

1005

1. BRIDGE COMMISSION OF OHIO, STATE—EMPLOYEES NOT SUBJECT TO PROVISIONS OF FAIR LABOR STANDARDS ACT OF 1938.
2. TOLL COLLECTORS—WITHIN DISCRETION OF COMMISSION TO DETERMINE STATUS, PAY AT TIME AND ONE-HALF FOR HOURS WORKED IN EXCESS OF MAXIMUM WORK-WEEK FIXED BY FAIR LABOR STANDARDS ACT OF 1938.

SYLLABUS:

1. The employees of the state bridge commission of Ohio are not subject to the provisions of the Fair Labor standards Act of 1938.

2. Whether or not toll collectors are entitled to pay at time and one-half for hours worked in excess of the maximum work-week fixed by the Fair Labor Standards Act of 1938 is a matter purely within the discretion of the state bridge commission itself.

Columbus, Ohio, June 10, 1946

State Bridge Commission of Ohio
Columbus, Ohio

Gentlemen:

Your request for my opinion reads:

“At the regular monthly meeting of the State Bridge Commission of Ohio, held March 29, the Commission directed its secretary to request an opinion of the Attorney General of Ohio on the following question:

Are the employees of the State Bridge Commission of Ohio subject to the provisions of the federal wages and hours act?

Toll collectors in the employ of the Commission have since 1936 worked six successive days of eight hours each, with one day off in seven days. At times they have worked seven successive days, with sometimes one day off, and other times two days off.

Employees are employed on the basis of a monthly salary, payable semi-monthly.

The question arises: ‘Are such toll collectors entitled to pay at time and one-half for hours worked in excess of the maximum work week fixed by the federal wages and hours act?’ ”

The Fair Labor Standards Act of 1938, referred to in your inquiry as the "federal wages and hours act", provides minimum wages and maximum hours for individuals "engaged in commerce or in the production of goods for commerce" and employed by an employer within the coverage of the act. 29 U. S. C. A. Sections 201-219.

Section 206 of the act, in so far as it is pertinent to your inquiry, provides as follows:

"(a) Every *employer* shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce, wages at the following rates * * *"

(Emphasis added.)

Section 207 of the act provides in part as follows:

"(a) No *employer* shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce - * * * (3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed * * *"

(Emphasis added.)

Congress has defined the word "employer" in Section 203 of the act, which reads in part as follows:

"As used in sections 201-219 of this title * * * (d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee *but shall not include* the United States or *any State* or political subdivision of a state * * *"

(Emphasis added.)

It is apparent from the above quoted sections of the United States Code that if the situation presented in your request for my opinion evidences an employer-employee relationship between the employees of the state bridge commission and the state of Ohio and the state bridge commission which falls within the language of the exception contained in Section 203 (d) of the Fair Labor Standards Act of 1938, the provisions of that act do not have application to the employees about whom you are concerned.

A question parallel to the one before us was presented in the case of *Creekmore v. Public Belt Railroad Commission of New Orleans* (C.C.A. La. 1943, 134 F. 2d 576, certiorari denied, 64 S. Ct. 43, 320 U. S. 742, 88 L. Ed. 440). The situation with which the court was

confronted in that case involved the Public Belt Railroad, owned by the city of New Orleans and operated by the Public Belt Railroad Commission, a department of the city of New Orleans, a political subdivision of the state of Louisiana. The problem presented in that case was whether or not the employer-employee relationship between the employees of the Public Belt Railroad and the city of New Orleans and its commission fell within the language of Section 203 (d) of the Fair Labor Standards Act of 1938 which, in defining "employer" excludes "any state or political subdivision of a state". The court held that this employer and employee relationship did fall within the exception provided by Section 203 (d) of the act. In that case the argument was advanced that in operating the railroad the city of New Orleans acts in a purely proprietary capacity, but the court rejected this argument and said in its opinion: "The exclusion provision of Section 3 (d) of the Fair Labor Standards Act is couched in plain and unambiguous language and should be given effect as it is written".

The state of Ohio has been authorized to acquire, improve, operate and maintain bridges by virtue of Section 1084-1, General Code, which provides in part as follows:

"The state of Ohio * * * is hereby authorized and empowered to acquire by purchase or condemnation and to improve, operate and maintain bridges over rivers and navigable waters which are within the state * * * or which form a boundary of the state * * * whenever the bridge or any part thereof or the approaches thereto will extend within the boundary of the state * * * and, to pay the costs of such acquisition and of such improvement, to issue bridge revenue bonds of the state * * * as hereinafter provided."

