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1. FOOD SERVICE OPERATION—CONDUCTED BY STATE AGENCY—SUBJECT TO PROVISIONS OF SECTIONS 3732.01 THROUGH 3732.08 RC.

2. FOOD SERVICE OPERATION—CONDUCTED ON STATE OWNED PROPERTY—LESSEES, CONCESSIONARIES, CONTRACTORS—SUBJECT TO PROVISIONS, SECTIONS 3732.01 THROUGH 3732.08 RC.

3. LAND OWNED BY US OVER WHICH US HAS ACQUIRED EXCLUSIVE JURISDICTION—SECTIONS CITED DO NOT APPLY TO FOOD SERVICE OPERATIONS.

4. FOOD SERVICE OPERATION—SECTION 3732.01 RC—PUBLIC PLACE WHERE MEALS OR LUNCHES SERVED FOR CONSIDERATION—COUNTY CHILDREN'S HOME OR COUNTY INFIRMARY—NOT A FOOD SERVICE OPERATION WHERE FOOD SERVICE IS FOR THOSE EMPLOYED OR KEPT AT INSTITUTION.

SYLLABUS:

1. An operation conducted by a state agency which otherwise meets the requirements of a food service operation is subject to the provisions of Sections 3732.01 to 3732.08, inclusive of the Revised Code.

2. An operation conducted on state owned property by lessees, concessionaires, or contractors of the state, which operation otherwise meets the requirements of a food service operation, is subject to the provisions of Sections 3732.01 to 3732.08, inclusive, of the Revised Code.

3. The provisions of Sections 3732.01 to 3732.08, inclusive, of the Revised Code, do not apply to food service operations where such operations are located on land owned by the United States and over which the United States has acquired exclusive jurisdiction.

4. A place where food is served and which in other respects meets the requirements of Section 3732.01, Revised Code, is a food service operation, within the meaning of the definition contained in such section, only when it is held out to the public to be a place where meals or lunches are served for a consideration; a county children's home or county infirmary does not constitute such a food service operation where the food service normally is only for those employed or kept at the institution.

Columbus, Ohio, April 6, 1954

Dr. John D. Porterfield, Director of Health
Columbus, Ohio

Dear Sir:

I have your request for my opinion which presents the following questions relative to the licensing of places where food is prepared or served:

> "1. Do the provisions of Sections 3732.01 to 3732.08, both inclusive, apply to food service operations conducted by state agencies such as state universities and the various state departments?
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> "2. Do the provisions of Sections 3732.01 to 3732.08, both inclusive, apply to food service operations where such operations are located on state-owned property and such operations are conducted by concessionaires, lessees, or contractors?
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> "3. Do the provisions of Sections 3732.01 to 3732.08, both inclusive, apply to food service operations where such operations are located on U. S. Government owned property and such operations are conducted by concessionaires, lessees, or contractors?"

In addition, one urther question of a like nature has been properly addressed to me by the Prosecuting Attorney of Champaign County which I shall also treat here. It is:

> "Must a county children's home and county infirmary comply with Section 3732.01, et seq., Revised Code, providing for a license for the operation of the kitchens and food handling in the children's home and infirmary?"

Section 3732.01, Revised Code, provides as follows:

> "As used in sections 3732.02 to 3732.08, inclusive, of the Revised Code: A food service operation, commonly known as a restaurant, is defined as any structure or building, permanent or temporary in nature, whether mobile or stationary, which is kept, maintained, advertised, or held out to the public to be a place where meals or lunches are served for a consideration. Provided, however, that sections 3732.02 to 3732.08, inclusive, of the Revised Code, shall not apply to dining or sleeping cars. Homes containing what is commonly known as the family unit

and their non-paying guests and food-processing and food-manufacturing establishments are not covered by sections 3732.02 to 3732.08, inclusive.

"Licensor means the board of health of any city or general health district."

Section 3732.02 authorizes the public health council to make rules and regulations governing food service operations. Section 3732.03, Revised Code, provides for the licensing of food service operations. Section 3732.04, Revised Code, provides in part:

> "An annual license fee shall be levied upon *each food service operation* for the purpose of enforcing and paying the expenses of such inspection, the license fee charged shall be determined by the licensor, subject to approval by the public health council and shall not exceed the cost of such inspection and enforcement. The sum of three dollars of each such license fee shall be transmitted by the licensor to the treasurer of the state, to be placed in a special fund to be used by the director of health for the purpose of administering and enforcing sections 3732.02 to 3732.08 of the Revised Code. *Provided, however, that churches, hospitals, schools and governmental institutions* shall pay only the sum of one dollar for said license which shall be retained by the licensor. * * *" (Emphasis added.)

