

July 27, 1993

OPINION NO. 93-014

The Honorable Thomas E. Ferguson
Auditor of State
P.O. Box 1140
Columbus, Ohio 43266-0040

Dear Auditor Ferguson:

In connection with your audit of the Equal Opportunity Center (the "EOC"), you have requested an opinion regarding whether the equal employment opportunity coordinator of the Department of Administrative Services (the "EEO Coordinator") correctly certified certain businesses that are owned by persons who are of Asian-Indian origin as minority business enterprises for purposes of bidding upon contracts awarded by the State of Ohio in accordance with the set aside provisions of the minority business enterprise laws contained in R.C. 123.151 and R.C. 125.081.

You note in your request that the definition of "minority business enterprise[s]" in R.C. 122.71 is limited to those companies which are owned by "Blacks, Hispanics, American Indians, and Orientals." Your request further notes that since 1991 the EEO Coordinator has defined "Orientals" to include persons who are of Asian-Indian origin. Accordingly, businesses owned by persons of Asian-Indian origin are recognized by the EEO Coordinator as eligible for certification as minority business enterprises.

In connection with your audit, certain background material has been brought to your attention with respect to the history of the minority business enterprise set aside laws. Based on your review of this material, in particular the minutes of the Joint Committee on Agency Rule Review (JCARR), March 7 and 8, 1984, in which a rule revision proposed by the Department of Administrative Services which would have included contractors of Asian-Indian origin within the definition of "Orientals" for purposes of 1 Ohio Admin. Code 123:2-15-01 was discussed and rejected by the Committee, you have questioned the propriety of the certification by the EEO Coordinator of businesses owned by persons of Asian-Indian origin as minority business enterprises.

Resolution of your question requires an examination of the provisions of Ohio's minority business enterprise laws, the administrative regulations promulgated by the Department of Administrative Services to implement these provisions, and the ability of the Department of

Administrative Services, through its EEO Coordinator, to interpret and apply the regulations it has promulgated.

Contract Set Asides for Minority Business Enterprises

R.C. 123.151 and R.C. 125.081 authorize the State of Ohio to set aside a certain percentage of various state contracts for bidding only by minority business enterprises. In particular, R.C. 123.151(C)(1) reads as follows:

From the contracts to be awarded under section 123.15¹ and Chapter 153. of the Revised Code,² the director shall select a number of contracts with an aggregate value of approximately five per cent of the total estimated value of contracts to be awarded in the current fiscal year. *The director shall set aside the contracts so selected for bidding by minority business enterprises only.* The bidding procedures for such contracts shall be the same as for all other contracts awarded under section 123.15 and Chapter 153. of the Revised Code except that only minority business enterprises certified and listed under division (B) of this section shall be qualified to submit bids. (Footnotes and emphasis added.)

R.C. 125.081(A) also provides as follows:

From the purchases that the department of administrative services is required by law to make through competitive selection, the director shall select a number of such purchases, the aggregate value of which equals approximately fifteen percent of the estimated total value of all such purchases to be made in the current fiscal year. *The director shall set aside the purchases selected for competition only by minority business enterprises,* as defined in division (E)(1) of section 122.71 of the Revised Code. The competitive selection procedures for such purchases set aside shall be the same as for all other purchases the department is required to make through competitive selection, except that only minority business enterprises certified by the equal employment opportunity coordinator of the department of administrative services in accordance with the rules adopted under division (B)(1) of section 123.151 of the Revised Code and listed by the director under division (B) of section 125.08 of the Revised Code shall be qualified to compete. (Emphasis added.)

¹ R.C. 123.15 states, in pertinent part, that the Director of Administrative Services "may enter into contracts with proper persons for the performance of labor, the furnishing of materials, or the construction of any structures and buildings necessary to the maintenance, control, and management of the public works of the state, or any part thereof."

² R.C. Chapter 153 addresses the award of building and public improvement contracts by the state and its political subdivisions.

See also R.C. 123.151(D)(1) and R.C. 125.081(B).

A business is eligible to bid upon contracts set aside under R.C. 123.151 if the EEO Coordinator formally certifies it as a minority business enterprise. R.C. 123.151(B)(1) and (2). The same certification requirement applies to a business that seeks to bid upon contracts set aside under R.C. 125.081. See R.C. 125.081(A). The term "minority business enterprise," as used in R.C. 123.151 and R.C. 125.081, is defined in R.C. 122.71(E)(1) as:

an individual, partnership, corporation, or joint venture of any kind that is owned and controlled by United States citizens, residents of Ohio, who are members of one of the following economically disadvantaged groups: Blacks, American Indians, Hispanics, and *Oriental*s. (Emphasis added.)

