

3488

A CREDITOR OF AN EMPLOYEE OF A STATE UNIVERSITY
MAY NOT MAINTAIN ACTION AGAINST THE STATE TO
GARNISH WAGES OF THE EMPLOYEE—§§3345.05, 115.46, R.C.

SYLLABUS:

1. A creditor of an employee of a state university may not maintain an action against the state under Section 115.46, Revised Code, to garnishee the salary of an employee of the university when the salary of such an employee is paid from funds under the control of the board of trustees of the university as provided in Section 3345.05, Revised Code.

2. A creditor of an employee of a state university may maintain an action against the university to garnishee the salary of an employee of the university when the salary of such an employee is paid from funds under the control of the board of trustees of the university as provided in Section 3345.05, Revised Code.

Columbus, Ohio, December 19, 1962

Board of Trustees, Miami University
Oxford, Ohio
Attention—Mr. Lloyd Goggin, Treasurer

Dear Sir:

Your request for my opinion reads as follows:

“Clarification of Section 115.46, Revised Code of Ohio, as it applies to garnishee action against employees of Miami University paid from other than funds handled by the Auditor of State is requested.

“In Attorney General’s Opinion 1959 OAG 923 specific reference is made to payments on warrants of the Auditor. The university employs approximately 600 persons in the residence halls and other similar projects, all of whom are paid from checks issued and signed by the treasurer of the university. Since these funds are not under the control of the Auditor of State’s office, but subject only to audit by that office, the question arises as to whether or not Section 115.46 of the R.C. of Ohio is applicable.

“An Act to Establish the Miami University, passed February 17, 1809 states ‘That the president and trustees of the Miami University, are hereby created a body politic and corporate . . .’ and further states ‘ . . . the said corporation shall be capable of suing and being sued . . .’ (Sections 2 and 9, 7 Ohio Laws 184)

“Your opinion regarding how garnishment actions should be handled when issued against employees paid from funds under the control of the Board of Trustees of Miami University as provided under Section 3345.05 of the R.C. of Ohio would be appreciated.”

Section 115.46, Revised Code, provides as follows:

“Any creditor or judgment creditor of an employee or officer of the state is entitled to maintain against the state any action or proceeding in attachment, garnishment, or in aid of execution to subject to the payment of his claim or judgment any salary, wages, or other compensation owing to any such employee or officer from the state, in the same manner, to the same extent, and in the same courts that any creditor or judgment creditor might, under the laws of this state, subject moneys due his debtor or judgment debtor from any person, partnership, firm or corporation.

“In any such action or proceeding against the state, the order and notice of attachment, garnishment, or proceeding in aid of execution shall be served upon the auditor of state and shall set forth the name of the office, department, division, board, bureau, or commission in which such debtor or judgment debtor is employed.”

Under the provisions of Section 115.46, *supra*, a creditor of a state employee is entitled to maintain an action against the state in garnishment to subject to the payment of his claim any salary owing to such employee from the state, “in the same manner, to the same extent, and in the same courts that any creditor or judgment creditor might, under the laws of this state, subject moneys due his debtor” from a private employer.

Under the laws of this state, a creditor initiates an action in garnishment by serving his debtor’s employer with a notice of garnishment. Section 2715.11, Revised Code. In the case of a state employee, Section 115.46, *supra*, provides that the notice of garnishment shall be served upon the auditor of state. Upon receiving a notice of garnishment, an employer must, “under oath,” answer “all questions put to him touching property of every description, and credits of the defendant *in his possession or under his control.*” Section 2715.29, Revised Code. The auditor of state has control over the salary owing to state employees, because no money can be paid out of the state treasury except on the warrant of the auditor of state (Section 113.06, Revised Code), and a claim for salary by a state employee is paid upon a warrant issued by the auditor of state on the treasurer of state (Section 115.35, Revised Code). See Opinion No. 923, Opinions of the Attorney General for 1959, page 623.

Under the facts in the instant case, however, the salaries of certain university employees are not paid upon warrants issued by the auditor of state, but are paid upon checks issued by the treasurer of the university from funds under the control of the board of trustees of the university. In this regard, Section 3345.05, Revised Code, provides as follows:

“All receipts from student fees of the state universities receiving state aid, required by law to be paid into the state treasury, shall be credited therein to special funds to be appropriately designated by the names of the respective institutions from which they are received. Such funds shall be applied to the uses and purposes of such respective institutions and shall be used for no other purpose.