I think it wise, at the outset, to point out that underlying each of the first three questions is the problem as to what actually constitutes a "food service operation". At least part of that problem is discussed in answering the fourth question.

1. Whether or not the state and state agencies are included within the terms of a state statute depends, of course, upon the intent of the legislature. Because of the historical concept of immunity of the sovereign, it is usually held that general statutes do not apply to the state unless the state is specifically included within the terms of the act. State ex rel. Parrott v. Board of Public Works, 36 Ohio St. 409. Were we to consider only the general language of Section 3732.01, Revised Code, therefore, it would be difficult to find a legislative intent to make the statute applicable to the state. However, that intent must be gathered from the entire enactment. The specific enumeration, in Section 3732.04, Revised Code, of "governmental institutions" as one of the groups entitled to a minimum license fee, clearly indicates that the legislature intended that "food service operations" conducted by the state be subject to the provisions of the act. A very similar problem was present in the case of State, ex rel. Nixon v. Merrell, 126 Ohio St. 239. There the Supreme Court of Ohio considered the effect of terms such as "public improvement", "public building", "public authority" upon the sovereign immunity rule. The Court said at p. 246 of its opinion:

> "No distinction is made in the statute between county, municipal or state officers, and this court cannot read such a distinction into words so all inclusive. The terms certainly include state officials and state improvements."

The same reasoning is equally applicable to the term "governmental institutions". It is therefore my opinion, and you are advised that an operation conducted by a state agency which otherwise meets the requirements of a food service operation is subject to the provisions of Sections 3732.01 to 3732.08, inclusive, of the Revised Code.

2. Your second question is disposed of both by the answer to the first and by Opinion No. 2768, which I rendered in 1953. First, licensees or lessees of the state can stand in no better position than the state with respect to immunity from state statutes. The state in this instance is not immune, and therefore neither are those whose claim comes through the state. Secondly, as pointed out in the opinion referred to, the extension of a part of the sovereignty of the government can be effected only by legislative grant in express terms. Therefore, lessees or licensees can obtain immunity only by the terms of the statute, and that is not the case here. It is therefore my opinion, and you are advised that an operation conducted on state owned property by lessee, concessionaires, or contractors of the state, which operation otherwise meets the requirements of a food service operation, is subject to the provisions of Sections 3732.01 to 3732.08, inclusive, of the Revised Code.

3. Your third question relates to the jurisdiction of the state. Ohio statutes are operative only in territory over which Ohio has jurisdiction. This, of course, usually includes all the territory within the boundaries of the state. The mere purchase of land in Ohio by the United States does not of itself deprive Ohio of this jurisdiction. Adams v. United States, 319 U. S. 312. If Ohio retains general jurisdiction, then of course Ohio health laws would apply to the particular territory. However, under the provisions of Section 159.01 et seq., Revised Code, the United States may acquire exclusive jurisdiction over land which it owns in Ohio. This exclusive jurisdiction is obtained by filing with the Governor a written acceptance of such. This procedure is provided for by Title 40, Section 255, U. S. Code, which provides in part:

> "* * * Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times

> as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted. * * *"

This jurisdiction, if it is obtained, generally extends to all purposes except the service upon such sites of civil and criminal process of the courts of the state. Section 159.04, Revised Code. Obviously then, in those instances where exclusive jurisdiction has been acquired by the United States, jurisdiction over matters of public health would be included in the grant. The records of the Governor's office will disclose the sites where such jurisdiction has been acquired. It is therefore my opinion, and you are advised that the provisions of Sections 3732.01 to 3732.08, inclusive, of the Revised Code, do not apply to food service operations where such operations are located on land owned by the United States and over which the United States has acquired exclusive jurisdiction.

4. The answer to the fourth question presented depends upon the meaning of the term "food service operation", for as pointed out above, if a county infirmary or children's home operates what is properly found to be a "food service operation", the fact that it is an activity of government will not take it outside the statute. The most important attributes of a "food service operation" are that the place be "kept, maintained, advertised, or held out to the public to be a place where meals or lunches are served for a consideration." Section 3732.01, Revised Code. This language, with the exception of the comma immediately following "advertised" comes directly from the definition of a "restaurant" in Section 843-2, General Code, and had been part of the law of Ohio for over twenty years prior to the enactment of the present statute. I do not regard the addition of the comma as in any way altering the meaning of the language as used in Section 843-2, General Code, for the punctuation was added in the recodification of that section which changed the numbering to Section 3731.01, (B), Revised Code. The recodification, of course, was not intended to change the substantive law. Section 1.24, Revised Code.

