of state government, the various provisions of R.C. 125.01-.11, R.C. 125.16, R.C. 127.16, and 2 Ohio Admin. Code Chapter 123:5-1 that impose a duty upon a "state agency," or "agency" are applicable to the ORSC.

B. Organization and Duties of the ORSC

The ORSC is created pursuant to R.C. Chapter 171. The membership of the ORSC consists of three members of the senate, appointed by the president of the senate; three members of the house of representatives, appointed by the speaker of the house of representatives; three members appointed by the governor, with the advice and consent of the senate; and five ex-officio members,³ who are nonvoting members. R.C. 171.01. The ORSC has the power to appoint a director to manage and direct the duties of the staff of the commission; appoint employees; employ or hire on a consulting basis necessary technical services; and fix the compensation of the employees of the commission. R.C. 171.03. The ORSC is directed by statute to:

³ The five ex-officio members of the ORSC are "the executive director of the public employees retirement system, the executive director of the state teachers retirement system, the executive director of the school employees retirement system, the executive secretary of the police and firemen's disability and pension fund, and the secretary of the state highway patrol retirement board." R.C. 171.01(D).

(A) Make an impartial review from time to time of all laws governing the administration and financing of the pension and retirement funds under Chapters 145., 146., 742., 3307., 3309., and 5505. of the Revised Code and recommend to the general assembly any changes it may find desirable with respect to the allowances and benefits, sound financing of the cost of benefits, the prudent investment of funds, and the improvement of the language, structure, and organization of the laws;

(B) Make an annual report to the governor and to the general assembly covering its evaluation and recommendations with respect to the operations of the state retirement systems and their funds;

(C) Study all changes in the retirement laws proposed to the general assembly and report to the general assembly on their probable costs, actuarial implications, and desirability as a matter of public policy.

R.C. 171.04.

C. The ORSC Is an Appointive Commission Established by the Laws of the State for the Exercise of a Function of State Government

The ORSC is an appointive commission established by the laws of the state for the exercise of a function of state government. First, the ORSC is a "commission," as that term is commonly understood. *See Webster's New World Dictionary* at 280. Secondly, the ORSC has been created by a legislative enactment of the General Assembly, and is, therefore, established by the laws of the state. *See, e.g.,* R.C. Chapter 171. Finally, the ORSC is an appointive commission, see R.C. 171.01, whose official duties involve the exercise of a function of state government. Courts have found that the administration and oversight of retirement systems involve functions of state government because they address the welfare of state employees by an exercise of the police power of the state. In one case, for example, the court held that "[t]here is no doubt but that the State Teachers Retirement Board is a public agency created by statute to exercise a certain portion of the sovereignty of the state as authorized by statute; namely, to provide for the welfare of teachers and certain other school and college educational employees so as to provide a retirement fund and system for their benefit." *In re Ford*, 3 Ohio App. 3d 416, 418, 446 N.E.2d 214, 216 (Franklin County 1982). Insofar as the ORSC is an appointive commission established by the laws of the state for the exercise of a function of state government, the various provisions of R.C. 125.01-.11, R.C. 125.16, R.C. 127.16, and 2 Ohio Admin. Code Chapter 123:5-1 that impose a duty upon a "state agency" or "agency" are applicable to the ORSC. *Cf.* 1983 Op. Att'y Gen. No. 83-048 at 2-188 (since "the Ohio Student Loan Commission is a creature of the General Assembly which serves, at least for some purposes, as an office or agency of the state, ... DAS is empowered by R.C. 123.01(A)(3) to 'make contracts for and supervise construction of any projects and improvements, or construction and repair of buildings' under the Commission's control").

