

1980

1. MINOR—IT IS IMMATERIAL WHETHER MINOR IS DIRECTLY EMPLOYED OR PERMITTED OR SUFFERED TO WORK IN OR ABOUT A PLACE OF AMUSEMENT—SECTIONS 12996, 13007-3 G. C.
2. MINOR UNDER SIXTEEN YEARS OF AGE EMPLOYED, PERMITTED OR SUFFERED TO WORK IN OR ABOUT PLACE OF AMUSEMENT REQUIRED TO HAVE AGE AND SCHOOLING CERTIFICATE—EXCEPTION, WHEN EMPLOYED IN IRREGULAR SERVICE—SECTION 12993-1 G. C.
3. PLACE OF AMUSEMENT—STADIUM, PARK OR OTHER PLACE USED TO PLAY BASEBALL GAMES, FOOTBALL GAMES OR OTHER SPORTS.
4. SECTIONS 12993, 13007-3 G. C. NOT IN CONFLICT—INTERPRETATION—SECTION 6064-1 G. C.—APPLICATION AS TO INTOXICATING LIQUORS SOLD IN PLACE OF AMUSEMENT.
5. BOY UNDER AGE OF EIGHTEEN YEARS—GIRL UNDER AGE OF TWENTY-ONE YEARS: SHALL NOT BE EMPLOYED, PERMITTED OR SUFFERED TO WORK IN, ABOUT OR IN CONNECTION WITH A PLACE OF AMUSEMENT BEFORE SIX O'CLOCK IN THE MORNING OR AFTER TEN O'CLOCK IN THE EVENING—BOY UNDER SIXTEEN OR GIRL UNDER EIGHTEEN—SHALL NOT BE EMPLOYED IN PLACE OF AMUSEMENT BEFORE SEVEN O'CLOCK IN MORNING OR AFTER SIX O'CLOCK IN EVENING.

SYLLABUS:

1. Under the provisions of Sections 12996 and 13007-3, General Code, it is immaterial whether a minor is directly employed, or is permitted or suffered to work in or about a place of amusement.

2. A minor under sixteen years of age, who is employed, permitted or suffered to work in, about or in connection with a place of amusement, is required to have an age and schooling certificate, except when employed in irregular service as defined by Section 12993-1 of the General Code.

3. A stadium, park or other place used to play baseball games, football games or other sports, is a place of amusement.

4. Sections 12993 and 13007-3, General Code, are not in conflict. Section 12993 applies to a child under sixteen years of age who is employed in a place of amusement, except when he is employed in irregular service, as defined in Section 12993-3, General Code, or holds an age and schooling certificate. Section 13007-3 applies to a child under eighteen years of age who is employed in a place of amusement, only when intoxicating liquors, as defined by Section 6064-1, General Code, are sold in such place of amusement.

5. No boy under the age of eighteen years of age and no girl under the age of twenty-one years shall be employed, permitted or suffered to work in, about or in connection with a place of amusement before six o'clock in the morning or after ten o'clock in the evening. No boy under the age of sixteen years and no girl under the age of eighteen years shall be employed, permitted or suffered to work in, about or in connection with a place of amusement before seven o'clock in the morning or after six o'clock in the evening.

Columbus, Ohio, June 18, 1947

Hon. W. J. Rogers, Director, Department of Industrial Relations
Columbus, Ohio

Dear Sir:

I have your recent request for my opinion, which is as follows:

"There has recently come to my attention a matter involving the employment and hours of employment of minors which I feel requires interpretation from you.

In the city of Cleveland, Ohio, the Cleveland Concession Company operates food and concession stands and engages minors to peddle hot dogs, drinks and other refreshments at the Cleveland Municipal Stadium where the Cleveland Baseball Club and the Cleveland Brown's Football Club play their home games. The Baseball Club plays about seventy games during the baseball season in the stadium and the Football Club plays about a dozen games there. Some of the baseball games are played at night and the minors work until about 11:00 P. M. during the night games.

The Concession Company claims that the Cleveland stadium is not a place of amusement. They also maintain that inasmuch as the stadium is not in continuous use they consider the employment of these minors as casual employment in irregular service, under Section 12993-3 of the General Code, and that age and schooling certificates are not required. They further maintain that these minors are not employees, that they are private contractors in business for themselves, buying their supplies from the Concession Company and selling them to the public attending these games at a price higher than what they paid for the supplies. The Concession Company, however, furnishes all uniforms for the minors and assigns them to various parts of the stadium to sell the refreshments. The male minors are permitted to buy refreshments for their own consumption at half price. The female minors who work in the refreshment stands where soft drinks and sandwiches and 3.2 beer are sold are allowed to eat without charge. I am also enclosing herewith a copy of the report of our Cleveland inspector, together with memorandum containing other pertinent information obtained from Mr. Axelrod, the president and manager of the Concession Company.

