

OPINION NO. 73-075

Syllabus:

Under R.C. Chapter 152 and R.C. 3304.16, there is no statutory provision for a food service operation in the new state office building, except under license by the Rehabilitation Services Commission.

(2) The authority to allocate space in the new state office building for food service facilities rests primarily with the Legislative Office Building Committee.

To: John J. Gilligan, Governor, Columbus, Ohio
By: William J. Brown, Attorney General, July 26, 1973

You have requested my opinion with respect to the operation of food service facilities in the new state office building, now being constructed by the Ohio Building Authority under the provisions of R.C. Chapter 152. Your letter reads in part as follows:

As the new state office building nears completion, questions of who has authority to do what with regard to that building seem to be surfacing.

The Director of the Ohio Building Authority has recently indicated that his agency will soon determine who will operate food service concessions in this building. Ohio has had a long standing tradition of providing space in public buildings for food service facilities operated by the blind. This policy provides productive jobs for Ohioans whose physical vision is impaired. However, under the announced plans of the Ohio Building Authority, the strong possibility seems to arise that this tradition will be set aside, as the agencies representing the blind may not meet the criteria which the Authority has set for obtaining the food service concession.

I understand those criteria to be that the food service facilities will be operated by the person, firm or agency that submits the "best" bid.

I understand that the building was constructed by the Ohio Building Authority as authorized by Ohio Revised Code Chapter 152. I further understand that the Department of Public Works is to lease the building from

the Ohio Building Authority for the use of state agencies. Consequently, I am not sure which of these two agencies, if either, has the authority to determine who will operate and occupy the building food service facilities. I, therefore, respectfully request that the Office of the Attorney General provide me with an opinion on the following question:

1. Which Agency, Board, Commission, Authority or Committee has the power to enter into a lease for the occupancy and operation of food service facilities in office buildings constructed for the use of state agencies pursuant to Revised Code Chapter 152?

Since the policy of determining who will operate such facilities seems a departure from Ohio's past practices as mentioned above, I also request your opinion on the following matters:

2. Must leases entered into by this Agency, Board, Commission, Authority or Committee for purposes of food service operations be advertised for bid and awarded to the "best" bidder?

3. If you determine such bidding is necessary, is the Rehabilitation Services Commission entitled to any preferential consideration in determining the "best" bid?

Under R.C. Chapter 152 the Ohio Building Authority is responsible for two different types of operation. Originally created by the General Assembly in 1963, the Authority was empowered to "purchase, construct, reconstruct, equip, furnish, improve, alter, enlarge, maintain, and operate buildings and facilities for the housing of the aged and the disabled. R.C. 152.04, and see generally R.C. 152.01 through 152.18. Among other powers it was given, in R.C. 152.08(A), is the right to:

(7) Provide for the persons occupying its buildings, facilities, and other properties, health clinics, medical services, food services, and such other services as such persons cannot provide for themselves; * * * (Emphasis added.)

In 1968 the General Assembly added several other Sections to R.C. Chapter 152 which were designed to grant to the Authority the right to construct office buildings and related storage and parking facilities, for the use of state agencies. See generally R.C. 152.19 through 152.27. The first project assigned to the Authority under these new Sections was the construction of a new state office building to replace the present state house annex. R.C. 152.19. In its implementation of this project the Authority was directed to follow the instructions of the Legislative Office Building Committee, a bipartisan group composed of four members of the Senate and four members of the House of Representatives. R.C. 152.20. The general scope of the Authority's new activities, and its responsibility to the Legislative Committee with

reference to the new state office building, appear in R.C. 152.19 and R.C. 152.25. The first of these two sections provides in pertinent part:

(A) The Ohio building authority may purchase, construct, reconstruct, equip, furnish, improve, alter, enlarge, maintain, repair and operate office buildings and related storage and parking facilities for the use of state agencies on one or more sites within the state.

(B) With the exception of construction by the adjutant general which involves federal funds that otherwise lapse, the first project of the authority pursuant to division (A) of this section shall be the acquisition, provision, or construction of office facilities, pursuant to the instructions of the legislative office building committee as provided in section 152.25 of the Revised Code. After the location of said facilities has been determined, the authority may proceed to subsequent projects.
* * *. (Emphasis added.)

And R.C. 152.25 provides in pertinent part:

(A) In the exercise of its powers under divisions (A) and (B) of section 152.19 of the Revised Code, the Ohio building authority, pursuant to instructions of the legislative office building committee, shall provide legislative office facilities which may also include office facilities for some or all officers and agencies that occupy the state house or the state house annex, or both, and such other state offices as the authority and the committee determine.

