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DELINQUENT TAX COMMISSION OF OHIO:

1. VOUCHER ISSUED BY ITS SECRETARY, NOT REQUIRED TO BE SUBMITTED TO OR APPROVED BY DEPARTMENT OF FINANCE — SECTIONS 154-28, 154-30 G.C.
2. NO POWER OR AUTHORITY TO EMPLOY ITS OWN COUNSEL.
3. PERSON EMPLOYED AS EXECUTIVE SECRETARY AND COMPENSATED THEREFOR, MAY ALSO BE COMPENSATED FOR DRAFTING PREPARED LEGISLATION, THE LAW REQUIRES TO BE PREPARED BY COMMISSION — APPROPRIATION — COMPENSATION.

SYLLABUS:

1. *The provisions of Sections 154-28 and 154-30, General Code, do not require the submission to or approval by the Department of Finance of a voucher issued by the Secretary of the Delinquent Tax Commission of Ohio created by Amended Senate Bill No. 420 of the Ninety-second General Assembly, and approved or certified by the Chairman thereof directing expenditures from appropriations made to such Commission.*
2. *The Delinquent Tax Commission of Ohio has no power or authority to employ its own counsel.*
3. *A person who is employed by the Delinquent Tax Commission of Ohio as its Executive Secretary and who receives compensation therefor may also be compensated out of appropriations made to such Commission for services rendered in drafting proposed legislation required by law to be prepared by the Commission.*

Columbus, Ohio, March 18, 1941.

Hon. Joseph T. Ferguson, Auditor of State,
Columbus, Ohio.

Dear Sir:

A recent request for my opinion from your office reads as follows:

“This office is in receipt of duplicate voucher No. 149, dated December 19, 1940, issued by Forrest Short, Secretary of

Delinquent Tax Commission, and approved by W. D. Burgett, Chairman of said commission.

The said voucher, which was delivered directly to this office, without being first referred to the Department of Finance, directs the issuance of a warrant in the amount of \$1,000.00, payable to X.

Attached to the invoice is duplicate bill from X, which states: 'to legal and research service rendered to date in drafting prepared legislation for the Delinquent Tax Commission of Ohio and other research incidental thereto - - - \$1,000.00.'

Certified excerpts from minutes of Delinquent Tax Commission of Ohio, state in substance that on April 2, 1940, the said commission approved the appointment of Mr. X as legal counsel for the commission with instructions to prepare a tentative legislative program and to draft prepared legislation for submission to the 94th General Assembly.

The records disclose that during Mr. X's period of employment as legal counsel for the commission, that he was also on the payroll of said commission as its Executive Secretary, and drawing compensation in such capacity.

In view of the above facts, we desire your opinion as to whether or not the said commission had legal authority to employ its own legal counsel, or must it have been represented in a legal capacity by the Attorney General, and whether or not Mr. X could be employed both as executive secretary and legal counsel of the commission and draw compensation in each capacity during one and the same period of time.

Kindly advise us as to the legal validity of the above noted voucher."

The Delinquent Tax Commission was created by Amended Senate Bill No. 420 of the Ninety-second General Assembly, Second Special Session (117 O.L., 811). Sections 1, 2, 3 and 6 of said Act respectively provide as follows:

Section 1.

"A commission is hereby created for the purpose of making a study and survey of the delinquent tax situation in the state of Ohio. This commission shall be known as the delinquent tax commission of Ohio and shall consist of nine members, three to be members of the Senate, to be appointed by the president of the Senate, three to be members of the House of Representatives, to be appointed by the speaker of the House of Representatives, and three to be county officials, one of whom shall be a county prosecuting attorney, one a county auditor, and one a county treasurer, to be appointed by the governor. This commission shall serve without pay, but shall be allowed their actual expenses incurred in the performance of their duties. The commission shall meet and organize at the earliest practicable date,

not to exceed thirty days following the taking effect of this act, and elect a chairman, vice-chairman and secretary. This commission shall make such rules and regulations as may be required for the carrying out of the provisions of this act, and shall be empowered to subpoena such witnesses and records as may be necessary. The commission shall be empowered to employ such stenographers and clerical assistance as may be required."