Materials submitted in conjunction with your opinion request suggest that insofar as the ORSC receives no moneys from the state and the ORSC's expenses are not paid upon warrant of the Auditor of State, the ORSC is not a "state agency" or "agency" for purposes of R.C. 125.01-.11, R.C. 125.16, R.C. 127.16, and 2 Ohio Admin. Code Chapter 123:5-1. *See generally* R.C. 171.05 (the expenses of, and the compensation of all employees of, the ORSC is paid upon vouchers signed by the director and the chairman of the commission from the moneys allocated to the ORSC by the public employees retirement system, the state teachers retirement system, the school employees retirement system, the state highway patrol retirement system, and the police and firemen's disability and pension fund). In support of this proposition,

the materials cite 1977 Op. Att'y Gen. No. 77-023, which determined that moneys in the control of an autonomous, quasi-public entity, other than those appropriated or otherwise on deposit with the Treasurer of State and payable upon warrant of the Auditor of State, are not considered state moneys for purposes of those statutes which purport to restrict the uses for which the moneys may be expended. Op. No. 77-023 reasoned that to construe the statutes related to the expenditure of state moneys to include moneys of an autonomous, quasi-public entity that are not appropriated or paid upon the warrant of the Auditor of State only serves "to frustrate the clear attempt of the General Assembly to create a financially independent body." *Id.* at 2-82.

However, as indicated in the text above, the provisions of R.C. 125.01-.11, R.C. 125.16, R.C. 127.16, and 2 Ohio Admin. Code Chapter 123:5-1 are applicable to a "state agency," as defined by R.C. 1.60, or an "agency," as defined by 2 Ohio Admin. Code 123:5-1-01(A). Neither the term "state agency," as defined by R.C. 1.60, nor the term "agency," as defined by rule 123:5-1-01(A), expressly requires an entity to receive its funding from the General Assembly or to pay its obligations upon warrants of the Auditor of State in order to be characterized as a "state agency" or "agency." Instead, it appears that the source of funding for an entity, and the method of payment of its obligations, simply are not germane to a determination as to whether that entity is a "state agency," as defined by R.C. 1.60, or an "agency," as defined by rule 123:5-1-01(A). The fact that an entity does not receive its funding from the General Assembly or pay its obligations upon warrants of the Auditor of State does not, as a matter of law, require the conclusion that the entity is *not* a "state agency" or an "agency," as those terms are defined in R.C. 1.60 and rule 123:5-1-01(A), respectively. *See, e.g.*, 1988 Op. Att'y Gen. No. 88-007 (although the Bureau of Disability Determination receives its funding from the federal government, the Bureau is a "state agency," as defined in R.C. 1.60).

III. R.C. 113.08 Is Applicable to the ORSC

R.C. 113.08, the final statute with which you are concerned, provides, in part:

Except as otherwise provided by law, *every state officer, employee, and agent* shall, at the times and in the manner prescribed by rule of the treasurer of state, pay to the treasurer of state all money, checks, and drafts received for the state, or for the use of the officer, employee, or agent, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals, or otherwise....

If a state officer, employee, or agent fails to pay to the treasurer of state, at the times and in the manner prescribed by rule of the treasurer of state, any money, checks, or drafts received for the state, or for the use of the officer, employee, or agent, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals, or otherwise, the treasurer of state shall immediately inform the attorney general thereof.... (Emphasis added.)

There is no set criteria for determining whether a particular officer, employee, or agent is a state officer, employee, or agent. In 1987 Op. Att'y Gen. No. 87-027, however, my predecessor determined that the moneys which the Ohio Student Loan Commission collects on behalf of lenders and remits to lenders are public moneys that must be paid to the Treasurer of State because an officer, employee, or agent of an entity established by law for the purpose of exercising functions of the state is a state officer, employee, or agent. *Id.* at 2-191 and 2-192. Thus, if the ORSC is determined to be an entity established by law for the purpose of exercising functions of the state, an officer, employee, or agent of the ORSC is required to pay to the Treasurer of State any money, checks, or drafts received for the state, or for the use of the

officer, employee, or agent, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals, or otherwise.

