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ACCOUNTANCY, STATE BOARD OF—WITHOUT LEGAL AUTHORITY TO ENTER INTO AGREEMENT WITH AMERICAN INSTITUTE OF ACCOUNTANTS TO PURCHASE EXAMINATION QUESTIONS AND PROBLEMS TO EXAMINE APPLICANTS FOR REGISTRATION AS CERTIFIED PUBLIC ACCOUNTANTS—ARRANGEMENT CONTEMPLATES QUESTIONS AND PROBLEMS TO BE ADOPTED WITHOUT BOARD'S PRIOR EXAMINATION AND APPROVAL—PUBLIC FUNDS MAY NOT LAWFULLY BE SO EXPENDED.

SYLLABUS:

The State Board of Accountancy is without legal authority to enter into an agreement with the American Institute of Accountants for the purpose of examination questions and problems for use in examining applicants for registration as certified public accountants when said arrangement contemplates that said examination questions and problems will be adopted without the Board's prior examination and approval thereof. Public funds may not lawfully be expended under such circumstances.

Columbus, Ohio, June 11, 1946

State Board of Accountancy  
Columbus, Ohio

Gentlemen:

Your request for my opinion reads:

“From time to time this Board has given consideration to the adoption of the uniform examination prepared by the American Institute of Accountants. The institute is the national organization representative of certified public accountants and is similar to the American Bar Association in its representation of lawyers.

Uniform C. P. A. examinations prepared by the Institute are now used by state accountancy boards in forty-four states. The grading of such examination papers is by the Institute in some states and by the state board in others.

It has always been the practice of this Board to prepare its own examination material and to grade the papers submitted by each applicant. In considering substitution of examination questions and problems prepared by the Institute, certain questions have arisen involving interpretation of law and we are, therefore, asking your opinion in the following respects:

(1) May the Ohio State Board of Accountancy enter into an agreement with the American Institute of Accountants under which it would adopt examination questions and problems for use in Ohio C. P. A. examinations?

(2) May the Ohio State Board of Accountancy cause the answers and solutions submitted in such examinations to be graded by the American Institute of Accountants and adopt such grades as its own in determining the results of the examination and in the issuance of C. P. A. certificates?

(3) If you should answer questions (1) and (2) in the affirmative, would the expense incurred for the services of the American Institute of Accountants in supplying examination papers and in grading the solutions be a proper charge against funds of the State Board of Accountancy?

It is stated in 3 Sutherland Statutory Construction (3 Ed.) 268, Section 6603, that “Administrative agencies are purely creatures of legislation without inherent or common law powers.” Since the State Board of Accountancy is an administrative agency it is in order, for the purpose

of ascertaining its powers and duties, to resort to the legislation by virtue of which it was heretofore established and now functions. The statutory provisions to be looked to are relatively few in number. (See Sections 1370 to 1379, General Code, both inclusive.) The only provisions that need be called to specific attention are Sections 1370, 1374 and 1378, which respectively provide:

Section 1370.

“There shall be a state board of accountancy consisting of three members not more than two of whom shall belong to the same political party. Each member of the board shall be a person skilled in the knowledge and practice of accounting and actively engaged as a professional public accountant within this state.”

Section 1374.

“Each year, the state board of accountancy shall hold an examination for such certificate. Each applicant shall be examined in theory of accounts, practical accounting, auditing and commercial law as affecting accountancy. If three or more persons apply for certificates within not less than five months after the annual examination, the board shall hold an examination for them. The time and place of each examination shall be fixed by the board.”

Section 1378.

“From fees collected under this chapter the board shall pay the expenses incident to its examinations and the expenses of preparing and issuing certificates, and to each member of the board for the time actually expended in the performance of his duties a sum not exceeding five dollars per day and his necessary traveling expenses. In no case shall the expenses of the board or the compensation or traveling expenses of the members thereof be a charge against any fund of the state.”

Before commenting upon these sections I advert to the well established principle of law that public officers have only such powers as are expressly delegated them by statute and such as are necessarily implied from those so delegated. See *Peter v. Parkinson*, Treas., 83 O. S. 36; *Frisbie Co. v. City of East Cleveland*, 98 O. S. 266; *Arnold v. Board of Education*, 20 O. L. A. 220; 32 O. Jur., Public Officers, 933.

It is further to be observed that your inquiry involves the matter

of the expenditure of public funds. The principle of law in connection therewith is set forth in *State, ex rel. Locher, v. Menning*, 95 O. S. 97, 99, wherein it is stated:

“The legal principle is settled in this state that county commissioners, in their financial transactions, are invested only with limited powers, and that they represent the county only in such transactions as they may be expressly authorized so to do by statute. *The authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county.*”  
(Emphasis added.)

See also *State, ex rel., Clarke, v. Cook, Auditor*, 103 O. S. 465, wherein the second paragraph of the syllabus reads:

“2. Boards of education, and other similar governmental bodies, are limited in the exercise of their powers to such as are clearly and distinctly granted. (*State, ex rel. Locher, Pros. Atty., v. Menning*, 95 Ohio St., 97, approved and followed.)”

Further bearing on the matter generally is a statement in 3 Sutherland Statutory Construction (3 Ed.) 275, Section 6603. In order for the full import and context of that statement to be understood, I find it necessary to quote certain matter that is not especially pertinent. It is stated therein as follows:

“In numerous cases a strict interpretation has been adopted where the argument has been made that a statute authorizes an administrative agency to exercise powers which tend to interfere with established or traditional property rights, the right to free contract, or personal freedom and liberty. And so the power to revoke a license or permit by an administrative body is subject to rigid limitations; and the same rigid interpretation is employed in regard to statutes whereby it is claimed that the power of eminent domain has been granted. On the whole the courts have looked with disfavor upon statutes delegating the power to tax or administer taxation statutes. *Similarly, the language of legislation granting the power to expend public funds has been narrowly restricted.* A problem commonly confronting administrative agencies is that of subdelegation. The authority to subdelegate discretionary powers and duties, in the absence of extenuating circumstances making it essential for the proper and efficient operation of the agency, *is usually regarded with disfavor.*”  
(Emphasis added.)

