

the transcript and upon the duplicate copy thereof, both of which are herewith returned.

Respectfully,
 JOHN W. BRICKER,
Attorney General.

2252.

LIQUOR CONTROL ACT—EMPLOYMENT OF WOMEN IN STATE LIQUOR STORES NOT PROHIBITED—LIQUOR CONTROL DEPARTMENT UNAUTHORIZED TO EMPLOY OFFICE COUNSEL—METHOD OF REQUESTING ADVICE FROM ATTORNEY GENERAL.

SYLLABUS:

1. *There is no provision of law which prohibits the employment of women, who have attained the age of twenty-one years, as cashiers or clerks or in any other capacity in connection with the operation of state liquor stores by the State Liquor Control Department.*
2. *The state liquor control department is without power to employ office counsel.*
3. *Any requests to the Attorney General from the liquor control department for advice, concerning matters relating to the official duties of such department, should come either from the Director of Liquor Control or from the Board of Liquor Control acting as a board.*

COLUMBUS, OHIO, February 2, 1934.

HON. JOHN A. HUGHES, *Director of Liquor Control, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

“1. Does any provision of the Liquor Control Act or any provision of the statutes and Constitution of the State of Ohio prohibit this department from employing women in the state liquor stores provided for under the Liquor Control Act? I particularly desire to know whether women may be employed as cashiers and clerks in said stores.

2. Does this department under the provisions of the Liquor Control Act and the statutes and Constitution of the State of Ohio have a right to employ office counsel? I am familiar with the fact that the Secretary of State's office, the Tax Commission and other departments of the State of Ohio do have office counsel, and desire to know whether there is any express prohibition preventing this department from securing the services of office counsel. I understand that under the law, the Attorney General's office is the legal adviser to this department and is required to represent this department in suits arising in court. Employment of office counsel by this department would not mean that this department

would expect to be represented by any other than the Attorney General's office in any court suits.

3. Do the members of the Liquor Control Board appointed by the Governor, have the right as state officers, to request you directly for legal opinions or should any such request come through the Director of the Department?"

The Liquor Control Act (House Bill No. 1 of the second special session of the 90th General Assembly) does not expressly prohibit the employment of women in the state liquor stores authorized by the act, in any capacity. General laws exist expressly prohibiting the employment of females in "barrooms and saloons or public drinking places which cater to male customers exclusively, and in which substitutes for intoxicating liquors are sold or advertised for sale." (Section 1008-1, General Code.) By force of sections 13007-3 and 13007-5, General Code, the employment of any person (male or female) under twenty-one years of age, is prohibited "about or in connection with any saloon or barroom where intoxicating liquors are sold or to handle intoxicating liquor in any way."

The foregoing are general provisions of law, and it is not necessary for purposes of this opinion to determine the full import of these provisions of law as, in my opinion, they do not apply to the state in its operation of state liquor stores.

It is a well established principle of law that the sovereign government by whose authority general statutes are enacted, is not bound thereby, where its sovereignty, rights, prerogatives or interest are involved, unless it is expressly named in the statute or by necessary implication is included within the terms and purposes of the act. Black on the Interpretation of Laws, 2d Ed., Sec. 36; *State ex rel. Nixon vs. Merrill*, 126 O. S. 239; *State ex rel. vs. Board of Public Works*, 36 O. S. 409; *State ex rel. Merrit & Co. vs. Morrow*, 10 O. N. P. (N. S.) 279, 283. In any event the provisions of Sections 13007-3 and 13007-5, General Code, with respect to the employment of minors, have no application in the instant case as the Liquor Control Act in Section 22 thereof, expressly provides that "no intoxicating liquor shall be sold to or handled by any person unless he shall have attained the age of twenty-one years."

It has been suggested that the legislature by the use of the word "he" in the sentence quoted above, intended thereby to limit the employment of persons in and about the handling of liquor, to men only. I am not impressed with this argument. The masculine pronoun "he" is often used in ordinary conversation and in written instruments of various kinds without any intent other than that the word should include all persons whether male or female coming within the class referred to. I am of the opinion that if the legislature had intended when fixing a minimum age limit for employes who handle liquor, to limit the employment to men only, it would have done so in more explicit language, especially in view of the provisions of Section 27 of the General Code of Ohio, which provide that in the interpretation of Parts First and Second of the General Code, words used in the masculine include the feminine, unless the context shows that another sense is intended. The provisions of the Liquor Control Act clearly are a part of "Part II Civil" of the General Code. This is further manifest by the Code numbers of a part of the act which numbers were indicated by the legislature itself.

Persons who may be employed in connection with the operation of the state liquor stores are state employes, and within the classified civil service of the state.

