38 Or. Op. Atty. Gen. 2079 (Or.A.G.), 1978 WL 29509

Office of the Attorney General

State of Oregon
Opinion No. 7624
May 18, 1978

This opinion is issued in response to questions presented by J. D. Bray, M.D., Assistant Director for Mental Health, Department of Human Resources, State of Oregon.

FIRST QUESTION PRESENTED

Are ORS 236.610 to 236.640 applicable to furnish protection to state employes who would be affected by a transfer of the Alcohol Safety Action Program (ASAP) and Comprehensive Options for Drug Abusers (CODA) from state operation to the County of Multnomah, which would in turn contract with private non-profit corporations expressly created for the purpose of carrying out these functions?

ANSWER GIVEN

Yes.

SECOND QUESTION PRESENTED

Does the term 'facility' as used in ORS 236.610(2) include services and programs using only minor movable equipment and not involving structures, buildings or other physical facilities?

ANSWER GIVEN

Yes.

THIRD QUESTION PRESENTED

What sort of 'seniority' protection is the transferee employer required to provide?

ANSWER GIVEN

The transferred employes must be provided with the same seniority protection against layoff or demotion that they would have enjoyed had they not been transferred.

FOURTH QUESTION PRESENTED

Must the transferee employer adopt personnel policies which include the indefinite accumulation of sick leave, and use of accumulated unused sick leave for retirement benefit purposes?

ANSWER GIVEN

No.

FIFTH QUESTION PRESENTED

Do transferred employes have a right to reemployment by the state in case of a layoff required by diminished funding of the transferee employer?

ANSWER GIVEN

Yes.

SIXTH QUESTION PRESENTED

Would the transferee non-profit corporations receiving public funds be required to adopt a 'merit system'?

ANSWER GIVEN

No. The Mental Health Division has authority, however, to require in the agreement of transfer that the non-profit corporation adhere to merit system principles.

DISCUSSION

The questions presented here involve a proposed transfer by the Mental Health Division of the Department of Human Resources of certain of its alcohol and drug treatment programs and the state employes administering the programs, to the County of Multnomah and, in turn, to non-profit Oregon corporations expressly created for this purpose. We are asked to what extent these former state employes would be entitled to a continuation of the merit system and retirement benefits they enjoyed while in state service.

The Mental Health Division is designated as the state agency to apply to and receive from the federal government or any agency thereof, such grants for promoting mental health, including grants for mental hygiene programs, as may be available to this state or any of its political subdivisions or agencies. ORS 430.140. ORS 430.260 requires the Mental Health Division to 'maintain and operate a rehabilitation clinic and agency for the treatment of persons addicted to the excessive use of alcoholic beverages.' The division is further authorized to contract with the federal government for services to alcohol and drug-dependent persons who are either residents or non-residents of the State of Oregon. ORS 430.265. In carrying out the objective of the act to prevent alcoholism and drug dependency, the Mental Health Division is given broad discretionary powers, including the right to 'solicit program proposals that address identified priorities from agencies, associations, individuals or any political subdivision of this state and award and distribute monies under this section in accordance with the provisions of this section.' ORS 430.290(b). The Mental Health Division is specifically authorized to 'provide directly through publicly operated treatment facilities, which shall not be considered to be state institutions, or by contract with publicly or privately operated treatment facilities, for the care of alcoholics or drug-dependent persons.' ORS 430.335.

***2** Additionally, the Mental Health Division may make grants for alcoholic treatment and rehabilitation programs meeting certain statutory standards, which include the fact
'. . . that an appropriate operating relationship exists or will exist with other community facilities able to assist in the treatment and rehabilitation of alcoholics, including nearby detoxification centers and halfway houses.' ORS 430.345(3).

The statute specifically authorizes a county to provide alcoholism treatment and rehabilitation services by contracting therefor with private non-profit agencies, and provides that a county entering into such a contract may receive grants from the Mental Health Division 'if the contracting agency meets the requirements of ORS 430.345.' ORS 430.370(1). Cities and counties, or any combination thereof, are also authorized to enter into a written agreement as provided in ORS ch 190 to jointly establish, operate and maintain alcoholism treatment and rehabilitation programs. ORS 430.370(2).

