May 25, 2012

The Honorable Julia R. Bates
Lucas County Prosecuting Attorney
700 Adams Street, Suite 250
Toledo, Ohio 43604-5659

SYLLABUS: 2012-015

A county prosecuting attorney may use moneys in her law enforcement trust fund created pursuant to R.C. 2981.13 to employ and pay the salary and fringe benefits of an assistant prosecuting attorney whose responsibilities consist solely of prosecuting drug offenses under R.C. Chapter 2925, provided the prosecuting attorney determines, in the reasonable exercise of her discretion, that such use is an appropriate law enforcement purpose. An expenditure of law enforcement trust fund moneys for that purpose must be made in accordance with the written internal control policy that addresses the use of those moneys. (1998 Op. Att'y Gen. No. 98-023 (syllabus, paragraph 2), approved and followed.)

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OPINION NO. 2012-015

The Honorable Julia R. Bates
Lucas County Prosecuting Attorney
700 Adams Street, Suite 250
Toledo, Ohio 43604-5659

Dear Prosecutor Bates:

I am in receipt of your request for an opinion on the following question: May a county prosecuting attorney use moneys in her law enforcement trust fund created pursuant to R.C. 2981.13 to employ and pay the salary and other work-related expenses of an assistant prosecuting attorney whose responsibilities consist solely of prosecuting drug offenses under R.C. Chapter 2925? Based on conversations between members of our respective staffs, by use of the term, "work-related expenses," I understand that you mean the standard fringe benefits commonly provided to public employees—such as medical insurance, life insurance, paid leave, and pension contributions—that constitute part of an employee's overall compensation. *See* 2011 Op. Att'y Gen. No. 2011-015, at 2-145; 2010 Op. Att'y Gen. No. 2010-017, at 2-107 to 2-108.

R.C. 2981.13 governs the disposal of property ordered forfeited as constituting contraband, proceeds from an offense, or an instrumentality used or intended to be used in an offense. *See also* R.C. 2981.01(B)(6), (10), (11), (12) (defining "instrumentality," "offense," "proceeds," and "property"). R.C. 2981.13 was enacted by Sub. H.B. 241, 126th Gen. A. (eff. July 1, 2007). Sub. H.B. 241 created a new R.C. Chapter 2981, repealed numerous statutory provisions, and altered many aspects of civil and criminal forfeiture law in Ohio. *See State v. Cruise*, 185 Ohio App. 3d 230, 2009-Ohio-6795, 923 N.E.2d 702, at ¶6; Ohio Legislative Service Comm'n, Final Analysis, Sub. H.B. 241, at p. 1-4 (as passed by the General Assembly).

R.C. 2981.13(A) provides that, unless otherwise specified, property ordered forfeited shall be disposed of, used, or sold pursuant to R.C. 2981.12. R.C. 2981.13(B) lists the order in which forfeiture moneys are to be distributed. *See Cruise*, 2009-Ohio-6975, at ¶9 ("the particularized distribution scheme set forth in [R.C. 2981.13(B)] serves as part of a greater legislative scheme to tightly control, direct, and monitor the distribution of forfeiture proceeds"). Forfeiture moneys must be used first to pay the costs associated with the forfeiture itself. R.C. 2981.13(B)(1). The second priority is to pay any court-ordered restitution. R.C. 2981.13(B)(2). The third priority is to pay security interests preserved by R.C. Chapter 2981. R.C. 2981.13(B)(3). If any moneys remain after the payment of these first three categories of claims, the moneys are divided and distributed,

depending on various factors, among alcohol and drug addiction treatment programs and various law enforcement trust funds. *See* R.C. 2981.13(B)(4)(a)-(c).

R.C. 2981.13(C)(1) governs the creation of law enforcement trust funds and provides, in relevant part:

> A law enforcement trust fund shall be established by the *prosecutor of each county who intends to receive* any remaining amounts pursuant to this section [*i.e.*, moneys distributed pursuant to R.C. 2981.13(B)(4)], by the sheriff of each county, by the legislative authority of each municipal corporation, by the board of township trustees of each township that has a township police department, township or joint police district police force, or office of the constable, and by the board of park commissioners of each park district created pursuant to [R.C. 511.18 or 1545.01] that has a park district police force or law enforcement department. (Emphasis added.)

