

OPINION NO. 88-016**Syllabus:**

1. R.C. 3304.11-.27 do not authorize the Rehabilitation Services Commission, outside the provisions of R.C. Chapter 4117, to establish an employee recognition award program providing monetary awards to its employees for outstanding and meritorious service in their employment; rather, pursuant to R.C. 124.17, the Director of Administrative Services is authorized to establish a program, including cash awards, for the recognition of those employees who are paid in accordance with R.C. 124.152 and those employees listed in R.C. 124.14(B)(2) and (4).
2. An employee recognition award program which includes monetary awards for outstanding and meritorious service may be included in a collective bargaining agreement entered into pursuant to R.C. Chapter 4117 as part of the wages, hours, and terms and conditions of employment for Rehabilitation Services Commission employees covered by the agreement.

To: Robert L. Rabe, Administrator, Rehabilitation Services Commission, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, March 30, 1988

I have before me your opinion request concerning an employee incentive program which you propose to begin within your agency. Your letter states that you plan to implement:

an ongoing program to recognize outstanding and meritorious service and achievement by our staff in serving the needs of the disabled population of our State.

....
Our primary question relates to the legality of providing monetary awards both to bargaining unit and exempt employees. Secondly, we would appreciate advice on procedural parameters of such monetary awards.

Since the Rehabilitation Services Commission (RSC) is a creature of statute, it has only those powers expressly granted by statute or necessarily implied therefrom. 1971 Op. Att'y Gen. No. 71-082. *See Burger Brewing Co. v. Thomas*, 42 Ohio St. 2d 377, 329 N.E.2d 693 (1975). Concerning the authority of a public body to expend public funds, 1983 Op. Att'y Gen. No. 83-029 set forth the following analysis:

The...[Commission] is also bound by the principle that a public body may expend public funds only pursuant to clear statutory authority, and where such authority is of doubtful import, the doubt must be resolved against the expenditure. *See State ex rel. Locher v. Menning*, 95 Ohio St. 97, 115 N.E. 571 (1916). Furthermore, public money may be expended only for a valid public purpose. *Kohler v. Powell*, 115 Ohio St. 418, 154 N.E. 340 (1926). As a general rule, where the legislature has specifically authorized the expenditure of funds for a particular purpose, such legislative determination is given great weight in examining the validity of such expenditure. *See State ex rel. McClure v. Hagerman*, 155 Ohio St. 320, 98 N.E.2d 835 (1951).

Op. No. 83-029 at 2-108. A determination as to whether the Commission may establish an incentive program granting monetary awards to Commission employees,

therefore, requires an examination of the statutes governing the operation of the Commission.

The RSC is established by R.C. 3304.11-.27. Its primary powers and duties are set forth in R.C. 3304.16 which states in part:

In carrying out the purposes of sections 3304.11 to 3304.27 of the Revised Code, the rehabilitation services commission:

(A) Shall develop all necessary rules;

...

(E) Shall take appropriate action to guarantee rights of and services to handicapped persons;

...

(K) May take any other necessary or appropriate action for cooperation with public and private agencies and organizations...

...

(M) May plan, establish, and operate programs, facilities, and services relating to vocational rehabilitation;

(N) May accept and hold, invest, reinvest, or otherwise use gifts made for the purpose of furthering vocational rehabilitation....

See generally Rone v. Fireman, 473 F. Supp. 92, 126 (N.D. Ohio 1979) ("[t]he primary function of the commission is to assist persons with a physical or mental disability which is a substantial impediment to employment and who could benefit in terms of employability from vocational rehabilitation services"). Although the above-quoted portion of R.C. 3304.16 is merely representative of the powers and duties of the RSC, R.C. 3304.16 does not, either expressly or impliedly, authorize the RSC to establish the type of employee award scheme described in your request. Further, no other statute of which I am aware, within R.C. 3304.11-.27 or otherwise, expressly empowers the RSC to establish such a scheme for RSC employees.

Because R.C. Chapter 3304 provides no express authority for the RSC to establish the type of plan you suggest, it is necessary to determine whether the RSC possesses any other power from which such authority may be implied. The proposed plan involves the payment of money to RSC employees for outstanding and meritorious service and for achievement in serving the needs of the state's disabled population. Since the plan contemplates the payment of money to RSC employees for services rendered in their employment, it is necessary to examine the Commission's authority with respect to compensating its employees. *See generally* 1981 Op. Att'y Gen. No. 81-052 at 2-202 ("the authority to provide fringe benefits flows directly from the authority to set compensation and is circumscribed only by apposite statutory authority which either ensures a minimum benefit entitlement or otherwise constricts the employer's authority *vis a vis* a particular fringe benefit").¹

¹ In *Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980), the court characterized sick leave benefits as a form of fringe benefit and, thus, a component of compensation. The nature of a "fringe benefit," specifically the county's payment of employee insurance premiums under R.C. 305.171, was discussed in *Madden v. Bower*, 20 Ohio St. 2d 135, 137-38, 254 N.E.2d 357, 359 (1969) as follows:

[A]s to each employee receiving the right to the benefits of the insurance, the premium is a part of the cost of the public service performed by such employee.