Section 1084-3, General Code, creates the state bridge commission of Ohio, and reads as follows:

"There shall be, and there is hereby created a commission to be known as the 'state bridge commission of Ohio', and by that name the commission may sue, and be sued; plead, and be impleaded; contract and be contracted with, and have a common seal. The said commission shall consist of three members of well-known and successful business qualifications, who shall be appointed by the governor, not more than two of whom shall belong to the same political party. The governor shall appoint the said commission as soon as this act becomes effective, and

before the first day of September, 1935, and shall designate the chairman thereof at the time of such appointment and thereafter at his description. The said commissioners shall immediately enter upon their duties and hold office until the expiration of two, four and six years, respectively, from the first day of April, 1935, the term of each to be designated by the governor but their successors shall be appointed for the term of six years, excepting that any person appointed to fill a vacancy shall serve only for the unexpired term, and any commissioner shall be eligible for reappointment; provided, that not more than two of the commissioners serving at any time shall have been appointed from the same political party. Each commissioner, before entering upon his duties, shall take, subscribe and file his oath of office as required by law. The said commissioners shall each execute a bond, to be approved by the governor, in the penalty of \$10,000 conditioned according to law, which bond shall be filed and recorded as are other bonds required by state officials."

Section 1084-6, General Code, provides for the organization of the state bridge commission, outlines its powers and authority and fixes the compensation of the members of the commission. This section, in so far as it pertains to your inquiry, reads as follows:

"Upon the appointment and qualification of the members of the state bridge commission * * * they shall at once proceed to organize. * * * such commission shall make necessary rules and regulations for its own government, shall appoint a secretary-treasurer, and have power and authority to make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act and to employ engineering, architectural and construction experts and inspectors and attorneys, and such other employees as may be necessary in its judgement, and fix their compensation, all of whom shall do such work as such commission shall direct. Each member of the state bridge commission shall receive a salary at the rate of \$2,000.00 per annum, and the necessary expenses incurred in the discharge of the duties of his office. * * * All salaries and compensations shall be paid solely from funds provided under the authority of this act, and no such commission shall proceed to exercise or carry out any authority or power herein given it to bind such commission beyond the extent to which money has been or may be provided under the authority of this act."

It will be noted that the foregoing section empowers the bridge commission to employ certain named employees and "such other employees as may be necessary in its judgment" without making such power subject to the civil service laws of the state. "All salaries and compensations", under the terms of this section, "shall be paid solely from funds provided under the authority" of Section 1084-1, et seq., General Code.

Section 1084-8, General Code, authorizes the state bridge commission of Ohio to acquire toll bridges and directs that title to bridges acquired under the authority of Section 1084-8, General Code, be taken in the name of the state.

That portion of Section 1084-8, General Code, which is pertinent to your inquiry, reads as follows:

"The state bridge commission is hereby authorized to acquire by purchase or condemnation whenever it shall deem such acquirement expedient but solely by means of or with the proceeds of bridge revenue bonds hereinafter authorized, any toll bridges located as provided in section 1 (G. C. Sec. 1084-1) of this act, or any such toll bridge or bridges wholly or partly constructed, upon such terms and at such prices as may be considered by it to be reasonable and can be agreed upon between it and the owner thereof, title thereto to be taken in the name of the state."

Section 1084-9, General Code, empowers the bridge commission to acquire by purchase or condemnation, bridges, lands, rights and easements. It outlines in detail the procedure in condemnation proceedings and provides that neither the state of Ohio nor any member of the state bridge commission shall be liable for the payment of any judgment awarded by a court as a result of the condemnation proceedings. This section also provides that "At least once each year the books of the state bridge commission shall be examined by the auditor of state or his agents."

Section 1084-10, General Code, provides for the issuance of bridge revenue bonds and reads in part as follows:

"The state bridge commission * * * is hereby authorized to provide by resolution for the issuance of bridge revenue bonds of the state * * * for the purpose of paying the cost as hereinabove defined of any one or more such bridges * * * the principal and interest of which bonds shall be payable solely from the special fund herein provided for such payment. * * *

Bonds issued by the state bridge commission shall be signed by the governor and the chairman of the commission, under the great seal of the state of Ohio, and attested by the secretary of state, * * * All bonds issued under this act shall contain a statement on their face that the state * * * shall not be obligated to pay the same or the interest thereon except from the revenue of such bridge or bridges. * * * such bonds shall be exempt from all taxation, state and municipal. Such bonds shall be lawful investments of banks, savings banks and trust companies with approval of the superintendent of banks, of trustees and of the trustees of the sinking fund of municipalities and counties, and of the state industrial commission * * *, of the retirement board of the state teachers' retirement system * * *, of the retirement board of the state public school employees' retirement system * * *, and of the retirement board of the public employees' retirement system * * *. The proceeds of such bonds shall be used solely for the payment of the cost of the bridges * * * ”

Section 1084-11, General Code, requires that money received from the sale of such bonds be applied solely to the payment of the cost of the bridges or to the appurtenant sinking fund and creates a lien on such moneys in favor of the holders of such bonds or the trustee provided for in Section 1084-12, General Code.

