

OPINION NO. 86-018

Syllabus:

A county children's home is not a "food service operation" as defined in R.C. 3732.01, and thus, is not required to obtain a food service operation license under R.C. 3732.03.

To: C. Keith Plummer, Guernsey County Prosecuting Attorney, Cambridge, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, March 21, 1986

I have before me your request for my opinion as to whether a county children's home, which cares for minor children, is required to obtain a food service operation license. You note in your letter of request that the home in question is operated by a county children services board and that food is provided for the children in the home without cost to the children.

R.C. 3732.03 provides that, "[p]rior to conducting a food service operation in this state, every person or governmental agency shall procure a license for the food service operation," and that, with certain exceptions, "no food service operation shall be maintained and conducted in this state without such a license." See R.C. 3732.01(B) (a "licensor" of food service operations is "the board of health of any city or general health district, or the authority having the duties of a board of health as authorized by [R.C. 3709.05]"). A "food service operation" is defined, for purposes of R.C. 3732.03, to include, with various exceptions not relevant herein: "Any place, including any governmental operation, where meals or lunches, or portions thereof, are prepared or served for a consideration, regardless of whether the meals, lunches, or portions are to be consumed on or off the premises" (emphasis added). R.C. 3732.01(A)(1).

In order to be considered a "food service operation," a place must prepare or serve food for a consideration. In 1956 Op. Att'y Gen. No. 6401, p. 278, one of my predecessors, in responding to the question whether a county home is a food service operation and thus subject to licensure and regulation under R.C. Chapter 3732, addressed the meaning of the phrase "preparing or serving meals or lunches for a consideration."¹ The opinion states:

¹ The version of R.C. 3732.01 in effect when 1956 Op. Att'y Gen. No. 6401, p. 278, was written defined a "food service operation" as "any place which is kept or

The board of county commissioners has the authority to construct and maintain a county home, and prescribe rules and regulations for its management....The county home is then maintained for the purpose of caring for the indigent, infirm, or aged persons in the county, and is essentially therefore a charitable institution of the county.

In view of the character and purpose of the county home, it is manifestly not a place which is kept or maintained for the purpose of preparing or serving meals or lunches for a consideration. The purpose of the county home in the preparing and serving of food is in direct opposition to a food service operation as defined in Section 3732.01, supra. Such food as is prepared for the persons in the county home is part of the total maintenance required for these indigent or infirm persons, and there is no consideration required to be paid for such food, or a demand for a consideration made upon such persons for the preparation or serving of the meals.

....
In the consideration of Section 3732.01, supra, it is my opinion that the section must be given a reasonable construction consistent with the ordinary and usual meaning of its terms. I am therefore led to the conclusion that the phrase "preparing or serving meals or lunches for a consideration" comprehends the usual sale transaction in which payment is made or promised conditioned upon the serving of the food. Any money paid to the county home by persons kept at the home is not a quid pro quo for the food served, as consideration is often described, and I must therefore hold that a county home is not a food service operation within the meaning of Section 3732.01, Revised Code.

....
...I am of the opinion that a county home...is not a food service operation within the meaning of Section 3732.01, Revised Code, where the food served is primarily for those persons employed or kept at the institution without consideration.

1956 Op. No. 6401 at 281-82.

1956 Op. No. 6401 was followed in 1965 Op. Att'y Gen. No. 65-025, which concludes that, "[a] home maintained for elderly members of a fraternal organization in which meals are served only to the residents and employees and to which such member-residents may or may not contribute for their care and maintenance, including meals, is not a food service operation within the meaning of [R.C. 3732.01(A)(1)]" (syllabus) and in 1970 Op. Att'y Gen. No. 70-082, which concludes that, "[a] group home, under the jurisdiction of the Ohio Youth Commission...does not constitute a 'food service operation' as defined in Section 3732.01, Revised Code," regardless of

maintained for the purpose of preparing or serving meals or lunches for a consideration." 1955-1956 Ohio Laws 32 (Am. Sub. S.B. 27, eff. Sept. 20, 1955). The definition was changed to its present form by 1983-1984 Ohio Laws, Part II, 3422 (Am. Sub. H.B. 311, eff. April 3, 1984). This change has no effect on the analysis or result reached herein.

whether the home is paid a consideration for the overall care and maintenance of the children (syllabus and at 2-141).

In applying the reasoning of those opinions set forth above, I believe that a county children's home is not a food service operation. A county children's home is established pursuant to R.C. 5153.21, which states that, "[t]he board of county commissioners may establish a children's home upon the recommendation of the county children services board or county department of welfare and subject to the approval of the department of public welfare." The purpose of these homes is to provide "a refuge and home for needy children." In Re Estate of Parish, 107 Ohio App. 43, 45, 153 N.E.2d 409, 411 (Fairfield County 1958). Food prepared for the residents of a children's home is served as part of the children's care and, as you note in your request, is provided at no cost to the children.² Thus, a county children's home is not a place where meals are prepared or served for a consideration, and thus is not a food service operation subject to licensure under R.C. 3732.03.

I note that in 1954 Op. Att'y Gen. No. 3700, p. 181, one of my predecessors considered the issue whether a county children's home is a "food service operation," as defined in R.C. 3732.01. At that time R.C. 3732.01 defined a "food service operation" as "any structure or building...which is kept, maintained, advertised, or held out to the public to be a place where meals or lunches are served for a consideration." See 1953-1954 Ohio Laws 682, 685 (Am. Sub. H.B. 429, eff. Oct. 29, 1953). In concluding that a children's home is not a food service operation, the opinion relies primarily on the fact that a children's home does not hold itself out to the public as a place where meals are served. The requirement of "holding out" is no longer contained in the definition of "food service operation" found at R.C. 3732.01. The opinion went on to state, however, that "in addition to this lack of holding out to the public, there is a serious question as to whether [a county children's home] is serving meals or lunches for a 'consideration', within the ordinary meaning of that term." 1954 Op. No. 3700 at 187. Thus, 1954 Op. No. 3700 supports my conclusion that the lack of consideration charged for meals prepared and served by a children's home indicates the home is not a food service operation.

Although a children's home is not subject to licensure as a food service operation under R.C. 3732.03, a board of health does have the authority to inspect a county children's home. R.C. 3709.22; R.C. 3709.26. Such inspections may include an examination of the home's facilities where food is prepared and served. See 1956 Op. No. 6401.

In conclusion, it is my opinion and you are advised, that a county children's home is not a "food service operation" as defined in R.C. 3732.01, and thus, is not required to obtain a food service operation license under R.C. 3732.03.

² A child, his parent, or guardian may, in some instances, be required to contribute to the county's cost of caring for the child. See R.C. 5153.19. Such contribution is for the overall care and maintenance of the child, and cannot be considered as payment for the meals provided the child for purposes of determining whether a children's home provides meals for a consideration and thus qualifies as a food service operation. See 1970 Op. Att'y Gen. No. 70-082; 1956 Op. Att'y Gen. No. 6401, p. 278.