The overall import of the statutory provisions is to authorize the Mental Health Division to establish and maintain alcohol treatment facilities at the lowest practical governmental level. The definition section of the statute, ORS 430.306, defines the terms 'detoxification center,' 'halfway house,' and 'other treatment facility' in the context of either publicly or privately operated **non-profit** 'facilities.'

From a reading of the statute as a whole, there appears to be no question that the Mental Health Division has authority to contract with and make grants to local governmental subdivisions, including counties, for the establishment of alcohol and drug treatment programs and facilities, and that such counties may in turn contract with private **non-profit** corporations

specifically created to operate such facilities and provide such services. The statutes further permit the Mental Health Division to establish and administer an 'Alcohol Safety Action Program.' The specific target of this program is persons convicted of driving under the influence of alcohol or of any crime committed while the defendant was intoxicated, when the judge has probable cause to believe that the person is an alcoholic or problem drinker. ORS 430.850 to 430.891.

ORS ch 190 provides for cooperation of governmental units. Units of local government are specifically authorized to make intergovernmental agreements 'for the performance of any and all functions and activities that a party to the agreement, its officers or agents, have authority to perform.' ORS 190.010. Additionally, units of local government and state agencies are authorized to cooperate. ORS 190.110 provides:
'In performing a duty imposed upon it or in exercising a power conferred upon it, a unit of local government or a state agency of this state may cooperate, by agreement or otherwise, with a unit of local government or a state agency of this or another state, or with the United States, or with a United States governmental agency. This power includes power to provide jointly for administrative officers.'

***3** Next, we turn to the effect of the transfer of state alcohol and drug treatment programs to a county and in turn to **non**-**profit** corporations established to carry out such programs. ORS **236**.**610** to 236.650 provides certain protections to transferred public employes. By express legislative intent, the provisions of those statutes 'shall be liberally construed.' ORS 236.650. ORS **236**.**610** provides, in part, that:
'(1) No public employe shall be deprived of his employment solely because the duties of his employment have been assumed or acquired by another public employer, whether or not an agreement, annexation or consolidation with his present employer is involved. Nothwithstanding any statute, charter, ordinance or resolution, but subject to ORS **236**.**610** to 236.650, the public employe shall be transferred to the employment of the public employer who assumed or acquired his duties, without further civil service examination.

'(2) As used in subsection (1) of this section, 'public employe' means an employe whose salary or wages is paid from public funds and 'public employer' includes an Oregon **non**-**profit** corporation that has accepted, by agreement, the transfer of a public facility from a political subdivision of this state for maintenance and operation.' (Emphasis added).

It is clear from ORS **236**.**610**(1) that 'public employe' employment rights will be preserved whenever 'the duties of his employment' have been assumed or acquired by another 'public employer.' The term 'public employe' is defined as 'an employe whose salary or wages is paid from public funds,' and the term 'public employer' refers not only to the state and its political subdivisions, but by statute includes an Oregon **non**-**profit** corporation that has accepted 'the transfer of a public facility from a political subdivision of this state for maintenance and operation.' ORS **236**.**610**(2).

The term 'public facility' is not otherwise defined by the statute and, narrowly read, the phrase 'for maintenance and operation' could envision a building, an institution, a treatment plant, vehicles, or other physical property which must be 'maintained and operated.' However, it is a commonly accepted fact that many state and local government programs and services are rendered from rented quarters or by personnel in the field with only minor movable equipment. In addition, we note that the Mental Health Division's enabling act for alcohol and drug rehabilitation programs, ORS 430.260 et seq., speake throughout in terms of publicly or privately operated **non**-**profit** 'facilities' and 'other treatment facilities.' In view of these facts, we believe such a narrow reading is inappropriate.