Consequently, R.C. 122.71(E)(1) reflects an understanding on the part of the General Assembly that *Oriental*s, *inter alia*, comprise an economically disadvantaged group in Ohio.

Regulations Promulgated by the Department of Administrative Services Under the Minority Business Enterprise Set Aside Laws

Pursuant to the rulemaking authority conferred upon him by R.C. 123.151(B)(1), the Director of Administrative Services has promulgated rules that are used to administer and implement the provisions of R.C. 123.151 and R.C. 125.081. Those rules appear at 1 Ohio Admin. Code Chapter 123:2-15. Rule 123:2-15-01 describes the procedures to be followed whenever a business applies for certification as a minority business enterprise and enumerates the specific criteria to be examined by the EEO Coordinator in determining whether such an application should be approved or denied. The rule also sets forth definitions of pertinent terms that appear in the minority business enterprise law. "Oriental" is included among those terms, and is defined as "all persons having origins in any of the original people of the Far East, including China, Japan and Southeast Asia." 1 Ohio Admin. Code 123:2-15-01(A)(9).

The Meaning Accorded "Oriental" and "Far East" as Used in R.C. 122.71(E) and 1 Ohio Admin. Code 123:2-15-01(A)(9) for Purposes of the Minority Business Enterprise Set Aside Laws

The issue presented by your inquiry is whether the term "Oriental," as used in R.C. 122.71(E)'s definition of "[m]inority business enterprise," and as further defined in 1 Ohio Admin. Code 123:2-15-01(A)(9), may be construed as applying to persons of Asian-Indian origin. The term "Oriental," as used in R.C. 122.71(E), has not been separately defined by the General Assembly. Rule 123:2-15-01(A)(9) defines "Oriental" by reference to the original

people of the "Far East," which the rule further states includes China, Japan, and Southeast Asia.

Dictionary definitions have, in fact, assigned varied meanings to the terms "Orientals" and "Far East." *Webster's New World Dictionary* (2nd college ed. 1978) 507 defines "Far East" as the "countries of E. Asia, including China, Japan, Korea, & Mongolia: the term sometimes includes the countries of Southeast Asia & the Malay Archipelago." "Oriental," used as an adjective, is defined as "designating or of the zoogeographical region that includes SE Asia south of the Himalayas, the Philippines, Sumatra, Java, Borneo, and other associated continental islands"; as a noun, "Oriental" is "a native of the Orient or a member of a people native to that region." *Id.* at 1003. *The American Heritage Dictionary* (2nd college ed. 1985) 876 defines "Oriental," the adjective, as "[o]f or designating the zoographic region that includes tropical Asia and the adjacent islands of the Malay Archipelago." "Far East" is identified as "SE Asia and the Malay Archipelago." *Id.* at 1494. *The Random House Dictionary of the English Language, Unabridged Edition* 515 (1966) provides that "Far East" is "a collective term indicating the countries of E Asia, including China, Japan, Korea, and sometimes adjacent areas." The adjective "oriental" is defined as "belonging to a geographic division comprising southern Asia and the Malay Archipelago as far as and including the Filipinos, Borneo, and Java." *Id.* at 1015.

Webster's Ninth New Collegiate Dictionary (1987) 832 defines "oriental" as "of, relating to, or constituting the biogeographic region that includes Asia south and southeast of the Himalayas and the Malay archipelago west of Wallace's line."³ (Footnote added.) It further describes "Far East" as "the countries of E Asia & the Malay Archipelago -- usu. considered as comprising the Asia countries bordering on the Pacific but *sometimes as including India, Sri Lanka, Bangladesh, Tibet, & Burma*" (emphasis added). *Id.* at 1457. *The Oxford English Dictionary*, vol. V, 731 (2d. ed. 1989) describes the "Far East" as "[t]he extreme eastern region of the Old World, esp. China and Japan," and further defines the adjective "oriental" as

[b]elonging to, found in, or characteristic of, the countries or regions lying to the east of the Mediterranean or of the ancient Roman empire; belonging to southwestern Asia, or Asiatic countries generally; also, belonging to the east of Europe, or of Christendom (as *the Oriental Empire, or Church*); Eastern. (Emphasis in original.)

