OPINION NO. 74-058

Syllabus:

A municipal corporation which employs licensed dentists to provide dental treatment to its indigent residents, and receives reimbursement from the Department of Welfare for such treatment in some cases, is not employing licensed dentists with a view to profit, provided that none of the proceeds of the clinic's operation are diverted to any use be-

sides that of maintaining the clinic. Therefore, the municipality is not practicing dentistry illegally under R.C. 4715.01. (Opinion No. 2235, Opinions of the Attorney General for 1947, approved and followed)

To: Peter Garvin, Secretary, Ohio State Dental Board, Columbus, Ohio
By: William J. Brown, Attorney General, July 19, 1974

I have your request for my opinion which is as follows:

> "It has come to the attention of the State Dental Board that the Health Department of the cities of * * * and * * * are operating dental health clinics. These clinics are providing all the ordinary dental services to indigent and disadvantaged citizens of those cities. Most patients are treated free of cost to the patient. However, for those patients for whom the Ohio Department of Public Welfare would normally reimburse the health provider, these clinics are billing the State Department of Welfare and depositing those proceeds in their city's general revenue fund. The licensed dentists practicing at these clinics are salaried employees of the cities and are paid from the general revenue funds of those cities.
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> "The State Dental Board asks your office for a formal legal opinion in regard to the above situation and in answer to the following questions:
>
> "1. Are the cities mentioned above engaged in the unlawful practice of dentistry by virtue of R.C. 4715.01 which requires all operators of a place for performing dental operations to themselves be licensed dentists?
>
> "2. If your answer to the above question is in part that such operation of a dental clinic is lawful so long as it is not operated for fee or profit (1962 OAG No. 3031), does the receipt of payment from the State Department of Welfare for dental services rendered constitute a violation?"

R.C. 4715.01, mentioned in your letter, reads in part as follows:

> "Any person shall be regarded as practicing dentistry, who is a manager, proprietor, operator, or conductor of a place for performing dental operations or who, for a fee, salary, or other reward paid or to be paid either to himself or to another person, performs, or advertises to perform, dental operations of any kind.
>
> "* * * * * * * * *
>
> "Manager, proprietor, operator, or conductor as used in this section includes any person:
>
> "(A) Who employs licensed operators;

"(B) Who places in the possession of licensed operators dental offices or dental equipment necessary for the handling of dental offices on the basis of a lease or any other agreement for compensation or profit for the use of such office or equipment, when such compensation is manifestly in excess of the reasonable rental value of such premises and equipment;

"(C) Who makes any other arrangements whereby he derives profit, compensation, or advantage through retaining the ownership or control of dental offices or necessary dental equipment by making the same available in any manner for the use of licensed operators; provided that this section does not apply to bona fide sales of dental equipment secured by chattel mortgage.

"Whoever having a license to practice dentistry or dental hygiene enters the employment of, or enters into any of the arrangements described in this section with, an unlicensed manager, proprietor, operator, or conductor, * * * may have his license suspended or revoked by the state dental board."

The first issue that must be resolved is whether R.C. 4715.01 applies only to individuals and corporations or whether it also applies to municipal corporations. The statutory definition for the word person is found in R.C. 1.59. That section states as follows:

"As used in any statute, unless another definition is provided in such statute or a related statute:

"* * * * * * * * *

"(C) 'Person' includes an individual, corporation, business trust, estate, trust, partnership, and association.

"* * * * * * * * *"

In Dayton v. McPherson, 29 Ohio Misc. 190 (1969), the Court of Common Pleas of Montgomery County, in interpreting the predecessor to R.C. 1.59, recognized that a municipality could fit within the definition of "any person" for purposes of R.C. 709.07. In so holding, the court relied upon the introductory phrase "unless the context otherwise provides". Although this language was changed in the 1972 amendments to R.C. Chapter 1, similarities still exist between former R.C. 1.02 and R.C. 1.59. Both sections provide that the definition of "person" includes specific classes. Neither section states that the definition of person "means" or "is limited to" an individual, corporation, etc. Therefore, the definition of person is not necessarily an exclusive listing of the possible interpretations.

In the case of Kraus v. City of Cleveland, 66 Ohio L.Abs. 417 (1954), aff'd on other grounds, 76 Ohio L. Abs. 214 (1954), aff'd 163 Ohio St. 559 (1955), appeal denied 351 U.S. 935 (1956), the Common Pleas Court of Cuyahoga County stated at 459 that "a municipal corporation, whether exercising its proprietary or governmental function, may not practice medicine or dentistry or pharmacy." However

it concluded that the fluoridation of water is not practicing dentistry because there is no dentist-patient relationship in such an operation. Thus, there was no need to discuss any other elements of the practice of dentistry.

