

1475.

“EMPLOYMENT” WITHIN THE MEANING OF UNEMPLOYMENT COMPENSATION ACT.

SYLLABUS:

*Sub-paragraph (D) of Section 1345-1, General Code, paragraph c, defining services which constitute “employment” within the meaning of the term as used in the Unemployment Compensation Act, does not qualify the services tabulated under sub-paragraph (E) of such section, which services are not included within the meaning of the term “employment” as used in such act.*

COLUMBUS, OHIO, November 18, 1937.

HON. CHARLES S. LEASURE, *Chairman, The Unemployment Compensation Commission of Ohio, Columbus, Ohio.*

DEAR SIR: I am in receipt of your request for my opinion as follows:

“I would appreciate having your opinion on the following question:

Section 1345-1c (D) reads as follows:

‘Service performed by an individual for remuneration shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commission that (i) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact, and (ii) such service is outside the usual course of the business for which such service is performed, and (iii) such individual is customarily engaged in an independently established trade, occupation, profession, or business.’

Section 1345-1c (E) (7) reads as follows:

‘The term employment shall not include service performed by an individual for one or more principals who is compensated on a commission basis, and who in the performance of the work is master of his own time and efforts, and whose remuneration is wholly dependent on the amount of effort he chooses to expend.’

I desire further to call your attention to the fact that Subsection D deals with coverable employment whereas Subsection E-7 describes what the term employment shall not include.

QUESTION: Should the provisions of these two subsections be construed one with the other or separately?

In other words, should the provisions as contained in Subsection E-7 be applied to a given set of facts exclusive of Subsection D or in conjunction with all of the provisions as set forth in Subsection D."

Within the language of the Unemployment Compensation Act itself, Sections 1345-1 to 1345-35, General Code, lies the answer to your question. Examining the various provisions in Section 1345-1, paragraph c, we find in paragraph c and in sub-paragraphs (A) to (D) certain general definitions of what the term "employment" shall include within the meaning of the Unemployment Compensation Act. Sub-paragraph (D), accordingly, deals with services which are defined as "employment" and within the act. Such paragraph, however, provides in substance that when "shown to the satisfaction of the commission" that certain stated conditions prevail, such services, although "employment" shall nevertheless not be subject to the act. It is obvious that whether or not such employment as is referred to in paragraph (D) shall in a particular case be subject to the act requires the exercise of some discretion on the part of your commission.

Sub-paragraph (E) of such Section 1345-1, General Code, under paragraph c "employment," on the contrary does not deal with services which constitute "employment" within the meaning of the term as used in the act but which may nevertheless be exempt from its provisions upon your commission being satisfied as to certain phases or conditions of the employment. Such sub-paragraph (E) deals with and defines services which are not "employment" at all, such as "agricultural labor, domestic service in a private home, service performed as an officer or member of the crew of a vessel on the navigable waters of the United States," etc. In each of these listed kinds of services set forth under sub-paragraph (E), the legislature has expressly said that such services shall not be included in the term "employment" as used in the act. They are obviously not employment at all in so far as the Unemployment Compensation Act is concerned. In other words, where the services are performed on a commission basis and the person performing them is master of his own time and efforts and his remuneration is wholly dependent upon the amount of effort he chooses to spend, his services are not employment within the meaning of this act even though an individual rendering services is free from control or direction over the performance of such services. If such services are outside the usual course of the business for which such service is performed and the individual is customarily engaged in an independently established trade or occupation, then the serv-

ices although "employment" may be exempt from the provisions of the act upon your commission being satisfied that such conditions exist.

It is accordingly my opinion in specific answer to your question that sub-paragraph (D) of Section 1345-1, paragraph c, defining services which constitute "employment" within the meaning of the term as used in the Unemployment Compensation Act, does not qualify the services tabulated under sub-paragraph (E) of such section, which services are not included within the meaning of the term "employment" as used in such act.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*

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1476.

APPROVAL--WARRANTY DEED RELATING TO PROPERTY  
IN THE CITY OF COSHOCTON FOR AN ARMORY.

COLUMBUS, OHIO, November 18, 1937.

HON. EMIL F. MARX, *Adjutant General, Columbus, Ohio.*

DEAR SIR: You have submitted for my examination and approval an abstract of title, warranty deed and an executor's deed relating to certain property in the city of Coshocton, Ohio, which is being acquired by the State for the purposes of an armory in said city. This property, as the same is described in the deeds above referred to, comprises lots numbered 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312 and 2313, as shown on the plat of said city of Coshocton, Ohio

Upon examination of the abstract of title of the lots above designated, it appears that in the year 1908 one Jesse McClain acquired title to an undivided one-half interest in the above designated lots and that thereafter in the year 1922 one Clara B. Olney acquired the title to the other undivided one-half interest in these lots.

The executor's deed above referred to is a deed executed by Charles M. McClain, the sole surviving executor of the estate of Jesse McClain, in and by which the undivided one-half interest of said Jesse McClain in and to these lots is conveyed to the State of Ohio as the purchaser of such property pursuant to an order of sale directed to said executor by the Probate Court of Coshocton County, in a proceeding instituted in that court by Charles McClain and Robert Porteus, as executors of the