

OPINION NO. 74-029

Syllabus:

R.C. 125.06 is not applicable to the Ohio Turnpike Commission nor the three major retirement systems.

To: Joseph J. Sommer, Director, Dept. of Administrative Services, Columbus, Ohio

By: William J. Brown, Attorney General, April 8, 1974

I have before me a request for opinion from the Director of the former Department of Finance, which reads as follows:

"It was recently brought to the attention of this department that both the Ohio Turnpike Commission and the three major retirement systems have been purchasing data processing equipment without going through the Department of Finance. We are somewhat troubled by this situation because there is some indication that both the Turnpike Commission and the retirement systems have purchased substantially more computer power than is necessary to their operations. It appears that sizable savings could result if the retirement systems shared their computers, rather than purchasing independently of each other.

"An important purpose of Section 125.13 of the Ohio Revised Code, which on its face requires purchasing of data processing through the Department of Finance, is to provide various agencies with the professional advice on procurement of equipment which the Department of Finance has by virtue of its centralized purchasing operations for the state. The Department of Finance believes efficient state government is best served by providing for a central purchasing unit in connection with the acquisition of data processing equipment.

"The Turnpike Commission and the retirement systems have taken the position that the statutes by virtue of which they exist except their data processing purchasing from the provisions of Section 125.13. The Department of Finance respectfully requests your opinion as to the applicability of this section to the purchasing of data processing equipment or services by the Turnpike Commission and retirement systems."

The Section to which you have referred, R.C. 125.13, has now become R.C. 125.06. This amendment was enacted by Am. S.B. No. 174 (effective December 4, 1973) which abolished the Departments of Finance, Public Works, and State Personnel and created the Department of Administrative Services. Since the newly enacted R.C. 125.06 requires the Department of Administrative Services to purchase data processing equipment in place of the now defunct Department of Finance, I am addressing this opinion to you.

Several Sections of the Code provide authority for the Department of Administrative Services to purchase supplies, equipment, and data processing machines for state departments, offices, and institutions. R.C. 125.02 vests the Department with the power to purchase supplies, material and equipment for the use of state departments, offices, and institutions. R.C. 125.04 states that when it is deemed necessary the Department may purchase supplies, equipment, and contracts of insurance for elective or appointive state officers, boards, and commissions. R.C. 125.06 reads, in part, as follows:

"No elective or appointive state officer, board, or commission, other than those excepted in section 125.04 of the Revised Code, shall procure or purchase any supply or equipment or contract of insurance or make contracts for or operate data processing machine services other than from or through the department of Administrative Services. * * *

Neither the Ohio Turnpike Commission nor the three retirement systems--the Public Employees Retirement System, the State Teachers Retirement System and the School Employees Retirement System--are excepted from the operation of R.C. 125.06 by R.C. 125.04. It will, therefore, be necessary to look to the statutes creating these bodies to determine whether they are elective or appointive state officers, boards, or commissions which come within the ambit of R.C. 125.06.

To begin with, the predecessor of R.C. 125.06 has been interpreted as giving the Department of Finance the duty of supervising the accounting and auditing of such expenditures, but not the power to determine whether the desired equipment should be purchased. For instance, in Opinion No. 5092, Opinions of the Attorney General for 1955, my predecessor said:

"It must be remembered that the director of the department of finance acts only as the agent of the various state departments and as such he must be subject to their directions at all times as to the matter which they desire to have printed, and as to the form in which they wish to have it printed. * * *"

See also Kauer v. Defenbacher, 153 Ohio St. 268 (1950); State, ex rel. v. Baker, 112 Ohio St. 356 (1925); State ex rel. v. Herrick, 107 Ohio St. 611 (1923); Opinion No. 72-120, Opinions of the Attorney General for 1972; Opinion No. 2092, Opinions of the Attorney General for 1961. I am unable to find anything in A.S.B. No. 174 to indicate that the General Assembly intended to give the Department of Administrative Services any greater authority in this respect than the Department of Finance had previously possessed.

The Ohio Turnpike Commission was created by R.C. 5537.02. This section provides that the Commission is to be composed of four members who are to be appointed by the Governor with the advice and consent of the Senate, and the director of transportation who is a member ex-officio without compensation. Thus, since the Commission is created by statute and its members are appointed, it would seem, at first glance, to fall within the literal ambit of R.C. 125.06.

However, a closer examination of the statutes relating to the Commission demonstrates that R.C. 125.06 is not applicable to it. R.C. 5537.02 reads in part:

"There is hereby created a commission to be known as the 'Ohio turnpike commission.' Such commission is a body both corporate and politic in this state, and the exercise by it of the powers conferred by sections 5537.01 to 5537.23, inclusive, of the Revised Code, in the construction, operation, and maintenance of turnpike projects shall be held to be essential governmental functions of the state, but the commission shall not be immune from liability by reason thereof."

(Emphasis added.)

