OPINION NO. 67-022

Syllabus:

1. A member of a limited partnership association who does in fact perform services under a contract of hire and, therefore, would qualify as an employee were he not a member of the association, is an employee for the purposes of the Ohio Workmen's Compensation Insurance Act.

2. An official of a limited partnership association is not entitled to a limitation of reporting remuneration for premium purposes by the terms of the Industrial Commission's General Rating, Rule VII.

3. An official of a limited partnership association may be covered by the Ohio Workmen's Compensation Act, depending upon the factual context in which the injury is sustained.

To: M. Holland Krise, Chairman, The Industrial Commission of Ohio, Columbus, Ohio
By: William B. Saxbe, Attorney General, February 16, 1967

I have before me your request for my opinion which reads as follows:

> "1. Are members of a limited partnership association considered to be employees under the Ohio Workmen's Compensation Insurance Act?
>
> "2. If such members are elected officials of the association are they entitled to a limitation of reporting remuneration to the Bureau in the same manner as officers of a corporation?
>
> "3. Would officers of the association be covered under the Ohio Workmen's Compensation Act?"

In answer to your first question, the determination of whether or not the members of a limited partnership association are employees under the Ohio Workmen's Compensation Act must be made by examining the statutory definition of "employee" as set forth in Section 4123.01 (A) (2), Revised Code, which reads in pertinent part as follows:

> "(A) 'Employee,' 'workman,' or 'operative' means:
>
> "* * * * * * * * *
>
> "(2) Every person in the service of any person, firm, or private corporation, including any public service corporation, that (a) employs three or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, but not including any person whose employment is casual and not in the usual course of trade, business, profession, or occupation of his employer, or (b) is bound by any such contract of hire or by any other written contract, to pay into the state insurance fund the premiums provided by sections 4123.01 to 4123.94, inclusive, of the Revised Code."

The broad scope of this statutory definition suggests that if the members of a limited partnership association do in fact perform services under a contract of hire they are employees. In the case of Coviello v. Industrial Commission, 129 Ohio St. 589, 592-94 (1935), the Ohio Supreme Court discussed the meaning of the term "contract of hire." The Court reached the conclusion that there must be some obligation upon the employer to pay the alleged employee for the services rendered. In other words, payment of wages or comparable remuneration must be the quid pro quo for the services rendered. This is basically a factual question and must be resolved by examining the specific relationship that exists between the alleged employee and employer in each particular case.

Some confusion exists in this area due to the contention that a member of a limited partnership association can never be an employee. This confusion has resulted because of the failure to distinguish between a general partnership and a limited partnership association. The Ohio Supreme Court, in the case of Goldberg v. Industrial Commission, 131 Ohio St. 399 (1936), held that a member of a general partnership could not be an employee under the Ohio Workmen's Compensation Insurance Act. The particular question considered by the Court was as follows:

> "Does this language of the Ohio Constitution contemplate a situation in which the same individual is at once an employer and an employee or workman?" (131 Ohio St. 399, 402)

The central concern of the Court was the dual capacity that a workman, who happened to be a member of a partnership, apparently assumed if he were classified as an employee. The incongruity

of this situation and the inability to reconcile this incongruity with the language contained in Article II, Section 35, Ohio Constitution, led to the Court's holding that an attempt to provide coverage for a member of a general partnership was not authorized by the Constitution. This decision was recently followed by the Franklin County Court of Appeals in the case of Gegas v. Keller, Case No. 8269, decided April 12, 1966 (motion to certify overruled September 21, 1966, S. Ct. No. 40318).

