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EMPLOYER'S CONTRIBUTIONS TO WELFARE FUND TO PURCHASE EMPLOYEE'S INSURANCE—NOT PART OF TOTAL PAYROLL—NOT REPORTED TO INDUSTRIAL COMMISSION—NOT USED IN CALCULATION OF STATE INSURANCE FUND PREMIUMS.

SYLLABUS:

Cash contributions or payments paid by an employer into a welfare fund created and administered pursuant to a certain agreement and declaration of trust for the purpose of purchasing policies of insurance to provide sickness and accident benefits, hospitalization benefits, and group life insurance for the benefit of its employees, cannot properly be considered as part of total payroll or wage expenditures, and such payments are not to be reported to the Industrial Commission, and premiums are not to be paid calculated on such payments into the state insurance fund.

Columbus, Ohio, December 26, 1956

Hon. Joseph J. Scanlon, Administrator,
Bureau of Workmen's Compensation, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion which presents the following question:

"We respectfully request your opinion as to whether payments to the Welfare Fund described in the attached documents constitute wages or part of the 'Total Payroll' as that term is used in our C-4123.29, so as to be subject to the payroll premium under the Workmen's Compensation Act of Ohio."

The Welfare Fund to which you refer is administered by virtue of an agreement and declaration of trust, a copy of which has been submitted for my consideration. The purposes of the trust and the application of the funds are indicated by this document, as follows:

"ARTICLE II

PURPOSE OF THE TRUST AND
APPLICATION OF THE FUND

"Section 1. The Trust and the Fund are created for the purpose of providing and maintaining through policies issued by duly licensed insurance carriers, group life and group accident and health insurance including group hospitalization, medical and surgical benefits or any of such insurance as may be determined by the Trustees for the benefit of the Employees of the Employers, and if so determined by the Trustees, in whole or in part, group insurance for hospitalization, surgical care for the families of such Employees as defined by the Trustees."

The trust res consists of all employed contributions, together with all policies of insurance purchased thereby, dividends, refunds or amounts payable from such policies, other investments, income, or property received and held by the trustees for the purposes of the trust. The agreement and declaration of trust specifically provides that no employee or person claiming through him, employer, or union shall have any right, title or interest in the fund or any part thereof.

The contributions of the employer are the subject of the contracts entered into between the employers and the union, as indicated by two standard forms of union agreements also submitted with the request. The following provisions are found in the agreements:

"STANDARD FORM OF UNION AGREEMENT

ARTICLE VII

"Section 1. The minimum *rate of wages* for journeymen * * * covered by this Agreement when employed in a shop or on

a job within the jurisdiction of the Union to perform any work specified in Article I of this Agreement shall be $2.75 per hour, * * *. Plus 7½c per hour for hours worked to be paid for a welfare plan effective Jan. 1, 1954, as approved by the proper Federal Agency.

"Section 5. *Wages at the established rates* specified herein shall be paid by cash or check in the shop or on the job at or before quitting time on Friday of each week, and no more than two days' pay will be withheld. * * *" (Emphasis added.)

"STANDARD FORM OF UNION AGREEMENT

ARTICLE VII

Section 1. The minimum *rate of wages* for journeymen * * * covered by this Agreement when employed in a shop or on a job within the jurisdiction of the Union to perform any work specified in Article I of this Agreement shall be $2.925 per hour, except as hereinafter specified in Section 2 of this Article. Plus .075 per hr. payment to the Sheet Metal Wkrs. Welfare Plan.

"Section 2. * * * (wages for work for erection or installation within jurisdiction of another local union, higher wage to be paid.)

"Section 3. * * * (wage scale when work performed within jurisdiction of another local union.)

"Section 4. * * * (wage scale when work performed within jurisdiction of another local union.)

"Section 5. In applying the provisions of Sections 2, 3, 4 of this Article VII, the term 'wage scale' shall include the value of all applicable hourly contractual benefits in addition to the hourly wage rate provided in said Sections.

"Section 6. Welfare benefit contributions shall not be duplicated.

"Section 7. Wages at the established rates specified herein shall be paid by cash or check in the shop or on the *job* at or before quitting time on Friday of each week, and no more than two (2) days' pay will be withheld. * * *

(Parenthetical matter and emphasis added.)