Moneys in a law enforcement trust fund cannot be expended unless the appropriate officer or governing entity has adopted a written internal control policy that addresses the use of moneys in the fund and the expenditure is in accordance with that policy. R.C. 2981.13(C)(2)(a).[1] Further, moneys in a law enforcement trust fund can be used only for the following purposes:

> (i) To pay the costs of protracted or complex investigations or prosecutions;
>
> (ii) To provide reasonable technical training or expertise;
>
> (iii) To provide matching funds to obtain federal grants to aid law enforcement, in the support of DARE programs or other programs designed to educate adults or children with respect to the dangers associated with the use of drugs of abuse;
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> (iv) To pay the costs of emergency action taken under [R.C. 3745.13] relative to the operation of an illegal methamphetamine laboratory if the forfeited property or money involved was that of a person responsible for the operation of the laboratory;
>
> (v) For other law enforcement purposes that the superintendent of the state highway patrol, department of public safety, prosecutor, county sheriff, legislative authority, department of taxation, board of township trustees, or board of park commissioners determines to be appropriate.

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[1] Your opinion request indicates, and for purposes of this opinion I will assume, that your office has adopted a written internal control policy for the use of its law enforcement trust fund.

Id. Finally, R.C. 2981.13(C)(2)(c) provides that a law enforcement trust fund shall not be used to meet any operating costs of a prosecutor's office that are unrelated to law enforcement.[2]

I turn now to your question of whether a county prosecuting attorney may use moneys in her law enforcement trust fund to pay the salary and fringe benefits of an assistant prosecuting attorney who prosecutes only drug offenses. Based on conversations between members of our respective staffs, I understand that the assistant prosecuting attorney will handle routine drug prosecutions under R.C. Chapter 2925, rather than protracted or complex prosecutions to which R.C. 2981.13(C)(2)(a)(i) applies. In addition, because hiring an assistant prosecuting attorney to prosecute drug crimes does not relate to technical training or expertise, federal grants, drug abuse awareness programs, or emergency actions involving illegal methamphetamine laboratories, R.C. 2981.13(C)(2)(a)(ii)-(iv) do not authorize the expenditure. This leaves only R.C. 2981.13(C)(2)(a)(v), which provides that moneys in a law enforcement trust fund may be expended for "other law enforcement purposes" that a county prosecuting attorney "determines to be appropriate."

While Sub. H.B. 241 significantly altered many aspects of Ohio forfeiture law, the provisions of R.C. 2981.13(C)(2)(a)(i)-(v) are almost identical to those of former R.C. 2933.43(D)(1)(c)(ii) regarding law enforcement trust funds.[3] Thus, prior opinions interpreting R.C. 2933.43(D)(1)(c)(ii) are instructive in this matter. In 1998 Op. Att'y Gen. No. 98-023, the Attorney General examined the "other law enforcement purposes" language in former 2933.43(D)(1)(c)(ii) (that now appears in R.C.

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[2] R.C. 2981.13(C)(2)(b) provides additional restrictions for the State Board of Pharmacy law enforcement fund, and R.C. 2981.13(C)(2)(d) provides additional restrictions for the Peace Officer Training Commission fund. Neither of these provisions is applicable here.

[3] Prior to its repeal, R.C. 2933.43(D)(1)(c)(ii) provided that moneys from a law enforcement trust fund could be used:

> only to pay the costs of protracted or complex investigations or prosecutions, to provide reasonable technical training or expertise, to provide matching funds to obtain federal grants to aid law enforcement, in the support of DARE programs or other programs designed to educate adults or children with respect to the dangers associated with the use of drugs of abuse, to pay the costs of emergency action taken under [R.C. 3745.13] relative to the operation of an illegal methamphetamine laboratory if the forfeited property or money involved was that of a person responsible for the operation of the laboratory, or for *other law enforcement purposes* that the superintendent of the state highway patrol, department of public safety, department of taxation, prosecuting attorney, county sheriff, legislative authority, board of township trustees, or board of park commissioners determines to be appropriate. (Emphasis added.)

