

OPINION 65-25**Syllabus:**

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 Section 3732.01 (A) (1), Revised Code.

To: Thomas R. Spellerberg, Seneca County Pros. Atty., Tiffin, Ohio
By: William B. Saxbe, Attorney General, February 10, 1965

Your request for my opinion reads as follows:

"A member of the Board of Health recently asked a question regarding a Home maintained by a national fraternal organization for its elderly members and which does not charge an entrance fee and will take members whether they have any property or not, but which does require that those members who do desire to enter and do have property, must transfer all assets presently owned or which they may thereafter become entitled to, be transferred to the Home.

"In return for this, the Home then maintains the individual, providing him with room, board,

care, including medical, physical, and further provides nursing and hospital services and also provides for burial in a portion of a cemetery, all at the Home's expense, said Home having at present approximately sixty members or inmates.

"The question being asked is whether or not by definition under 3732.01 (A) (1) (c) such an organization would qualify as an exception as to fraternal organizations serving meals or lunches on their premises.

"Said Home does not provide meals or lunches to anyone other than the inmates of the Home or to the staff of the Home. They do not solicit nor do they cater to the public in general.

"It would appear that 1956 Ohio Attorney General Opinion #6401 at Page 278 would be applicable since the food served is primarily for the persons employed and the inmates at the institution without consideration."

Section 3732.01, Revised Code, sets forth the following pertinent definition:

"As used in sections 3732.02 to 3732.08, inclusive, of the Revised Code:

"(A) A 'food service operation' means:

"(1) Any place which is kept or maintained for the purpose of preparing or serving meals or lunches for a consideration except:

"(a) Homes containing what is commonly known as the family unit and their non-paying guests;

"(b) Operations serving a meal or a lunch to five or less persons;

"(c) Churches, school, fraternal, or veterans' organizations serving meals or lunches on their premises; provided said meals or lunches are served on no more than seven consecutive days or on no more than fifty-two separate days in any one calendar year;"

Under the facts as herein presented, it is clear that the home in question could not in any event fall within the exceptions of Section 3732.01 (A) (1) (b) or (c), supra, since meals are served to more than five persons on a daily basis. It is therefore necessary to determine whether this home comes within the scope of a "food service operation" as defined in Section 3732.01 (A) (1), supra.

Prior to September 20, 1955, Section 3732.01, Revised Code,

defined "food service operation" as follows:

"As used in sections 3732.02 to 3732.08, inclusive, of the Revised Code: A food service operation commonly known as a restaurant, is defined as any structure or building, permanent or temporary in nature, whether mobile or stationary, which is kept, maintained, advertised, or held out to the public to be a place where meals or lunches are served for a consideration....."

Pursuant to this definition the essential criteria for determining a food service operation was whether there was a holding out to the public and whether there was a consideration for such service. This was concluded in prior opinions where the term "public" was also interpreted to include something larger than a particular group or class of people to whom meals are served. Opinion No. 1240, Opinions of the Attorney General for 1920, page 551; Opinion No. 1024, Opinions of the Attorney General for 1946, page 434; Opinion No. 785, Opinions of the Attorney General for 1949, page 452; Opinion No. 3700, Opinions of the Attorney General for 1954, page 181.

The amendment to Section 3732.01, supra, enacted in 1955 (126 Ohio Laws 32) deleted "held out to the public" and redefined a "food service operation" in substantially the same manner as it presently appears in Section 3732.01 (A) (1), supra. By this amendment the emphasis was shifted primarily to whether the serving of food is "for a consideration."

The 1954 Opinion No. 3700, supra, concluded that a county children's home serving meals only to the residents and employees was not within the scope of Chapter 3732, Revised Code, because there was no holding out to the public. It was necessary, therefore, to re-examine that fact situation following the 1955 amendment. In Opinion No. 6401, Opinions of the Attorney General for 1956, page 278, the same question was raised as to a county home in which some of the residents contributed toward their maintenance. The Opinion concluded that the home was not a place kept or maintained for the purpose of preparing or serving meals or lunches for a consideration. The following excerpts from this Opinion are taken from pages 281 and 282:

"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.* * *

"I am advised that there are four persons in the county home who make a contribution toward their maintenance in the county home. However, I do not consider this fact to change the conclusion reached as to the essential character of the county home. The contribution made by these

persons is not a payment made as consideration for the meals served, but is an amount which has been agreed upon as a reasonable payment within the means of the person for all the services performed by the home without any specific relation to 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 the 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."

Upon consideration of Opinion No. 6401, supra, I concur with the conclusion and reasoning therein set forth. Furthermore, I can see no basis upon which to distinguish a county home from the home you describe for elderly persons maintained by a fraternal organization. To conclude, however, that the serving of meals in such a home is not within the scope of Chapter 3732, supra, does not mean that the food operation is free from regulation and inspection.

Pursuant to Chapter 3721, Revised Code, the home as you have described is an institution which has to be licensed by the director of health and inspected either by employees of the state department of health or local health agencies as provided in Section 3721.03, Revised Code. Section 3721.04, Revised Code, further provides that the public health council shall promulgate rules and regulations relating to healthful, safe and sanitary conditions and nutritional services in such institutions.

It is therefore my opinion and you are advised 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 Section 3732.01 (A) (1), Revised Code.