OPINION NO. 77-003

Syllabus:

R.C. 5155.06 is not preempted by the decision of Souder v. Brennan, 367 F. Supp. 808 (1973), and the Federal Regulations promulgated thereunder. Therefore, the superintendent of a county home must require all persons received therein to perform such reasonable and moderate labor, as is suited to their age and bodily strength, without compensation.

The superintendent of a county home has no authority to order the payment of spending money to residents in lieu of compensation for labor performed pursuant to the provisions of R.C. 5155.06.

To: Michael DeWine, Greene County Pros. Atty., Xenia, Ohio
By: William J. Brown, Attorney General, January 26, 1977

Your office has requested my opinion on the following questions:

> 1. Is R.C. 5155.06 constitutional under the Supremacy Clause, U.S. Const. Art. 6, in light of the case of Souder v. Brennan, 367 F. Supp. 808 (1973); and the subsequent U.S. Department of Labor Regulations governing compensation to inmates of state supported, non-penal institutions?
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> 2. Should the Greene County Board of Commissioners continue its policy of paying residents of the Greene County Home for "productive work" as defined in the U.S. Department of Labor Regulations?
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> 3. Does R.C. 5155.06 operate as an absolute prohibition of resident worker compensation, or may it be construed as a discretionary or partial prohibition?
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> 4. Is there any authority prohibiting the Superintendent from supplying spending money to residents, if nominal funds are not provided as compensation?

With respect to your questions, you state that:

> "For some period of time, the residents of the Greene County Home have been compensated by the County for labor they perform in and around the home. As a result of this practice the County is now caught between conflicting directives from the U.S. Department of Labor and the Auditor's Office of the State of Ohio, as follows:
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> (1) The Employment Standards Administration of the U.S. Department of Labor,

applying 29 C.F.R. 529, "Employment of Patient Workers in Hospitals and Institutions at Subminimum Wages," has directed the Executive Director to comply with the Fair Labor Standards Act. This includes use of a subminimum wage certificate, use of prevailing rate for the job being performed by the patient worker, etc.

(2) The Auditor of State of Ohio, in applying R.C. 5155.06, has directed that the superintendent immediately discontinue the practice of compensating resident workers.

(3) The Superintendent of the County Home considers the practice of compensating the resident workers to be a valuable therapeutic and morale building device and would prefer to continue the payments without the federal restrictions. As an alternative to direct compensation at a minimum he would seek authority to provide the residents with a nominal amount of spending money for incidentals such as soft drinks and candy bars."

Your questions relating to the effect, if any, of U.S. Department of Labor Regulations and Souder v. Brennan, 367 F. Supp. 808 (1973) upon R.C. 5155.06 will be considered first.

Souder, supra, involved a petition by a long time patient-worker at an Ohio state mental institution to the U.S. District Court for the District of Columbia for a determination that minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. Sections 201 et seq., apply to patient-workers of non-federal hospitals, homes, and institutions for the mentally retarded and mentally ill. The Court, hearing the case on the plaintiff's motion for summary judgment, rules that the Secretary of Labor has a duty to enforce the minimum wage and overtime provisions of the Act for all patients who perform work of consequential economic benefit, notwithstanding the claim that the work was therapeutic in value. Because this action was brought as a class action, the decision applied to institutions for the mentally retarded and mentally ill across the nation.

On February 7, 1975, the Department of Labor implemented the dictates of Souder with regard to patient-workers in a volume of new regulations entitled "Employment of Patient Workers in Hospitals and Institutions at Subminimum Wages." 29 C.F.R. Sections 529.1 through 529.17.

Specifically 29 C.F.R. Section 529.4 was enacted to provide in pertinent part that:

(a) A patient worker whose earning or productive capacity is not impaired shall be paid at least the statutory minimum wage. A patient worker whose earning or productive capacity is impaired to the extent that the individual is unable to earn at least the statutory minimum wage may be paid a subminimum wage but only after a certificate au-

thorizing payment of such lower wage has been obtained from the Wage and Hour Division.

The scope of this provision is set by 29 C.F.R. Section 529.2 which defines "patient worker" and "hospital or institution" as follows:

> (b) "Patient worker" or "resident worker," hereafter referred to as "patient worker," means a sick, aged or mentally ill or defective individual who receives treatment or care by a hospital or institution, whether he or she is a resident or not, and has an employment relationship with such establishment, other than in a sheltered workshop program.
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> (c) "Hospital or institution" hereinafter referred to as "institution," is a public or private, nonprofit or profit facility primarily engaged in (i.e., more than 50% percent of the income is attributable to) providing residential care for the sick, the aged, or the mentally ill or defective, including but not limited to nursing homes, intermediate care facilities, rest homes, convalescent homes, homes for the elderly and inform, half-way houses, residential centers for drug addicts or alcoholics, and the like, whether licensed or not licensed. (Emphasis added.)

The root of the reasoning in Souder and the subsequent federal regulations thereto lie in Maryland v. Wirtz, 392 U.S. 183 (1968). Originally, the Fair Labor Standards Act exempted the states and then political subdivisions from its provisions. Then, in 1966 Congress amended the Act and modified the definition of "employer" so as to remove this exemption with respect to employees of hospitals, institutions and schools. 29 U.S.C.A. Section 203(d). Subsequently, twenty-eight states brcught an action against the Secretary of Labor to enjoin enforcement of the Act insofar as it applied to schools and hospitals operated by the states or their subdivisions in Maryland v. Wirtz, supra. The states argued that this expanded definition of "employer" was an impermissible exercise of power by Congress, going beyond that authority granted by the Commerce Clause. It was argued that the employer-employee relationship at these institutions was a matter exclusively within the realm of state sovereignty.