A strict construction of R.C. 4715.01 may be favored by the rule stated in the first branch of the syllabus of State, ex rel. Moore Oil Co. v. Dauben, 99 Ohio St. 406 (1919), as follows:

> "Statutes or ordinances of a penal nature, or which restrain the exercise of any trade or occupation or the conduct of any lawful business, or which impose restrictions upon the use, management, control or alienation of private property, will be strictly construed and their scope cannot be extended to include limitations not therein clearly prescribed; exemptions from such restrictive provisions are for like reasons liberally construed."

See also, Inglis v. Pontius, 102 Ohio St. 140, 148 (1921). I am unaware of any case which discusses this rule with respect to the practice of a profession, but such practice could well be included by the term "occupation." Moreover, I am not aware of any authority which applies this rule to a municipal corporation.

It was held in Springfield v. Walker, 42 Ohio St. 543 (1885), that a municipal corporation was within the purview of a statute which provided that "all persons" having a controversy, not involving title to or possession of real estate, could submit it to arbitration. However, this conclusion was based upon a common law rule that arbitration is favored as an alternative to litigation, and upon a statutory directive that the statute in question was to be given a liberal construction.

In many cases, statutes expressly provide a definition of "person" which includes or excludes municipal corporations. See for example the Ohio Consumer Sales Practice Act, R.C. 1345.01 et seq., and Chicago v. Ames, 365 Ill. 524, 7 N.E. 2d 294 (1937). In other cases the court has relied upon legislative history in interpreting the word "person". See for example, Monroe v. Pape, 376 U.S. 167, 187-192 (1961), concerning the Federal Civil Rights Act, 42 U.S.C. Sec. 1983. Cases such as these are of little assistance in construing statutes which do not contain an express definition and do not have reported legislative history.

The strongest precedent, as well as the best reason, answers the present question on the basis of the nature of the municipal corporation's activity. If the activity is of a governmental nature, then statutes regulating persons do not apply to the municipal corporation insofar as it is engaged in such an activity; if it is proprietary, they do apply. The United States Court of Appeals for the Fifth Circuit discussed this distinction in Seabord Air Line R. Co. v. County of Crisp, 280 F. 2d 873 (1960), cert. denied 364 U.S. 942 (1961), at 877, as follows:

> "Where a governmental entity is authorized to exercise non-governmental powers and engages in an activity of a business nature such as is generally engaged in by individuals or private

> corporations, it acts as a corporation and not in any sovereign capacity. In such instances the law leans to the theory that the governmental entity has the full power to function in such capacity as a private person might do. * * *"

The Court held the county liable for damages resulting from its business activities authorized by statute.

In Ohio v. Helvering, 292 U.S. 360 (1934), the United States Supreme Court held that Ohio was a "person" for purposes of the federal tax on dealers in spiritous liquors. The applicable definition read as follows (26 U.S.C. Sec. 11, quoted at 292 U.S. 368):

> "* * * where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person,' as used in this title, shall be construed to mean and include a partnership, association, company, or corporation as well as a natural person."

This definition is quite simlar to that contained in R.C. 1.59(C). The Court held that states are exempt from the taxing power of the federal government only with respect to their governmental functions, not with respect to their proprietary, or business functions. In holding that the taxation statute in question applied, the Court cited many cases in which it was held that a state was a "person" with respect to regulatory statutes.

I am aware that the two foregoing cases involved a county and a state, respectively, rather than municipal corporations. However, their reasoning applies even more strongly to municipal corporations, with respect to which the distinction between governmental and proprietary functions has long been established. See State, ex rel. White v. City of Cleveland, 125 Ohio St. 230 (1932).

Turning to the instant fact situation, it is clear that the municipal corporation is not engaged in a governmental function in furnishing dental care to its inhabitants. See Sears v. Cincinnati, 31 Ohio St. 2d 157 (1972), which reached the same conclusion with respect to a municipal hospital. Rather, it is performing a service ordinarily performed by private dentists, professional associations of dentists, and dental corporations (R.C. Chapter 1740.).

Your letter states that "most patients are treated free of cost to the patient." I infer from this statement that the remainder are charged a fee. For some of those who are treated without cost to themselves, the Department of Public Welfare reimburses the city for the cost of dental care. The remainder are charity cases, for whom the city absorbs the cost of providing dental care.