I request that you render an opinion, answering the following questions:

A. Under the above circumstances, are the minors employees of the Cleveland Concession Company, or are they private or independent contractors?

B. Must the minors 18 years and under hold age and schooling certificates in order to perform this work or service, or are they employed in irregular service under Section 12993-3?

C. If the minors are engaged in irregular service, as defined in Section 12993-3 of the General Code, is there a violation of the law if the Health Commissioner of the District has made no determination whether the employment involves confinement or requires continuous physical strain so that it cannot be deemed irregular service within the meaning of the section?

D. Is the stadium, when used for baseball or football games or other sports, a place of amusement?

E. Does Section 13007-3 of the General Code of Ohio (15) prohibit the employment of a minor under 18 to work in the stadium if it is a place of amusement, in view of the fact that Section 12993 permits the employment of minors under 16 years of age to work in a place of amusement (21) if he is employed in irregular service, or is the holder of an age and schooling certificate? Does the place of amusement, as set forth in Section 13007-3, mean such a place where intoxicating liquors are sold?

F. Would this occupation be one in which no boy under the age of 18, and no girl under the age of 21, shall be employed, permitted or suffered to work in this occupation or establishment after ten o'clock in the evening? And no boy under the age of 16, and no girl under the age of 18, shall be employed, permitted or suffered to work in this occupation or establishment after six o'clock in the evening, according to the provisions of Section 12996 of the General Code."

There is attached thereto a report of one of your inspectors the pertinent parts of which are as follows:

"Report of Cleveland Concession Company

* * * This company employs 20 to 75 females according to the crowd expected for the event. All ball games they work 5 hours and when conventions use the stadium they work 7 to 8 hours. When school is not in session there are approximately 15 to 18 girls 16 to 18 years of age in this group. All females work in the refreshment stands where they sell soft drinks, sandwiches and 3.2% beer. Girls are allowed to eat without charge, and uniforms are furnished.

ALL BEER SOLD IN THE STADIUM IS 3.2%.

There are from 50 to 150 males employed during events of which 50 to 75 are between 16 and 18 years of age. These boys buy tickets to purchase a load of merchandise and in turn sell it in the grand stand. For example: 1 load of coca cola is 20 bottles for which the boys pay \$1.80 and sell for \$2.00. This allows the boys 20c or a 10% of whatever they sell. All their uniforms are furnished by the Cleveland Concession Company and the boys are allowed to buy refreshments at half price.

THERE WILL BE 8 to 10 NIGHT GAMES THIS SEASON AND ALL EMPLOYEES WORK DURING THESE GAMES. * * *

The matters set forth in your request involve several statutes. The pertinent part of Section 12993, General Code, reads as follows:

"Unless he either is employed in irregular service as defined by section 12993-3, General Code, or is the holder of an age and schooling certificate issued under section 4851-2, Section 4851-4, or Section 4851-5, General Code, no child under sixteen years of age shall be employed, permitted or suffered to work in or about any * * * (21) place of amusement, * * *."

Section 12993-3, General Code, is as follows:

"Notwithstanding the provisions of Sections 12993 and

12993-2 of the General Code, "a child may be employed in irregular service not forbidden by Sections 13001, 13002 or 13003 of the General Code, without holding an age and schooling certificate.

Irregular service shall be interpreted to mean service not forbidden by federal child labor laws which (a) does not involve confinement, (b) does not require continuous physical strain, (c) is interrupted with rest or recreation periods and (d) does not require more than four hours of work in any day or twenty-four hours in any week. The health commissioner of the district in which employment is afforded to any child shall determine whether the employment involves confinement or requires continuous physical strain so that it cannot be deemed irregular service within the meaning of this section."

The pertinent part of Section 12996, General Code, is as follows :

"No boy under the age of eighteen years and no girl under the age of twenty-one years shall be employed, *permitted or suffered to work in, about or in connection* with any establishment or occupation named in Section 12993 (1) for more than six days in any one week, (2) nor more than forty-eight hours in any one week, (3) nor more than eight hours in any one day, (4) or before the hour of six o'clock in the morning or after the hour of ten o'clock in the evening; * * * No boy under the age of sixteen and no girl under the age of eighteen shall be employed, *permitted or suffered to work in, about or in connection* with any establishment or occupation named in Section 12993 before the hour of seven o'clock in the morning or after the hour of six o'clock in the evening. * * *" (Emphasis added.)

