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CIVIL SERVICE—EMPLOYEES OF LOCAL INSTITUTIONAL COMMISSARIES—NOT STATE EMPLOYEES IN THE CLASSIFIED SERVICE—§5119.131 R.C.

SYLLABUS:

Employees of local institutional commissaries who are paid from the "commissary fund" established as provided in Section 5119.131, Revised Code, are not in the classified service of the state.

Columbus, Ohio, June 30, 1958

Hon. Leland S. Dougan, Chairman
Civil Service Commission of Ohio, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"R.C. 5119.13.1 was enacted by the last Legislature and became effective September 4, 1957 entitled 'Industrial and entertainment fund; commissary fund.'

"An employee from an institution operating under the above mentioned section of the law has never been entered in the office of the State Civil Service Commission of Ohio, as an employee of the State of Ohio.

"The question: Is this employee in the unclassified or classified service?"

Section 5119.131, Revised Code, as enacted effective September 4, 1957, reads as follows:

"Each managing officer of an institution under the jurisdiction of the department of mental hygiene and correction as described in section 5119.05 of the Revised Code and with the approval of the director of the department of mental hygiene and correction, may establish local institution funds designated as follows:

"(A) Industrial and Entertainment Fund created and maintained for the entertainment and welfare of the patients, pupils, and inmates of the institutions under the jurisdiction of the department of mental hygiene and correction. The director shall establish rules and regulations for the operation of the Industrial and Entertainment Fund.

"(B) Commissary Fund created and maintained for the benefit of patients, pupils, and inmates in the institutions under the jurisdiction of the department of mental hygiene and correction. Commissary revenue over and above operating costs and reserve shall be considered profits. All profits from the Commissary Fund operations shall be paid into the Industrial and Entertainment Fund and used only for the entertainment and welfare of patients, pupils, and inmates. The director shall establish rules and regulations for the operation of the Commissary Fund."

It appears that this fund is an express statutory recognition of the authority of the several state benevolent and correctional institutions to maintain those local rotary funds the authority for which previously was found by implication in various statutory enactments, such implication having been recognized in numerous viewings of this office. See for example, Opinion No. 3651, Opinions of the Attorney General for 1941, p. 234; Opinion No. 4753, Opinions of the Attorney General for 1955, p. 41; and Informal Opinion No. 23, Informal Opinions of the Attorney General for 1957, p. 108.

In Opinion No. 3651, *supra,* the syllabus reads in part:

"* * * 2. Monies in the Commissary Fund of the Ohio state reformatory may be used to pay the compensation of the person in charge of and operating the commissary.

"4. The person in charge of and operating the commissary at the Ohio state reformatory, who is paid out of the Commissary Fund, is not a state employee. * * *"

Because personal service is an absolute necessity in the operation of a commissary, and since Section 5119.131, *supra,* contemplates the realization of profits "over and above operating costs," and because operating costs would clearly include the expense of personal service, I am impelled to concur fully in the view that the compensation of commissary employees should be paid from the "local institution fund" which has thus been given express statutory recognition.

On the question of whether such employees are "state employees," the writer of Opinion No. 3651, *supra,* said:

"* * * While, as we have pointed out, the operation of the commissary is a lawful undertaking and one in which the public has a real interest, it does not follow that the person in charge of and operating a commissary is a state employee. It might be said that he is a quasi-public employee. There is no statute

creating his position, nor is he paid from funds appropriated from the state treasury. He is not in the classified civil service as he would be required to be, unless, of course, he were employed under a lawful exemption. * * *"

I might be inclined to entertain some doubt as to the accuracy of this conclusion were it not for certain subsequent enactments which indicate a legislative view in harmony with the conclusion thus reached in the Opinion No. 3651, *supra.*

In Substitute Senate Bill No. 96, 99th General Assembly, 124 Ohio Laws, 617, extensive amendments were made to the statutes relating to the public employees retirement system. In that enactment the term "public employee" was defined in Section 486-32, General Code, as follows:

"* * * 'Public employe' shall mean any person holding an office, not elective, under the state of Ohio, any county, municipality, park district, conservancy district, sanitary district, health district, township, metropolitan housing authority, state retirement board or public library, or *employed* and paid in whole or in part *by the state of Ohio or any of the above named authorities* in any capacity whatsoever. * * *" (Emphasis added)

This section was amended by the enactment of Amended Substitute House Bill No. 551, 100th General Assembly, 125 Ohio Laws, 651. As so amended, the definition in question was changed in Section 145.01, Revised Code, to read as follows:

"* * * 'Public employee' means any person holding an office, not elective, under the state or any county, municipal corporation, park district, conservancy district, sanitary district, health district, township, metropolitan housing authority, state retirement board, * * * public library, union cemetery, joint hospital, *institutional commissary,* state university rotary fund, or *employed* and paid in whole or in part *by the state or any of the authorities named in this division* in any capacity. * * *" (Emphasis added)

This legislative use of the language "employed * * * by the state or any of the authorities named in this division" and the addition to the definition of "institutional commissary" as one of such "authorities," clearly indicated a legislative understanding that employees of state institutional commissaries were not therefore regarded as being "employed * * * by the state."

This latter enactment became effective on October 26, 1953 and there was in effect on that date, in Section 143.08, Revised Code, a statutory definition of the classified service of the state, reading in part as follows:

"* * * (B) The classified service shall comprise *all persons in the employ of the state* and the several counties, cities, and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class and the unskilled labor class. * * *" (Emphasis added)

This definition has not since been substantially changed, and we may conclude from the amendment, above noted in the public employees retirement system law, that it was the legislative purpose, while recognizing commissary employees as being in a category distinct from state employees, to admit them nevertheless to membership in the public employees retirement system, but without including them in the classified service of the state. I conclude, therefore, that these employees of local institutional commissaries who are paid from the "commissary fund" established as provided in Section 5119.131, Revised Code, are not in the classified service of the state.

Respectfully,
WILLIAM SAXBE
Attorney General