OPINION NO. 85-078

Syllabus:

1. The Ohio Bureau of Employment Services is prohibited by 20 C.F.R. §652.9(a) from making job referrals on job orders which will aid directly or indirectly in the filling of a job opening which is vacant because an employee is on strike or is being locked out in the course of a labor dispute, or where the filling of the vacancy is an issue in a labor dispute involving a work stoppage.

2. As used in 20 C.F.R. §652.9 a "labor dispute" includes any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment. The term includes any controversy between employers, or their representatives, and workers or their representatives; or between groups of workers or their representatives, concerning any of the following:

a. Negotiating, fixing, maintaining, changing or arranging terms or conditions of employment;

b. The employment, nonemployment, or tenure of employment of any individual or group of individuals;

c. The right of individuals or groups of individuals to be recognized as the representatives or bargaining agents of employers or workers.

3. A "labor dispute" may exist for purposes of 20 C.F.R. §652.9 despite the fact that the disputants do not stand in the proximate relation of employer and employee and despite the fact that an employee organization which is striking an employer has no members among the employees of that employer.

4. A "labor dispute" may exist for purposes of 20 C.F.R. §652.9 where an employee organization pickets in an attempt to organize an employer's workers.

To: Dr. Roberta Steinbacher, Administrator, Ohio Bureau of Employment Services, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 17, 1985

I have before me your request for my opinion concerning the circumstances under which the Ohio Bureau of Employment Services (OBES) is required to make referrals on job orders or to accept job orders from employers pursuant to the provisions of the Wagner-Peyser Act of 1933, 29 U.S.C. §§49-49L-1 and the regulations promulgated thereunder, 20 C.F.R. Part 652. Your questions arise within the context of the Bureau's duties with regard to job orders received from employers involved in labor disputes.

Before I address your specific concerns, I note that the Ohio State Employment Service has been established as a division of the Bureau of Employment Services. R.C. 4141.04. It has been designated and constituted as the Ohio agency to cooperate with the United States Employment Service in the operation of the public employment service system. R.C. 4141.04. See 29 U.S.C. §49c. The public employment service system was established by the United States Congress through the Wagner-Peyser Act (the Act), 29 U.S.C. §§49-49L-1. See generally Gomez v. Florida State Employment Service, 417 F.2d 569 (5th Cir. 1969) (discussing establishment, purpose and operation of the Act); DiGiorgio Fruit Corporation v. Department of Employment, 56 C.2d 54, 362 P.2d 487, 13 Cal. Rptr. 663 (1961). The Director of the Ohio State Employment Service is directed to "cooperate with any official or agency of the United States having powers or duties under said act of congress [Wagner-Peyser Act] and shall do and perform all things necessary to secure to this state the benefits of said act of congress in the promotion and maintenance of a system of public employment offices." R.C. 4141.04.

The questions which you have posed to this office require an interpretation of federal law. Members of your staff have informed my staff that they have contacted representatives from the United States Employment Service concerning this issue and have been advised that the implementation and interpretation of the pertinent federal regulations are subject to the discretion of the appropriate state agency officials. That representation comports with the general intent of the United States Congress "that the States exercise broad authority in implementing the provisions of the Act." 20 C.F.R. §652.1(a). As I stated in 1985 Op. Att'y Gen. No. 85-007 at 2-25:

I have neither the capacity to provide authoritative interpretations on questions of federal law, see, e.g., 1982 Op. Att'y Gen. No. 82-097 at 2-270 n. [1]; 1982 Op. Att'y Gen. No. 82-071, nor the authority to exercise on behalf of another state official discretion which has been delegated to him, see generally State ex rel. Copeland v. State Medical Board, 107 Ohio St. 20, 140 N.E. 660 (1923); State ex rel. Commissioners of Franklin County v. Guilbert, 77 Ohio St. 333, 83 N.E. 80 (1907); 1984 Op. Att'y Gen. No. 84-098; 1984 Op. Att'y Gen. No. 84-067. Thus, where there is no definitive interpretation on a matter of federal law, I am able to advise only whether your adoption of a particular interpretation appears to be consistent with your duty to carry out your responsibilities under the law of this state. See R.C. 109.12 ("[t]he attorney general, when so requested, shall give legal advice to a state officer. . .in all matters relating to [his] official duties"). See generally State ex rel. Hunt v. Hildebrant, 93 Ohio St. 1, 12, 112 N.E. 138, 141 (1915), aff'd, 241 U.S. 565 (1916) (where no direction has been given, an officer "has implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method" of performing his duties).

I turn now to the authority of OBES to make job referrals. 20 C.F.R. §652.3 sets forth the minimum requirements for a basic labor exchange system and states:

> At a minimum, each State shall administer a labor exchange system which has the capacity:
> (a) To assist jobseekers in finding employment;
> (b) To assist employers in filling jobs;
> (c) To facilitate the match between jobseekers and employers;
> (d) To participate in a system for clearing labor between the States, including the use of standardized classification systems issued by the Secretary pursuant to JTPA Section 462(c)(3); and
> (e) To meet the work test requirements of the State unemployment compensation system.

