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INDUSTRIAL COMMISSION OF OHIO — CLAIMS, FOUR
BOARDS OF—MEMBERS CREATED UNDER SECTION 1465-44a
G. C. — “OFFICIALS”, SECTION 1465-61, PARAGRAPH 1 G. C. —
EXCLUDED TO PARTICIPATE IN STATE INSURANCE FUND
AS STATE EMPLOYEES—WORKMEN'S COMPENSATION ACT.

SYLLABUS:

The members of the four Boards of Claims created under Section 1465-44a of the General Code, are “officials” within the meaning of paragraph 1 of Section 1465-61, General Code, and are therefore excluded from participation in the State Insurance Fund as employees of the state, under the provisions of the Workmen's Compensation Act.

Columbus, Ohio, January 6, 1941.

Industrial Commission of Ohio,
State Office Building,
Columbus, Ohio.

Gentlemen:

I have for consideration and reply your recent request for my opinion, which reads as follows:

“The Commission would be pleased to have your opinion on the following question:

Are the members of the four Boards of Claims, created under Section 1465-44a of the General Code, ‘employees’ within the meaning of Section 1465-61 of the General Code, or are said Board members ‘officials’ within the meaning of Paragraph 1 of said Section 1465-61 and thereby excluded from being employees within the meaning of said Section?”

That portion of Section 1465-61, General Code, pertinent to your inquiry, reads as follows:

“The term ‘employees,’ ‘workmen’ and ‘operative’ as used in this act, shall be construed to mean:

1. Every person in the service of the state, or of any county, city, township, incorporated village or school district therein, including regular members of lawfully constituted police and fire departments of cities and villages, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, township, incorporated village or school district therein.”

From the provisions of Section 1465-44a, General Code, we derive the following pertinent facts regarding the members of the four Boards of Claims:

1. Said members are appointed by the Governor, with the advice and consent of the Senate.
2. The regular term of said members is six years.
3. Not more than one member may be chosen from the so-called employer class or from the so-called employee class.
4. Not more than two members of each Board may be from the same political party.
5. Said Board of Claims shall be located in places or districts determined by the Industrial Commission, and may be transferred temporarily from one place to another, as deemed advisable “to promote prompt and efficient administration of the law”.
6. Said members are subject to removal by the Governor at any time for inefficiency, neglect of duty, malfeasance, misfeasance or nonfeasance in office.
7. Each member must devote full time to his duties as such member.
8. No member may hold any position of trust or profit or engage in any occupation or business interfering or inconsistent with his duties as such member.
9. For said Boards necessary rooms, equipment, supplies, furniture

and employees shall be provided for the "proper and efficient performance of their duties".

10. The salary of board members is fixed at \$3,600.00, plus reimbursement for any necessary traveling expenses.
11. Each member shall give bond in the sum of \$5,000.00.
12. With reference to claims referred to them by the Industrial Commission, Boards of Claims and their members shall have the same powers with reference to investigation, hearing and deciding of claims as the Industrial Commission and members thereof.

A consideration of the question you pose is found in 71 C. J. pages 509 through 511, inclusive, Workmen's Compensation Acts, Sections 245 and 246. From Section 246 I quote, in part, as follows:

"Although it has been said that there is no rule of law by which this question can be generally determined, and that the cases are practically limited to holding that certain persons filling certain positions are officials, and persons holding certain positions are not officials, within the meaning of compensation acts differentiating between public officers and employees, an 'office' is distinguishable from an 'employment' by the former's greater importance, dignity, independence, more secure tenure, requirement of official oath and bond, by the liability of the incumbent to account, as a public officer, for misfeasance or non-feasance in office, by the continuing nature of the duties, and the fact that they are defined by rules prescribed by the government and not by contract, and, in some jurisdictions, by the fact that to an office, but not to a mere employment, is delegated a portion of the sovereign power."

In the few cases decided by Ohio courts with reference to the definition of "official", in this connection, the last of the tests referred to in the foregoing excerpt from 71 C. J. seems to have been looked upon as the most important, i.e., the delegation of a portion of the sovereignty.

In the case of Industrial Commission of Ohio v. Rogers, 122 O. S. 134, which held that a juror is not an officer within the purview of Section 1465-61, General Code, the Court said as follows, p. 136:

"There are many definitions of an 'officer', none of which is sufficient to determine the status of every agency through which the state acts; but the outstanding characteristic common to all definitions of an officer is the possession by him of some sovereign power."