“Those receipts which are required by law to be paid into the state treasury shall be limited to registration fees and non-

resident tuition fees, which fees shall be credited to the student fee memo accounts of the respective institutions, academic fees for the support of off-campus instruction, laboratory and course fees when so assessed and collected, and student health fees for the support of a student health service, which fees shall be credited to the designated rotary accounts of the respective institutions. *All other fees, deposits, charges, receipts, and income from all or part of the students shall be held and administered by the respective boards of trustees of the state supported universities and colleges notwithstanding section 131.01 of the Revised Code. Fees, charges, revenues, or receipts, and proceeds of borrowings or of sale of evidences of indebtedness, received before or after the effective date of this section by said respective boards of trustees pursuant to sections 3345.07 and 3345.11 of the Revised Code, shall be held and administered by said respective boards of trustees and used only for the purpose for which they are collected or received.* (Emphasis added)

Sections 3345.07 and 3345.11, Revised Code, referred to in Section 3345.05, *supra*, provide, among other things, that the university may “maintain and operate” dormitories, dining halls, and other buildings,” and pay for same out of any funds in their possession.” I shall assume for the purposes of this opinion that the employees referred to in your request are necessary to “maintain and operate” buildings pursuant to Sections 3345.07 and 3345.11, *supra*, and that such employees are being paid out of funds in the possession of the board of trustees which are being held and administered by them pursuant to Section 3345.05, *supra*. Regarding these employees, therefore, the auditor of state would not have any money owing to them “in his possession or under his control.” Section 2715.29, *supra*. Thus, even if such employees were “state employees” within the meaning of Section 115.46, *supra*, the serving of a notice of garnishment on the auditor of state concerning the salary of one of these employees would be a vain and useless act because the auditor of state obviously could not “under oath” answer any questions about funds not under his control. The construction of a statute should be avoided which would require the performance of a vain or useless thing. 50 Ohio Jurisprudence 2d, 216, Statutes, Section 234.

It is my opinion, however, that these employees are not “state employees” within the meaning of Section 115.46, *supra*. In this regard, Section 115.46, *supra*, refers to “salary, wages, or other compensation owing to any such employee or officer *from the state.*” In the instant case compensation is owing to such employees not from the state but from the

university, and such compensation is paid out of funds in the possession and under the control of the university's board of trustees. My opinion that these university employees are not "state employees" is limited, however, to the provisions of Section 115.46, *supra*, I express no opinion on whether these employees may be state or public employees for some other purpose. (See, for example, Section 145.01, Revised Code, regarding retirement.)

In your request for my opinion you ask how garnishment actions should be handled when issued against employees paid from funds under the control of the board of trustees. If such garnishment actions cannot be handled through the auditor of state, then the question arises whether such actions may be handled directly by the university.

An action cannot be maintained against an agency of the state to garnishee the pay of an employee of such agency. *Palumbo v. Industrial Commission*, 140 Ohio St., 54 (1942). For most purposes the Miami University would be considered an agency of the state. Under the provisions of Section 3345.05, *supra*, however, funds derived from the sale of evidences of indebtedness received by the board of trustees pursuant to Sections 3345.07 and 3345.11, *supra*, "shall be held by said respective boards of trustees and used only for the purposes for which they are collected or received." Under the provisions of Sections 3345.07 and 3345.11, *supra*, such evidences of indebtedness" shall not be a claim against or lien upon any property of the state or any property of or under the control of said boards of trustees excepting such parts of the receipts of the operation of any such buildings under their control as the said boards may respectively pledge to secure the payment of any such indebtedness." It is apparent from these provisions that the university, insofar as the use of the funds under their control is concerned, is not an agency of the state.

The position of the university in this case is analogous to the position of the liquor control commission in *The Dispatch Printing Co. v. Hain*, 2 Ohio Opns., 187 (Municipal Court of Columbus, 1935), wherein the court at page 190 stated as follows:

"It (the state) has made it possible for the state liquor control commission to sue on its obligations. It has made it possible for it to create obligations without any supervision of the state of Ohio. Therefore, it should pay its obligations. There is no difference in the opinion of this court between making the liquor control board a garnishee than making it a party defendant on a suit for an obligation it has created."

To the same effect see *C. D. Peters Ice & Coal Co. v. Zopf*, 3 Ohio Opinions, 299 (Municipal Court, Hamilton County, 1935). The Miami University is a body politic and corporate capable of suing and being sued (7 Ohio Laws, 184), and I can see no reason, therefore, why an action could not be maintained against the university to garnishee the salary of an employee paid from funds under the control of the university's board of trustees which are being held and administered by them pursuant to Section 3345.05, *supra*.

It is my opinion, therefore, and you are accordingly advised:

1. A creditor of an employee of a state university may not maintain an action against the state under Section 115.46, Revised Code, to garnishee the salary of an employee of the university when the salary of such an employee is paid from funds under the control of the board of trustees of the university as provided in Section 3345.05, Revised Code.

2. A creditor of an employee of a state university may maintain an action against the university to garnishee the salary of an employee of the university when the salary of such an employee is paid from funds under the control of the board of trustees of the university as provided in Section 3345.05, Revised Code.

Respectfully,

MARK McELROY

Attorney General