2005-2006 Ohio Laws, Parts III, IV, 5982, 6243-6244 (Am. Sub. H.B. 530, eff. Mar. 30, 2006, with certain sections effective on other dates).

2981.13(C)(2)(a)(v)). The issue before the Attorney General was whether moneys deposited in a township's law enforcement trust fund pursuant to former R.C. 2923.35(D)(2)(c) and former R.C. 2933.43(D)(1)(c)(ii) could be used by township law enforcement officers to purchase controlled substances during undercover criminal investigations.

Analyzing the "other law enforcement purposes" language, the Attorney General made two points. First, this language is broad and grants the relevant officer or governing entity "the discretion to determine whether a proposed expenditure is for an appropriate law enforcement purpose." 1998 Op. Att'y Gen. No. 98-023, at 2-125. Second, the Attorney General lacks the authority to exercise discretion bestowed upon another government official. *Id.* Accordingly, the Attorney General concluded, at paragraph 2 of the syllabus:

> Moneys deposited in a township's law enforcement trust fund established pursuant to R.C. 2933.43(D)(1)(c)(ii) may be used by township law enforcement officers to purchase controlled substances during undercover criminal investigations if the board of township trustees determines that such use is an appropriate law enforcement purpose. Any expenditure of moneys in a township law enforcement trust fund by a township law enforcement agency, however, must be made in accordance with the agency's written internal control policy that addresses the agency's use of such moneys. (1989 Op. Att'y Gen. No. 89-078, syllabus, paragraph one, modified by statutory amendment).[4]

See also 2000 Op. Att'y Gen. No. 2000-039, at 2-238 ("moneys in a county sheriff's or township's law enforcement trust fund are to be used by the sheriff or township law enforcement agency,

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[4] Your opinion request specifically references 1989 Op. Att'y Gen. No. 89-078. 1998 Op. Att'y Gen. No. 98-023, at 2-125, approvingly cites and relies upon the reasoning in 1989 Op. Att'y Gen. No. 89-078. When 1989 Op. Att'y Gen. No. 89-078 was issued, former R.C. 2933.43(D) provided that moneys from a law enforcement trust could be expended "for *such* other law enforcement purposes that the [county] commissioners or legislative authority determines to be appropriate." 1989 Op. Att'y Gen. No. 89-078, at 2-362 (emphasis added). Relying on the word, "such," the Attorney General concluded that expenditures from a law enforcement trust fund were limited to "law enforcement purposes similar to those provided in R.C. 2933.43(D)"—such as protracted or complex prosecutions or technical training. *Id.* (syllabus, paragraph 1). As 1998 Op. Att'y Gen. No. 98-023 notes, the relevant statutory language was amended by Am. H.B. 107, 121st Gen. A. (1995) (eff. June 30, 1995), and as amended, former R.C. 2933.43(D)(1)(c)(ii) "no longer requires that the law enforcement purpose be similar to one of the law enforcement purposes enumerated in [former] R.C. 2933.43(D)." 1998 Op. Att'y Gen. No. 98-023, at 2-125. Thus, the notation in 1998 Op. Att'y Gen. No. 98-023 (syllabus, paragraph 2) that 1989 Op. Att'y Gen. No. 89-078 (syllabus, paragraph 1) was modified by statutory amendment is a recognition that the officer or governing entity in control of a law enforcement trust fund now has much more discretion than when 1989 Op. Att'y Gen. No. 89-078 was issued.

respectively, for those law enforcement purposes expressly provided for in R.C. 2933.43(D), or for other law enforcement purposes *that the sheriff or board of township trustees determines* to be appropriate" (emphasis added)).