(Section 486-8b-1, General Code.) No appointments can lawfully be made to these positions except of persons who have been certified as being eligible thereto by the State Civil Service Commission. In determining this eligibility the Civil Service Commission is directed by law to conduct examinations which are open to all persons within certain limitations "as to citizenship, residence, age, sex, experience, health habits and moral character," which limitations are to be determined by the Civil Service Commission. (Section 486-10, General Code.) I am informed that the Civil Service Commission has limited the admission to the competitive examinations for liquor store employes to males only, under authority of this last mentioned section.

By your second question you inquire as to whether or not there is anything in the law prohibiting the Liquor Control Board or Department from employing "office counsel." The question is not whether the law prohibits such action but whether it is authorized by law. It is a well established principle of law that public officers who are creatures of statute have such powers and such only as are expressly given by law or necessarily implied to carry out the express powers granted. *Ireton vs. State*, 21 O. C. D., 412, affirmed by the Supreme Court in *Ireton vs. State*, 81 O. S. 562; *Peter vs. Parkinson*, 83 O. S. 36; *Schwing vs. McClure*, 120 O. S. 335.

Neither in the Liquor Control Act nor in any other provision of law is the Liquor Control Board authorized, either expressly or impliedly to employ office counsel. Counsel for the board is provided for by Sections 333 and 341 of the General Code of Ohio, which read as follows:

"Sec. 333. The attorney-general shall be the chief law officer for the state and all its departments. No state officer, board, or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys-at-law. The attorney-general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state may be directly or indirectly interested. When required by the governor or the general assembly, he shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, he shall prosecute any person indicted for a crime.

"Sec. 341. The attorney-general, when so requested, shall give legal advice to a state officer, board or commission, the warden or directors of the penitentiary, the superintendent, trustees, or directors of a benevolent or reformatory institution of the state, and the trustees of the Ohio State University, in all matters relating to their official duties."

The provisions of the above statutes to the effect that the Attorney General is the chief law officer of the state and of all its departments, and that he shall render opinions upon request, to state officers and boards upon matters relating to their official duties, is equivalent to limiting such officers and boards in seeking advice with respect to their official duties from the Attorney General. They are not empowered to employ and pay any other counsel. A familiar rule of construction of statutes is that the "expression of one thing in a statute is exclusion

of another." *Fulton vs. Smith*, 99 O. S. 230, 232; *State ex rel. vs. Harter*, 43 O. App. 503.

The statute, Section 333, General Code, goes further, however, and expressly forbids state officers and boards from employing or being represented by other counsel or attorneys at law than the Attorney General.

Moreover, the legislature recognized the provisions of law with respect to the Attorney General's duties as contained in Sections 333 and 341, General Code, by providing in the Liquor Control Act itself an appropriation of \$7,500.00 to the Attorney General for Personal Service and \$2,500.00 for Traveling Expenses incident to the performance of his duties in connection with the matter. This alone precludes the expenditure of any other or further public funds for that purpose in the absence of express authorization therefor.

Nor may an appointment of legal counsel for the Liquor Control Board be made under the guise of a clerkship or some other employment. Under Section 486-7, General Code, the Civil Service Commission is directed to prescribe and enforce administrative rules for the purpose of carrying out and making effectual the provisions of law relating to civil service. Section 486-9, General Code, provides that the Civil Service Commission shall put into effect rules for the classification of offices, positions and employments in the civil service of the state. In pursuance of the power thus vested in the Civil Service Commission, the Commission has provided by Section 19 of Rule VII, as follows:

"No person shall be appointed or employed under any title not appropriate to the duties to be performed, and no person shall be assigned to perform duties other than those properly belonging to the position to which he has been legally appointed."

Your attention is also directed to Section 2, of Rule XIII, which reads in part, as follows:

"Titles of all positions in the classified service shall be as nearly as possible descriptive of the duties attached thereto and indicative of the character thereof, and shall be the same for all offices and places requiring the same kind of service regardless of location of employment. * *"

You have directed my attention to the fact as you assert it to be, that other departments such as the Secretary of State and the Tax Commission do employ and pay "office counsel."

While the appointees to which you refer, may not properly be classified, in my opinion, as "office counsel", these departments of government and some others do employ certain persons who necessarily are attorneys at law and they do in a sense advise the department in which they are employed, with respect to certain legal phases of their respective departments. The statutes pertaining to these particular departments do not expressly authorize or direct the appointment of these specific employes. The appropriation bills, however, for a number of years have carried specific appropriations for the purpose of paying such specially designated appointees. For instance, in the General Appropriation Act of 1933 (House Bill No. 699, of the 90th General Assembly) there will be found an appropriation to the Secretary of State under the classification "Personal Service—A-1-Corpora-

tion Advisor" of \$3,575.00 for each of the years of the biennium ending December 31, 1934; to the Department of Finance—Tax Commission—Division of Intangible Tax under the classification "Personal Service—A-1, seven legal examiners" the sum of \$13,562.50 for each of the years of the biennium ending December 31, 1934. Also under this heading "four attorney examiners" the sum of \$6,210.63 for each of the years of the biennium, and again, under this heading "chief attorney examiner", the sum of \$2,725.00 for each of the years of the biennium. Similar appropriations are made for attorney examiners to the Department of Commerce, Division of Banks.