As noted above, the ORSC is an appointive state commission established by the laws of the state for the exercise of a function of state government. An officer, employee, or agent of the ORSC is, therefore, a "state officer, employee, or agent" required by R.C. 113.08 to "pay to the treasurer of state all money, checks, and drafts received for the state, or for the use of the officer, employee, or agent, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals, or otherwise," in accordance with applicable rules of the Treasurer of State. Cf. Op. No. 87-027 at 2-191 and 2-192 (because the Ohio Student Loan Commission is established by law for the purpose of exercising functions of the state, the officers, employees, and agents of the Commission are state officers, employees, and agents who are required by R.C. 9.38 to pay to the Treasurer of State all public moneys received by them, in accordance with applicable rules of the Treasurer of State). See generally R.C. 171.05 ("[t]he treasurer of state shall be the custodian of all funds of the commission").

Information provided in conjunction with your letter of request surmises that the employees of the ORSC are not state employees in that such employees "are not in the state civil service inasmuch as they are not 'in the service of the state' because they are not compensated in whole or in part by state funds, but rather are paid solely from trust funds of the state retirement systems." It is true that the employees of the ORSC are not "in the service of the state" for purposes of R.C. Chapter 124 (civil service law). As stated in 1983 Op. Att'y Gen. No. 83-022,

[t]he concept of employment in the service of the state under R.C. 124.01 was recently discussed by the Court of Appeals of Franklin County in connection with the question whether an employee of the State Teachers Retirement System of Ohio was subject to the civil service provisions of R.C. Chapter 124. In re Ford, 3 Ohio App. 3d 416, 446 N.E.2d 214 (Franklin County 1982), motion to certify the record overruled, No. 82-1127 (Ohio Sup. Ct. Sept. 22, 1982). In that case, the court concluded that employees of the State Teachers Retirement System are not in the state service for purposes of R.C. 124.01 because they are paid solely from trust funds of the board and not from any state funds. The court stated: "In other words, employment in the service of the state under R.C. 124.01 has two requisites: (1) employment by a state agency, and (2) compensation being paid in whole or in part from state funds, whether general or special, regardless of the source of such state funds." Id. at 420, 446 N.E.2d at 218. The court used the term "state funds" to mean moneys "belonging to the state, whether from the general fund or some special fund," id. at 420, 446 N.E.2d at 218, and not to extend to trust funds of a state agency.

Op. No. 83-022 at 2-80. Thus, an individual is "in the service of the state" for purposes of the civil service provisions of R.C. Chapter 124 if he or she is employed by a state agency and compensated in whole or in part from state funds. *In re Ford*; Op. No. 83-022 at 2-80.

A review of the above discloses that the court in *In re Ford* implicitly recognized that an individual could be employed by a state agency without being compensated in whole or in part from state funds. Moreover, it is axiomatic that an individual employed by a state agency is a state employee. Consequently, since the ORSC is clearly affiliated with the state and, as determined in the text above, is considered a "state agency" and an "agency" for purposes of R.C. Title I and 2 Ohio Admin. Code Chapter 123:5-1, the employees of the ORSC are state

employees, notwithstanding that they are not in the service of the state for purposes of the civil service provisions of R.C. Chapter 124 because they are paid solely from trust funds of the state retirement systems. In light of the foregoing, it must be concluded that R.C. 113.08 is applicable to the ORSC.

IV. Conclusions

Based upon the foregoing, it is my opinion, and you are hereby advised, that:

1. The requirements relative to bonds and oaths of office in R.C. 121.11 are not applicable to the Ohio Retirement Study Commission.
2. The provisions prescribing a centralized system of state purchasing, competitive bidding requirements and procedures, annual inventories of state property, and the payment of state moneys to the Treasurer of State set forth in R.C. 113.08, R.C. 125.01-.11, R.C. 125.16, R.C. 127.16, and 2 Ohio Admin. Code Chapter 123:5-1 are applicable to the Ohio Retirement Study Commission.