## OPINION NO. 73-051

**Syllabus:**

Employees of Ohio Inns working in several State Park lodge and cabin facilities are not considered public employees of the Department of Natural Resources for purposes of the National Labor Relations Act.

To: William B. Nye, Director of Dept. of Natural Resources, Columbus, Ohio
By: William J. Brown, Attorney General, May 25, 1973

I have your request for my opinion which reads as follows:

> For purposes of the National Labor Relations Act are employees who are currently working in several State Park Lodge and Cabin facilities pursuant to contractual agreements between Ohio Inns, Inc., and the Department of Natural Resources considered State employees?
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> I have attached to this Opinion Request a copy of the contract between the Department of Natural Resources and Ohio Inns, Inc., which sets forth the contractual agreement in force at the Burr Oaks State Park facility. This contract is identical to, with minor exceptions, contracts between the Department and Ohio Inns, Inc., on other State Park Lodge and Cabin facilities.

For purposes of the National Labor Relations Act the term, 'employee" is so defined as to include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute * * * but shall not include any individual employed as an agricultural laborer * * *, or by any other person who is not an employer as herein defined." 29 U.S.C.A. 152 (1970).

The term "employer", is defined so as to specifically exclude any state or political subdivision thereof. The sole issue to be resolved is, therefore, whether the people working in the State Park lodge and cabin facilities, pursuant to contractual agreements, are state employees, and thus exempt from the jurisdiction of the National Labor Relations Board, or whether they are employees of an independent contractor.

The term, "public employee," does not have a single legislative definition for all sections of the Revised Code. For purposes of the public employees retirement system, the term, 'public employee", is defined in R.C. 145.01 in pertinent part as follows:

> (A) * * * * * * * * *
> * * * "Public employee' means also any person who performs or has performed services under the direction of an employer, as defined in division (D) of this section, notwithstanding his compensation for such services has been or is paid by one other than such employer. * * *
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> (D) "Employer" means the state or any county, municipal corporation, park district, conservancy district, sanitary district, health district, township, metropolitan housing authority, state

> retirement board, Ohio historical society, public library, county law library, union cemetery, joint hospital, institutional commissary, state medical college, state university local rotary fund or board, bureau, commission, council, committee, authority, or administrative body as the same are, or have been, created by action of the general assembly or by the legislative authority of any of the units of local government named in this division not covered by section 3307.01 or 3309.01 of the Revised Code. In addition, "employer" means the employer of employees described in division (A) of this section.

The Ferguson Act [R.C. Chapter 4117] employs a similar definition of public employee. R.C. 4117.01 (B) provides as follows:

> (B) "Public employee" means any person holding a position by appointment or employment in the government of this state, or any municipal corporation, county, township, or other political subdivision of this state, or in the public school service, or any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service.

These statutory definitions of a "public employee" adopt the common law distinction between an employee and an independent contractor. If the governmental unit can "direct" the individual's actions, the person is a public employee. But, if the governmental unit can not "direct" the employee, then he is the employee of an independent contractor.

A similar distinction between an employee and an independent contractor appears in the National Labor Relations Act. Justice Brennan, writing for the Supreme Court in Allied Chemical & Alkali Workers of America v. Pittsburg Plate Glass Co., 404 U.S. 157, 167-168 (1971), explained what the term, "employee", means for the purposes of the Act:

> "* * * The term 'employee' must be understood with reference to the purpose of the Act and the facts involved in the economic relationship." 322 US, at 129, 88 L Ed at 1184. Congress reacted by specifically excluding from the definition of "employee" "any individual having the status of an independent contractor." The House, which proposed the amendment, explained:
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> "An 'employee', according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, . . . means someone who works for another for hire. But in the case of National Labor Relations Board v. Hearst Publications, Inc. * * *, the Board * * * held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees.' The people the merchants hired to

> sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' 'Employees' work for wages or salaries under direct supervision.* * * It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. HR Rep No. 245, 80th Cong, 1st Sess, 18 (1947) (emphasis added). See also 93 Cong Rec 6441-6442; HR Conf Rep No. 510, 80th Cong, 1st Sess, 32-33 (1947).

See also NLRB v. United Insurance Co., 390 U.S. 254 (1968).

To determine the relationship between workers hired by Ohio Inns, Inc., and the State of Ohio, it is essential that we understand the contractual arrangement between the parties.

The Department of Natural Resources is authorized to enter into such contract pursuant to R.C. 1501.09. R.C. 1501.10 stipulates certain provisions that must be in the contract. It provides in pertinent part, as follows:

> (A) The lessee shall be responsible for keeping such facilities in good condition and repair, reasonable wear and tear and damages caused by casualty or acts beyond the control of lessee, excepted;
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> (B) That the lessee shall operate the facilities for such periods during the year as the director of natural resources deems necessary to satisfy the needs of the people of the state; provided that such periods of required operation must be set forth in the notice for the acceptance of bids;
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> (C) The lessee, upon the execution of the lease, shall furnish a bond to the state in an amount as prescribed by the director, conditioned that the lessee shall fully perform all terms of the lease.
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> The director may lease any public service facilities in state parks to the person, firm, partnership, association, or corporation who submits the highest and best bid under the terms set forth in this section and in accordance with the rules and regulations of the director, taking into account the financial responsibility and the ability of the lessee to operate

such facilities. Bids shall be sealed and opened at a date and time certain, published in advance.

