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TUBERCULOSIS HOSPITAL, COUNTY—MAY CONTRACT FOR SERVICES OF CONSULTING PHYSICIANS TO BE PAID UPON FEE BASIS FOR SERVICES—SUCH CONTRACTURAL SERVICE NOT SUBJECT TO LAWS REGULATING CIVIL SERVICE OF COUNTIES.

SYLLABUS:

A county tuberculosis hospital may contract for the services of consulting physicians to be paid upon a fee basis for services performed. Such contractual service is not subject to the laws regulating the civil service of the counties.

Columbus, Ohio, March 8, 1946

Hon. Carl W. Smith, Chairman, Civil Service Commission of Ohio
Columbus, Ohio

Dear Sir:

I have your recent letter which asks for my opinion and which letter reads as follows:

“For your information we are enclosing a copy of a communication received from Dr. Ray Metzger, Assistant Superintendent of the Franklin County Tuberculosis Hospital.

It will be noted the matter referred to in the attached letter concerns the possibility of their securing and paying for the services of medical consultants on a fee or service basis rather than through appointment as part-time employes in the classified service.

The question involved is: ‘Can the Franklin County Tuberculosis Hospital employ specialists on a fee or service basis in

accordance with the actual number of visits or time required, rather than on a flat monthly salary for part-time service?"

May we respectfully request your opinion as to whether or not persons engaged as specialists or consultants in county tuberculosis hospitals must necessarily be in the classified civil service."

Your letter contained an inclosure, quoted in part below, which further exemplifies the procedure sought to be adopted:

"* * * the consultants are specialists in various medical activities and are called by our resident physicians when needed for the treatment of various patients. As you would observe, there is no way to forecast how frequently this may occur during the course of a year.

It is the plan of our Board that a rate-per-visit be established as the basis of reimbursement to the consulting physician. This would substitute for the present plan of monthly salary."

Your request resolves itself simply into this inquiry: May the officers in charge of a tuberculosis hospital call consulting physicians for the treatment of patients and pay such physicians on a regular per call fee basis or must such physicians be considered, if their services are desired and obtained, as employes in the classified civil service and be compensated as are regular civil service employes on a salary basis?

Section 3139-11, General Code, provides for the establishment of county tuberculosis hospitals by the county commissioners of counties with a population in excess of fifty thousand, with the consent of the State Department of Health. The succeeding section, Section 3139-12, General Code, provides for the maintenance of such hospitals by the county commissioners and the annual appropriation of funds for such purpose.

Section 3139-13, General Code, with an exception not important here, places the management and control of a county tuberculosis hospital in a board of trustees of three members to be appointed by the county commissioners for a term of three years. This statute contains the following language:

"* * * Such board of trustees shall have all the powers conferred by law upon the board of trustees of a district hospital for the care of persons suffering from tuberculosis. * * *"

Section 3139-15, General Code, repeats the grant of authority to the board of trustees of a county tuberculosis hospital in these words :

“* * * The management and control of such tuberculosis hospital shall be vested in a board of trustees as provided for in Section 14 (G. C. §3139-13) of this act. Such board of trustees shall have all the powers conferred by law upon the board of trustees of a district hospital for tuberculosis, and all laws applicable to the appointment of employes and to the levy of taxes for the erection, operation and maintenance of a district hospital for tuberculosis, shall apply to said county hospital.”

Section 3139-10, General Code, provides for the control and management of a district tuberculosis hospital in the following words, and, because of the language above quoted, it also becomes the authority for the control and management of a county tuberculosis hospital :

“The board of trustees of a district tuberculosis hospital shall appoint a qualified physician as a medical superintendent, who shall not be removed except for cause. Said superintendent or a qualified medical assistant shall serve on a full time basis, except in such hospitals having less than fifty beds. Upon the recommendation of said medical superintendent, said board of trustees shall appoint other physicians and nurses for service within and without the hospital, and such other employees as may be necessary for the proper operation of the hospital. *Such trustees shall fix the compensation of the medical superintendent, physicians, nurses and all other employes.* * * *”

(Emphasis added.)

The statute above, it will be noticed, contains the words “shall appoint other physicians and surgeons for service within and without the hospital * * *. The trustees shall fix the compensation of the * * * physicians * * *.” This is the only specific authority contained in the law regarding the employment of physicians for service in connection with the operation of a county tuberculosis hospital. It, I believe, has specific reference to the employment within the classified service of physicians to be in regular attendance upon patients.

Does the grant of this specific authority deny to the responsible administrative heads of the hospitals the authority to call consulting physicians to treat with matters needing the services and opinion of a doctor practicing in a specialized branch of medicine?

It is stated in Sections 3139-13 and 3139-15, General Code, that the management and control of a county tuberculosis hospital is enjoined upon the trustees of that hospital. I have a firm opinion that the vesting of the authority to manage and control the hospital in the trustees carries with it the right to do all those things necessary for the operation of the hospital. One of those things would be to see to it that the patients of the hospital have the proper medical care. If the giving of such medical care would include the necessity of consultation with physicians, not on the salaried staff of the hospital, but who are possessed of peculiar skills in a particular branch of the medical practice, I believe the authority is present to provide such skill in the manner in which it is customarily obtained; that is, by calling upon a medical consultant and affording to him his compensation upon the usual basis of a fee for services rendered.

It must next be determined if the provisions of the civil service law preclude such manner of contracting for services and such manner of compensation.

Stated in general terms, Sections 486-1, General Code, under the direction of Article XV, Section 10 of the Ohio Constitution, establishes the civil service to include "all offices and positions of trust or employment in the service of the state and counties, cities and city school districts thereof." Section 486-8, General Code, divides the civil service into the classified and unclassified service. The unclassified service is there stated to be those positions exempt from examination and competition and there specifically listed. The classified service is stated to be all the remainder of employment in the state, counties, cities and city school districts. I do not believe that the establishment in the above manner of a system of employment for the state, counties, cities and city school districts was meant to preclude the obtaining of services, where properly done, on a contract basis rather than on an employment basis.

Any other conclusion would deny to the public service things necessary to the public service not available through regular salaried employment. It also would force upon the public subdivisions made subject to the civil service laws an uneconomic and costly method of operation not justified by circumstances.

I am, therefore, of the opinion that the obtaining of consulting physicians' services upon a fee basis is not employment or the holding of a position as meant by the laws governing civil service.

I, therefore, conclude, and it is my opinion, that a county tuberculosis hospital may contract for the services of consulting physicians to be paid upon a fee basis only for services performed and that such contractual service is not subject to the laws regulating the civil service of the state, counties, cities and city school districts.

Respectfully,

HUGH S. JENKINS,
Attorney General.