See 29 U.S.C. §49g and 20 C.F.R. §652.6 (preparation of state plan for providing services and activities under the Act). It is my understanding, that pursuant to this section and the State's plan submitted to the United States Secretary of Labor pursuant to 29 U.S.C. §49g and 20 C.F.R. §652.6, your agency accepts job announcements from employers and refers qualified job applicants to those positions.

The general duty of OBES to make job referrals is circumscribed, however, by 20 C.F.R. §652.9, which states:

> (a) State agencies shall make no job referral on job orders which will aid directly or indirectly in the filling of a job opening which is vacant because the former occupant is on strike, or is being locked out in the course of a labor dispute, or the filling of which is otherwise an issue in a labor dispute involving a work stoppage.
> (b) Written notification shall be provided to all applicants referred to jobs not at issue in the labor dispute that a labor dispute exists in the employing establishment and that the job to which the applicant is being referred is not at issue in the dispute.
> (c) When a job order is received from an employer reportedly involved in a labor dispute involving a work stoppage, State agencies shall:
> (1) Verify the existence of the labor dispute and determine its significance with respect to each vacancy involved in the job order; and
> (2) Notify all potentially affected staff concerning the labor dispute.
> (d) State agencies shall resume full referral services when they have been notified of, and verified with the employer and workers' representative(s), that the labor dispute has been terminated.

> (e) State agencies shall notify the regional office in writing of the existence of labor disputes which:
>
> (1) Result in a work stoppage at an establishment involving a significant number of workers; or
>
> (2) Involve multi-establishment employers with other establishments outside the reporting State.

See 29 U.S.C. §49j(b) ("[i]n carrying out the provisions of this chapter, the Secretary [of Labor] is authorized and directed to provide for the giving of notice of strikes or lockouts to applicants before they are referred to employment"); 29 U.S.C. §49k ("[t]he Secretary of Labor is authorized to make such rules and regulations as may be necessary to carry out the provisions of this chapter"). See also DiGiorgio Fruit Corporation v. Department of Employment (upholding the authority of the Secretary of Labor to promulgate regulations concerning referrals to places of employment involved in labor disputes). You have indicated in your letter, that because the term "labor dispute" is not defined in the context of 20 C.F.R. Part 652, you have not been able to determine the circumstances under which you are limited in making job referrals.

Although the term "labor dispute" has not been defined in 20 C.F.R. Part 652, for purposes of that part of Title 20, it was defined by the War Manpower Commission. At one time the United States Employment Service was an arm of the Commission, and in its manual dated October 13, 1943, the Commission imposed analogous restraints upon the local offices of the United States Employment Service with regard to referring applicants for jobs to employers who were involved in labor disputes as may now be found in 20 C.F.R. §652.9.[1] In its manual dated October 13, 1943, the Commission defined the term "labor dispute" for those purposes. The United States Court of Claims acknowledged and adopted that definition in Ottinger v. United States, 106 F. Supp. 198 (Ct. Cl. 1952). The court quoted the manual as follows:

> The term "labor dispute" shall include any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment regardless of whether or not the disputants stand in the proximate relation of employer and employee. The term includes any controversy between employers, or their representatives, and workers, or their representatives; or between groups of workers or their representatives, concerning any of the following:
>
> "1. Negotiating, fixing, maintaining, changing, or arranging terms or conditions of employment;
>
> "2. The employment, non-employment, or tenure of employment of any individual or group of individuals;
>
> "3. The right of individuals or groups of individuals to be recognized as the representatives or bargaining agents of employers or workers." (Emphasis added.)

---

[1] Section 3440 of the United States Employment Service Manual issued by the War Manpower Commission, dated October 13, 1943 read in part:

> Policy Regarding Referrals to Jobs Vacant Because of a Labor Dispute: Local offices of the United States Employment Service shall make no referral, except in accordance with specific instructions to do so from the Regional Manpower Director, which will aid directly or indirectly in filling a job (a) which is vacant because the former occupant is on strike or is being locked out in the course of a labor dispute or (b) the filling of which is an issue in a labor dispute.

Ottinger v. United States, 106 F. Supp. 198, 201 (Ct. Cl. 1952).