I have concluded that a municipal corporation is included within the term "any person" in R.C. 4715.01. Therefore, if the municipal corporation is practicing dentistry under that Section, it is in violation of the law, because only a natural person can obtain a license to practice dentistry. The requirements of R.C. 4715.10, that an applicant be at least 18 years of age and of good moral character, obviously cannot be met by a corporation or governmental entity. See Opinion No. 1751, Opinions of the Attorney

General for 1952, page 608, and Opinion No. 4081, Opinions of the Attorney General for 1948, page 559.

It will be recalled from R.C. 4715.01 that "any person shall be regarded as practicing dentistry, who is a manger, proprietor, operator, or conductor of a place for performing dental operations * * *." "Manager, proprietor, operator, or conductor" is defined as, inter alia, any person "who employs licensed operators [dentists]." It is conceded that the city employs licensed dentists to staff its clinic.

A line of Attorney General's opinions has held that "manager, proprietor, operator, or conductor" includes only one who employs licensed dentists with a view to profit, although the terms of the statute contain no such limitation. The first of these was Opinion No. 2235, Opinions of the Attorney General for 1947, page 468. My predecessor justified his construction of R.C. 4715.01 (then G.C. 1329) at page 472, as follows:

> "* * * If the section is not interpreted as making profit an indispensable element then there would be brought within its operative effect any person who owned a place for performing dental operations and employed a licensed dentist to operate the same even though such operation thereof was not for profit. Under such construction a charitable organization that owned a place for performing dental operations which was being operated by a licensed dentist as its employe, and supplying free dental services to needy persons, would be engaged in the practice of dentistry. It is difficult for me to believe it was the legislative intent for such to be the situation. I feel, therefore, that in interpreting the provisions of said section we are required to start with the proposition that, unless the arrangement is one which contemplates profit or gain, a person who employs a licensed operator to conduct a place for performing dental operations is not within the definition of the term manager, proprietor, operator or conductor."

This conclusion has been cited with approval in several opinions of my predecessors. See Opinion No. 4081, Opinions of the Attorney General for 1948, page 559; Opinion No. 1717, Opinions of the Attorney General for 1952, page 567; and Opinion No. 3031, Opinions of the Attorney General for 1962, page 414. On the basis of these opinions, I conclude that the municipal corporation is practicing dentistry only if it employs licensed dentists "with a view to profit." Conversely, if the municipality is employing dentists for charitable purposes, it is not practicing dentistry illegally.

The Ohio Supreme Court's most recent definition of charity is found in Planned Parenthood Assn. v. Tax Comr., 5 Ohio St. 2d 117 (1966), quoted with approval in Ohio Children's Society v. Porterfield, 26 Ohio St. 2d 30 (1971). The Court stated in the former decision at 120 as follows:

> "When the last syllable has been uttered in the quest to define 'charity' (and the attempts have been legion) this hallmark will sur-

> vive: charity is the attempt in good faith, spiritually, physically, intellectually, socially and economically to advance and benefit mankind in general, or those in need of advancement and benefit in particular, without regard to their ability to supply that need from other sources, and without hope or expectation, if not with positive abnegation, of gain or profit by the donor or by the instrumentality of the charity." (Footnote omitted)

Institutions open to the needy for the relief of disease have always been considered to be charitable in nature. Humphries v. The Little Sisters of the Poor, 29 Ohio St. 201 (1876); Vick v. Medical Foundation, 2 Ohio St. 2d 30 (1965).

In a decision on a fact situation similar to the instant one, the Ohio Supreme Court held that a home for the aged was operating exclusively for charitable purposes, and therefore was not an "employer" for purposes of workmen's compensation, even though all its residents paid something for its facilities and services, and some paid a fee greater than the cost of their own care. Carmelite Sisters, St. Rita's Home, v. Board of Review, 18 Ohio St. 2d 41 (1969). The Court noted at 42 that "'[t]he sole criteria for admission to the home is that the applicant must be 65 years of age or older and have need for the services rendered by the Home." (Emphasis in the original) The home operated on a "break-even" budget, that is, "[a]ny surplus of revenue over operating costs would be used to improve the home." 18 Ohio St. 2d 42.

In specific answer to your question, it is my opinion and you are so advised that a municipal corporation which employs licensed dentists to provide dental treatment to its indigent residents, and receives reimbursement from the Department of Welfare for such treatment in some cases, is not employing licensed dentists with a view to profit, provided that none of the proceeds of the clinic's operation are diverted to any use besides that of maintaining the clinic. Therefore, the municipality is not practicing dentistry illegally under R.C. 4715.01. (Opinion No. 2235, Opinions of the Attorney General for 1947, approved and followed)