Id., vol. X at 930.

Thus, while many dictionary definitions of the terms "Oriental" and "Far East" do not encompass either the land of India or Asian Indians, several definitions indicate that, when viewed in the broadest sense, such terms could be read to include India and Asian Indians under certain circumstances.

³ "Wallace's line," named for the English naturalist Alfred Russel Wallace, who lived from 1823 to 1913, is "a hypothetical boundary separating the characteristic Asian flora and fauna from those of Australasia and forming the common boundary of the Australian and Oriental biogeographic regions." *Webster's Ninth New Collegiate Dictionary* (1987) 1326.

Authority of the Department of Administrative Services to Interpret Rules that Implement the Provisions of the Minority Business Enterprise Set Aside Laws

As a general matter, a governmental agency such as the Department of Administrative Services has broad authority to interpret its own governing statutes and the administrative regulations it has promulgated thereunder. *See generally United States v. City of Painesville, Ohio*, 644 F.2d 1186, 1190 (6th Cir.), *cert. denied*, 454 U.S. 894 (1981) ("[a]n agency's interpretation of its own regulations is controlling unless plainly erroneous" (citations omitted)); *Hocking Valley Railway Co. v. Public Utilities Commission*, 92 Ohio St. 362, 110 N.E. 952 (1915) (a court will not substitute its judgment for that of an administrative body, but determinations made by such body are subject to judicial review for abuse of discretion); 1992 Op. Att'y Gen. No. 92-037 at 2-145 (noting that the Accountancy Board "may adopt any reasonable interpretation of its rule that it believes will advance the Board's regulatory goals and objectives"). Accordingly, an agency may generally interpret its rules in any reasonable manner it deems appropriate. 1989 Op. Att'y Gen. No. 89-008.

Nevertheless, there clearly are limits to the discretion granted to an agency to promulgate and construe its own rules and governing statutes. As recently noted by the Ohio Supreme Court:

The purpose of administrative rulemaking is to facilitate the administrative agency's placing into effect the policy declared by the General Assembly in the statutes to be administered by the agency. In other words, administrative agency rules are an administrative means for the accomplishment of a legislative end.

Doyle v. Ohio Bur. of Motor Vehicles, 51 Ohio St.3d 46 (1990) (citing *Carroll v. Dept. Admin. Services*, 10 Ohio App. 3d 108, 110, 460 N.E.2d 704, 706 (Franklin County 1983)). Thus, where a particular administrative interpretation of its rules would serve to defeat the policy and intent of a particular statutory enactment of the General Assembly, such interpretation must be found to exceed the authority of the agency and must yield to a construction that is consistent with legislative intent.

The proceedings of the Joint Committee on Agency Rule Review referred to in your request provide guidance in determining legislative intent with respect to the definition of "Orientals" for purposes of the minority enterprise business set aside laws. These materials indicate that in 1984 the Department of Administrative Services promulgated a proposed revision of 1 Ohio Admin. Code 123:2-15-01(A)(9) that would have included within the definition of "Orientals" persons of Asian-Indian origin. The proposed amendment was submitted to the Joint Committee on Agency Rule Review pursuant to R.C. 119.03(H). Members of the Committee expressed concern that inclusion of persons of Asian-Indian background within the definition of "Orientals" exceeded the intent of the General Assembly when it enacted the set-aside program in Am. Sub. H.B. 584. *See* 1979-1980 Ohio Laws, Part II 3062 (Am. Sub. H.B. 584, eff. Dec. 17, 1980). Testimony was received from one of the sponsors of that legislation, Rep. C.J. McLin, who stated that the General Assembly had considered the inclusion of such persons, but had determined that they had not been the victims of

discrimination in state contracting.⁴ See *Minutes of the Joint Committee on Agency Rule Review*, March 7, 1984.⁵ The Committee voted 8-0 to recommend to the General Assembly that the rule be invalidated pursuant to R.C. 119.03(I)(1)(c) because it conflicted with the legislative intent in adopting the set-aside law. *Id.* Following such action, the Department of Administrative Services then withdrew the proposed amendment, leaving the prior rule in place. See *Minutes of the Joint Committee on Agency Rule Review*, March 8, 1984. Although substantive changes subsequently were made to the rule in 1985, the definition of "Orientals" was not affected. Compare [1981 Monthly Record] Ohio Admin. Code 123:2-15-01(A)(5) at 699 with [1985-86 Monthly Record] Ohio Admin. Code 123:2-15-01(A)(9) at 489.