For the purpose of the accumulation of a state insurance fund for the compensation of industrial accidents, every employer contributing to the fund makes premium payments as required by Section 4123.35, Revised Code. The amount of the premium is determined by such classi-

fications, rules and rates as are established by the Industrial Commission pursuant to the general authority vested in Section 4123.29, Revised Code. This section reads as follows:

> "The industrial commission shall classify occupations or industries with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same *based upon the total payroll* in each of said classes of occupation or industry sufficiently large to provide an adequate fund for the compensation provided for in sections 4123.01 to 4123.94, inclusive, of the Revised Code, and to maintain a state insurance fund from year to year. Where the payroll cannot be obtained or, in the opinion of the commission, is not an adequate measure for determining the premium to be paid for the degree of hazard, the commission may determine the rates of premium upon such other basis, consistent with insurance principles, as is equitable in view of the degree of hazard, and whenever in such sections reference is made to *payroll or expenditure of wages* with reference to fixing premiums, such reference shall be construed to have been made also to such other basis for fixing the rates of premium as the commission may determine under this section." (Emphasis added.)

The precise question presented by your inquiry is whether the payments required by the instant Union agreements to be made to the Welfare Fund, as described in the agreement and declaration of trust, are part of the "total payroll" upon which the premium is to be calculated and paid by an employer to the state insurance fund.

A definition of the term "total payroll" as used in Section 4123.29, Revised Code, supra, or a precise description of those items which are to be included in the "payroll" report made by the employer was not provided by the General Assembly within Chapter 4123., Revised Code. Considering the use of the term in the Chapter, it should be pointed out that Sections 4123.23 and 4123.24, Revised Code, relating to the duty of the employer to keep payroll records, and the inspection of such records by the Industrial Commission, refer interchangeably to records showing "the amount of wage expenditure" and "expenditures of payroll." Section 4123.26, Revised Code, providing for an annual statement to be filed by an employer, requires information as to the "aggregate amount of wages *paid* to such employees," and similarly Section 4123.32, Revised Code, requires the Industrial Commission to make certain rules in regard to the collection of premiums and refers to "estimated expenditures of wages," "actual expenditure of wages," and "actual payroll expenditures."

Thus in the absence of any express definition of these terms, it can readily be concluded that the context requires that the terms be construed together and given a common meaning derived from their ordinary usage. Horack's Sutherland Statutory Constitution, 3rd Edition, Vol. 2, page 359.

Webster's New International Dictionary, Second Edition, provides the following definition of the term "pay roll":

> "1. A paymaster's list of those entitled to receive compensation at a given time and of the amounts due to each; as to make out a payroll; * * *
>
> "2. The sum necessary for distribution to those on a pay roll (sense 1); also, the money to be distributed; as to increase the weekly *pay roll;* * * *"

The term "wages" is defined by Webster in the following manner:

> "1. Pay given for labor, usually manual or mechanical, at short stated intervals, as distinguished from salaries or fees."

I am not aware of any judicial decisions in Ohio which have considered the question at hand. There is, however, some judicial authority in other jurisdictions in regard to the meaning of "pay roll" which is of some assistance. In a proceeding involving a policy of insurance against loss of pay roll, McGruer v. Fidelity & Casualty Co., 89 Cal. App. 227, 1928, 264 P., 501, the following definition appears: "The term 'payroll' in the usual and ordinary acceptation means a fund or sum of money on hand in cash, to be disbursed in payment of wages at a designated place and time, * * *." The Supreme Court of California was subsequently required to consider the definition of "payroll" as used in exempting employers from the Workmen's Compensation Act, in Mantonya v. Bratlie, 199 P. 2d., 677. The court followed this same definition, remarking that the term, "payroll" is to be used in the ordinary sense of the term, and thus refers to amounts due or expended for wages of employees.

In view of the foregoing, it follows that such contributions required by the Union agreement to the Welfare Fund are not within the statutory requirements for the calculation and payment of premiums under Section 4123.29, Revised Code, supra. I am of the opinion that the terms "payroll" and "wage expenditures" generally connote a payment or delivery of money to the employee, these terms being somewhat more limited in scope than the term "compensation," for example, when employed in its

broadest generic sense. Moreover, the benefits from the welfare fund, as provided in the agreement and declaration of trust, are not predicated upon the service or labor of the employee but upon contingencies of illness, disability or death. The employee benefits irrespective of his period of employment, or wage scale, upon such happenings. It is also apparent that there is no payroll check-off or deduction from the wages which are paid for his employment. This conclusion is further required by reason of the terms of the agreement and declaration of trust, wherein the employee has no pecuniary interest in the fund as such, which clearly distinguishes this contribution from a payroll or wage expenditure.