Section 2.

"This commission shall make a careful and thorough study and survey of the delinquent tax situation in this state, with a view to making specific recommendations for means and methods whereby the major portion of such taxes and assessments now delinquent in the state of Ohio, may be speedily liquidated. The purpose of the commission shall include the following:

(a) To study the causes for the present delinquency in general taxes, assessments, personal property taxes, intangible taxes and all other excise taxes.

(b) To study abuses in the assessment privileges of municipalities, counties, and other political subdivisions.

(c) To prepare and recommend legislation which will secure the prompt liquidation of present lawfully levied general taxes and assessments, and to prevent the future accumulation of delinquent taxes and assessments of any of the above classifications in this state.

The commission shall be required to make its report and recommendations to an adjourned session or a special session of the Ninety-second General Assembly if possible, otherwise to the Ninety-third General Assembly not later than December 31, 1939."

Section 3.

"The sums appropriated herein shall be expended upon voucher issued by the secretary of the commission after same has been certified and/or approved by the chairman of the commission, and/or, in the absence from the state or the incapacitation of the chairman the vice-chairman may assume the full responsibilities and duties conferred upon the chairman of the commission."

Section 6.

"There is hereby appropriated out of any moneys in the state treasury to the credit of the general revenue fund and not otherwise appropriated, the sum of \$5,000 to the office of the attorney general, for the purpose of enabling the attorney general to employ and assign special counsel to the delinquent tax commission created under section 1 of this act."

Sections 4, 5 and 7 of such Act made appropriations to the Com-

mission for the purpose of carrying on its functions. House Bill No. 674 of the Ninety-third General Assembly reappropriated the unexpended balances of the sums so appropriated and in addition thereto made a further appropriation of \$4,000 to the Commission.

In passing, it should be noted that Senate Bill No. 325 of the Ninety-third General Assembly (118 O.L., 670) amended Section 2 of Amended Senate Bill No. 420 of the Ninety-second General Assembly by providing that the report and recommendations of the Commission should be made to an adjourned or special session of the Ninety-third General Assembly, if possible, otherwise to the Ninety-fourth General Assembly not later than February 15, 1941.

Your communication raises the question as to whether you may draw your warrant against the appropriation made to the Delinquent Tax Commission upon a voucher issued by the Secretary of the Commission and approved by the Chairman of the Commission without being first referred to and approved by the Department of Finance. Sections 154-28 and 154-30, General Code, respectively provide in part:

Section 154-28.

"The department of finance shall have power to exercise control over the financial transactions of all departments, offices and institutions, *excepting the judicial and legislative departments*, as follows: * * *

(2) By prescribing and requiring uniform order and invoice forms and forms for financial reports and statements, and by requiring financial reports and statements. * * *

(4) By requiring orders, invoices, claims, vouchers or payrolls to be submitted to the department, where such submission is prescribed by law or where the governor shall deem such submission necessary, and by approving or disapproving such orders, invoices, claims, vouchers or payrolls.

(5) By supervising and examining accounts, the expenditures and receipts of public money and the disposition and use of public property, in connection with the administration of the state budget * * *.

(9) By prescribing rules and regulations for carrying into effect any or all of the other powers herein granted.

No provision of law authorizing or requiring any department, office or institution to keep accrual, encumbrance or cost accounts or to exercise fiscal management and control over or with respect to any institution, activity or function of the state

shall be so construed as to exclude such department, office or institution from the control of the department of finance herein specified, but the power of the department of finance herein provided for shall apply and relate to such accounts and reports of all such departments, offices and institutions." (Emphasis mine.)

Section 154-30.