The purpose of an employer, whether public or private, in extending "fringe benefits" to an employee is to induce that employee to continue his current employment. If inducement to continue public service could not be found in the provisions of former [R.C. 305.171], the public purpose of payments thereunder would be highly suspect, if not flatly unconstitutional.

Pursuant to R.C. 3304.14:

The rehabilitation services commission shall appoint an administrator to serve at the pleasure of the commission and shall fix his compensation....The commission may delegate to the administrator the authority to appoint, remove, and discipline...such other professional, administrative, and clerical staff members as are necessary to carry out the functions and duties of the commission.

Thus, although the RSC may appoint an administrator and other employees, the Commission is authorized to fix the compensation of only the administrator. Other RSC employees, as employees of a state commission, receive compensation pursuant to the scheme set forth in R.C. Chapter 124 or pursuant to a collective bargaining agreement as provided for in R.C. Chapter 4117.² See generally R.C. 124.15 (except for employees of the State School for the Deaf and the State School for the Blind who are compensated under R.C. 124.15(L) and "exempt employees," as defined in R.C. 124.152, "all employees working for the state or any of the several departments, commissions, bureaus, boards, or councils of the state shall be paid a salary or wage in accordance with the...schedule of rates [set forth in R.C.124.15]"); R.C. 4117.03(A) (public employees, as defined in R.C. 4117.01(C), "have the right to...(4) [b]argain collectively with their public employers to determine wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, and enter into collective bargaining agreements").

Since the compensation scheme for state employees covered by a collective bargaining agreement differs greatly from that governing the compensation of state employees not covered by a collective bargaining agreement, I will address your question separately as to each type of employee. First, I will discuss the statutory scheme providing compensation for state employees who are not subject to a collective bargaining agreement. Pursuant to the scheme set forth in R.C. Chapter 124, employees of state commissions are paid a salary or wage in accordance with the schedule of rates set forth in R.C. 124.15(A). An exception to the payment of a salary or wage under R.C. 124.15(A) is provided for "exempt employees," defined in R.C. 124.152(E) as:

a permanent full-time or permanent part-time employee paid directly by warrant of the auditor of state whose position is included in the job classification plan established under [R.C. 124.14(A)] but who is not considered a public employee for the purposes of [R.C. Chapter 4117].³ As used in this section, "exempt employee" also includes a permanent full-time or permanent part-time employee of the secretary of state, auditor of state, treasurer of state, or attorney general who has not been placed in an appropriate bargaining unit by

² Prior to the enactment of R.C. Chapter 4117, the salary and fringe benefits of state employees were expressly regulated by statute. 1984 Op. Att'y Gen. No. 84-036; 1981 Op. Att'y Gen. No. 81-056. See generally *Local 4501, CWA v. Ohio State Univ.*, 24 Ohio St. 3d 191, 195, 494 N.E.2d 1082, 1086 (1986) (note 3) ("[p]rior to the enactment of R.C. Chapter 4117, public employees had been permitted to collectively bargain with their employer only when the employer, in its discretion, chose to engage in such bargaining" (citations omitted)).

³ For purposes of R.C. Chapter 4117, a public employee is defined, with fifteen exceptions, including confidential employees, management level employees, and supervisors, as meaning, "any person holding a position by appointment or employment in the service of a public employer [including the state], including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer...." R.C. 4117.01(C).

the state employment relations board. As used in this section, "exempt employee" does not include a member of a board or commission any of whose members is appointed to a fixed term of office.

An exempt employee, as defined in R.C. 124.152(E), is paid a salary or wage in accordance with the schedules set forth in R.C. 124.152.

