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EMPLOYMENT—DEPARTMENT OF PUBLIC WELFARE—MAY USE ITS REGULAR EMPLOYEES OR EMPLOY LABOR DIRECT ON NEW CONSTRUCTION OF PROJECTS BY FORCE ACCOUNT FOR ANY AMOUNT—CONDITION, PLANS, SPECIFICATIONS, BILLS OF MATERIAL AND ESTIMATES OF COST ARE APPROVED BY STATE ARCHITECT AND ENGINEER—MUST BE APPROVED BY CONTROLLING BOARD AND FILED WITH CONTROLLING BOARD AND AUDITOR OF STATE.

SYLLABUS:

The Department of Public Welfare may use its regular employees or employ labor direct to do new construction of projects by force account for any amount on condition that the plans, specifications, bills of material and estimates of cost of any such project are approved by the state architect and engineer, and filed with the controlling board and with the auditor of state, and approved by said controlling board.

Columbus, Ohio, February 13, 1950

Hon. J. M. Lamneck, Director, Department of Public Welfare
Columbus, Ohio

Dear Sir:

I am in receipt of your communication requesting my opinion, as follows:

“Under House Bill 655, there appears several hundred small items of appropriations for capital improvements at state institutions in the Department of Public Welfare.

“For several years it has been the practice of the Department to make capital improvements of a minor nature at state institutions by force account with the consent and approval of the Controlling Board if the aggregate cost of the improvement exceeded \$1,000. Materials necessary would be purchased by the State Purchasing Department, and regular employees of the institution where such new construction would be done would perform the labor if sufficient. If insufficient, the Department would employ other labor direct to supplement its regular forces for the particular project and would pay the prevailing rate of wages as provided by Sections 17-1 to 17-6, inclusive, of the General Code.

"A question has now arisen as to the legality of this procedure. I therefore desire your opinion relating to the foregoing in the following particulars:

"1. May the Department use its regular employees or employ labor direct to do new construction of projects by force account where the aggregate cost for labor and materials does not exceed \$1000; and if so under what conditions and requirements?

"2. May the Department use its regular employees or employ labor direct to do new construction of projects by force account where the aggregate cost for labor and materials exceeds \$1000; and if so, under what conditions and requirements?

"3. If the Department of Public Welfare may not use its regular employees or employ labor direct to do new construction of projects by force account, may the Director of Public Works do so, and if so under what conditions and requirements?

"Your attention is particularly directed to Sections 17-1 to 17-6, inclusive, Section 154-40; Sections 2314 to 2330, inclusive, of the General Code; and Section 8 of House Bill 654 and Section 5 of House Bill 655 of the 98th General Assembly."

Before proceeding to discuss the questions presented by your communication, it should be noted that "force account" lacks authoritative definition as used in the statutes and imports a variety of meanings in the various state departments. I will therefore assume that your use of the term "force account" refers to the employment of labor and the purchase of materials in the open market.

It may also be well to mention, since you have referred to the state purchasing department in your communication, that this department was abolished as such, and all powers and duties relative to purchasing are now under the jurisdiction of the department of finance.

Your attention is thus invited to Section 5 of Amended House Bill No. 655, passed by the 98th General Assembly, to make appropriations for equipment, repairs and rehabilitation, and for capital expenditures. This section reads as follows:

"If any order or invoice drawn against any appropriation, reappropriation or rotary fund herein made is for labor and materials furnished, the aggregate cost of which exceeds one thousand dollars (\$1,000.00) or for commodities purchased, at a cost in excess of one thousand dollars (\$1,000.00), it shall show

that the same was furnished or purchased pursuant to competitive bidding and that the lowest or best bidder was awarded the contract unless the controlling board shall have authorized the furnishing of such labor or material or the purchase of such commodities without competitive bidding, provided, however, that the controlling board shall authorize the furnishing of such labor or material or the purchase of such commodities without competitive bidding only after it has been determined that an emergency exists requiring such action.