106 F. Supp. at 202. The court went on to state:

> The definition of the term "labor dispute" in this manual was an orthodox definition. The first sentence in the definition is copied verbatim from the Act of March 23, 1932, c. 90, §13, 47 Stat. 73, 29 U.S.C.A. §113(c), the Norris-LaGuardia Act. The same definition, with the addition of one word, was contained in the Act of July 5, 1935, c. 372, §2, 49 Stat. 450, 29 U.S.C.A. §152(9), the original National Labor Relations Act. The amendments to the National Labor Relations Act made by the Taft-Hartley Act of June 23, 1947, c. 20, Title I, §101, 61 Stat. 137, 29 U.S.C.A. §152(9) left this definition unchanged. The Commission, therefore, in defining the term "labor dispute" to include a controversy between an employer and persons such as union organizers who were not his employees and who did not represent his employees was defining the expression as Congress then defined it and still defines it.[2] The rest of the Commission's interpretation of the term adds nothing which is inconsistent with the Congressional definition. (Emphasis and footnote added.)

Id. Thus, your determination of whether any particular situation involves a labor dispute such that your obligation to make job referrals is affected, should be based upon the definition of "labor dispute" adopted in Ottinger.

With that definition in mind, I turn now to your specific questions. Your first question asks whether there is "a labor dispute when the disputants do not stand in the proximate relation of employer and employee." Your second question asks whether you could determine that a labor dispute exists regardless of the fact that no employees are union members. Both of these issues were resolved by the United States Court of Claims in Ottinger.

Ottinger involved a number of contractors working on one project. All but one contractor, Ottinger Brothers, operated on a closed shop basis, employing only union labor. Ottinger Brothers had always operated on an open shop basis and refused the union's demand to change to a closed shop. At first, no Ottinger employees were members of the union. The Court of Claims stated at 106 F. Supp. at 203:

> The fact that the unions which were demanding that the plaintiffs unionize the job may have had no members among the plaintiffs' employees did not prevent it from being a labor dispute. The statutes and the manual say that "regardless of whether or not the disputants stand in the proximate relation of employer and employee," the controversy is a labor dispute.

Thus, in answer to your first and second questions, a labor dispute may exist for purposes of 20 C.F.R. §652.9 despite the fact that the disputants do not stand in the proximate relation of employer and employee. Further, such a dispute may be found despite the fact that one disputant is a union in which none of the employer's employees are members.

Your third question concerns the liability of OBES "if a referred potential employee is injured while crossing a picket line." 20 C.F.R. §652.9(a) prohibits a state agency from making job referrals on job orders which will aid in filling a job opening which is vacant because an employee is on strike or is being locked out in the course of a labor dispute, or where the filling of the vacancy is an issue in a labor dispute involving a work stoppage. Thus, OBES is prohibited from referring a person to an employer if a job vacancy exists because an employee is on strike or is

---

[2] 29 U.S.C. §§113(c) and 152(9) still contain the definitions of "labor dispute" considered in Ottinger v. United States.

being locked out, or if the filling of the vacancy is an issue in a labor dispute. However, assuming a job referral might be made under different conditions (see, e.g., 20 C.F.R. §652.9(b)), I cannot speculate on the circumstances under which a court would impose liability upon OBES in the event that an applicant whom OBES refers is injured while crossing a picket line. As a general matter, however, the Ohio Supreme Court has stated:

> [T]he state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. However, once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of such activities.

Reynolds v. State, 14 Ohio St. 3d 68, 70, 471 N.E.2d 776, 778 (1984). See R.C. 2743.02.

Your fourth question asks whether there is "a labor dispute if an organization or association pickets in an attempt to organize an employer's workers." As discussed above, that was generally the purpose of the picketing in Ottinger. The pertinent part of the definition of "labor dispute" as used in Ottinger states that a "labor dispute" includes any controversy "concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment." (Emphasis added.) 106 F. Supp. at 202. Therefore, a labor dispute for purposes of 20 C.F.R. §652.9 may exist where the controversy concerns employee representation.

Your fifth question asks about a specific labor dispute. I have been informed that that situation has been resolved and, therefore, no response to that specific situation is necessary or appropriate at this time.

Based upon the foregoing, you are hereby advised that:

1. The Ohio Bureau of Employment Services is prohibited by 20 C.F.R. §652.9(a) from making job referrals on job orders which will aid directly or indirectly in the filling of a job opening which is vacant because an employee is on strike or is being locked out in the course of a labor dispute, or where the filling of the vacancy is an issue in a labor dispute involving a work stoppage.

2. As used in 20 C.F.R. §652.9 a "labor dispute" includes any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment. The term includes any controversy between employers, or their representatives, and workers or their representatives; or between groups of workers or their representatives, concerning any of the following:
   a. Negotiating, fixing, maintaining, changing or arranging terms or conditions of employment;
   b. The employment, nonemployment, or tenure of employment of any individual or group of individuals;
   c. The right of individuals or groups of individuals to be recognized as the representatives or bargaining agents of employers or workers.

3. A "labor dispute" may exist for purposes of 20 C.F.R. §652.9 despite the fact that the disputants do not stand in the proximate relation of employer and employee and despite the fact that an employee organization which is striking an employer has no members among the employees of that employer.

4. A "labor dispute" may exist for purposes of 20 C.F.R. §652.9 where an employee organization pickets in an attempt to organize an employer's workers.