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1. CIVIL SERVICE COMMISSION, CLEVELAND — EMPLOYMENT BY RESOLUTION OF A PERSON TO “ASSIST IN COLLECTING DATA”—UNDER PROVISIONS OF CHARTER DOES NOT AMOUNT TO CREATION OF A PUBLIC POSITION, FIXING A SALARY NOR APPOINTMENT OF MUNICIPAL EMPLOYEE — ATTEMPT TO MAKE CONTRACT.
2. IF EXPENDITURE INVOLVED EXCEEDS FIVE HUNDRED DOLLARS, CONTRACT, UNLESS AUTHORIZED BY ORDINANCE OF COUNCIL IS ILLEGAL AND VOID — CHARTER, CLEVELAND, SECTION 108.

**SYLLABUS:**

1. The employment of one by the civil service commission of the city of Cleveland by resolution of the commission, merely approving “the employment of Mr. G. to assist in collecting data,” etc., and further stating that his “compensation for this work is to be ten dollars per hour plus necessary clerical and material expense”, does not under the provisions of the Cleveland City Charter amount to the creation of a public position, nor to fixing a salary nor to the appointment of Mr. G. as a municipal employe; but such action is at most an attempt at the making of a contract for doing the work mentioned.

2. Such contract, if the expenditure involved therein exceeds the sum of five hundred dollars, unless first authorized by ordinance of council, pursuant to the provisions of Section 108 of the charter of the city of Cleveland, is illegal and void.

Columbus, Ohio, August 1, 1942.

Bureau of Inspection and Supervision of Public Offices,  
Columbus, Ohio.

Gentlemen:

I have your letter asking for my opinion on the legality of payment of \$891.37 to H.W.G. for certain services rendered to the civil service commission of Cleveland. Your communication reads as follows:

“We are enclosing herewith a letter from one of our City of Cleveland Examiners, concerning a contract with, or the employment of, Mr. H.W.G. by the civil service commission, to assist in collecting data with regard to compensation paid for various positions in the Cleveland area.

It will be noted by said letter that the expenditure involved by said contract or employment exceeded the sum of \$500, and while the rate for said service was apparently \$10 per hour, yet the vouchers issued in payment for such service fail to show the dates or hours of service of either the principal or necessary clerical assistance.

The employment in question was not authorized and directed by ordinance or resolution of council, which authorization and direction would seem to be essential if the employment in question was in the form of contractual service. (See sections 108 and 109 of the Cleveland charter.)

However, if said employment is considered as a regular position of the civil service commission, such as contemplated by the provisions of section 125 of the City Charter, then said commission would seem to be authorized to fix the salary of said position without special authorization and direction of council.

Question. Will you kindly examine the enclosed correspondence, together with the City Charter, and advise us if, in your opinion, the payment of \$891.37 to H.W.G., for the services in question, as made upon voucher without itemization as to hours of service or detail as to clerical assistance, constitutes a legal expenditure of the public funds of the City of Cleveland?"

Attached to your communication is a letter from your assistant state examiner, as follows:

"The civil service commission of Cleveland, Ohio, employed the services of H.W.G., as noted in their minutes of December 19, 1938, which reads as follows:

'The commission approved the employment of Mr. H.W.G. to assist in collecting data with regard to compensation paid for various positions in the Cleveland area. This data will be used in connection with the salary schedule recommendations which the Commission is required to make to the council of the city of Cleveland in accordance with the provisions of Section 191 of the Charter of the City of Cleveland. Mr. G.'s compensation for this work is to be ten dollars per hour plus necessary clerical and material expense.'

Vouchers for this service were issued to H.W.G. as follows:

Voucher No. 74702, dated Feb. 4, 1939,	\$ 300.00
Voucher No. 114043, dated July 7, 1939,	891.37
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	\$1191.37

Voucher No. 74702 has bills attached dated Jan. 4, 1939.

For services rendered:

H. W. G.	\$ 160.00
Assistants	140.00

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\$ 300.00

Voucher No. 114043 has bill attached dated May 23, 1939.

For services rendered,  
Jan. 5 to May 23, 1939:

H. W. G.	\$ 647.50
Assistants	169.00

Printing 200 copies 'Distribution of Compensation within Classifications'	\$ 53.72
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Printing 200 copies each of 2 tables "Going Rates of Pay" in Cleveland by Selected Job Classifications' and 'Rates of Pay for Selected Classifications — City of Cleveland and 20 Representative Business Concerns'	\$ 15.70
Stationery, postage, paper, photostats, etc.,	\$ 5.45

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\$ 891.37

Section 125 of the Charter of the City of Cleveland reads as follows:

'The civil service commission shall designate one of its members as president, shall appoint a secretary who shall act as chief examiner and such other officers and employes as may be necessary. The salaries of the secretary and other subordinates shall be fixed by the commission. The salaries of the commission shall be determined by the council and a sufficient sum shall be appropriated each year to carry out the civil service provisions of this charter.'