The pertinent part of Section 13007-3, General Code, is as follows :

"No child under the age of eighteen years shall be employed, *permitted or suffered to work* * * * (15) or in any hotel, theater, concert hall, place of amusement, or any other establishment where intoxicating liquors are sold; (16) nor any boy under sixteen or girl under eighteen in any theater or other place of amusement * * * when not otherwise prohibited by law." (Emphasis added.)

The above statutes are all applicable to the employment of minors. It will be noted that Sections 12996 and 13007-3 of the General Code both say "employed, permitted or suffered to work." This language is broad enough to cover the situation referred to in your letter, and it would seem to me that it would make no difference whether the minors

working for the concessionaire were directly employed by him or held some other status. By the use of such language, it seems to me that it was the evident intent of the legislature to eliminate evasions of the restrictions made to protect minors in employment. In any event, the conditions set forth in the statutes would apply to any person, firm or corporation for whom minors work in any such status, whether by direct employment or under any other arrangement.

Your second and third questions will be considered together. Irregular service is defined in Section 12993-3, *supra*. The pertinent elements are shown in (a), (b), (c) and (d) of that section. Obviously we need not consider (a), since the work performed is outdoors. If you feel that there is continuous physical strain as set forth in (b), application may be made to the health commissioner of the district, requesting a determination of that factor. From the report of your inspector, it would seem that the employment consists of a minimum of five hours, but no mention of rest and recreation periods is made. These elements are covered in (c) and (d). It would seem, therefore, that the minors employed by the concessionaire do not come within the requirements of the statute with reference to irregular employment and that they do require age and schooling certificates.

As for the contention of the concessionaire that the employment is casual for the reason that the stadium is not in continual operation, I find that the conducting of a baseball park is defined as "a continual seasonal business for profit" and is not casual. See 52 Am. Jur., page 389.

Coming now to your fourth question, I find that the term "place of amusement" is not defined in our statutes. However, the courts in Ohio and other jurisdictions have rendered many decisions on this subject. With particular reference to sports, in the case of *The Cincinnati Baseball Club Company v. Eno*, 112 O. S. 175, the court, referring to the plaintiff, used this language: "being in the business of providing public entertainment for profit."

The courts of Pennsylvania have also defined "amusement" and "place of amusement." In its opinion in the case of *Eckman's Application*, 27 Pa. Dist. R. 331, the court said: "The word 'amusement' is synonymus with diversion, entertainment, relaxation, recreation pastime and sport," adopting the definition cited in 38 Cyc., page 258. In another case,

In re Shibe, 177 A. 234, 117 Pa. Sup. 7, the court held that a "baseball park is a place of amusement." At page 235 of the opinion, the court said:

"In Commonwealth, ex rel. v. American Baseball Club, 290 Pa. 136, the Supreme Court (of Pennsylvania) expressly said that the exhibition conducted upon the grounds here in question * * * differs not at all from a circus or a theatrical performance, such court saying that there was no difference between playing baseball and conducting a circus or running a theater."

Places of amusement are discussed in 52 Am. Jur., and at page 262 it is stated:

"* * * the right of a state, in the exercise of its police power, to regulate, control and supervise theaters and all public amusements is universally recognized."

Further, at pages 263 and 264, we find:

"Entirely independent of any nuisance status, many different businesses and occupations are within the general police power of the public to regulate and control public amusements, among which are * * * *baseball games and other athletic sports*, especially those conducted for gain." (Emphasis added.)

Again at page 271:

"* * * the licensing power of the state and its authorized municipal subdivision has been exercised in respect to a great variety of public amusements, among them to illustrate, * * * baseball and other athletic and sports exhibitions, * * *."

Citing American Baseball Club v. Philadelphia, 92 A. L. R., 386.

Reference to this same subject is also found at pages 288 and 392, 52 Am. Jur., to the same effect.

I am, therefore, of the opinion, and you are advised, that the stadium, when used for the playing of baseball games, football games and other sports, is a place of amusement.

The fifth question propounded relates to the construction of Sections 12993 and 13007-3, General Code. At first glance, these sections might seem to be in conflict. Section 12993 prohibits the employment of any child under *sixteen years of age* in a place of amusement, unless he is

employed in irregular service, as defined by Section 12993-3, General Code, or has an age and schooling certificate. Section 13007-3 prohibits the employment of any child under eighteen years in a place of amusement *where intoxicating liquors are sold*. The distinction is contained in the phrase "where intoxicating liquors are sold."