(B) With respect to the project described in division (A) of this section, the committee shall:

(1) Determine whether a new building compatible with the state house can be placed on the site of the annex;

(2) If not feasible to use the annex location or if feasible to use such location for only part of the project, determine where the legislative office facilities and office facilities for officers occupying the state house and state house annex shall be located;

(3) In cooperation with the authority, cause plans, specifications, detail drawings, cost estimates, and such other documents and information as are necessary to be drawn, and approve the same;

* * * * *

(5) In cooperation with the authority and the department of public works, cause plans to be made for the relocation of all offices currently located in the state house and the state house annex and any other offices or agencies whose work may be affected by the project if necessary.

* * * * *
(Emphasis added.)

The word "facilities" and the phrase "one or more buildings" were used interchangeably in an earlier version of these two Sections. Apparently for the sake of uniformity, "facilities" has been substituted for the more lengthy phrase in the later version. Compare 133 Ohio Laws, 980-981 with 133 Ohio Laws, 2684.

The Authority's 1968 powers with respect to the erection of office buildings are enumerated in R.C. 152.21, the first six subsections of which substantially duplicate the first six subsections of R.C. 152.08 which enumerate the Authority's 1963 powers over housing for the aged and infirm. But the seventh subsection of R.C. 152.21 represents a striking departure from the seventh subsection of R.C. 152.08. There is no mention of food services in connection with the office building. Instead of R.C. 152.08(A) (7), supra, which does provide for food services in housing projects for the aged and infirm, R.C. 152.21 contains the following subsection:

(G) Manage and have general custodial care and supervision of its buildings and facilities or enter into contracts with the department of public works for such purposes;
* * *

Where the General Assembly omits, in the enactment of a bill, language which it obviously considered, it is almost impossible to escape the conclusion that the omission was intentional. Caldwell v. State, 115 Ohio St. 458, 466-467 (1926). And where different language is used in a later enactment dealing with the same subject matter, the presumption is that the intent of the General Assembly was altogether different. Securities Co. v. Bank, 117 Ohio St. 69, 74-77 (1927).

Furthermore, where the General Assembly has intended that food services be supplied at a state building or facility, it has specifically so provided. Thus, universities are given authority to construct dining facilities. R.C. 3345.07. The Ohio Expositions Commission is authorized to grant food concessions at the State Fair and such other fairs and exhibitions as it shall conduct. R.C. 991.01. The Ohio Turnpike Commission may enter into contracts for the operation of restaurants at its turnpike projects. R.C. 5537.13. Boards of education may operate lunchrooms in the public schools. R.C. 3313.81 and 3313.811; see also Opinion No. 71-026, Opinions of the Attorney General for 1971, and Opinion No. 70-061, Opinions of the Attorney General for 1970. There are, of course, food services at state hospitals and state penal institutions, the inmates of which are wards of the State. Cf. Opinion No. 3700, Opinions of the Attorney General for 1954. And, as has already been mentioned, the Building Authority itself has specific power to provide food services in the operation of its

housing projects for the aged and infirm. In the Sections dealing with the new office building, such language is, on the contrary, conspicuous by its absence.

The only statutory authority for a food service operation in a state office building, so far as I am aware, appears in R.C. Chapter 3304, which created the Rehabilitation Services Commission to provide employment opportunities for the handicapped and disabled. R.C. 3304.16 provides in part:

In carrying out the purposes of sections 3304.11 to 3304.27, inclusive, of the Revised Code, the rehabilitation services commission:

* * * * *

(E) May take any other necessary or appropriate action for cooperation with public and private agencies and organizations which may include:

* * * * *

(2) Contracts or other arrangements with public or other non-profit agencies and organizations for the * * * operation of vocational rehabilitation programs and facilities;

* * * * *

(K) May license blind persons to operate vending stands under commission supervision on state, county, municipal, or other property, or federal property pursuant to the provisions of the "Randolph-Sheppard Act," 49 Stat. 1559 (1936), 20 U.S.C. 107, as amended. (Emphasis added.)

The provisions of that statute grew out of the enactment, in 1936, of the Federal Randolph-Sheppard Act, under which blind people were given the opportunity to operate such stands in federal buildings and which specifically provides that in authorizing the operation of vending stands on any federal property, preference is to be given, so far as feasible, to blind persons licensed by a state agency. One of my predecessors, when referring to that Act in Opinion No. 2440, Opinions of the Attorney General for 1938, said that it:

* * * has opened a new gainful occupation to blind persons who, because of lack of sight, are limited to a very small sphere of remunerative occupations.