The particular contracts between Ohio Inns, Inc., and the Department of Natural Resources provide that Ohio Inns must satisfy the above mentioned conditions.

The contracts also provide that high quality food service is of the essence of the agreement and that the dining facilities under the contract are to be respected as "good eating places."

Clauses 14 and 16 of the contract provide as follows:

(14) CONCESSIONAIRE'S AUTHORITY: The Concessionaire shall, subject to the approval of the Director and all of the terms and provisions hereof, and except as herein otherwise provided, have control and discretion in the operation of the properties, including use of the premises for all customary purposes, the charges to be made for and the terms of admittance to the cabins and guest rooms, for commercial space, for privileges of entertainment and amusement, for food and beverages, except as herein otherwise limited, and the labor policies (including wage rates) and the hiring and discharge of employees and all phases of promotion and publicity, all except as otherwise herein expressly limited or provided. The Department agrees that Concessionaire, making the payments specified herein and performing and observing the agreements and conditions herein on its part to be performed and observed, may occupy the properties during the term hereof without further demands or hindrance by the Department or anyone claiming under it.

It is further understood and agreed by and between the parties that nothing herein contained shall constitute or be construed to be a co-partnership or joint venture between the Department, its successors or assigns, on the one part, and the Concessionaire, its successors or assigns, on the other part.

(16) CONCESSIONAIRE'S EMPLOYEES: Concessionaire will employ only competent and orderly employees who will keep themselves neat and clean and accord courteous and competent treatment and service to all guests and patrons. Whenever the Department notifies Concessionaire or its manager of the properties that any employee is deemed by it to be incompetent, disorderly, or unsatisfactory, Concessionaire will discharge such person within twenty-four hours unless such person be in a managerial or supervisory position and provided, however, that such discharge is not in violation with any outstanding union contracts or other Ohio or Federal employment regulations, in which event such discharge shall take place

> and be effective within one week of the date of such notification. In the case of employment of supervisory personnel or manager, both will be subject to approval by the Director; however, Concessionaire will have thirty (30) days to replace supervisory personnel and sixty (60) days to replace the manager. Any person so discharged will not be reemployed except with the written consent of the Director. In the event the Department specifies uniforms to be worn by persons working on the properties, Concessionaire will furnish the necessary uniforms or require the employees to furnish same and will require their use in accordance with the requirements of the Department. Any uniforms so required shall be of such type as are ordinarily worn by employees doing like work in similar places of business. (Emphasis added.)

Thus, although the State does exercise some control over the employees of Ohio Inns, it does not exercise direct daily supervision over them.

In NLRB v. Howard Johnson Co., 317 F.2d 1 (1963), cert. denied 375 U.S. 920 (1963), the question before the court was whether the Howard Johnson Co. in operating a restaurant on the New Jersey Turnpike, acts in the capacity of a state or a political subdivision thereof, and is therefore not an employer for purposes of the National Labor Relations Act. The court, in holding that the Howard Johnson Co. was an employer for purposes of the act and not merely an agent for the state, stated that control of the employment relationship is of paramount significance. The Court then proceeded to apply the facts to see if the state did indeed control the employees, stating as follows:

> We think an application of these principles to the facts of this case compels the conclusion that respondent operates its restaurant as an independent contractor of the Authority, and has retained such control over the elements of the employment relationship that it is an "employer" within the meaning of the Act.
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> To support its position respondent cites, among others, the following provisions of the agreement:
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> (1) Respondent must operate on a 24 hour basis unless the Authority approves a more limited operation.
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> (2) Respondent must make ample provision for speedy and convenient handling of patronage during all hours.
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> (3) The Authority may take charge and operate the restaurant if respondent is unable to do so because of a "strike or other labor difficulties."
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> (4) The range of prices for food,

beverages, merchandise and services shall be comparable to the prices charged in the general vicinity of the turnpike.

(5) The agreement defines what constitutes gross sales.

(6) The buildings and substantially all of the equipment are owned by the Authority.

(7) The Authority may terminate the agreement upon the failure of respondent to remedy any unsatisfactory condition, including quality of service, efficiency, cleanliness, safety, and sanitation.

(8) The Authority has the right to inspect and audit respondent's records.

We think that these provisions, whether viewed individually or in their totality, do not impair the Board's finding that respondent is an independent contractor and not an agent of the Authority. None of them manifest an attempt by the Authority either to control the relationship between respondent and the restaurant workers or to impose terms and conditions of employment. On the contrary, the clause providing for the operation of the restaurant by the Authority in the event of a "strike or other labor difficulties" constitutes a recognition that the workers are employees of respondent and not state employees. If the parties considered them to be state employees, the clause would be meaningless in its context, for under New Jersey law such employees do not possess the right to strike. Donevero v. Jersey City Incinerator Authority, 75 N.J. Super. 217, 182 A.2d 596 (1962). (Emphasis added.)