Could the expenditure mentioned above be classified as salary?

No contract was issued for this service and no action was taken by council.

Will you kindly give me a written opinion on the legality of this transaction?"

Your inquiry seems to call for an answer to three questions:

(1) Was the employment in the nature of an appointment to a public position, or was it merely a contract for a specified service?

(2) Was the contract legally made?

(3) Was the payment of the bill in the form in which it was rendered a legal transaction?

In order to arrive at the character of the employment in question, it will be helpful to review briefly the characteristics which distinguish a public office from a public employment.

In the case of *Newman vs. Skinner*, 128 O.S. 325, the syllabus reads in part as follows:

“1. A public officer, as distinguished from an employee, must be invested by law with a portion of the sovereignty of the state and authorized to exercise functions either of an executive, legislative or judicial character.”

To like effect see *State ex rel Landis vs. Board of County Commissioners*, 95 O.S. 157, where the court, in discussing the status of the clerk of the board of county commissioners, pointed out that a public officer has specific statutory and independent duties imposed upon him in relation to police powers of the state, or has independent power in the disposition of public property or power to incur financial obligations upon the part of the county or state, whereas one who is appointed to a subordinate or clerical position has no such power.

This distinction is elaborated at length in 32 O.Jur. p. 872 et seq. It is stated at p. 872:

“It is hard to distinguish between a contract of employment and an office because every public office has the characteristics of a contract, including parties, consideration, and subject-matter. Yet a government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration and specific in its objects, and the terms agreed upon define the rights and obligations of both parties.”

I quote further from page 874 of the same volume:

“The term ‘employment’ is more comprehensive than the term ‘office,’ for while an office is an employment, it does not follow that an employment is an office. It is also of broader significance than the terms ‘appoint’ and ‘elect.’ In a broad sense it includes appointments to positions, but it also includes much more. The terms ‘appoint’ and ‘elect’ are properly used to indicate that one has been chosen for an office, created by law, with prescribed duties.”

It is not necessary to pursue this distinction further because it is evident that Mr. G. was in no sense a public officer. Considering him,

however, as an employe, I think there is a further distinction to be made between one who is employed in or rather appointed to a *position* of public employment, and one with whom a contract is made merely for the doing of a specific job. It may be observed that where a board or officer having the power of supervision in a department creates a position of high or low degree and appoints a person to fill that position, such person is a *public employe*. If, on the contrary, such board or officer contracts with a man to do a certain piece of work for an agreed remuneration, that person is not in any sense a public employe but is simply a contractor. Plainly, the idea that one holds a position of public employment presupposes the creation of the position itself.

Let us then examine the question from the standpoint which here presents itself. The action of the civil service commission is embodied in the resolution taken from its minutes, which reads as follows:

“The commission approved the employment of Mr. H.W.G. to assist in collecting data with regard to compensation paid for various positions in the Cleveland area. This data will be used in connection with the salary schedule recommendations which the Commission is required to make to the council of the city of Cleveland in accordance with the provisions of Section 191 of the Charter of the city of Cleveland. Mr. G.'s compensation for this work is to be ten dollars per hour plus necessary clerical and material expense.”

Section 125 of the charter of the city of Cleveland reads as follows:

“The civil service commission shall designate one of its members as president, shall appoint a secretary who shall act as chief examiner and such other officers and employes as may be necessary. The salaries of the secretary and other subordinates shall be fixed by the commission. The salaries of the commission shall be determined by the council and a sufficient sum shall be appropriated each year to carry out the civil service provisions of this charter.”

This section gives the commission power to *appoint* a secretary and such other officers and employes as may be necessary. Express power is conferred on the commission to fix the salary of such secretary and such other officers and employes as may be appointed. It may be conceded that the salary so fixed may be by the year, month, day or hour, but it seems to me quite essential that anyone so appointed must be appointed

to a position created and established by the commission and that the compensation fixed will be the salary pertaining to that position.

The resolution of the commission above quoted merely approved the employment of Mr. G. to do certain work. It does not, as it might have done, create the position of statistical clerk or assistant; and does not in terms fix a salary pertaining to any position, but merely provides that his "compensation for this work" is to be \$10.00 per hour "plus necessary clerical and material expense." It is significant that the resolution used the word "employment" and not "appointment." Suppose that the commission had adopted a resolution providing that "Mr. X shall be employed to sod the yard in front of the office of the commission and his compensation for this work is to be \$1.00 per hour plus the necessary hired labor and material expense." Could it be said that the commission had thereby created a position of ground keeper and attached a salary to the position? Would not the inclusion in the compensation of Mr. X of all labor expense and material expense that he might incur put him clearly in the light of a contractor rather than the incumbent of a salaried position? In the case under consideration, the number of assistants is not specified; their rate of compensation is not fixed; the commission neither appoints them nor reserves the right to do so; they would be in no sense employes of the commission or of the city; nor is the "material" for which he is to be reimbursed in any way specified or valued. These assistants are hired by Mr. G. and paid by him. His practical construction of the arrangement, evidenced by the form of the bills which he submitted, shows conclusively that he regarded his employment as a mere contract for doing certain work and furnishing the necessary labor and materials therefor.