Section 1084-12, General Code, provides that the commission may, in its discretion, provide for a trust indenture securing such bonds and also provides as follows :

“* * * such commission may provide by resolution or by such trust indenture for the payment of the proceeds of the sale of the bonds and the revenues of the bridge or bridges to such officer, board or depositary as it may determine for the custody thereof, and for the method of disbursement thereof, with such safeguards and restrictions as it may determine. * * *”

Section 1084-13, General Code, authorizes the collection of tolls for transit over the bridges and provides in part as follows :

“Tolls shall be fixed, charged and collected for transit over such bridge or bridges and shall be so fixed and adjusted, in respect of the aggregate of tolls from the bridge or bridges for which a single issue of bonds is issued, as to provide a fund sufficient to pay such issue of bonds and the interest thereon and to provide an additional fund to pay the cost of maintaining, repairing and operating such bridge or bridges, * * *. The tolls from the bridge or bridges for which a single issue of bonds

is issued, except such part thereof as may be necessary to pay such cost of maintaining, repairing and operating during any period in which such cost is not otherwise provided for (during which period the tolls may be reduced accordingly), shall be set aside each month in a sinking fund which is hereby pledged to and charged with the payment of (a) the interest upon such bonds as such interest shall fall due and (b) the necessary fiscal agency charges for paying bonds and interest and (c) the payment of such bonds * * *"

Provision for suspension of the collection of tolls is made in Section 1084-14, General Code, which reads as follows:

"When the particular bonds issued for any bridge or bridges and the interest thereon shall have been paid or a sufficient amount shall have been provided for their payment and shall continue to be held for that purpose, tolls for the use of such bridge or bridges shall cease except for the cost of maintaining, repairing and operating such bridge or bridges. Thereafter and as long as the cost of maintaining, repairing and operating such bridge or bridges shall be provided for through means other than tolls, no tolls shall be charged for transit thereover and such bridge or bridges shall be free."

Section 1084-15, General Code, directs that certain bridges acquired under authority of Section 1084-1, et seq., General Code, be added to the state highway system and reads in part as follows:

"Any bridge acquired under authority of this act and connected at each end with a highway which is a part of the state highway system shall be added to the state highway system by the director of highways, * * * and such bridge and approaches shall thereafter be maintained in good physical condition as a state highway or a bridge or culvert thereon."

From the above quoted sections of the Ohio General Code it is apparent that the bridges operated by the state bridge commission are owned by the state of Ohio. This was recognized by one of my predecessors who held in an opinion that the real estate and bridges under the control of the state bridge commission are not subject to Ohio property taxes since they are owned by the state. 1938 Opinions of the Attorney General, page 1373. It is also clear that the state bridge commission, in operating the bridges, is acting as an instrumentality of the state of Ohio to facilitate the acquisition of bridges by the state and to make them

free to the traveling public. The very nature of the creation and existence of the state bridge commission manifests its character as an agency of the state. It is true that under the terms of Section 1084-6, General Code, which provides that salaries and compensation of members and employees of the bridge commission are to be paid solely from funds provided under authority of Section 1084-1, et seq., General Code, the individuals who are employed in the operation of the bridges are not dependent upon an appropriation by the legislature for their compensation. But this, together with the question of whether the activities of the state bridge commission are proprietary or governmental in nature, is not particularly relevant in view of the clear and unmistakable language contained in Section 203, paragraph (d), of the Fair Labor Standards Act. That the bridges are wholly owned and controlled by the state of Ohio through the state bridge commission of Ohio acting for the state can not be gainsaid. It follows that the employer and employee relationship between the bridge employees and the state and its commission falls within the exclusion provision of Section 203 (d) of the Fair Labor Standards Act of 1938.