With the foregoing in mind I revert to the sections of the General Code above quoted. By virtue of the provisions of Section 1370 each member of the State Board of Accountancy "shall be a person skilled in the knowledge and practice of accounting." Section 1374 provides for the holding of examinations and specifies that each applicant shall be examined in the subjects therein enumerated. It is clear, therefore, it must have been the legislative intent that persons appointed to the State Board of Accountancy would be fully qualified to prepare examination questions and problems. If that were not so the provision in Section 1370 to the effect that each member of the board shall be a person "skilled in the knowledge and practice of accounting" would be somewhat meaningless. Section 1378 specifically provides that the board shall pay the "expenses incident to its examinations" and certain compensation to each member for the time expended in the performance of his duties. Your inquiry, therefore, resolves itself into a question as to whether the proposed expenditure of public funds for the purposes mentioned in your said inquiry is an expenditure that is contemplated by the above quoted language in Section 1378.

In considering your inquiry it is pertinent to note the phraseology of your first question. You refer to your authority to "enter into an agreement" with the American Institute of Accountants under which you would "*adopt* examination questions and problems" to be supplied by it for use in the examinations which you are required to hold pursuant to Section 1374, General Code. Your second question then refers to your authority to "adopt" the grades of said American Institute of Accountants as your own grades in determining the results of the examination. It would seem evident that the proposed arrangement is one that, in reality, contemplates the performance by another of a duty which it is felt is enjoined upon you by law. In other words, it would appear that such an arrangement would in effect be tantamount to delegating to another the powers and duties which, as I conceive it, are vested in you exclusively by virtue of the legislation under consideration.

As I view it, you have the legal authority to purchase material or data that may prove beneficial or helpful in the preparation of examination questions. And if it is deemed advisable, I see no reason why you may not expend public funds for purchasing prepared examination questions. In such event, *if it be determined by you* that the prepared questions

are suitable for the purpose of testing the knowledge of applicants in the subjects mentioned in Section 1374, General Code, said questions and problems may be used. It is of paramount importance, however, to point out that in this connection there would be an exercise of judgment or discretion on your part which is precisely what the law contemplates. As above noted, such discretion may not be delegated to another. If I have correctly understood the purport of your first question, and particularly as it is connected with your second question, it would appear that the proposed contractual agreement is one pursuant to which said questions and problems would be arbitrarily *adopted* without the exercise of your independent judgment as to whether they are suitable for your purposes.

It might appear at first blush that the reasoning herein results in a highly technical distinction which is more artificial than real. But I desire to make it plain that it is essentially your function to pass upon the propriety of the examination questions and to determine the examination grades. That does not, of course, preclude you from receiving assistance in connection therewith. If the plan suggested in your inquiry, as appears to be the situation, contemplates the delegation of your statutory duties to some independent agency by reason of an agreement to accept prepared examination questions and problems and then to adopt its grades as your grades, I must necessarily conclude public funds may not be legally expended for such purpose. It is upon the distinction theretofore made that my conclusion pivots.

Support for the views above set forth can be found by reference to opinions of former Attorneys General. It was held by my immediate predecessor in Opinions of the Attorney General for 1943, p. 108, as disclosed by the syllabus thereof, as follows:

“A board of education of a city school district is without authority to employ, at public expense, the services of a private non-governmental agency such as the National Committee on Teacher Examinations, to conduct examinations to determine the relative fitness of applicants for teaching positions in the public schools of its district and to classify, grade and recommend such applicants in accordance with standards set up by the agency conducting the examinations, for the purpose of aiding the superintendent of schools in the performance of his duty of appointing teachers as provided by law, or to pay any part of the cost thereof.”

In Opinions of the Attorney General for 1938, Vol. III, page 2495, it was held that certain expenditures made from public funds by the Cleveland Public Library were not legal. Included in this list of unauthorized expenditures was the payment of fees for preparing, conducting and correcting examination papers of employes.

Touching on the general proposition that public officers are presumably elected and appointed to their positions by virtue of their ability to discharge the duties thereof see: Opinions of the Attorney General, 1939, Vol. II, p. 1131, Vol. III, p. 1310; Opinions of the Attorney General, 1940, Vol. I, p. 730, Vol. II, p. 1039.

Before concluding it should be mentioned that no doubt exists as to the competency of the American Institute of Accountants to prepare problems and questions designed to test the knowledge of applicants for registration as certified public accountants and to grade the examination papers thereafter submitted. As is evident however, my views resolve around the proposition that you may not completely delegate to another those duties which I am firmly convinced the legislation that has been considered has imposed upon you.

In specific answer to your first question, it is my opinion as follows :

You are without legal authority to enter into an agreement with the American Institute of Accountants for the purchase of examination questions and problems for use in examining applicants for registration as certified public accountants when said arrangement contemplates that said questions and problems will be adopted without your prior examination and approval thereof. Public funds may not lawfully be expended under such circumstances.

Since it appears that the examination questions aforementioned, if purchased, would thereafter be graded by the aforementioned institute and such grades then adopted as your grades, it would seem a specific answer to your second question is unnecessary.

Respectfully,

HUGH S. JENKINS  
Attorney General