"If any requirement of the department of finance respecting the submission of statements of proposed expenditures, or orders, invoices, claims, vouchers or payrolls is not complied with, or if any statement of proposed expenditure, or any order, invoice, claim, voucher or payroll is submitted to and disapproved in whole or in part by the department of finance, the department shall have authority to notify the auditor of state thereof, and such auditor shall not issue any warrants on the treasury in payment of such expenditure, claim or voucher. * * *"

These sections are part of the Administrative Code which became effective April 26, 1921. Amended Senate Bill No. 420 of the Ninety-second General Assembly was filed in the office of the Secretary of State on the 15th day of February, 1938, and became effective ninety days thereafter. Any conflict between the provisions of Sections 154-28 and 154-30, General Code, supra, and Section 3 of Amended Senate Bill No. 420 of the Ninety-second General Assembly would to the extent of such conflict be resolved in favor of the latter. Not only is it later in point of time, but also deals with the specific subject of expenditures made by the Delinquent Tax Commission, whereas, Sections 154-28 and 154-30, General Code, are concerned with financial transactions of all departments, offices and institutions of the state, except the judicial and legislative.

However, I do not find it necessary in order to answer the question raised in your letter, to determine whether there is any conflict between these provisions of the General Code and Section 3 of Amended Senate Bill No. 420 of the Ninety-second General Assembly. By reason of the express language of Section 154-28, General Code, the provisions of these two sections do not apply to the legislative and judicial departments. The Constitution of Ohio recognizes only three branches of government, viz., legislative, executive and judicial. See Articles II, III and IV of the Constitution of Ohio, and *Harmon v. State*, 66 O.S., 249, 253. While of recent years another branch of government known as "administrative" has come into existence and to some extent has been recognized judicially in this state, for the purposes of this opinion it is unnecessary to depart from the classification made in the Constitution.

The powers conferred upon the Delinquent Tax Commission by the Act creating it are so clearly non-judicial as to require no discussion to demonstrate this conclusion, and it is just as obvious that the Commission does not possess any executive powers. Its functions are limited to those set forth in Sections 1 and 2 of the Act and consist in the main of the power only to make a study and survey of the delinquent tax situation in Ohio and to prepare and recommend legislation to alleviate the evils which it finds with respect thereto and prevent future recurrence thereof. Since the Delinquent Tax Commission is not a part of either the executive or judicial branch of the government of this state and because of the functions reposed in it by law, it seems clear that it is an adjunct of the General Assembly created by that body to assist it properly to carry out its functions.

It follows therefore that Sections 154-28 and 154-30, General Code, supra, have no application to expenditures made by the Delinquent Tax Commission and the laws of this state therefore do not require submission of vouchers issued by the Secretary of the Commission and approved by its Chairman to be submitted to or approved by the Department of Finance.

The letter requesting my opinion states that the bill submitted is for "legal and research service rendered to date in drafting prepared legislation for the Delinquent Tax Commission of Ohio and other research incidental thereto." It is also stated in the letter that certified excerpts from the minutes of the Delinquent Tax Commission state in substance that the Commission approved the appointment of Mr. X as its legal counsel with instructions to prepare a tentative legislative program and to draft prepared legislation for submission to the General Assembly. The letter also states that Mr. X, during the period of his employment as legal counsel, was also Executive Secretary for the Commission, and being paid compensation in such capacity.

My opinion is requested as to whether the Delinquent Tax Commission had authority to employ its own legal counsel and also whether or not the same person could serve both as Executive Secretary and legal counsel and be paid compensation in each capacity for one and the same period of time.

Section 333, General Code, provides in part as follows:

“The attorney-general shall be the chief law officer for the state and all its departments. No state officer, board, or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys-at-law. * * *”

The provisions of this section standing alone would prohibit the Commission from employing counsel. But in addition thereto, Section 6 of the Act creating it appropriated \$5,000 to the Attorney General for the purpose of enabling him to employ and assign special counsel to the Commission. The General Assembly thereby obviously evidenced an intent that the Commission which it created should not in this respect have any greater or different powers from those possessed by boards, institutions and departments of the state generally. It may also be stated that the general rule is that a commission such as this is possessed only of such powers as are expressly granted to it by law and such additional powers as may necessarily be implied to carry out those expressly granted. No such power has been granted to the Commission. For these reasons, I am of the opinion that the Commission was without any authority to employ its own counsel.

The appropriation of \$5,000 to the Attorney General for the purpose of enabling him to employ and assign special counsel to the Commission was entirely expended by the end of December, 1938. When the Ninety-third General Assembly extended the time in which the Commission might make its report, it did not make any further appropriation to the Attorney General for such special counsel and none was therefore assigned from this office. Nevertheless, this office was, by reason of the provisions of Section 333, General Code, *supra*, counsel for the Commission and the appropriation made to it for the purpose of conducting its operations generally could and would have been used so far as necessary for the purpose of assigning some member of my staff to represent the Commission as counsel if I had been requested so to do.