Upon superficial consideration of Section 13007-3, General Code, it might seem that the phrase "where intoxicating liquors are sold," as the same appears in said section in (15), modifies only the words "or any other establishment," and for such reason does not apply to hotels, theaters, concert halls, and places of amusement. However, the unsoundness of such conclusion is at once apparent when consideration is given to the language immediately following the term in (15) "where intoxicating liquors are sold." It will be noted that such language again deals with employment in theaters and places of amusement. Here without any reference to the sale of intoxicating liquors, the statute prohibits the employment of boys under sixteen and girls under eighteen "in any theater or other place of amusement." From this it seems obvious that the prohibition set out under enumeration (15), in so far as the employment of children under eighteen years of age in places of amusement is concerned, relates to only the places of amusement where intoxicating liquors are sold.

In your letter you state that 3.2 beer is sold by employees of the concessionaire. In the case of *Akron v. Scalera*, 28 O. L. A., 490, which was affirmed by the Supreme Court in 135 O. S. 65, the court in its opinion said:

"Under the provisions of Section 6064-1, General Code, beer is defined as including 'all malt beverages containing one-half of one per centum or more of alcohol by weight but not more than 3.2 per centum of alcohol by weight.' 'Intoxicating liquor' is defined as including 'any and all liquids and compounds containing more than 3.2 per centum of alcohol by weight,' etc. It therefore follows that the legislature has declared 'beer' to be non-intoxicating so far as said act is concerned. * * * Inasmuch as beer, as defined in the liquor control act, has, by legislative fiat, been determined to be a non-intoxicating beverage, this court is of the opinion that it falls into the same category as any other innocuous beverage."

In view of the foregoing, it is my opinion, and you are so advised, that Sections 12993 and 13007-3, General Code, are not in conflict. Sec-

tion 12993, General Code, applies to a child under sixteen years of age employed in a place of amusement except when he is employed in irregular service, as defined by Section 12993-3, General Code, or holds an age and schooling certificate, and Section 13007-3, General Code, applies to a child under eighteen years of age employed in a place of amusement, only when intoxicating liquors, as defined by Section 6064-1, General Code, are sold in such place of amusement.

Section 12996, General Code, restricts the working hours of minors. Its restrictions deal with two age groups. In the first group, "no boy under the age of eighteen years and no girl under the age of twenty-one years shall be employed, permitted or suffered to work in, about or in connection with any establishment or occupation named in Section 12993, * * * before the hour of six o'clock in the morning or after the hour of ten o'clock in the evening." It will be noted that this group is beyond the compulsory school age. In the second group, "no boy under the age of sixteen and no girl under the age of eighteen shall be employed, permitted or suffered to work in, about or in connection with any establishment or occupation named in section 12993 before the hour of seven o'clock in the morning or after the hour of six o'clock in the evening." The legislature in passing this section evidently intended that persons of tender years should not be required to work before or beyond the hours specified, for health reasons, and, as in all other sections of the General Code with reference to employment of minors, this section is intended to protect them and to prevent employers from taking advantage of their youth.

There are no exceptions to the conditions with reference to working hours contained in this section, and it applies to all minors working in, about or in connection with any establishment or occupation named in Section 12993, General Code. Since a "place of amusement" is one of the establishments named by that section, your questions contained in the last paragraph of your letter must be answered in the affirmative.

From the above, you are advised, and it is my opinion, that :

1. Under the provisions of Sections 12996 and 13007-3 of the General Code, it is immaterial whether a minor is directly employed, or is permitted or suffered to work in or about a place of amusement.

2. A minor under sixteen years of age, who is employed, permitted or suffered to work in, about or in connection with a place of amusement, is required to have an age and schooling certificate, except when employed in irregular service as defined in Section 12993-1 of the General Code.

3. A stadium, park or other place used to play baseball games, football games or other sports, is a place of amusement.

4. Sections 12993 and 13007-3, General Code, are not in conflict. Section 12993 applies to a child under sixteen years of age who is employed in a place of amusement, except when he is employed in irregular service, as defined in Section 12993-3 of the General Code, or holds an age and schooling certificate. Section 13007-3 applies to a child under eighteen years of age who is employed in a place of amusement, only when intoxicating liquors, as defined by Section 6064-1, General Code, are sold in such place of amusement.

5. No boy under the age of eighteen years of age and no girl under the age of twenty-one years shall be employed, permitted or suffered to work in, about or in connection with a place of amusement before six o'clock in the morning or after ten o'clock in the evening. No boy under the age of sixteen and no girl under the age of eighteen years shall be employed, permitted or suffered to work in, about or in connection with a place of amusement before seven o'clock in the morning or after six o'clock in the evening.

Respectfully,

HUGH S. JENKINS,
Attorney General.