

OPINION NO. 85-025

Syllabus:

1. Although the Director of Agriculture has no authority to hire an executive director or secretary of the Ohio Grape Industries

Committee, the Committee may hire such a person in accordance with the procedure set forth in R.C. Chapter 124.

2. Pursuant to R.C. 924.55, the Ohio Grape Industries Committee is under a duty to reimburse the Department of Agriculture for any actual administrative and overhead costs incurred in the administration of the statutory provisions governing the Ohio Grape Industries Committee in an amount not to exceed ten percent per year of the amount received in that year in the Ohio Grape Industries special account.

To: Dale L. Locker, Director, Department of Agriculture, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, June 18, 1985

I have before me your request for my opinion on several questions concerning the Ohio Grape Industries Committee. You specifically ask:

1. In light of Sections 924.52 and 924.53, does the Director of Agriculture have authority to hire and or fire an Executive Director or Secretary of the Grape Industries Committee[?]
2. [W]ith respect to reimbursement of expenses, does Section 924.55 require the Department of Agriculture to charge the Grape Industries Committee for actual administrative and overhead costs, or may the department waive [its] right to reimbursement for these costs[?]

By way of background, I note that the Ohio Grape Industries Committee is created by R.C. 924.51 for the purpose of encouraging the grape industries of the state. See R.C. 4301.43 and R.C. 4301.432 (taxes collected for this purpose). The Director of Agriculture, who is a member of the Committee, R.C. 924.51(A), has certain responsibilities with regard to the activities of the Committee. For example, pursuant to R.C. 924.53, the Director monitors the Committee's activities and audits the Committee's books and records.

Your first question asks whether the Director of Agriculture may hire an executive director or secretary of the Ohio Grape Industries Committee. The Director of Agriculture, as a creature of statute, R.C. 121.02(E), has only those powers and duties as are prescribed by statute. See *Burger Brewing Co. v. Thomas*, 42 Ohio St. 2d 377, 329 N.E.2d 693 (1975). R.C. 924.53 sets forth the duties of the Director of Agriculture with respect to the Ohio Grape Industries Committee as follows:

- (A) The director of agriculture shall monitor the conduct of the Ohio grape industries committee to ensure that:
 - (1) The committee is operating within the requirements of sections 924.51 to 924.55 of the Revised Code;
 - (2) The committee's program is self-supporting;
 - (3) The committee keeps all records that are required by agencies of the state.
- (B) The director may, in accordance with Chapter 119. of the Revised Code, adopt, rescind, or amend rules necessary to carry out the purposes of this section.
- (C) The director shall accomplish an audit of the books and records of the committee prior to the thirtieth day of September each year.

Pursuant to this statute, the Director has a duty to monitor the Committee's activities and audit the Committee's books and records. Further, the Director has authority to adopt, rescind or amend rules necessary to carry out the purposes of R.C. 924.53. It is clear, however, that the Director has no authority to hire or fire persons on behalf of the Committee. Thus, in answer to your first question, I must conclude that the Director of Agriculture is without authority to hire or fire an executive director or secretary of the Ohio Grape Industries Committee.

It is my understanding, however, that you have additional concerns regarding the hiring or firing of an executive director or secretary of the Committee. You question whether the Committee itself may hire such a person, and, if so, whether such person must be hired pursuant to the provisions of R.C. Chapter 124. The powers and duties of the Ohio Grape Industries Committee are set forth in R.C. 924.52. Pursuant to R.C. 924.52(A), the Committee may conduct or contract with others to conduct certain research, provide information as to proper methods of handling grapes and grape products, make or contract for market surveys and similar activities, enter into contracts necessary for the promotion of the sale of grapes and grape products, publish and distribute information, and make proposals to the Director of Agriculture concerning rules and orders necessary for the exercise of its powers and the performance of its duties. The Committee's duties are further specified in R.C. 924.52(B) and include promoting the sale of grapes and grape products; keeping accurate records, books and accounts; and performing "all acts and [exercising] all powers incidental to, in connection with, or considered reasonably necessary, proper, or advisable to effectuate the purposes of this section," R.C. 924.52(B)(3). Pursuant to R.C. 924.52(B)(3), should the Committee reasonably determine that hiring an executive director or secretary is necessary, proper or advisable to enable the Committee to carry out its functions, the Committee is empowered to hire such a person.

In determining whether an executive director or secretary is subject to hire pursuant to R.C. Chapter 124, I turn to the case of In re Ford, 3 Ohio App. 3d 416, 446 N.E.2d 214 (Franklin County 1982), motion to certify the record overruled, No. 82-1127 (Ohio Sup. Ct. Sept. 22, 1982), wherein the Court of Appeals of Franklin County discussed the concept of employment in the service of the state for purposes of R.C. Chapter 124. The court stated: "employment in the service of the state under R.C. 124.01 has two requisites: (1) employment by a state agency, and (2) compensation being paid in whole or in part from state funds, whether general or special, regardless of the source of such state funds." Id. at 420, 446 N.E.2d at 218.

