

2161.

MUNICIPALITY—INTERPRETATION SECTION 17-3 G. C.—  
EXAMPLES—TYPES OF OPERATIONS—MAINTENANCE  
—CLEANING, SPRINKLING, ETC., UNDER SECTION—  
TYPES OF WORK NOT UNDER SECTION—EMPLOYEE—  
CIVIL SERVICE—PENSION SYSTEM—STATUS MONEYS  
CONTRIBUTED.

*SYLLABUS:*

1. *Ordinary maintenance operations performed by municipalities which do not include repair work do not come under the regulatory provisions of Section 17-3, et seq., General Code. Common examples of such types of maintenance operations are street cleaning and sprinkling, snow removal and cleaning of public buildings. However, such activities which may be defined as "construction, reconstruction, improvement, enlargement, alteration or repair" do come under these provisions of the section of the General Code, regardless of whether the work is performed on new improvements or old ones.*

2. *Amounts contributed by an employe to a pension system constitute part of said employe's "wages" as that term is used in Section 17-5 if the said employe has the right to obtain all monies so contributed upon the termination of his employment.*

COLUMBUS, OHIO, March 28, 1938.

*Bureau of Inspection and Supervision of Public Offices, State House Annex, Columbus, Ohio.*

GENTLEMEN: I am in receipt of your communication in which you set forth the following facts:

A municipality employs a large number of men in classified civil service for making repairs on existing streets and structures. Some of these men are employed on an annual basis and others are employed on a per diem basis, but even the latter group receives very steady employment. All of the men so employed are included in the pension system of the municipality, which system provides for a fund which is maintained by contributions paid by the employes, plus a regular appropriation by the municipality. The amounts which are contributed by the employes may be withdrawn if the employment is severed before the retirement age, with

interest compounded at four per cent. Upon death before retirement, the beneficiaries receive one-half of the decedent's yearly wage. If death occurs in the course of employment, the beneficiaries receive a pension for life. These men, however, are not paid an amount equal to the prevailing wage rate as set up by the Department of Industrial Relations pursuant to Section 17-4.

It is contended by the officials of the municipality "that Sections 17-3, et seq. are not intended to include the regular city employes engaged on maintenance and repair of existing works; that the sections apply to regular city employes, if at all, only on new construction work of over \$300.00 in cost; \* \* \* that street repair or maintenance (no matter how extensive), sewer maintenance and repair, street cleaning, street sprinkling and flushing, street signs, waste collection and incineration, snow removal, water works repair and maintenance (both plant and distribution) city buildings cleaning, maintenance, and repairs, are all regular city functions, and are not intended to be included in said sections."

The quoted matter is from the letter from your examiner which you included with your communication. This letter further recites that the quoted contentions are based on the case of *State vs. Peters*, 112 O. S. 249.

I note that the words "maintenance" and "repair" are used quite frequently in your communication and that of your examiner. It is necessary, therefore, to observe at the outset that the words are not synonymous and that the word "maintenance" does not appear in the statutes relating to this matter.

The following, in my opinion, are the portions of the General Code here relevant:

Section 17-3:

"The term 'public authority' as used in this act, shall mean any officer, board, or commission of the state of Ohio, or any political subdivision thereof, authorized by law to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor. The term 'construction,' as used in this act, shall mean any construction, reconstruction, improvement, enlargement, alteration or *repair* of any public improvement fairly estimated to cost more than three hundred dollars. The term 'public improvement,' as used in this act, shall

include all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works and all other structures or works constructed by the state of Ohio or any political sub-division thereof. \* \* \*” (*Italics the writer's.*)

It is noteworthy that the above section provides that the term “construction” as used in that enactment means “any construction, reconstruction, improvement, enlargement, *alteration or repair* of any public improvement fairly estimated to cost more than three hundred dollars,” and that the term “public improvement” includes “all buildings, *roads, streets, alleys*, sewers, ditches, sewage disposal plants, water works.”