In accordance with the rule-making authority vested in the Industrial Commission for the purpose of the collection of the state insurance fund, the commission has had occasion to define the terms "payroll" and "wage expenditures." It is, of course, recognized that the Industrial Commission can exercise this authority only within the statutory limits provided, and cannot make such rules as would be contrary to the statutes creating the state insurance fund. State, ex rel. Kildow, v. Industrial Commission of Ohio, 128 Ohio St., 573. Such rules properly made and within proper statutory authority are thereupon recognized as the law of the state, and have the full force and effect of law. Further, it must be acknowledged that administrative interpretation of law, while not conclusive, if long continued, must be seriously considered and not disregarded unless judicial construction makes it imperative so to do. Industrial Commission v. Brown, 92 Ohio St., 309.

The Industrial Commission has defined the terms which are under consideration in Rule XIV, pertaining to the completion of payroll reports, in the Manual of Premium Rules and Rates, effective July 1, 1955.

> "The terms 'payroll' and 'wage expenditures' as used in the rate manual shall include the entire remuneration allowed by an employer to employees in the employer's service for the six months' period, such as wages, bonuses, commissions, premiums and the reasonable value of board, lodging, house or room rent, laundry, food supplies, merchandise, or certificates and orders issued for merchandise or food supplies."

Pertinent to this question is Rule XX, in regard to Bonuses, Commissions, etc.:

"Where bonuses, commissions, vacation pay, rent, housing or similar advantages are received as, or a portion of, the remuneration of an employee, they shall be considered as wages and must be included in the payroll report.

"Bonuses paid in consideration of services rendered in, and/or based on the earning of, a past year shall be evenly applied over such year or that part thereof in which the employee was paid for such services."

I am advised that these rules have been in substantially the same form for a period of at least twenty years, and can well be taken as an expression of the accepted administrative practice.

The form of Rule XIV is unfortunately not entirely free from ambiguity, for the use of the term "entire remuneration" introduces a general concept of consideration which is in opposition to the more restrictive terms of "payroll" or "wages" as used in Section 4123.29, supra, and related sections, and the examples of payroll and wage expenditure provided by the Industrial Commission. In order that there be a uniform construction of Section 4123.29, supra, and the rule, it would be appropriate to apply the recognized rule of construction, *noscitur a sociis.* Thus, when a general word, such as remuneration, is grouped together with other words which have a similar meaning but are not equally comprehensive, it is proper to conclude that the general term will be limited and qualified by the special words. See Horack's Sutherland Statutory Construction, 3rd Edition, Vol 2, page 393.

With this view of Rule XIV, the conclusion that a payment to a welfare fund, such as that under consideration, is not within the definition of payroll or wage expenditure is in apparent accord with the rules of the Industrial Commission. The payment to the welfare fund is, of course, a benefit to the employee, and a contractual obligation which is a portion of the consideration for the union agreement. However, in direct contrast to wages, premiums, board or lodging as enumerated in Rule XIV, there is no actual payment to the employee. The contributions made to the welfare fund as thus clearly not legally comparable to the specific examples provided by this rule of the Industrial Commission.

The question presented by this request has been previously considered by one of my predecessors in Opinion No. 1106, Opinions of the Attorney General for 1946, page 538, and I am in full accordance with his conclusions on the question. The syllabus reads as follows:

> "Cash contributions paid exclusively by an employer into a pension fund for the benefit of its employees cannot properly be considered as wages, and such contributions need not be reported to the Industrial Commission of Ohio and premiums paid thereon into the state insurance fund."

The welfare plan involved in this situation was voluntary on the part of the employee, and the agreement established a pension plan for employees who were over thirty and under sixty-five years of age, had income over $1,000, and were employed for five years. The plan also provided for a vested right in the employee upon termination of employment. It might even be pointed out that this result is even clearer in the question presently before me by reason of the contractual requirement of participation and the fact that the employee can have no interest in the fund.

For these reasons, therefore, I am of the opinion and you are advised that cash contributions or payments paid by an employer into a welfare fund created and administered pursuant to a certain agreement and declaration of trust for the purpose of purchasing policies of insurance to provide sickness and accident benefits, hospitalization benefits, and group life insurance for the benefit of its employees, cannot properly be considered as part of total payroll or wage expenditures, and such payments are not to be reported to the Industrial Commission, and premiums are not to be paid calculated on such payments into the state insurance fund.

Respectfully,
C. WILLIAM O'NEILL
Attorney General