The term 'facility' is a broad term intended to embrace anything, including human agencies, which aid or make easier the performance of activities. Extendicare, Inc. v. State Coordinating Council, 216 Kan 527, 532 P2d 1119 (1975). A 'facility' is a thing that promotes ease of any action, operation or course of conduct, and can be animate beings such as persons or groups. Cheney v. Tolliver, 234 Ark 973, 356 SW2d 636, 638 (1962). We conclude that both programs are public 'facilities' within the language of the statute, notwithstanding that in some contexts facilities may be material objects such as buildings and equipment. ORS **236**.**610** et seq. apply whenever the 'duties of employment' of a 'public employe' are transferred by agreement to another public employer or in turn by a political subdivision to an Oregon **non**-**profit** corporation, even if the services and programming require only minor movable equipment and not structures, buildings, or other physical facilities.

***4** ORS 236.620 details the employment status of a transferred public employe. Question Three relates to seniority

protection. ORS 236.620(3) provides:
'The [transferred] employe shall retain the seniority he accrued under this prior employment, but no regular employe of the transfree employer shall be demoted or laid off by reason of that seniority.'

In addition to being free from further civil service examination, if the transferred employe was serving on a probationary period with his employer at the time of transfer, the employe's past service on probation applies on the regular probation requirements of the transferee employer. ORS 236.620(1). A state transferred employe also has the right to elect to continue to participate in the Public Employes' Retirement System or to participate in the retirement system available to employes of the transferee employer. ORS 263.620(2). The transferred employe retains 'the seniority he accrued under his prior employement' and 'otherwise shall enjoy the same privileges and be subject to the same regulations as other employes of the transferee employer.' ORS 236.260(3) and (4).

The fourth question relates to accumulation of sick leave, and the right to use of accumulated unused sick leave, under ORS 237.153, in calculating 'final average salary' for retirement benefit purposes.

ORS 236.620(2) gives the transferred employe an option either to stay with PERS, or elect to accept the retirement system available to employes of the transferee employer. The use of accumulated unused sick leave to increase benefits as provided in ORS 237.153 is not a matter of employe right, but rather is optional with the participating public employer. A transferred employe would have a right to retain unused sick leave accumulated before transfer for retirement purposes. But if the transferred employe elects to remain under PERS, the transferee employer would not be required to continue the state's sick leave policy or to provide paid sick leave in any particular form to its employes, including the transferred employes. ORS 236.620(4) provides:
'The employe otherwise shall enjoy the same privileges and be subject to the same regulations as other employes of the transferee employer.' (Emphasis added).

The fifth question relates to reemployment rights. At the end of the agreement period, a transferred employe is entitled to reinstatement in his or her former position with the transferring employer prior to transfer, 'if he has remained an employe of the transferee employer in good standing to the termination of the agreement.' ORS 236.640. The same result would necessarily follow if a lay-off is caused by reduced funding, even though the program continues in effect under the transfer agreement in reduced form. The requirement that the law be liberally construed prevents its intent from being defeated, for all except the last few employes, by a phasing out of the program rather than an abrupt cutoff.

***5** Finally, it should be particularly noted that the statute does not require the transferee 'public employer' to maintain a merit system or any particular set of employment standards. While other state statutes provide 'merit systems' for county, city and school district employes and firemen, ORS ch 241 and 242, the mere receipt of state funds would not require the transferee employer to establish a merit system. Similarly, federal regulations, 45 CFT, part 70, require that state and political subdivisions receiving federal grant-in-aid funds employ under a 'merit system' meeting certain standards, but by exclusion these regulations do not apply to **non-profit** corporations. However, the division could provide in the transfer agreement that the transferee employer must adhere to merit system principles.

Other questions concerning merit system rights of transferred state classified employes whose duties have been assumed or acquired by another public employer, and the rights of such transferred state employes to return to the state classified service at the end of the agreement period, would be governed by the provisions of any applicable collective bargaining agreements and Personnel Rules of the Executive Department.

James A. Redden
Attorney General

38 Or. Op. Atty. Gen. 2079 (Or.A.G.), 1978 WL 29509

End of Document