As my predecessor noted in that Opinion, the Ohio Commission for the Blind promptly took advantage of the Randolph-Sheppard Act and began to train students at the State School for the Blind to fill places in the federal buildings. The General Assembly shortly thereafter opened state buildings to the same program. In 1941 it enacted G.C. 1369-1 which provided (119 Ohio Laws, 717-718):

Whenever, in the judgment of the head of any department, board, agency or governing body in

charge of any state, county or municipal building or property, it shall be deemed desirable and proper to permit the operation of a stand as herein-after described, such department head shall grant to the Ohio commission for the blind or any other welfare association for the blind, a permit to operate in such building or on such property, under its control, a stand for the vending of newspapers, periodicals, confections, tobacco products and such other articles as may be approved by such department head. In buildings where a stand now exists the present operator shall not be removed but if and when such operator ceases to operate such stand the concession for further operation shall be granted to the Ohio commission for the blind or any other welfare association for the blind.

No license fee, rental or other charge shall be demanded, exacted, required or received for the granting of such permit. (Emphasis added.)

It will be noted that the General Assembly acknowledged the de facto existence of some concessions in public buildings which were not operated by blind persons, and it allowed them to remain in existence, but only until the present concessionaire should cease to operate. In a case in which the state had tried to remove one of these holdovers, the court, in Drugen v. Flaher, 188 Ohio L. Abs. 188, 192 (1956), said:

* * * [the operator] plaintiff's right in the premises does not depend upon a lease, but is a statutory right bestowed upon her by the General Assembly of Ohio.

In the absence of a legislative declaration to the contrary and in the absence of any constitutional restriction, a right conferred by statute is taken away by the repeal of the statute.

* * * * * * * *

In other words, the General Assembly having conferred on the plaintiff the right to remain in the premises and to operate her stand, may, by subsequent legislation, modify or terminate such right; * * *

* * * * * * * *

The General Assembly did terminate this right of private concessionaires in 1970 by the repeal of O.C. 1369-1 (which had become R.C. 5109.11) and by the simultaneous enactment of R.C. 3304.16, supra (133 Ohio laws, 2766-2768, 2772). This most recent enactment, R.C. 3404.16, was the subject of an analysis by the Legislative Service Commission which described the new law as authorizing the Rehabilitation Services Commission to

license blind persons to operate vending stands on public or private property (presently, under Sec. 5109.11, the Blind Commission or any

other welfare association for the blind may be granted permission by persons in charge of public buildings to operate vending stands in these buildings: the existing section does not mention licensing individual persons to operate the stands.) [See R.S.P. 92; passed by the 108th General Assembly.]

The analysis of a proposed enactment by the Legislative Service Commission has been treated by the courts as a proper reference for use in interpreting legislation. Moiss v. Porterfield, 27 Ohio St. 2d 117, 120 (1971). JIT Canteen Corp. v. Porterfield, 30 Ohio St. 2d 155, 158 (1972). Therefore, it appears that, aside from termination of the rights of prior concessionaires, founded on the holdings of the Drugan case, the net effect of the 1970 legislation on this particular point was to authorize the newly created Rehabilitation Services Commission to make arrangements with the proper official for the operation of vending stands in state buildings and to license individual blind persons to operate these stands. It should also be noted that the phrase, "vending stands," is no longer limited in R.C. 3304.16 to newspapers, cigarettes, candy, etc., as it was previously in G.C. 1369-1 and R.C. 5109.11.

I conclude that there is no statutory provision for food service facilities in the new state office building, except under license by the Rehabilitation Services Commission. Under R.C. 3304.16(E)(2), supra, the Commission must enter into a contract with the proper agency for the operation of such a program, and there is no requirement that the agency accept the contract if it finds its terms unsatisfactory. Under these circumstances, there is no room for competitive bidding, and your second and third questions, which involve that issue require no further answer. The question remaining to be determined is: with which agency, board, commission, authority or committee, should the Rehabilitation Services Commission enter into contract negotiations under R.C. 3304.16, supra, for the operation of vending stands in the new building?

The 1968 additions to R.C. Chapter 152., and the 1969 amendments thereof, place responsibility for the new building in the hands of the Legislative Office Building Committee, the Ohio Building Authority, and the Department of Public Works. The function of the Legislative Committee is primarily devoted to planning -- plans for the location of the building, plans for its construction, and plans for the transfer of state offices currently situated in other buildings. R.C. 152.25. The function of the Building Authority is to construct, maintain and operate the building, R.C. 152.19 (A) and R.C. 152.21 (B); to fix rentals for its occupancy by state agencies and to enter into leases for such occupancy, R.C. 152.21 (E); and to exercise general custodial care and supervision, or to contract with the Department of Public Works for that purpose, R.C. 152.21 (G). The function of Public Works is to lease the building from the Building Authority for the use of any state agencies. R.C. 152.24 provides:

The department of public works shall lease any building or facility acquired or constructed by the Ohio building authority for the use of any state agencies. An agreement between the authority and the department may provide for the transfer of property to the state after bonds and notes

issued by the authority for the purpose of the acquisition or construction of such building or facility have been repaid. A lease between the authority and the department of public works shall be for a period not exceeding the then current two-year period for which appropriations have been made by the general assembly to the department of public works and the state agencies which will occupy the building or facility being leased. An agreement between the authority and the department may provide for renewal of a lease at the end of each term for another term, not exceeding two years. (Emphasis added.)

