OPINION NO. 73-019

Syllabus:

The Industrial Commission of Ohio did not abuse its discretion in classifying a training school for the trainable mentally retarded, administered and supervised by a county board of mental retardation, under the county agency rate for workmen's compensation purposes, rather than under the public school rate.

To: J. Walter Dragelevich, Trumbull County Pros. Atty., Warren, Ohio
By: William J. Brown, Attorney General, March 8, 1973

Your request for my opinion reads as follows:

> Under the Trumbull County Board of Mental Retardation, there is a school for mentally retarded children known as Fairhaven. Fairhaven School is set up to train mentally retarded children.
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> Recently, Fairhaven School was re-assigned for Workmen's Compensation purposes from the public school rate to that of a county agency rate. This re-assignment has resulted in a tremendously higher rate of insurance costs for the Fairhaven program.
>
> There is a recent ruling from your office, 72-022, issued in April of 1972, which stated in essence that programs such as Fairhaven's are, in fact, free public education. The specific question is "In the light of Attorney General's Opinion 72-022 of April, 1972, should not Fairhaven School for Mentally Retarded Children be classified under the public school rate for Workmen's Compensation and Disabled Relief Assessments, instead of a county agency rate? "

R.C. 4123.29, which establishes the procedure for determining rates of premium for workmen's compensation, reads as follows:

> The industrial commission shall classify occupations or industries with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total payroll in each of said classes of occupation or industry sufficiently large to provide an adequate fund for the compensation provided for in sections 4123.01 to 4123.94, inclusive, of the Revised Code and to maintain a state insurance fund from year to year. Where the pay-

> roll cannot be obtained or, in the opinion of the commission, is not an adequate measure for determining the premium to be paid for the degree of hazard, the commission may determine the rates of premium upon such other basis, consistent with insurance principles, as is equitable in view of the degree of hazard, and whenever in such sections reference is made to payroll or expenditure of wages with reference to fixing premiums, such reference shall be construed to have been made also to such other basis for fixing the rates of premium as the commission may determine under this section. (Emphasis added.)

It follows from this section that it is the responsibility of the Industrial Commission of Ohio to classify occupations with respect to their degree of hazard and to determine the classes and their risks. It should also be pointed out that within each risk classification the premiums which are paid into the Workmen's Compensation Fund may vary according to the employer's own risk history and merit rating. An employer classified at the public school rate may have a high risk merit rating, while an employer in the county agency rate could have a low risk merit rating, within their own respective risk classifications. It is, therefore, conceivable that the premiums owed by these two employers, although in different risk classifications, could be very similar because of their respective merit ratings. State, ex rel. River Mining Co. v. Industrial Comm., 136 Ohio St. 221, 227 (1940); State, ex rel. Zone Cab Corp. v. Industrial Comm., 132 Ohio St. 437, 439-442 (1937); State, ex rel. Powhatan Mining Co. v. Industrial Comm., 125 Ohio St. 272 (1932). An excellent merit rating could justify a request for a change in risk classification.

The Industrial Commission's classification of an employer will be upheld unless it can be shown that there was an abuse of discretion. In State ex rel. River Mining Co. v. Industrial Comm., supra, the Supreme Court held that while the Industrial Commission could establish classifications, the placing of a coal company's garage business in the same classification as its coal mining operations amounted to an abuse of discretion. The Court also stated (136 Ohio St. at 225-226) that:

> * * * classification, establishment of basic rates and merit rating are not matters of judicial cognizance which entitle the relator to a formal hearing before the Industrial Commission upon application, but are, on the other hand, subjects which require the exercise of administrative authority only.

On the facts stated in your letter, I see no basis for a claim that the Industrial Commission abused its discretion in reclassifying Fairhaven School from the public school rate to the county agency rate. It is clear from an examination of the provisions of R.C. Chapters 5126 and 5127 that the Trumbull County Board of Mental Retardation is a county agency, despite the fact that it must look for general direction to the Department of Mental Health and Mental Retardation. And it is also clear from the same Chapters of the Revised Code that the purpose of a county board of mental retardation

is to administer and supervise training centers for the trainable mentally retarded, i.e., those who have been adjudged ineligible for enrollment in the public schools but capable of profiting by specialized training. R.C. 5127.01 and 5127.02. The necessarily different types of education to be afforded to the mentally retarded who are trainable, and to those who are educable and capable of attending the public schools, has been recognized by the General Assembly in these and other Chapters of the Code. See Opinion No. 73-014, Opinions of the Attorney General for 1973. I think, therefore, the Industrial Commission was justified in concluding that the training of the severely mentally retarded is appreciably more hazardous than the normal teaching position in the public schools. State, ex rel. Powhatan Mining Co. v. Industrial Comm., supra, 125 Ohio St. at 277-279

You have referred to my Opinion No. 72-022, Opinions of the Attorney General for 1972. The question there was whether a county program for the trainable mentally retarded is considered "free public education" as that phrase is used in federal statutes providing federal grants for state programs meeting that description. The answer to that question can have no bearing on whether one class of free public education can reasonably be considered more hazardous than other classes.

In specific answer to your question it is my opinion, and you are so advised, that the Industrial Commission of Ohio did not abuse its discretion in classifying a training school for the trainable mentally retarded, administered and supervised by a county board of mental retardation, under the county agency rate for workmen's compensation purposes, rather than under the public school rate.