While the proceedings and minutes of the Joint Committee on Agency Rule Review are not conclusive as to legislative intent, they do, under these circumstances, provide reasonable evidence to suggest both that (1) the General Assembly did not intend to include persons of Asian-Indian origin within the meaning of "Orientals" as used in R.C. 122.71(E)(1) with respect to the minority business enterprise set aside laws, and (2) at the time the proposed revision of the rule was submitted in 1984, the Department of Administrative Services did not believe that the term "Orientals," as used in 1 Ohio Admin. Code 123:2-15-01(A)(9) as then in effect, could be interpreted to include persons of Asian-Indian origin. This evidence should clearly be accorded reasonable weight⁶ in determining

⁴ Statutes and regulations not only must be interpreted so as to conform to legislative intent, but also, if possible, to comply with the requirements of state and federal constitutional provisions. See 1977 Op. Att'y Gen. No. 75-087 at 2-351; R.C. 1.47(A) ("In enacting a statute, it is presumed that ... [c]ompliance with the constitutions of the state and the United States is intended."). In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989), the Supreme Court announced criteria for determining the constitutionality of set-aside ordinances under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Among other things, the Court required that a legislative body have before it substantial evidence of discrimination in public contracting against a particular racial group. Based on the testimony contained in the minutes of the Joint Committee on Agency Rule Review and the Supreme Court's holding in *Croson*, an interpretation of the term "Orientals" that would permit contractors of Asian-Indian origin to participate in the set-aside program could raise serious constitutional issues.

⁵ The testimony received by the Joint Committee on Agency Rule Review concerned only state contracting. This opinion, therefore, addresses only the state contract set-aside programs established in R.C. 123.151 and R.C. 125.081 and does not apply to any state-operated affirmative action program established by other provisions of state or federal law.

⁶ Pursuant to R.C. 119.03(I)(1)(c), the Joint Committee on Agency Rule Review is statutorily empowered to recommend the adoption of a concurrent resolution invalidating a proposed agency rule, amendment, or rescission if it finds, *inter alia*, that "the proposed rule, amendment, or rescission conflicts with the legislative intent in enacting the statute under which the rule-making agency proposed the rule, amendment, or rescission." Accordingly, although the proceedings and minutes of the Joint Committee on Agency Rule Review are not viewed as formal legislative history, such proceedings are carried out pursuant to a specific statutory mandate.

the scope of these provisions, particularly where there appears to be no other evidence of legislative intent. R.C. 1.49 ("If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: ...(C) [t]he legislative history; ...(F) [t]he administrative construction of the statute.").

In the absence of the minutes of the Joint Committee on Agency Rule Review, the EEO Coordinator may have had a reasonable basis to conclude that persons of Asian-Indian origin were "Orientals" for purposes of R.C. 122.71(E) and 1 Ohio Admin. Code 123:2-15-01(A)(9). In light of that material, however, I am constrained to conclude that such a construction of the term "Orientals" for purposes of the minority business enterprise set aside laws would not be consistent with the intent of the legislature. The EEO Coordinator, therefore, should no longer interpret the term "Orientals" as defined in 1 Ohio Admin. Code 123:2-15-01(A)(9) to include persons of Asian-Indian origin for purposes of certifying businesses owned by such persons as minority business enterprises under R.C. 123.151 and R.C. 125.081 and the rules promulgated thereunder.

Conclusion

It is, therefore, my opinion, and you are hereby advised, that persons of Asian-Indian origin are not included within the meaning of the term "Orientals" as used in R.C. 122.71(E) and 1 Ohio Admin. Code 123:2-15-01(A)(9) for purposes of certifying businesses owned by such persons as minority business enterprises under R.C. 123.151 and R.C. 125.081 and the rules promulgated thereunder.

Respectfully,

LEE FISHER
Attorney General

July 27, 1993

The Honorable Thomas E. Ferguson
Auditor of State
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SYLLABUS:

93-014

Persons of Asian-Indian origin are not included within the meaning of the term "Orientals" as used in R.C. 122.71(E) and 1 Ohio Admin. Code 123:2-15-01(A)(9) for purposes of certifying businesses owned by such persons as minority business enterprises under R.C. 123.151 and R.C. 125.081 and the rules promulgated thereunder.