The employing unit we are considering in your request is not a partnership but a limited partnership association. Chapter 1783, Revised Code, authorizes the creation of limited partnership associations. An examination of this chapter of the code leads to my conclusion that a limited partnership association is a distinct legal entity separate and apart from its individual members. In a limited partnership association, the employing unit is the association and not the partners as is the case in a general partnership. In the case of R. F. Roof, Ltd. v. Sommers, 75 Ohio App. 511 (1944), it was decided that the rationale set forth in the Goldberg case, supra, was not applicable when the employing unit was a limited partnership association and that its members when performing services for the association were employees of the association. The reasoning of the Court in the Roof case is founded upon logic and reason and I am in agreement with the conclusion.

It is therefore my opinion that if a member of a limited partnership association does in fact perform services under a contract of hire and, therefore, would qualify as an employee were he not a member of the association, he is an employee for the purposes of the Ohio Workmen's Compensation Insurance Act.

Your second question inquires whether or not the members of the association, who are elected officials, are entitled to a limitation of reporting remuneration to the Bureau in the same manner as officers of a corporation. The Industrial Commission's General Rating, Rule VII, limits the amount of remuneration paid to a corporate officer that must be reported for premium purposes. Rule VII, reads in pertinent part as follows:

> "The actual remuneration, of an executive officer of a corporation commonly known and styled as President, and Vice President, Secretary or Treasurer and any other executive officer enumerated in and empowered by the Charter or any regularly adopted By-laws of the corporation and who are elected or appointed and empowered by the Directors and who perform duties for the corporation, shall be included in the payroll report of the corporation, not to exceed an average weekly maximum of $200.00 or $5,200.00 semi-annually or an accumulate of $10,400.00 annually regardless of what period of the Calendar year the remuneration is received. Such remuneration shall be assigned to the classification applicable to the duties performed."

An examination of the language of the rule reveals no mention or indication that limited partnership associations are entitled to the same exemption. It is an accepted rule of interpretation that when a statute or a rule speaks specifically concerning a certain subject matter that the statute or rule is limited in application to that subject which is specifically mentioned.

This is particularly true when the statute or rule in question creates an exception to the general application of a statutory or regulatory scheme. It is therefore my opinion that since Rule VII specifically addresses itself to granting an exception when reporting corporate officers' remuneration that this rule cannot be extended to the officials of a limited partnership association.

It is important however in determining the amount of remuneration required to be reported to distinguish between that amount of money received under a contract of hire and any monies received as a share in the profits of the limited partnership association. It is obvious that any portion received by the members as a return on the capital invested in the association does not have to be reported. This is once again a factual question and requires inquiry into what payments to the association officials represent; i. e., payment for services rendered under a contract of hire or return on capital invested.

Your third question asks whether or not officers of the association are covered under the Ohio Workmen's Compensation Act. This question can only be determined at the time an injury is sustained. If the injury is sustained in the performance of a duty consistent with any contract of hire which may exist and the injury is in the course of and arising out of the employment contracted for, then the official would be covered. This once again requires an examination of the facts of each particular case and a determination of whether or not there is a contract for hire, whether the injury occurred while performing services consistent with the contract and whether the injury occurred during the course of and arising out of the officials employment under the contract.

It is therefore my opinion that an official of a limited partnership association may be covered by the Ohio Workmen's Compensation Act, depending upon the factual context in which the injury is sustained.

I am aware that the opinions set forth in response to your questions do not resolve any particular problem that you may be confronted with. However, there is adequate authority in the Ohio Workmen's Compensation Act to order a hearing upon the factual problems outlined above and reach a determination as to the status of the members of a particular limited partnership association and the nature of any employment relationship which may exist.

Therefore, it is my opinion, and you are hereby advised that:

1. A member of a limited partnership association who does in fact perform services under a contract of hire and, therefore, would qualify as an employee were he not a member of the association, is an employee for the purposes of the Ohio Workmen's Compensation Insurance Act.

2. An official of a limited partnership association is not entitled to a limitation of reporting remuneration for premium purposes by the terms of the Industrial Commission's General Rating, Rule VII.

3. An official of a limited partnership association may be covered by the Ohio Workmen's Compensation Act, depending upon the factual context in which the injury is sustained.