For those employees compensated in accordance with R.C. Chapter 124, benefits other than salary or wages are limited to those authorized by statute. *See* 1983 Op. Att'y Gen. No. 83-042 at 2-164 (issued prior to the enactment of 1983-1984 Ohio Laws, Part I, 336 (Am. Sub. S.B. 133, eff., in part, April 1, 1984), which established collective bargaining procedures for public employers and public employees, Op. No. 83-042 concluded that the salary and fringe benefits of state employees were expressly regulated by statute and that under the statutory scheme, "a state agency has no authority to grant additional fringe benefits to its employees"); 1977 Op. Att'y Gen. No. 77-090 at 2-304 (issued prior to the enactment of R.C. Chapter 4117, stating: "[t]he plain meaning of [R.C. 124.14(C)],⁴ is to reserve in the General Assembly the power to grant or alter fringe benefits for state employees. A state agency does not have the authority to grant additional fringe [benefits] to its employees"); *see, e.g.*, R.C. 124.13 (vacation leave for full-time state employees, except employees accruing vacation leave under R.C. 124.134, and county human services employees); R.C. 124.134 (vacation leave for full-time state employees paid under R.C. 124.152); R.C. 124.387 (bereavement leave for any full-time employee whose salary or wage is paid directly by warrant of the Auditor of State). Where the General Assembly has granted state appointing authorities discretion with regard to fixing employee compensation, it has expressly done so. *See, e.g.*, R.C. 124.15(D) (allowing an appointing authority, subject to the approval of the Director of Administrative Services and the Director of Budget and Management, to establish payments to employees for various requirements of the department, such as uniforms and equipment); R.C. 124.15(H) (allowing an appointing authority to fix and adjust the rate of pay within the appropriate pay range of employees in appointive managerial or professional positions paid under salary schedule C of R.C. 124.15 or under salary schedule E-2 of R.C. 124.152). Because the General Assembly has not specifically authorized the Rehabilitation Services Commission to provide the type of benefit about which you ask for its employees who are compensated in accordance with the statutory scheme set forth in R.C. Chapter 124, I must conclude that the RSC is without authority to provide such benefit for such employees.

The only statute of which I am aware that authorizes the payment of awards to state employees for outstanding and meritorious service in their employment is

⁴ R.C. 124.14 states in pertinent part:

(C) On or before the first day of November in each even-numbered year, the director of administrative services shall report to the state employee compensation board whether the pay ranges and the steps contained in sections 124.15 and 124.152 of the Revised Code should be adjusted by a uniform percentage to reflect increases or decreases in the wages of nonpublic employees in Ohio or other states in order to maintain the competitive status of state employment. The director shall at the same time report whether sick leave, holidays, health or life insurance, vacation, leave, or other fringe benefits of state employees should be changed for such reasons. The board shall make recommendations on such adjustments to the general assembly and governor by the first day of January in each odd-numbered year.

R.C. 124.14(C), as in effect at the time 1977 Op. Att'y Gen. No. 77-090 was issued, *see* 1977-1978 Ohio Laws, Part II, 3318 (Am. H.B. 734, eff. Oct. 11, 1977), contained substantially the same language as in its current form.

set forth in R.C. 124.17, which states:

The director of administrative services may institute an employee awards system designed to encourage all state employees to submit suggestions that will reduce the costs, or improve the quality, of state services. The rule shall provide reasonable standards for determining the amount, not to exceed five thousand dollars, of any award that may be given for a suggestion. The department of administrative services shall review each suggestion and make a recommendation of the amount of award, if any, to be given. The state employee compensation board shall determine the amount of any award to be given and its determination is final and not appealable.

In addition to the employees award system, *the director may establish a program for the recognition of employees paid in accordance with [R.C. 124.152] and those employees listed in divisions (B)(2) and (4) of [R.C. 124.14].* The program may include, but is not limited to, cash awards, additional leave, or other provisions as the director deems appropriate. (Emphasis added.)

Pursuant to R.C. 124.17, however, it is the Director of Administrative Services, not each state employing entity, who determines whether state employees are entitled to cash awards in recognition of outstanding service. Further, R.C. 124.17 authorizes the Director to establish such a program only for employees paid in accordance with R.C. 124.152 and for employees listed in R.C. 124.14 (B)(2) and (4).⁵ The fact that awards for state employee recognition are expressly authorized by statute in R.C. 124.17 further supports the conclusion that the RSC is without implied authority to establish such a program for those of its employees whose compensation is governed by the statutory scheme prescribed by R.C. Chapter 124.⁶ Cf. Op. No. 77-090 at 2-303 (since the General Assembly expressly empowered certain state agencies to acquire, maintain, and operate buildings and facilities, the opinion concludes that, "the General Assembly has seen fit to vest all powers relating to the acquisition and maintenance of parking facilities in certain specified agencies. Where the General Assembly has granted such power, the power expressly conferred is so broad that one cannot reasonably conclude that the power is elsewhere necessarily implied in more general terms").