In order to determine whether the Ohio Grape Industries Committee is a state agency for purposes of R.C. Chapter 124, it is necessary to examine the statutes governing the establishment, funding and operation of the Committee. The Ohio Grape Industries Committee is created by R.C. 924.51. The Committee consists of eight members: the Director of Agriculture or his designee, the chief of the division of markets of the Department of Agriculture, the viticulture extension specialist of the Ohio Agricultural Research and Development Center, and five members appointed by the Director of Agriculture. R.C. 924.51. Pursuant to R.C. 924.54, the Legislature has created the Ohio Grape Industries special account in the state special revenue fund. Moneys from this account are used to fund the operation and activities of the Ohio Grape Industries Committee. See, e.g., R.C. 924.51(D) (payment of expenses of Committee members in performance of their duties); R.C. 924.52(A)(1) (expenditures for research concerning, among other things, marketing and distribution of grapes and grape products); R.C. 924.55 (payment for administrative and overhead costs). Funds in the Ohio Grape Industries special account are derived from taxes and are paid into the account by the Treasurer of State pursuant to R.C. 4301.43 and R.C. 4301.432.¹ Pursuant to R.C. 924.54(A), moneys in the Ohio Grape Industries special account are disbursed "upon the issuance of vouchers approved by the director of agriculture." Pursuant to R.C. 924.52(B)(2), the books, records and accounts of the Committee's dealings and financial transactions are subject to inspection and audit by the Auditor of State. The statutory scheme governing the establishment and operation of the Ohio Grape Industries Committee thus appears to make the Committee, at least for purposes of R.C. Chapter 124, an agency of the state.

¹ R.C. 4301.43 levies a tax on the sale or distribution of wine "[f]or the purposes of providing revenues for the support of the state and encouraging the grape industries in the state." R.C. 4301.432 levies a tax on the sale or distribution of vermouth, sparkling and carbonated wine and champagne, and other wine "[f]or the purpose of encouraging the grape industries of the state."

The second prong of the Ford test is whether compensation is paid in whole or in part from state funds, whether general or special, regardless of the source of the funds. As set forth above, the moneys expended by the Ohio Grape Industries Committee are moneys paid by the Treasurer of State into a special account within the state special revenue fund from taxes levied pursuant to R.C. 4301.43 and R.C. 4301.432. See R.C. 924.54 (moneys in the Ohio Grape Industries special account "shall be disbursed to carry out the purposes of [R.C. 924.51 to 924.55] upon the issuance of vouchers approved by the director of agriculture"). See generally R.C. 131.32(B)(3) (defining funds of the state as including the state special revenue fund "which shall receive all fees or charges levied by the state which have been dedicated by law...for a specific designated use or purpose"). It is clear, therefore, that the compensation of an executive director or secretary hired by the Committee would be paid from state funds.

Since it appears that the Ohio Grape Industries Committee is a state agency for purposes of R.C. Chapter 124 and since a person hired by the Committee would be compensated from state funds, such person's employment is employment in the state service² and must be accomplished in accordance with the provisions of R.C. Chapter 124.³

Your second question is whether R.C. 924.55 requires the Department of Agriculture to charge the Ohio Grape Industries Committee for actual administrative and overhead costs or whether the Department may waive such reimbursement.

R.C. 924.55 states:

The department of agriculture shall be reimbursed for actual administrative and overhead costs incurred in the administration of sections 924.51 to 924.55 of the Revised Code in an amount not to exceed ten per cent per year of the amount received in that year in the Ohio grape industries special account created under section 924.54 of the Revised Code. (Emphasis added.)

The language of this statute states that the Department of Agriculture shall be reimbursed for actual administrative and overhead costs incurred in the administration of the statutory provisions governing the Ohio Grape Industries Committee. The amount of such reimbursement may not, however, exceed ten percent per year of the amount received in that year in the Ohio Grape Industries special account. The fact that the Legislature has used the word "shall" in directing that such reimbursement be made indicates the legislative intent that such reimbursement is mandatory, subject, of course, to the ten percent limitation. See Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) (in statutory construction the word "shall" is to be construed as mandatory, absent clear legislative intent to the contrary). The General Assembly has clearly evidenced an intent that the actual administrative

² Pursuant to R.C. 124.11, the civil service of the state is divided into the classified and unclassified service. Only those categories of employees listed in R.C. 124.11(A) are part of the unclassified service. All other employees in the state service are classified employees and are subject to appointment and removal in accordance with R.C. Chapter 124. See 1965 Op. Att'y Gen. No. 65-079.

³ Although the Ohio Grape Industries Committee has authority under R.C. 924.52(A)(3) to make "such other contracts or agreements as the committee considers necessary for the promotion of the sale of grapes and grape products," such authority does not permit the Committee to hire persons pursuant to contract where such persons are required to be hired pursuant to R.C. Chapter 124. See Local 4501, CWA v. Ohio State University, 12 Ohio St. 3d 274, 466 N.E.2d 912 (1984). See generally Council v. Douglas, 163 Ohio St. 292, 126 N.E.2d 597 (1955) (distinctions between employee and independent contractor); 1985 Op. Att'y Gen. No. 85-008.

and overhead costs incurred in the administration of the statutes governing the Ohio Grape Industries Committee are ultimately to be paid from the Ohio Grape Industries special account rather than from the funds appropriated to the Department of Agriculture.

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

1. Although the Director of Agriculture has no authority to hire an executive director or secretary of the Ohio Grape Industries Committee, the Committee may hire such a person in accordance with the procedure set forth in R.C. Chapter 124.
2. Pursuant to R.C. 924.55, the Ohio Grape Industries Committee is under a duty to reimburse the Department of Agriculture for any actual administrative and overhead costs incurred in the administration of the statutory provisions governing the Ohio Grape Industries Committee in an amount not to exceed ten percent per year of the amount received in that year in the Ohio Grape Industries special account.