The case of State ex rel. Alcorn v. Beeman, 34 O. App., 382, holds that deputy county officers are not officials within the meaning of Section 1465-61,

General Code. The decision is based on a decision of the Ohio Supreme Court in *State ex rel. v. Jennings*, 57 O. S. 415, wherein it is pointed out that:

“To constitute a public office, against the incumbent of which quo warranto will lie, it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law, to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else.”

Without attempting to enter into any scholarly discussion of sovereignty, it seems apparent from the outline of the provisions of Section 1465-44a, General Code, that to the Boards of Claims and the members thereof the State of Ohio has delegated certain phases or details of its sovereignty. It was seriously questioned for some time whether or not the Legislature itself had the power to pass a Workmen's Compensation Act. The question was finally settled, however, by the adoption of the amendment to the Constitution known as Article II, Section 35. Likewise, it was later seriously questioned whether or not the Legislature had the power to create the Boards of Claims to which your letter refers. That the constitutional provision above referred to conferred upon the Legislature the necessary powers was decided by the Supreme Court in the case of *State ex rel. DeTorio v. Industrial Commission*, 135 O. S. 214. In view of these facts it can hardly be questioned that the exercise of the powers delegated to the Industrial Commission, and to a lesser degree to the Boards of Claims, constitutes an exercise of the sovereignty of the state.

I recognize that the Industrial Commission of Ohio has duties and prerogatives not assigned to the Boards of Claims. I also recognize that under certain conditions stated in Section 1465-44a, the Industrial Commission may review, modify, suspend or cancel any awards or decision of any of said Boards, and also that the Industrial Commission may recall from any of said Boards any claims that may have been referred to said Boards by it. These provisions do not, however, in my opinion, change the fact that the powers granted are, in so far, a delegation of sovereignty.

This conclusion is further strengthened by the fact that the members of the Boards of Claims meet many, if not all, of the other qualifications of “officials”, as set out in the excerpt from 71 C. J.

The board members likewise meet another of the tests of “officials”

pointed out as important, if not controlling, by a number of our courts. This test is stated in the case of *Pinnel v. City of Portland*, 124 Me. 14, in the syllabus thereof, as follows: (The Main statute has a provision very similar to the Ohio statute under consideration).

“Though the word ‘official’ and the cognate words ‘office’ and ‘officer’ are often used in a broad sense including officers of a lodge, society, school, etc. but as used in Section 1 of the Workmen’s Compensation Act we think it may fairly be interpreted to mean the incumbent of an office created by statute or valid municipal ordinance.”

The same test is brought into clear focus by the two Illinois cases of *City of Chicago v. Industrial Commission*, 291 Ill. 23, and *Johnson v. Industrial Commission*, 326 Ill. 553. In the first case, a police patrolman regularly appointed and sworn as such under the ordinances of the City of Chicago was held to be an official, not an employee, under the Workmen’s Compensation Act. In the second, a motorcycle officer of a village was held to be an employee, not an official of the village, since there was no ordinance of the village creating the office of police patrolman, and the officer was merely employed as a special traffic officer.

See also *Hall v. City of Shreveport*, 157 La. 589, and *Coleman v. Maryland Casualty Company*, Court of Appeals, La. 1937, 76 So. 143, both of which apply the same test.

Applying one or more of the foregoing tests, a deputy sheriff has been held to be an official, not an employee, in *Borders v. Cline*, N. C. 193 So. 836, and in *Wingler v. Sheriff of Queens County New York*, 256 App. Div. 770; an assistant road supervisor was held to be an official in *Keene v. Board of Commissioners of Jasper County (Ind.)* 16 N. W. (2d) 967; a township road superintendent was held to be an official in *Hop v. Brink*, 203 Iowa, 74; and a game warden was held to be an official in *State Conservation Department v. Nattkemper*, 86 Ind. App. 85.

Wherefore, in specific answer to your inquiry, it is my opinion that the members of the four Boards of Claims created under Section 1465-44a of the General Code, are “officials” within the meaning of paragraph 1 of Section 1465-61, General Code, and are therefore excluded from participation in the State Insurance Fund as employees of the state, under the provisions of the Workmen’s Compensation Act.

Respectfully,

THOMAS J. HERBERT,
Attorney General.