

should not be used to create manifest preferences or discrimination among taxpayers.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1375.

CONTRACT—COOPERATIVE, STATE WITH VILLAGE OF BARNESVILLE, BELMONT COUNTY, IMPROVEMENT S. H. 295, ALONG MAIN SREET FROM BALTIMORE AND OHIO RAILROAD AT ARCH STREET, APPROXIMATELY 0.628 MILE.

COLUMBUS, OHIO, November 2, 1939.

HON. ROBERT S. BEIGHTLER, *Director, Department of Highways, Columbus, Ohio.*

DEAR SIR: You have submitted a cooperative contract between the Director of Highways and the Village of Barnesville, covering the following improvement:

Being all of that portion of the Barnesville-Bellaire Road State Highway No. 295, as extended over and along Main Street in the Village of Barnesville, Ohio, from the Baltimore and Ohio railroad at Arch Street, southeast, then northeast, for a distance of approximately 0.628 mile, to Station 33 plus 17 and there terminate.

Finding said contract proper as to form and legality, I have accordingly endorsed my approval thereon, and return the same herewith.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

1376.

MINIMUM WAGE—FOOD AND LODGING BUSINESS—DIRECTOR, DEPARTMENT INDUSTRIAL RELATIONS—NO AUTHORITY UNDER MINIMUM FAIR WAGE STANDARDS TO MODIFY DIFFERENTIALS IN RATES ESTABLISHED BY WAGE BOARD—SUCH MODIFICATION DEPARTURE FROM BASIC MINIMUM RATES—SECTIONS 154-45d TO 154-45t, G. C.

SYLLABUS:

The Director of the Department of Industrial Relations had no authority under the provisions of the Minimum Fair Wage Standards to

modify by an administrative regulation the differentials in the basic wage rates as established by the Wage Board for the food and lodging industry, as such modification is a departure from the basic minimum rates.

COLUMBUS, OHIO, November 2, 1939.

HON. GEORGE A. STRAIN, *Director, Department of Industrial Relations, Columbus, Ohio.*

DEAR SIR: This will acknowledge the recent request from your office for an opinion, which reads as follows:

“Sections 154-45d to 154-45t, both inclusive, General Code, State of Ohio, provide for the establishment of minimum wages for female and minor help in the State of Ohio, and for the enforcement thereof.

Under Sections 154-45g, 154-45h, 154-45i and 154-45j, a mandatory order establishing a basic minimum wage in the food and lodging industry was had, after the procedure had been duly followed by a Wage Board properly appointed by the Director of the Department of Industrial Relations of Ohio for that purpose.

In the establishment of such mandatory order establishing a minimum wage in the food and lodging business or industry, said Wage Board provided for what is commonly known as or called a ‘differential.’ By ‘differential’ we mean the payment of a basic minimum wage in cities in excess of 100,000 population, a basic minimum wage in cities between 5,000 and 100,000 population, and a basic minimum wage in cities under 5,000 population.

Then under sub-division eight (8) of what is known as ‘Administrative Regulations’ the Director of the Department of Industrial Relations modified the minimum wage as aforesaid by defining certain metropolitan districts, which under such definition includes many towns, cities and villages in Ohio which have a population of less than 100,000, yet, however, because of the Administrative Regulation number eight (8) the highest or maximum basic minimum wage would apply to such towns, villages or cities under a population of 100,000 because they are in a certain so-called metropolitan area.

The Department of Industrial Relations, State of Ohio, would like to have a formal opinion rendered by your office on the following question:

Did the Director of the Department of Industrial Relations have the right and authority under the Gen-

eral Code of Ohio to modify by administrative regulation the basic minimum wage fixed for female and minor employees in the food and lodging industry or business? In other words did he have the right by administrative regulation to say or fix a minimum wage in a certain district which had already been fixed by mandatory order?

You will find enclosed a copy of what is known as mandatory order No. 3.”

Sections 154-45d to 154-45t, both inclusive, of the General Code of Ohio provide for the establishment of a minimum wage standard for women and minors in the State of Ohio and for the enforcement thereof.

Sections 154-45g, 154-45h and 154-45i, General Code, to which you refer in your communication, in substance provide for an investigation to be made by the Superintendent or Director, of wages being paid to women and minors in any industry, for the appointment of a Wage Board, and also set forth their powers and duties and provide for making their reports and recommendations. Further provision is made for proceedings after the Wage Board has made its report.

Section 154-45j of the General Code reads as follows:

“Within ten days after such hearing the director shall confer with the superintendent and approve or disapprove the report of the wage board. If the report is disapproved the director may resubmit the matter to the same wage board or to a new wage board. If the report is approved the director shall make a directory order which shall define minimum fair wages in the occupation or occupations as recommended in the report of the wage board and which shall include such proposed administrative regulations as the director may deem appropriate to implement the report of the wage board and to safeguard the minimum fair wage standards established. Such administrative regulations may include among other things, regulations defining and governing learners and apprentices, their rates, number, proportion or length of service, piece rates or their relation to time rates, overtime or part time rates, bonuses or special pay for special or extra work, deductions for board, lodging, apparel or other items or services supplied by the employer, and other special conditions or circumstances; and in view of the diversities and complexities of different occupations and the dangers of evasion and nullification, *the director may provide in such regulations without departing from the basic minimum rates recommended by the wage board such modifications or reductions of or addi-*

tions to such rates in or for such special cases or classes of cases as those herein enumerated as the commissioner may find appropriate to safeguard the basic minimum rates established.” (Emphasis the writer’s.)