I am of the opinion that the employment of Mr. G., in the manner stated in your communication, makes him a mere contractor and not in any sense a municipal employe.

I come now to a consideration of the second question, viz., was this contract made in compliance with law? It is distinctly stated in your communication that there was no action of council and that no contract further than the resolution above mentioned was made with Mr. G.

Section 108 of the charter of the city of Cleveland reads as follows:

"All contracts involving any expenditure in excess of five

hundred (\$500.00) dollars shall first be authorized and directed by ordinance of council. When as authorized and directed, the director of the department involved shall make a written contract with the lowest responsible bidder, after advertisement once a week for two consecutive weeks in the City Record. There shall be no splitting of orders to avoid the effect of this section, and any contract made contrary to or in evasion of the foregoing provisions of this section, shall be illegal and void."

Since the above section of the charter expressly requires that all contracts involving expenditure in excess of \$500.00 shall first be authorized and directed by ordinance of council, and since it appears further that the voucher in question calls for payment of \$891.37, it would seem to follow that the contract was not authorized as required by the charter and that having been made contrary to the provisions quoted, such contract is "illegal and void."

It is further to be noted that Section 108 requires that such contract when authorized and directed shall be made *in writing* with the lowest responsible bidder after advertisement once a week for two consecutive weeks in the City Record. It is worthy of note that whereas Section 4328, General Code, relating to contracts by the director of service, and Section 4371, General Code, to contracts by the director of safety, make an exception of "the compensation of persons employed therein," the above quoted Section 108 of the Cleveland charter contains no such exception, but applies in terms to "all contracts."

I have no means of knowing whether there was in this case an advertisement for bids, nor do I consider it essential to decide whether in a contract of this character bids must be taken. As a matter of fact no contract was authorized and no "written contract," such as the charter requires, was made or attempted to be made. I am constrained, therefore, to hold that the employment of Mr. G. in the manner revealed by your information is not in accord with the provisions of the charter of the city of Cleveland and is therefore illegal and void.

As to the third proposition, whether the payment of the bill in the form in which it was presented was legal, it would of course follow that, if the contract be illegal and void, payment made in any manner would be illegal and should be recovered. It appears that in the two bills rendered and for which vouchers were issued, there was no itemization or information whatsoever as to the amount of the services Mr. G. per-

formed, but merely a lump sum of \$160.00 in one case and \$647.50 in the other, for services rendered by him. The second bill does refer to a period from January 5 to May 23, 1939, but contains no statement whatsoever as to the number of hours alleged to have been served. The other bill does not even have that much information. The items as to his assistants, in the amount of \$140.00 in one case and \$169.00 in the other case, are lumped, no information being furnished as to the names of such assistants, the amount of service performed by them, or the rate of pay. The item for printing 200 copies "Distribution of compensation within classifications" is given in a lump sum, likewise the item of printing 200 copies of another pamphlet. The sufficiency of these statements as the basis for the issuance of the vouchers in question may be more a matter of good accounting than of law. I note, however, in this connection Section 95 of the charter, reading as follows:

"Accounts shall be kept by the department of finance showing the financial transactions of all departments and offices of the city. The form of all such accounts and the financial reports rendered to or by the department of finance, shall be described (prescribed) by the director of finance. The accounts and the accounting procedure of the city shall be adequate to record all cash receipts and disbursements, all revenues accrued and liabilities incurred, and all transactions affecting the acquisition, custody and disposition of values and for making such reports of the financial transactions and conditions of the city as may be required by law or ordinance."

I cannot see how statements in the form submitted and vouchers issued thereon could be said to be adequate "to record all cash receipts and disbursements, all revenues accrued and liabilities incurred," or, "for making such reports of the financial transactions and conditions of the city as may be required by law or ordinance."

Answering your question specifically, I am of the opinion that the payment of \$891.37 to Mr. H.W.G., for services alleged to have been rendered by him to the civil service commission of the city of Cleveland, pursuant to the resolution of that commission of December 19, 1938, made upon voucher without itemization as to hours of service or detail as to clerical assistance, does not constitute a legal expenditure of the public funds of the city of Cleveland.

Respectfully,

THOMAS J. HERBERT  
Attorney General.