1998 Op. Att'y Gen. No. 98-023 and 2000 Op. Att'y Gen. No. 2000-039 are persuasive authority. First, the language of R.C. 2981.13(C)(2)(a)(v) is identical to that of former R.C. 2933.43(D)(1)(c)(ii), and the General Assembly did not amend the language of R.C. 2933.43(D)(1)(c)(ii) in the years following the issuance of 1998 Op. Att'y Gen. No. 98-023. Further, 1998 Op. Att'y Gen. No. 98-023 and 2000 Op. Att'y Gen. No. 2000-039 are part of, and consistent with, a decades-long approach utilized by the Attorney General when analyzing proposed expenditures from special-purpose funds.

The Revised Code establishes many funds or categories of moneys that, like the law enforcement trust fund in R.C. 2981.13, are meant to benefit a particular office or governmental entity and are to be used for a particular purpose. *See, e.g.*, R.C. 307.514 (county law library resources fund); R.C. 325.071 (county sheriff's furtherance of justice fund); R.C. 325.12 (county prosecuting attorney's furtherance of justice fund); R.C. 341.25(B) (county jail commissary fund); R.C. 2925.03(F) (mandatory drug fines). On numerous occasions, the Attorney General has been asked whether moneys from these various funds may be used for a specific expenditure. In response, the Attorney General has consistently advised: (1) the determination of whether an expenditure satisfies a particular statutory purpose lies in the discretion of the officer or governmental entity having the power to make the expenditure, and (2) that discretion must be exercised in a reasonable manner. *See* 2011 Op. Att'y Gen. No. 2011-036 (syllabus, paragraph 2) ("[a] county law library resources board may contract with a vendor and pay for the cost of uploading to a third-party website public land records filed with the county recorder if the county law library resources board determines, in the reasonable exercise of its discretion, that the expenditure furthers the statutory purposes and responsibilities of the county law library resources board"); 2000 Op. Att'y Gen. No. 2000-031 (syllabus) ("[p]ursuant to R.C. 341.25(B), a county sheriff may spend profits from the county jail commissary fund to purchase hand-held radios to be used by corrections officers when supervising inmates outside the jail facility only if the sheriff reasonably determines that such radios are supplies and equipment for the benefit of persons incarcerated in the jail, or are used to provide life skills training and education or treatment services for the benefit of persons incarcerated in the jail"); 1989 Op. Att'y Gen. No. 89-090 (syllabus, paragraph 1) (modified in part, and on other grounds, by 1990 Op. Att'y Gen. No. 90-022) ("[a] county prosecutor may expend mandatory drug fines, distributed pursuant to R.C. 2925.03(J) [now R.C. 2925.03(F)], for those expenses determined by him to be consistent with the activities of his office that pertain to drug offenses. This determination must be reasonable and within the limitations set by statute"); 1988 Op. Att'y Gen. No. 88-100 (syllabus) ("[u]nder R.C. 325.071, a county sheriff may expend funds for expenses, including meals for staff and retirement mementos, which are incurred by him in the performance of his official duties and which he determines are in the furtherance of justice. This determination must not be manifestly arbitrary or unreasonable"); 1969 Op. Att'y Gen. No. 69-159 (syllabus) ("[t]he General Assembly intended the Prosecuting Attorney to determine, in his discretion, the expenditures to be made from the fund established pursuant to [R.C. 325.12], and that his discretion is limited only by the purposes for which such fund may be expended, as set forth in such section"); 1967 Op. Att'y Gen. No. 67-120 (syllabus)

("[f]unds provided to a county sheriff under authority of [R.C. 325.071] may be used for any purpose, including purchasing of equipment, which is in furtherance of his responsibility to preserve justice").

The statutory powers of a county prosecuting attorney include inquiring into the commission of crimes within the county, prosecuting on behalf of the state all complaints, suits, and controversies in which the state is a party, causing execution to be issued for fines or costs, and urging the collection of monies due the state or county. R.C. 309.08(A); *see also* 1999 Op. Att'y Gen. No. 99-027, at 2-178. The various drug offenses identified in R.C. Chapter 2925 are one category of criminal cases that are prosecuted by a prosecuting attorney.