If, in fact the incumbents of these positions for which the appropriations are made may be regarded as office counsel, the appropriation itself, is authority for and justifies the appointment. It has long been recognized that in the absence of an express prohibition with respect thereto, an item in an appropriation bill appropriating for a salary for a specific employe is sufficient authority to warrant the appointment of such an employe.

In an opinion of a former Attorney General, which may be found in the reported Opinions of the Attorney General for 1919, page 513, it is said:

"An appropriation within its proper sphere is, of course, a 'law'. (See article II, section 22 of the constitution.) Its natural scope, however, does not go beyond authorizing the withdrawal of money from the treasury for the specific purposes mentioned in it. It is true that in many instances its effect is larger than this, as where an item in an appropriation law authorizes the withdrawal of money from the treasury for the payment of the salary of a clerk or other employe in a department the head of which is not authorized by permanent law to employ such clerk or other assistant. By long usage such an appropriation is regarded as including, by necessary implication, the authority to make the employment, though logically it might well be questioned whether it has that effect. Of course, such implied authority could not last longer than the appropriation itself, viz.: for the period of two years."

I come now to a consideration of your third question concerning the duty of the Attorney General to render opinions to the Department of Liquor Control.

The Department of Liquor Control is composed of a Board of Liquor Control of four members and a Director of Liquor Control. The Board of Liquor Control is expressly prohibited by the terms of Section 3 of the Liquor Control Act from having or exercising any executive or administrative duties or powers except those enumerated in the said Section 3 of the said act. An examination of the provisions of this section fixing the duties of the Board of Liquor Control and enumerating its powers clearly shows that the members of the board have no powers whatever that may be exercised as individuals independently of the board. It must act as a board. No official duties delegated to the board can be performed by the individuals composing the board.

It has long been recognized that in the absence of a statutory provision to the contrary, where official authority is conferred on a board or commission composed of several persons, such authority may be exercised by a majority of the members of the board, but it may not be exercised by a single member of such body. Throop on Public Offices, Section 106; *State ex rel. Cline vs. Trustees*, 20

O. S. 288; *McCorkle vs. Bates*, 29 O. S. 419; *Martin vs. Lemon*, 26 Conn. 192; *Pell vs. Ulmar*, 21 Barb. 500.

The Director of Liquor Control is constituted a public officer by the terms of the Liquor Control Act, with powers that he may exercise individually and independently of the Board of Liquor Control. Without a doubt the Director of Liquor Control, as a state officer with independent functions and duties, may request in his own name the advice of the Attorney General concerning matters relating to his official duties, and it is the duty of the Attorney General to comply with such request.

Since the official acts of the Liquor Control Board are the acts of the board, and must necessarily be so under the law, there is no occasion or necessity for any advice covering its official duties to be rendered to any other than the board itself. Individual members of the board, apart from the board as such, could have no official interest in its duties, and no right to demand advice with reference thereto.

The language of the statute itself, Section 341, supra, clearly indicates, in my opinion, that the intent of the law is to require the Attorney General to advise public boards, upon request, and not the individual members of such boards. The advice which the Attorney General is to give as provided by statute is "in all matters relating to their official duties." As the "official duties" of the board are the board's duties and not the duties of its individual members, it is no doubt the intent of the law that the advice concerning those duties should be rendered to the agency whose duties are under consideration. Moreover, this intent is further indicated by the words of the statute which states that the Attorney General when so requested, shall give legal advice "to a state officer, board or commission." The clear import of this language is that the advice is to be to a state officer, a state board or a state commission and if the advice is to be given to the board as such, the request for it should come from the board as such.

I am therefore of the opinion, in specific answer to your questions:

1. There is no provision of law which prohibits the employment of women, who have attained the age of twenty-one years, as cashiers or clerks or in any other capacity in connection with the operation of state liquor stores by the State Liquor Control Department.
2. The state liquor control department is without power to employ office counsel.
3. Any requests to the Attorney General from the liquor control department for advice, concerning matters relating to the official duties of such department, should come either from the Director of Liquor Control or from the Board of Liquor Control acting as a board.

Respectfully,

JOHN W. BRICKER,

Attorney General.