

OPINION NO. 70-088**Syllabus:**

The Cuyahoga County Community Mental Health and Retardation Board does not have the authority under Section 4141.01 (A) (4), Revised Code, as amended, effective March 18, 1969, to voluntarily qualify its employees for the purposes of unemployment compensation.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: Paul W. Brown, Attorney General, July 24, 1970

I have your request for my opinion concerning the question of whether employees of the Cuyahoga County Community Mental Health and Retardation Board may be covered by the State Unemployment Compensation Program.

The second paragraph of your letter, which is repeated below, correctly states the principles of the sections cited:

"Section 4141.01 of the Ohio Revised

Code was amended, effective March 18, 1969, in which subsection (A) (4) provides a procedure by which an employer for whom services that do not constitute employment are performed may file with the administrator a written election to bring such services within the scope of Sections 4141.01 to 4141.46, inclusive, of the Ohio Revised Code. However, Section 4141.01 of the Ohio Revised Code, provides in Section (B) (2) (c) that 'service performed in the employ of any governmental unit, municipal or public corporation, political subdivision, or instrumentality of the United States or of one or more states or political subdivisions in the exercise of purely governmental functions;' does not constitute employment within the meaning of Sections 4141.01 to 4141.46, inclusive, of the Ohio Revised Code."

It would appear necessary first to determine whether the Cuyahoga County Mental Health and Retardation Board is an "Employer" within the purview of the Ohio Revised Code.

Section 4141.01 (A) (1), Revised Code, defines an employer as follows:

"(A) 'Employer' means any individual or type of organization including any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee, or the successor thereof, or the legal representative of a deceased person who subsequent to December 31, 1936, had in employment three or more individuals at any one time within a calendar year."

It will be noted from the foregoing definition that neither the State of Ohio nor any of its political subdivisions are encompassed within said definition.

Coming next to the matter of whether employees of said Board are considered as being in "Employment," reference is made to Section 4141.01 (B) (2) (c), of the Ohio Revised Code, wherein employment and exemptions from employment are spelled out. Section 4141.01 (B), Revised Code, provides in part as follows:

"(B) 'Employment' means service performed for wages under any contract of hire, written or oral, express or implied, * * *."

And said Section under paragraph (B) (2) (c), provides:

"(2) 'Employment' does not include:

"(c) Service performed in the employ of any governmental unit, municipal or public corporation, political subdivision, or instrumentality of the United States or of one or more states or political subdivisions in the exercise of purely governmental functions;"

It has heretofore been determined that employees of a Community Mental Health and Retardation Board, or facilities operated by them and are public employees and a part of the "State service." Opinion 67-104, Opinions of the Attorney General of Ohio issued in 1967, states in syllabus No. 1 as follows:

"Employees of a Community Mental Health and Retardation Board or employees of facilities operated by them are both 'public employees' within the meaning of Chapter 145, Revised Code, and form part of the 'State service' as defined in Chapter 143, of the Ohio Revised Code."

From the foregoing, therefore, it is evident that employees of a mental health and retardation board would not fall within the category of "Employment" as hereinbefore defined.

Referring now specifically to mental health and retardation services within the State of Ohio, reference is made to Chapter 340. of the Revised Code, which outlines the structural and funding processes by which such governmental subdivisions are created and maintained.

The first paragraph of Section 340.01, Revised Code, which sets up "Community health and retardation services," provides as follows:

"A community mental health and retardation service program shall be established in any county or combination of counties having a population of at least fifty thousand to provide community services for mentally ill, mentally retarded, and emotionally disturbed persons. The commissioner of mental hygiene may authorize any county or combination of counties having a population of less than fifty thousand to establish such programs."

Section 5119.061, Revised Code, provides for the

establishment of a bureau of retardation, as follows:

"There is hereby established a bureau of mental retardation within the division of mental hygiene, administered by an assistant commissioner of mental hygiene who shall be chief of the bureau of mental retardation. * * *"

I see no valid reason, therefore, for distinguishing the prior holding of this office as it relates to your question under the provisions of Section 4141.01 (B) (2) (c), supra. It is the writer's opinion that such public employees are not entitled to coverage under the Unemployment Compensation Act of Ohio. The legislature has made no provision to appropriate funds for assessments against a governmental unit for payment of unemployment benefits, and even though the County Commissioners desired to foster such a program, they are powerless to appropriate funds for the purpose of paying benefits under the Unemployment Compensation Act.

It is, therefore, my opinion and you are so advised that the Cuyahoga County Community Mental Health and Retardation Board does not have the authority under Section 4141.01 (A) (4), Revised Code, as amended, effective March 18, 1969, to voluntarily qualify its employees for the purpose of unemployment compensation.