The Court, however, held that the expanded definition of "employer" was permissible and stated in the second branch of the syllabus that "the commerce power provides a basis for extension of the Act to state-operated schools and hospitals."

Thus, Maryland v. Wirtz, supra, had given the Department of Labor the authority to promulgate rules and regulations prescribing compliance with the Act by the states. "Employee" was not originally defined to include patient-workers. The Department of Labor in 1968 interpreted the Act as covering patient-workers but determined it would take no enforcement action. See Souder v. Brennan, supra, at p. 811, footnote 6. Then, in Souder, the Court interpreted "employee" to include

patient-workers of institutions for the residential care of the mentally retarded and the mentally ill. Finally, the Department of Labor regulations, set out above, extended its scope to include all patient-workers at all non-federal hospitals and institutions. 29 C.F.R. Part 529.1 through 529.17.

With respect then to your specific questions it is appropriate to set out the pertinent language of R.C. 5155.06:

> "The superintendent and matron of the county home shall require all persons received therein to perform such reasonable and moderate labor, without compensation, as is suited to their age and bodily strength. . . ." (Emphasis added.)

The above provision clearly requires, in apparent conflict with 29 C.F.R. 529.1 et seq., that inmates of a county home perform reasonable and moderate labor "without compensation." Two recent federal cases, however, are relevant to resolution of this conflict. They are Brennan v. Harrison County, Mississippi, 505 F. 2d 901 (1975) and National League of Cities v. Usery, 96 S. Ct. 2465 (1976).

In Brennan v. Harrison County, Mississippi, supra, the United States Court of Appeals for the Fifth Circuit held that, where indigency, not illness or age, was the indispensable prerequisite for the operation of the home in question, and where the age or illness of the indigents are incidental factors, such home does not come within the definition of "hospital" or "institution" provided in 29 C.F.R. Section 529.2(c). Therefore, the court held that county homes for the indigent are not covered by the Federal Regulations mandating that the Fair Labor Standards Act provisions apply to patient-workers.

National League of Cities v. Usery, supra, decided on June 24, 1976, was an action brought by a number of cities and states against the Secretary of Labor, challenging the validity of the Fair Labor Standards Act, as amended in 1974 to extend the Act's minimum wage and hour provisions to almost all employees of states and their political subdivisions. The Supreme Court held, as summarized in the syllabus:

> 1. Insofar as the 1974 amendments operate directly to displace the State's abilities to structure employer-employee relationships in areas of traditional governmental functions, such as fire prevention, police protection, sanitation, public health, and parks and recreation, they are not within the authority granted Congress by the Commerce Clause. In attempting to exercise its Commerce Clause power to prescribe minimum wages and maximum hours to be paid in a fashion that would impair the States' "ability to function effectively within a federal system," Fry v. United States, supra, distinguished; Maryland v. Wirtz, 382 U.S. 183, overruled. Pp. 18-21. 406 F. Supp. 826, reversed and remanded.

Thus, National League of Cities v. Usery, supra, specifically overrules Maryland V. Wirtz, supra, which was the original authority for the Department of Labor to apply the Fair Labor Standards

Act to the states. Therefore, in light of Brennan v. Harrison County, Mississippi, supra, which held that the Federal Regulations promulgated concerning patient-workers did not extend to patients who are in homes primarily because of indigency, and National League of Cities v. Usery, supra, which overruled the authority (Maryland v. Wirtz, supra) upon which the power to promulgate regulations, such as those found in 29 C.F.R. 529.1 et seq., was derived, I conclude in response to your first two questions that Souder v. Brennan, supra, and the Federal Regulations promulgated thereunder are not controlling of any determination concerning the operation and effect of R.C. 5155.06.

With respect to R.C. 5155.06 it should be noted that the language of the statute is quite specific in stating that the superintendent and matron of the county home shall require all persons received therein to perform . . . reasonable and moderate labor without compensation. . ." The word "shall" as used in a statute must be construed as being mandatory in nature unless there appears a clear and unequivocal legislative intent that it receive a meaning other than its ordinnary meaning. State, ex rel. Ewing v. Without a Stitch, 37 Ohio St. 2d 95 (1974); Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102 (1971); 1973 Op. Att'y Gen. No. 73-083. Therefore, in response to your question whether R.C. 5155.06 operates as an absolute prohibition of patient-worker compensation, I conclude that the superintendent must require all persons received therein to perform such reasonable and moderate labor without compensation as is suited to their age and bodily strength.

With regard to your final question as to whether the superintendent may supply spending money to the county home's residents, I am unable to find any specific statutory authority either expressly or implicitly authorizing such payments. In this regard it should be noted that any moneys given to the residents would be public funds. It is a well-settled rule of long-standing that public funds may be exepnded or disbursed only by clear authority of law, and in cases of doubt as to the propriety of the expenditure, such doubt must be resolved against the expenditure. State, ex rel. Bentley and Sons Co. v. Pierce, 96 Ohio St. 44 (1917); The State, ex rel. Stanton v. Andrews et al., 105 Ohio St. 489, 498 (1922); 1976 Op. Att'y Gen. Nos. 76-015, 76-017. I must, therefore, conclude that in the absence of express or implied authority for such payments, they may not be made.

In answer to your questions, it is my opinion and you are so advised that:

1. R.C. 5155.06 is not preempted by the decision of Souder v. Brennan, 367 F. Supp. 808 (1973), and the Federal Regulations promulgated thereunder. Therefore, the superintendent of a county home must require all persons received therein to perform such reasonable and moderate labor, as is suited to their age and bodily strength, without compensation.

2. The superintendent of a county home has no authority to order the payment of spending money to residents in lieu of compensation for labor performed pursuant to the provisions of R.C. 5155.06.