But I do not regard the services performed by Mr. X and for which he rendered his bill as those of a nature which the law requires to be performed by the Attorney General. Advice to the Commission as to the present state of the law and the effect of proposed legislation and the constitutionality thereof are examples of matters which are properly within the scope of the duties of the Attorney General. If any witness disobeyed a subpoena issued by the Commission, the prosecution of proceedings in contempt properly should be performed by the Attorney General or

special counsel designated by him, but the preparation of legislation, investigation as to the causes of delinquency in taxes, and examination of the present state of the law with a view to changing it by legislation have never been regarded as part of the duties of this office. Such functions are ordinarily performed by the Legislative Reference Bureau pursuant to Sections 798-1 and 798-2, General Code.

It is true that the bill submitted by Mr. X denominates his services as legal and research services in drafting prepared legislation for the commission and other research incidental thereto, but this characterization by Mr. X is not at all controlling in the determination of the question. It appears from his bill that his services were not such as the law requires this office to perform. The Commission was authorized by Section 1 of the Act creating it "to employ such stenographers and clerical assistance as may be required," and Section 7 of the Act authorized the appropriation made thereby to be expended "for the purpose of paying all clerical, stenographic, accounting, traveling and other necessary expenses of the Commission." Mr. X should therefore be regarded as having been employed by the Commission pursuant to this grant of authority and the services performed by him were rendered pursuant to such employment.

The duties imposed upon the Commission were of such nature as unquestionably to require a great deal of time, study and preparation for their proper performance and it is hardly conceivable that the legislature intended that the members of the Commission should personally perform all the duties imposed upon it. These members served without pay and it would seem that it was intended that a great deal of the work imposed upon the Commission should be carried on by its employes. I therefore regard the statement in the bill of Mr. X that his services were legal as erroneous in the light of the further statement therein to the effect that they consisted of the preparation of legislation and research incidental thereto.

The request for my opinion also raises the question as to the right of Mr. X to be employed both as Executive Secretary for the Commission and as legal counsel. I have already shown that the services performed by Mr. X were not those which should have been performed by this office. It is therefore unimportant that in the resolution of the Commission he was authorized to be employed as counsel. As a matter of fact, he performed no services as counsel and must be regarded as having been

employed under authority of Section 1 of the Act. But the question still remains as to whether he could serve both as Executive Secretary and as a clerk employed under authority of Section 1.

This question is no doubt raised by the provisions of Section 154-20, General Code, which is part of the Administrative Code. The last sentence of this section provides:

“No employe in the several departments, employed at a fixed compensation, shall be paid for any extra services, unless expressly authorized by law.”

The word “department” as used in such section is defined in Section 154-2, General Code, which is part of the same chapter, as follows:

“As used in this chapter:

‘Department’ means the several departments of state administration enumerated in Section 154-3 of the General Code.”

The Delinquent Tax Commission is not one of the several departments of state administration enumerated in Section 154-3, General Code, and it is therefore clear that the provisions of Section 154-20, General Code, above quoted, do not apply to employes of the Delinquent Tax Commission.

It does not appear from the letter just what the duties of an Executive Secretary to the Commission may have been, but I assume that it was physically possible for Mr. X to perform the duties of Executive Secretary and also to perform the services for which he rendered his bill. The members of the Commission apparently were of the view that the two employments were not incompatible because they approved his bill and issued a voucher calling for payment thereof. Since nothing appears in the letter which would require a contrary conclusion, I am not disposed to question the discretion of the members of the Commission in this respect.

I am therefore of the opinion, based upon the facts contained in the letter from your office, that a warrant may lawfully be drawn and issued by you in the sum of \$1,000 pursuant to the direction contained in duplicate voucher No. 149 issued by the Secretary of the Delinquent Tax Commission and approved by the Chairman thereof.

Respectfully,

THOMAS J. HERBERT,
Attorney General.