Further, "an assistant prosecuting attorney does not act for or stand in the place of the prosecuting attorney in a particular matter unless so authorized and directed by the prosecuting attorney." 1999 Op. Att'y Gen. No. 99-027, at 2-175. This means that

> [a]n assistant prosecuting attorney is not, by virtue of his appointment to that position, conferred all of the powers, duties, and responsibilities of the prosecuting attorney. Nor is he empowered to act for or in the place of the prosecuting attorney in all matters. Rather, an assistant prosecuting attorney may perform only those duties or functions that the prosecuting attorney assigns to him.

Id.; *accord* 2001 Op. Att'y Gen. No. 2001-040, at 2-241 to 2-242; 2001 Op. Att'y Gen. No. 2001-027, at 2-154. Consistent with these principles, prior Attorney General opinions have concluded that assistant prosecuting attorneys are not subject to the same conflicts of interest as prosecuting attorneys because the responsibilities of an assistant prosecuting attorney may be limited to certain categories of cases or matters. *See* 2001 Op. Att'y Gen. No. 2001-040, at 2-243 to 2-244 (assistant prosecuting attorney simultaneously serving as a board of health member was not subject to an impermissible conflict of interest because the assistant's duties were limited to prosecuting criminal cases in the court of common pleas); 2001 Op. Att'y Gen. No. 2001-027, at 2-155 to 2-156 (assistant prosecuting attorney simultaneously serving as a township trustee was not subject to an impermissible conflict of interest because the assistant's duties were limited to handling criminal cases pending before the appellate courts).

The same principle applies here. A county prosecuting attorney may employ an assistant prosecuting attorney whose responsibilities consist solely of prosecuting drug offenses under R.C. 2925. I cannot exercise discretion on your behalf or formally opine whether paying the salary and fringe benefits of such an assistant prosecuting attorney is an appropriate law enforcement purpose under R.C. 2981.13(C)(2)(a)(v). *See* 1998 Op. Att'y Gen. No. 98-023, at 2-125; 1989 Op. Att'y Gen. No. 89-90, at 2-429; 1988 Op. Att'y Gen. No. 88-100, at 2-495; 1969 Op. Att'y Gen. No. 69-159, at 2-337. The term, "law enforcement purpose," however, is a broad one, and the expenditures that might satisfy this statutory standard are too numerous to catalogue. *See* 1988 Op. Att'y Gen. No. 88-100, at 2-495 ("the county sheriff has much discretion regarding the use of these [furtherance of justice] funds and may use them for a variety of expenses"); 1969 Op. Att'y Gen. No. 69-159, at 2-337 (ruling on the legality of a specific expenditure from a furtherance of justice fund "can only result in the placing of artificial restrictions upon the use of the fund which were not intended by the General

Assembly"). The only restriction is that a prosecuting attorney's determination of what constitutes an appropriate law enforcement purpose may not be arbitrary or unreasonable. *See* 2000 Op. Att'y Gen. No. 2000-031 (syllabus); 1989 Op. Att'y Gen. No. 89-090 (syllabus, paragraph 1); 1988 Op. Att'y Gen. No. 88-100 (syllabus).

In conclusion, it is my opinion, and you are hereby advised, that a county prosecuting attorney may use moneys in her law enforcement trust fund created pursuant to R.C. 2981.13 to employ and pay the salary and fringe benefits of an assistant prosecuting attorney whose responsibilities consist solely of prosecuting drug offenses under R.C. Chapter 2925, provided the prosecuting attorney determines, in the reasonable exercise of her discretion, that such use is an appropriate law enforcement purpose. An expenditure of law enforcement trust fund moneys for that purpose must be made in accordance with the written internal control policy that addresses the use of those moneys. (1998 Op. Att'y Gen. No. 98-023 (syllabus, paragraph 2), approved and followed.)

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General