Section 17-4:

“It shall be the duty of every public authority authorized to \* \* \* construct with its own forces for a public improvement, before \* \* \* undertaking such construction with its own forces, to have the department of industrial relations ascertain and determine the prevailing rates of wages of mechanics and laborers for the class of work called for by the public improvement, in the locality where the work is to be performed; \* \* \*”

Section 17-4a:

“The wages to be paid for a legal day’s work, as hereinbefore prescribed in Section 17-4 of this act, to laborers, workmen or mechanics upon such public works shall not be less than the wages paid in the same trade or occupation in the locality where such public work is being performed, under collective agreements or understanding between bona fide organizations of labor and employers, at the date such contract is made, and in the event there be no such agreement or understanding, then not less than the prevailing rate of wages to be determined as provided in Section 17-4 of this act. \* \* \*”

Section 17-5:

“\* \* \*

Where a public authority constructs a public improvement with its own forces it shall be the duty of such authority to pay a rate or rates of wages which shall not be less than the rate or rates of wages so fixed as herein provided. Any mechanic or laborer paid less than such rate or rates by any public authority shall have a right of action against such public authority for the difference between the fixed

rate of wages and the amount paid to him, and in addition thereto a penalty equal in amount to such difference."

I have quoted from these sections quite extensively so that the system set forth therein may be fully contemplated. As pointed out above, Section 17-3 in defining the word "construction" does not include "maintenance," and for the purposes of this discussion, it is only necessary to consider the word "repair" as used in your correspondence and in the statute. In the ordinary sense of the word, the word "repair" is used to indicate a changing of form, as for example, if a hole in a street is filled in, the substance or form of the street is materially changed. I have no hesitancy in stating that, in my opinion, the above quoted statutes were not intended to include ordinary maintenance operations and that the employment of labor for purposes other than those enumerated in the statute is not regulated by the statutory provisions.

In your communication you refer to "street cleaning." I am of the opinion that this is maintenance; likewise, "street sprinkling and flushing." There is also a reference to "street signs." If by this is meant the erection of street signs, I do not believe there is any reason why such work would not be governed by the statute. Certainly it comes within the term "construction" as that term is defined in Section 17-3, *supra*. You also refer to "waste collection and incineration" in your communication. I do not believe that these operations would constitute repair. Such activities are in the same category as "snow removal" and the clearing of city buildings and are in the nature of maintenance. However, the repair of city buildings and streets and the repair of the water works plant are functions which have been regularly performed by the municipality and does not alter the fact that such work is "repair" of a "public improvement" as these terms are used in Sections 17-3 and 17-5. I know of no reason to exclude such repair work from the provisions of this legislation merely because it has been regularly performed by the municipality.

I see no force to the contention that this legislation only applies to new construction or reconstruction. If that were the intentions of the enactors, why was the term "construction" defined in Section 17-3, *supra*, to include "construction, reconstruction" and also "improvement, enlargement, alteration or repair"? As I see it, there is no ambiguity in the statute in this regard and, therefore, no necessity for construing or interpreting the statute.

The case of *State vs. Peters*, *supra*, is not, in my opinion, authority for the contentions urged by the municipality. That case con-

sidered Section 17-1 and there is no definition in that statute for the interpretation of the terms used therein. The court was interpreting the following portion of the section:

“\* \* \* workmen engaged on any public work carried on or aided by the state, or any political sub-division thereof, whether done by contract or otherwise; \* \* \*”

This case is not, in my opinion, of any authority in the determination of questions arising under Sections 17-3, et seq., supra, because the terms used in these latter enactments are defined therein and, therefore, there is no room for conjecture as to the legislative intent.

Coming now to the consideration of the monies contributed by the employes to the pension fund. In most cases such contributions to pension or retirement funds are deducted from the wages paid to the employes. I assume that that is the manner by which the contributions are made in this particular locality by the employes in question. Section 17-5a provides in part as follows:

“All contractors and sub-contractors required by the terms of this act and the action of any public authority to pay not less than the prevailing rate or rates of wages shall make full payment of such wages in lawful money of the United States, without any deduction for food, sleeping accommodations, transportation, use of small tools, or any other thing of any kind or description.”

I call attention to the fact that this provision only relates to “contractors and sub-contractors” and not to public authorities. If an employe has, upon the termination of his employment, the right to obtain all monies which he has previously contributed to a pension fund, I believe the amounts so contributed may be considered part of his wages within the meaning of the herein considered statutes.

Respectfully,

HERBERT S. DUFFY,  
*Attorney General.*