I find it very difficult to reconcile this mandate (that the Department of Public Works shall lease the new building) with the powers granted to the Ohio Building Authority by Section 152.21 (F) under which the Authority may

Fix, alter, and charge rentals for the use and occupancy by state agencies of its buildings and facilities and enter into leases with such agencies;

* * * * *

On the one hand, the language of R.C. 152.24 indicates that the General Assembly intended that the Department continue to exercise, with reference to the new building, its specific authority over the public buildings of the State. See R.C. 123.01. On the other hand, Section 152.21 (E), and other passages in the 1968 additions to Chapter 152, seem to indicate that the General Assembly intended the Authority to have at least the initial control over the space in the new building.

These two sections of a statute appear to be in contradiction, the entire statute should be examined in search of a construction which will permit all its parts to be read in harmony with the fundamental purpose of the act. In Humphreys v. Winous Co., 165 Ohio St. 45 (1956), the Supreme Court said (at pp. 49, 56-57):

The primary duty of a court in construing a statute is to give effect to the intention of the Legislature enacting it. In determining that intention, a court should consider the language used and the apparent purpose to be accomplished, and then such a construction should be adopted which permits the statute and its various parts to be construed as a whole and gives effect to the paramount object to be attained. Cochrel, a Minor v. Robinson, 113 Ohio St., 526, 149 N.E., 871.

* * * * *

Judge Newman, in In re Nasse, 93 Ohio St., 230, 234, 112 N.E., 511, said:

"It is settled that where there are contradictory provisions in statutes and both are susceptible of a reasonable construction which will not nullify either, it is the duty of the

court to give such construction, and further, that where two affirmative statutes exist one is not to be construed to repeal the other by implication unless they can be reconciled by no mode of interpretation."

* * * * *

See also State, ex rel. Purton v. Smith, 174 Ohio St. 420, 432 (1963); Industrial Commission v. Wilshorst, 117 Ohio St. 337, 342-344 (1927); State, ex rel. Stokes v. Probate Court, 17 Ohio App. 2d 247, 257 (1969); Baldine v. Klee, 14 Ohio App. 2d 181, 183-184 (1968); State, ex rel. Venn v. Faber, 26 Ohio Ops. 446, 452 (1943).

The fundamental purpose of the 1968 additions to Chapter 152 (A.S.H.B. No. 995, 132 Ohio Laws, 2801), and of the 1969 amendments thereof, was to authorize the construction and operation of office buildings and related storage and parking facilities for the use of state agencies. R.C. 152.19 (A). As has already been noted, the Legislative Office Building Committee, the Ohio Building Authority, and the Department of Public Works were directed to cooperate in the accomplishment of this aim. As its first project, the Authority was directed to construct office facilities, pursuant to the instructions of the Legislative Committee. R.C. 152.19 (B). The duties of the Legislative Committee in connection with the first project are detailed in R.C. 152.25 which provides in pertinent part:

(A) In the exercise of its powers under divisions (A) and (B) of section 152.19 of the Revised Code, the Ohio building authority, pursuant to instructions of the legislative office building committee, shall provide legislative office facilities which may also include office facilities for some or all officers and agencies that occupy the state house or the state house annex, or both, and such other state offices as the authority and the committee determine.

(B) With respect to the project described in division (A) of this section, the committee shall:

* * * * *

(5) In cooperation with the authority and the department of public works, cause plans to be made for the relocation of all offices currently located in the state house and the state house annex and any other offices or agencies whose work may be affected by the project if necessary.

* * * * *

In the light of the above, I conclude that the fundamental intent of the General Assembly as to the allocation of space in the new building was to vest primary responsibility for that decision with its own Legislative Committee after consultation with the Building Authority and Public Works. Since the statutes themselves are unclear as to the proper party to negotiate and enter a lease with the Rehabilitation Services Commission for the use of space in the building, this determination must be found

in plans formulated by the Legislative Office Building Committee. I have not been able to ascertain what action the Committee has taken pursuant to this authority.

In specific answer to your questions it is my opinion, and you are so advised, that:

(1) Under R.C. Chapter 152 and R.C. 3304.16, there is no statutory provision for food service operation in the new state office building, except under license by the Rehabilitation Services Commission.

(2) The authority to allocate space in the new state office building for food service facilities rests primarily with the Legislative Office Building Committee.