This precise language, "kept, maintained, advertised, or held out to the public to be a place where meals or lunches are served for a consideration",

was considered by my predecessors in office on at least two occasions. The third paragraph of the syllabus of Opinion No. 1240, Opinions of the Attorney General for 1920, p. 551, reads as follows:

> "A manufacturing company operating an eating place commonly called a factory or employes' restaurant in which meals or lunches are supplied and furnished solely to its employes, and which is never held out as a place where meals or lunches will be served to others, is not conducting a restaurant as the word is defined in section 843-2, General Code. And the mere fact that occasionally, but not as a matter of practice, a traveling salesman or other person having business at the factory may, as a personal accommodation, be permitted to secure a meal or lunch in such factory or employes' restaurant, would not of itself constitute a holding out to the public, within the meaning of the statute."

This holding, you will note, is based upon the premise that a place cannot be designated a "restaurant" unless, among other things, there is a holding out to the public. Similarly, the syllabus of Opinion No. 1024, Opinions of the Attorney General for 1946, p. 434, reads:

> "A company operating an eating place in or on the premises of a manufacturing plant pursuant to an arrangement with the owner of such plant, and furnishing meals and lunches to the employes of such plant and not to the general public, is not operating a restaurant as that word is defined in Section 843-2, General Code."

Here again the specific conclusion was based, even more clearly, upon a general conclusion that a holding out to the public was an essential quality of a "restaurant" as defined by that statute. Thus, the language "kept, maintained, advertised, or held out to the public to be a place where meals or lunches are served for a consideration" had a well settled and precise interpretation when the legislature in 1953 used the same language to define a "food service operation". That the legislature was aware of the fact that they were using language which had been in use for many years in the old restaurant law is clearly evidenced by the opening words of the definition in Section 3732.01, "A food service operation, *commonly known as a restaurant* * * *." Thus, we find a direct reference to the old definition from which the language comes. This reference, I might add, together with the other critical language I have set out, was inserted in the act by amendment on the floor of the House of Representatives. House Journal, June 16, 1953. It replaced language much more comprehensive in scope. Sub. House Bill No. 429.

Sutherland points out in Vol. 2, Statutory Construction, Section 5109 that:

> "Where a statute has received a contemporaneous and practical interpretation and the statute as interpreted is reenacted, the practical interpretation is accorded greater weight than it ordinarily receives, and is regarded as presumptively the correct interpretation of the law. The rule here is based upon the theory that the legislature is acquainted with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing the law, and therefore impliedly adopts the interpretation upon re-enactment."

This principle of statutory construction has been utilized by our own Supreme Court in State, ex rel. Automobile Machine Co. v. Brown, 121 Ohio St. 73. In the instant situation, I think it may fairly be said that the legislature, in considering a law to protect the healthfulness of prepared foods, was well aware that the preceding licensing system was limited to those instances where there was a holding out to the public. Knowing that limitation, the legislature chose deliberately to use the same language, omitted any qualifying language and, in fact, referred the definition of a "food service operation" to that which is "commonly known as a restaurant". I can only conclude that the legislature intended to incorporate into the new statute the interpretation of the old, which required a holding out to the public before the statute is to apply to any given place or operation. This is not to say that all of the other words of definition are supplanted. The entire definition is modified by the requirement that in each instance there must be a holding out to the public. Nor is this conclusion weakened by the provision in Section 3732.04, Revised Code, for "churches, hospitals, schools and governmental institutions", for many of the activities of these groups involve a holding out to the public.

It is my understanding that both a county children's home and a county infirmary usually limit their food service to those regularly employed or kept at such institutions, and that no representation is made that meals or lunches will be served to the public at large. You will note, too, that in addition to this lack of holding out to the public, there is a serious question as to whether either of these institutions is serving meals or lunches for a "consideration", within the ordinary meaning of that term.

It is therefore my opinion, and you are advised that a place where food is served and which in other respects meets the requirements of Section

3732.01, Revised Code, is a food service operation, within the meaning of the definition contained in such section, only when it is held out to the public to be a place where meals or lunches are served for a consideration; a county children's home or county infirmary does not constitute such a food service operation where the food service normally is only for those employed or kept at the institution.

Respectfully,
C. WILLIAM O'NEILL
Attorney General