The Commission is, therefore, not only a political creation of the state, but is also a corporate body which is not immune from suit. See Harrison Construction Co. v. Ohio Turnpike Commission, 262 F.2d 337 (6th Cir. 1959), and Hoffmeyer v. Ohio Turnpike Commission, 83 Ohio L. Abs. 391 (1960). The Commission has authority to exercise the powers conferred to it in Chapter 5537., and to pay all expenses incurred in carrying out such powers from funds provided within Chapter 5537. R.C. 5537.02. That Section further provides that "no liability or obligation shall be incurred by the commission beyond the extent to which moneys have been provided under such sections."

R.C. 5537.04(D) permits the Commission to sue and be sued in its own name. Subsection (F) gives the Commission power to issue turnpike revenue bonds of the state as provided in R.C. 5537.08 and 5537.09. R.C. 5537.04(K) provides that the Commission may "make and enter into all agreements necessary or incidental to the performance of its duties and the execution of its powers under sections 5537.01 to 5537.23, inclusive, of the Revised Code" and provides bidding procedures for certain types of contracts. R.C. 5537.10 reads in part: "Sections 5537.01 to 5537.23 inclusive, of the Revised Code provide an additional and alternative method for doing the things authorized thereby, and shall not be regarded as in derogation of any powers existing on September 1, 1949." (Emphasis added.) R.C. 5537.11 states that the bonds issued by the Commission do not constitute a pledge of the credit of the state or of any of its political subdivisions. Finally, R.C. 5537.23 states that Chapter 5537. is necessary for the welfare of the state, and is to be liberally construed to accomplish the purposes set out therein.

When interpreting the sections in Chapter 5537., the court in Hoffmeyer v. Ohio Turnpike Commission, supra, at p. 392, stated as follows:

* * * *The words used in the sections give rise to the clear inference that the Legislature did not regard the Turnpike Commission as a political arm of the state. * * *

See also Harrison Construction Co. v. Ohio Turnpike Commission, supra. Similarly, one of my predecessors, in Opinion No. 65-145, Opinions of the Attorney General for 1965, which held that Turnpike Commission employees were not "in the service of the state, made the following statements:

"It appears that although the Ohio Turnpike is an arm of the State of Ohio insofar as it is statutory in origin and created for a public purpose, in its operation and financial structure it is an autonomous entity severed from the State of Ohio."

I am in agreement with these interpretations. Therefore, I conclude, that R.C. Chapter 5537. makes it clear that the legislature intended to create an autonomous entity with its own financial structure and operation.

It remains to consider the applicability of R.C. 125.06 to the Public Employees Retirement Board, the State Teachers Retirement Board, and the School Employees Retirement Board. All these boards are in charge of the general administration and management of their respective systems. See R.C. 145.04, 3307.04, and 3309.04.

Boards which are covered by R.C. 125.06 must be elected or appointed state boards. I conclude that the retirement boards do not meet these requirements, since their members are designated by statute. R.C. 145.04 provides:

"The general administration and management of the public employees retirement system and the making effective of sections 145.01 to 145.57, inclusive, of the Revised Code, are hereby vested

in a board to be known as the 'public employees retirement board,' which shall consist of seven members as follows:

- (A) The attorney general;
- (B) The auditor of State;
- (C) The director of state personnel;

(D) Four other members known as employee members, one of whom shall be a state employee member of the retirement system and who shall be elected by ballot by the state employee members of the retirement system from among their number, another of whom shall be a county employee member of the system and who shall be elected by ballot by the county employee members of the system from among their number, another of whom shall be a municipal employee member of the system from among their number, and another of whom shall be a park district, conservancy district, health district, public library, township, or metropolitan housing authority employee member of the system and who shall be elected by ballot by the park district, conservancy district, health district, metropolitan housing authority, township, and public library employee members of the system from among their number, in a manner to be approved by the board.
(Emphasis added.)

R.C. 3307.05 reads as follows:

"The state teachers retirement board shall consist of five members:

- (A) The superintendent of public instruction;
- (B) The auditor of state;
- (C) The attorney general;

(D) Two members, known as teacher members, who shall be members of the state teachers retirement system, and who shall be elected by ballot by the members of the system."
(Emphasis added.)

R.C. 3309.05 states as follows:

"The school employees retirement board shall consist of five members:

- (A) The auditor of state;
- (B) The attorney general;

(C) Three members known as employee members, who shall be members of the school employees retirement system, and who shall be elected by ballot by

the members of the system.
(Emphasis added.)

Although some members of the board are ex-officio members by virtue of their election or appointment to other state offices, other members of the board are elected by the membership of the system rather than by the people of the state or a political subdivision. While the term "elected" is not defined in R.C. 125.06, I believe that there is a reasonable and necessary implication that such term refers to officers and boards elected by the people of the state, and not by the members of a particular limited system. Therefore, the retirement boards are not "elective or appointive state boards" and R.C. 125.06 is not applicable to them.

In specific answer to your question, it is my opinion and you are so advised that R.C. 125.06 is not applicable to the Ohio Turnpike Commission nor the three major retirement systems.