In conformity with the above section, the Director approved and accepted the report of the Wage Board and subsequently issued a directory order in which he defined the basic minimum rates for the food and lodging industry.

Section 154-45m of the General Code reads as follows:

“If at any time after a directory minimum fair wage order has been in effect for three months the director is of the opinion after conferring with the superintendent that the persistent non-observance of such order by one or more employers is a threat to the maintenance of fair minimum wage standards in any occupation or occupations the director or the superintendent may give notice of the intention of the director to make such order mandatory and of a public hearing to be held not sooner than fifteen nor more than thirty days after such publication at which all persons in favor of or opposed to a mandatory order may be heard by the director or the superintendent. After such hearing the director, if he adheres to his opinion, may make the previous directory order or any part thereof mandatory and so publish it.”

By virtue of the above section, the Director within three months made such order mandatory and published it.

Section 154-450 of the General Code reads as follows:

“The director may at any time and from time to time after conference with the superintendent propose such modification of or additions to any administrative regulations included in any directory or mandatory order of the director without reference to a wage board, as the director may deem appropriate to effectuate the purposes of this article, provided such proposed modifications or additions could legally have been included in the original order, and notice shall be given of a public hearing to be held by the director or superintendent not less than fifteen days after such publication at which all persons in favor of or opposed to such proposed modification or additions may be heard. After such hearing the director may make an order putting into effect such proposed modifications of or additions to the administrative regulations as he deems appropriate, and if the order of which the administrative regulations form a part

has theretofore been made mandatory in whole or in part by the director under section ten (G. C. Section 154-45m), then the director in making any new order shall have the power to declare to what extent such order shall be directory and to what extent mandatory." (Matter in parenthesis the writer's.)

In conformity with the provisions of the above section, the Director proposed various administrative regulations and issued Mandatory Order No. 3 governing women and minors at work in establishments at occupations relating to the furnishing of food or lodging or both.

The differentials in the basic rate for a full week of forty-eight hours according to localities are maintained in Ohio. The Wage Board defined them to be as follows:

Cities of 100,000 population and over;
 Cities of 5,000 up to 100,000 population;
 Cities under 5,000 population.

Under authority of Section 154-45j, supra, the Director proposed various administrative regulations, among which is the following found under sub-section 8 in the Administrative Regulations. It reads as follows:

"8. LOCALITY: Differentials in rates by population of localities shall be maintained throughout the State. (Population means that the population of localities within this State shall be deemed to be the same as the population therefor as shown by the latest U. S. Official Census, except all subdivisions of Metropolitan areas,* which shall be placed in the same classification as the largest city, according to such Census, in the area.

*(Metropolitan Areas, as defined, 1930 Census of Population: Metropolitan districts include in addition to the central city or cities all adjacent and contiguous civil divisions having a density of 150 inhabitants or more per square mile, and as a rule those civil divisions of less density that are directly contiguous to the central cities, or are entirely, or nearly, surrounded by minor civil divisions that have the required density.)"

It will be noted in part that Section 154-45j, supra, allows the Director to propose administrative regulations as he deems fit to implement the report of the Wage Board and to safeguard the minimum fair wage standards established. The said section further enumerates what matters the Director may incorporate in establishing administrative regu-

lations. However, it expressly sets forth that *he must not depart from the basic minimum wage rates in establishing administrative regulations.*

An examination of Section 154-45j, *supra*, does not give the Director specific authority to establish an administrative regulation in regard to localities. To so establish such a regulation is not an implied power from those delegated by the statute.

At page 933 of 32 Ohio Jurisprudence, under Section 74 of the topic "Public Officers," it is stated:

"The powers of public officers are limited and while some exercise powers which are defined in the fundamental law, the larger portion of them are of statutory creation with duties and powers prescribed and limited by law. It is such powers that are for the most part treated in the specific titles. As a general rule, public officers have only such powers as are expressly delegated by statute and such as are necessarily implied from those so delegated. These powers must be exercised in the mode prescribed by statute. It is equally well settled that where the statute prescribes the mode by which power conferred upon a public officer or board shall be exercised, the mode specified is also the measure of power granted."

Therefore, in view of the foregoing and in specific answer to your question, the Director of the Department of Industrial Relations had no authority under the provisions of the Minimum Fair Wage Standards to modify by administrative regulation the differentials in the basic wage rates as established by the Wage Board for the food and lodging industry, as such modification is a departure from the basic minimum rates.

Respectfully,

THOMAS J. HERBERT,
Attorney General.