The rationale of this case is supported by the Supreme Court decision in Amalgamated Asso. of Street, E.R. & M.C.E. v. Missouri, 374 U.S. 74 (1963). In that case the court rejected Missouri's contention that seizure of a public utility by the stateexcluded the employees from the coverage of the National Labor Relations Act. Justice Stewart rejected the idea that this was a strike against the state in the following passage:

The employees of the company did not become employees of Missouri. Missouri did not pay their wages, and did not direct or supervise their duties. No property of the company was actually conveyed, transferred or otherwise turned over to the State. Missouri did not participate in any way in the actual management of the company, and there was no change of any kind in the conduct of the company's business.

In Herbert Harvey Inc. v. NLRB, 424 F. 2d 770 (1969), the

court again upheld the right of the Board to assert jurisdiction over the Harvey corporation which was a joint employer with the World Bank, an exempt corporation. In this case the issue was "whether, in this alliance of exempt and nonexempt employers, Harvey is vested with enough autonomy over the employment arrangements and working conditions to enable it to bargain efficaciously with the Union."

In deciding that Harvey had enough autonomy so as to be able to negotiate, the Board looked at both the contract and the actual practice of the parties. The World Bank had exercised controls similar to those granted the State here, and the Court said:

> The Board recognized that the Bank has to some extent participated in the hiring and firing of employees. It acknowledged that the Bank approves promotions and year-end wage increases but saw from the evidence that the Bank routinely agrees to them. But despite so much of an interlinking relationship between the Bank and Harvey over the employees, the Board found that primary control of the employees was vested by the contract in Harvey and was actually exercised by Harvey.

The Court continued:

> In NLRB v. E.C. Adkins & Company, [331 U.S. 398 (1947)], the Supreme Court held that guards at a plant producing military materials were Adkins' "employees" although they were required to be civilian auxiliaries to the Army's military police, and although the Army had power to veto the hiring or firing of any guard and to take corrective action through management to safeguard the caliber of plant protection. The Court sustained the Board's determination that Adkins had "a sufficient residual measure of control over the terms and conditions of employment of the guards" to permit their treatment as employees; "it matters not," said the Court, "that [Adkins] was deprived of some of the usual powers of an employer, such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their service. Those are relevant but not exclusive indicia of employer-employee relationship under [the Act]."

In this case the Department of Natural Resources has exercised only peripheral control over Ohio Inns' employees, similar to that exercised by the World Bank over Harvey's employees. The Department of Natural Resources has never interfered in the wage agreements between Ohio Inns and its employees. It has primarily concerned it self with the supervisory personnel of Ohio Inns. In one instance, it did ask for the removal of a lodge manager. The State exercises no power of initiative in the hiring of employees. The Department

routinely interviews management personnel but does not interview other employees. Complaints about discourteous employees are sent to management who then take the proper disciplinary action.

Thus Ohio Inns has sufficient residual control to bargain with employees, for the Court's remarks in Harvey are equally applicable here. In Herbert Harvey Inc. v. NLRB, supra, the Court stated:

> In the Board's judgment, "[s]o far as the record reveals, the extent of [Harvey's] acquiesence in the World Bank's participation in the hiring, discharge, and assignment of employees was no more than that which any service company would permit in order to please its clients, and the World Bank's participation in promotions and the setting of wage scales was no more than an exercise of its right to police the costs being incurred under the contract."
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> [3] The evidence sustains the Board's finding that Harvey is able to bargain effectively in the areas of prospective negotiation--hiring, firing, promotions, wages, benefits and other conditions of employment. True it is that Harvey, like many--perhaps most--other employers, may face practical limitations in some of these areas but, as the evidence denotes and the Board found, not in sufficient degree to frustrate bargaining efforts. The process of collective bargaining, we are instructed, may appropriately be invoked although the employer is subject to rather substantial handicaps. (Emphasis added.)

In making the conclusion that Ohio Inns has sufficient residual control to effectively bargain I have relied on many of the variables used by the court in N.L.R.B. v. A.S. Abell Co., 327 F.2d 1 (1964), to distinguish independent contractors from employees, for the existence of these variables indicates that Ohio Inns is independent of the State and thus capable of bargaining. Some of these variables are: (1) the formal basis of the relationship between the State and Ohio Inns; (2) the essential business decisions concerning the operation of the facilities are largely within the discretion of Ohio Inns, and like most independent businesses, it may either reap the profits or bear the losses which are the consequences of its judgment; (3) the State regards the employees as independent contractors and does not pay them or make deductions from their pay; (4) the State is concerned only with the accomplishment of ultimate results (good eating and vacation areas with courteous employees) rather than with the details of the operation.

In specific answer to your question it is my opinion, and you are so advised, that employees of Ohio Inns working in several State Park lodge and cabin facilities are not considered public employees of the Department of Natural Resources for purposes of the National Labor Relations Act.