“Whenever in the judgment of the responsible officers of the department, board, commission, or other agency, it seems desirable and in the interests of economy to construct or repair any building or make any other improvement herein provided by force account, plans, specifications, bill of material and estimate of cost, approved by the state architect and engineer, shall be filed with the controlling board and with the auditor of state. If the controlling board consents to the making of such improvement by force account and certifies such consent in writing to the auditor of state, and to the director of finance, sections 2314 and 2330, inclusive, of the General Code shall be deemed not to apply to that part of such work to be done by force account. The controlling board may upon similar application in cases of emergency or when the interests of the state require, permit the advertisement for bids to be published once, not more than ten days nor less than eight days preceding the day of the opening of the bids. Such consent shall be certified to the auditor of state and the director of finance and the provisions of section 2318 of the General Code shall be deemed not to apply to that portion of the improvement for which such method of advertising is authorized.”

The provisions of this section are substantially the same as the provisions of Section 8 of the general appropriation act, Amended House Bill No. 654, passed by the 98th General Assembly.

The first paragraph of Section 5 provides for labor and material costs exceeding one thousand dollars. It provides that orders or invoices for amounts above one thousand dollars shall be pursuant to competitive bidding, and permits the controlling board to sway from this provision only if an emergency exists.

The second paragraph makes the only provision in the statutes applicable to your question relative to “force account.” This paragraph does not revert to the first paragraph for its meaning and does not specify any particular amount over or under a thousand dollars for its interpretation.

The language "herein provided," as used in this paragraph does not refer to the section of which it is a part, but refers to the entire act.

The conditions and requirements which must be complied with to justify construction or repair by "force account" are also set out in the statute, as follows :

"Whenever * * * it seems desirable and in the interests of economy to construct or repair any building or make any other improvement herein provided by force account, plans, specifications, bills of material and estimate of cost, approved by the state architect and engineer, shall be filed with the controlling board and with the auditor of state. If the controlling board consents to the making of such improvement by force account and certifies such consent in writing to the auditor of state, and to the director of finance, Sections 2314 and 2330, inclusive, of the General Code shall be deemed not to apply to that part of such work to be done by force account. * * *"

If this provision was interpreted to revert to the preceding paragraph of Section 5, and apply only to amounts exceeding one thousand dollars, there would be no provision for expenditures under one thousand dollars by force account, and it seems highly improbable that such was the intent of the legislature. And to hold that the specific provisions for amounts over one thousand dollars could be extended by implication to say that amounts under one thousand dollars could be expended by force account without any restrictions or conditions would be contrary to the many cases which hold that public funds can be disbursed only by clear authority of law. See *State ex rel. Bentley & Sons Co. v. Pierce, Auditor*, 96 O. S. 44, where the third branch of the syllabus recites :

"In case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power."

Therefore, the only reasonable conclusion is that any amount expended by force account pursuant to the stipulations of your letter of request must be subject to the conditions and requirements of Section 5 of House Bill 655, to which you refer in your communication.

Relative to your question as to whether regular employees may be used to make repairs and improvements on institutions under the control

of the department of public welfare, attention is invited to Section 1835, General Code, which says in part :

“The director of public welfare shall appoint such employees as may be deemed necessary for the efficient conduct of the department, prescribe their titles and duties, except as otherwise provided by law. The department of public welfare shall have full power to maintain, operate, manage and govern all state institutions. * * *”

I believe that the general grant of power afforded by this statute would permit the use of regular employees to make necessary repairs and improvements to state institutions under the control of the department of public welfare, as well as the construction of new projects where such construction is necessary for the efficient conduct of the department. However, such construction by a public authority with its own forces would be subject to the provisions of Section 17-4 et seq., General Code.

Therefore, in specific answer to questions one and two of your communication, I am of the opinion that the Department of Public Welfare may use its regular employees or employ labor direct to do new construction of projects by force account for any amount on condition that the plans, specifications, bills of material and estimates of cost of any such project are approved by the state architect and engineer, and filed with the controlling board and with the auditor of state, and approved by said controlling board.

Respectfully,

HERBERT S. DUFFY,

Attorney General.