In my consideration of the problem you present, I have not been unmindful of an opinion rendered by my immediate predecessor on February 21, 1939. In that opinion, reported in 1939 Opinions of the Attorney General at page 213, it was necessary to determine whether the employees of the state bridge commission were "in the service of the state" within the meaning of that phrase as it is used in the laws relating to civil service, Section 486-1, et seq., General Code. I concur with the views expressed in that opinion which concluded that the state bridge commission exists as a separate legal entity apart from the state itself and the employees of the bridge commission therefore are not subject to the civil service laws of the state of Ohio.

Notable among the indices leading to the conclusion that the state bridge commission is a complete legal entity, a body politic and corporate, a distinct agency in the administration of functions of a special nature having a distinct classification in the civil divisions of the state, are certain definite provisions found in Section 1084-1, et seq., General Code, to which I have referred earlier in this opinion. These include, among others, the fact that the commission may sue and be sued in its own name and contract and be contracted with; that the members and employees

of the commission turn for their compensation not to an appropriation of the legislature but to bridge revenues, funds raised under the authority of the act itself; that the commission is empowered to employ attorneys, architects and such other employees as it may deem necessary and fix their compensation and duties; that the commission collects, controls, deposits and disburses its own funds in manner and method determined by itself.

From the same sections which contain the provisions just mentioned it seems clear that the purpose of the act creating the state bridge commission was to create an entity separate and apart from the state or its regular subdivisions in order to acquire bridges for the state without encumbering or using state funds or credit. To accomplish this the legislature, asserting the undoubted power of the state to acquire bridges, has delegated to a commission certain limited and defined administrative duties relative to the acquisition, improvement, operation and maintenance of bridges. That the legislature has established a definite limitation to control the powers of the commission was asserted by the Supreme Court of Ohio in a case in which it was decided that in the issuance of bridge revenue refunding bonds the state bridge commission violated no constitutional provisions. The state, ex rel., State Bridge Commission of Ohio v. Griffith, Secretary of State, 136 O. S. 334, 25 N. E. (2nd) 847, 16 O.O. 467.

Section 486-1, General Code, defines the term "civil service" and provides in part as follows:

"The term 'civil service' includes all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof."

The word "state", as used in the foregoing section, does not include everything within the state. As it was said in Opinion No. 1645 of Opinions of the Attorney General for 1918, at page 1596:

" * * * if the term 'state' were meant to include all officers * * * within the state, irrespective of the nature of the officers * * * there would have been no necessity of adding 'counties, cities and city school districts thereof'."

Having determined that the state bridge commission of Ohio exists as a distinct legal entity empowered and confined by legislative provisions to

perform certain functions, I feel that the maxim, "expressio unius est exclusio alterius" has direct application to a proper understanding of Section 486-1, General Code, and a realization that no conflict exists between this opinion and the opinion rendered by my predecessor in 1939, to which I have heretofore made reference. Section 486-1 General Code, provides that "civil service" includes "all offices * * * in the service of the state and counties, cities and city school districts * * *". A glance will suffice to suggest the omission therefrom of bridge commissions.

The word "state" is used in the civil service laws in contradistinction with the counties, cities and city school districts. This is a narrower and more limited sense than would prevail if the word "state" appeared alone. It is not inconsistent, therefore, to say that the individuals engaged in the maintenance and operation of the bridges are not in the service of the state in the more limited sense in which the word "state" is to be understood in the civil service laws and at the same time to say that the state is the employer of these individuals within the meaning of the word "state" as it is used in the Fair Labor Standards Act of 1938.

I turn now to the second question contained in your inquiry which reads:

"Are such toll collectors entitled to pay at time and one-half for hours worked in excess of the maximum work week fixed by the federal wages and hours act?"

If in this question it is your desire to know whether the toll collectors are entitled to pay at time and one-half for hours worked in excess of the maximum work-week fixed by the Fair Labor Standards Act of 1938 by virtue of that act, your question has already been answered. If not, I again invite your attention to Section 1084-6, General Code, and especially to the following excerpt therefrom:

"* * * such commission shall * * * have power and authority * * * to employ engineering, architectural and construction experts and inspectors and attorneys, and such other employees as may be necessary in its judgment, and fix their compensation * * *"

It is clear from this section that the state bridge commission itself

is invested with the power and authority to determine the amount of compensation which it shall pay to its employees.

Specifically answering the questions contained in your inquiry, it is my opinion that:

1. The employees of the state bridge commission of Ohio are not subject to the provisions of the Fair Labor Standards Act of 1938; and

2. Whether or not toll collectors are entitled to pay at time and one-half for hours worked in excess of the maximum work-week fixed by the Fair Labor Standards Act of 1938 is a matter purely within the discretion of the state bridge commission itself.

Respectfully,

HUGH S. JENKINS

Attorney General