I will now address the permissibility of establishing such a program for RSC employees whose wages, salaries, and other terms and conditions of employment are governed by a current collective bargaining agreement. Since the state, which includes the RSC, is a "public employer" for purposes of R.C. Chapter 4117, see R.C. 4117.01(B) (defining "public employer" as meaning, "the state or any political subdivision of the state located entirely within the state including, ...any state agency, authority, *commission*, or board" (emphasis added)), it is under a duty to bargain collectively with an exclusive representative designated under R.C. 4117.05

⁵ R.C. 124.14 reads in pertinent part:

(B) Division (A) of this section and sections 124.15 and 124.152 of the Revised Code do not apply to the following persons, positions, offices, and employments:

...
(2) Legislative employees and employees of the legislative service commission, employees in the office of the governor, and employees of the supreme court;

...
(4) Any position for which the authority to determine compensation is given by law to another individual or entity.

⁶ From information supplied by the Department of Administrative Services, it is my understanding that the employee recognition program authorized by R.C. 124.17 has not yet been implemented and that the precise format of the program has not yet been determined.

for purposes of R.C. Chapter 4117. R.C. 4117.04(B); 1986 Op. Att'y Gen. No. 86-052 at 2-278 through 2-279 ("[i]f an exclusive representative is selected, an employer must collectively bargain with the exclusive representative with regard to the terms and conditions of employment of the employees in that unit"). R.C. 4117.08 lists those matters which are, and those which are not, appropriate subjects for collective bargaining. The general rule is set forth in R.C. 4117.08(A), as follows: "All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section." Further, pursuant to R.C. 4117.10(A):

An agreement between a public employer and an exclusive representative entered into pursuant to [R.C. Chapter 4117] governs the wages, hours, and terms and conditions of public employment covered by the agreement....Where no agreement exists or where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees....[With certain enumerated exceptions], Chapter 4117 of the Revised Code prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in Chapter 4117 of the Revised Code or as otherwise specified by the general assembly.

The term "wages," as used in R.C. Chapter 4117, is defined as meaning, "hourly rates of pay, salaries, or *other forms of compensation for services rendered.*" (Emphasis added.) R.C. 4117.01(L). Since the program you propose is designed to recognize outstanding service and achievement by the RSC staff through cash and other awards, the awards fall within the definition of "wages" for purposes of R.C. Chapter 4117 and, as such, are a permissible matter about which the state and its employees may bargain under R.C. Chapter 4117. Thus, an employee recognition award program, as negotiated between the state and the exclusive representative, may be included as part of a collective bargaining agreement between the state and the exclusive representative of an appropriate bargaining unit of state employees. Further, since R.C. 4117.10(A) specifies that, with certain exceptions not here applicable, R.C. Chapter 4117 "prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in [R.C. Chapter 4117] or as otherwise specified by the general assembly," such a provision in a collective bargaining agreement would prevail over any conflicting provisions in R.C. 124.17. See 1987 Op. Att'y Gen. No. 87-041 at 2-273 ("the collective bargaining agreement will govern the wages, hours, terms and conditions of employment, notwithstanding the conflicting provisions of state law. R.C. 4117.10(A)").

There is also the possibility, however, that a collective bargaining agreement may exist between the state and an exclusive representative of RSC employees, but will not provide for an employee recognition award program as described in your letter. In that event, as set forth above, pursuant to R.C. 4117.10(A), if the state and the exclusive representative of an appropriate bargaining unit enter an agreement pursuant to R.C. Chapter 4117, and the agreement makes no specification about the matter of employee recognition awards, the state and the employees in the bargaining unit, being subject to "all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees," are then subject to the employee recognition award scheme as may be provided by R.C. 124.17. See generally note 6, *supra*.

It is, therefore, my opinion, and you are hereby advised, that:

1. R.C. 3304.11-.27 do not authorize the Rehabilitation Services Commission, outside the provisions of R.C. Chapter 4117, to establish an employee recognition award program providing monetary awards to its employees for outstanding and meritorious service in their employment; rather, pursuant to R.C. 124.17, the Director of Administrative Services is authorized to

establish a program, including cash awards, for the recognition of those employees who are paid in accordance with R.C. 124.152 and those employees listed in R.C. 124.14(B)(2) and (4).

2. An employee recognition award program which includes monetary awards for outstanding and meritorious service may be included in a collective bargaining agreement entered into pursuant to R.C. Chapter 4117 as part of the wages, hours, and terms and conditions of employment for Rehabilitation Services Commission employees covered by the agreement.