March 18, 1994

OPINION NO. 94-005

Arnold R. Tompkins, Director
Department of Human Services
30 East Broad Street
Columbus, Ohio 43266-0423

Dear Director Tompkins:

You have requested an opinion concerning legal representation provided to a county department of human services ("CDHS") in an action in small claims court for the recovery of a public assistance benefit overpayment. By way of background, you state that 1987 Op. Att'y Gen. No. 87-090 determined that insofar as a county prosecuting attorney is the statutory counsel for the CDHS, *see* R.C. 309.09(A), the county prosecuting attorney is required to prosecute an action to recover welfare overpayments in the small claims division of a municipal or county court on behalf of a CDHS. Following the issuance of Op. No. 87-090, the Department of Human Services promulgated 15 Ohio Admin. Code 5101:1-25-35 and 5101:1-27-03. Under these rules, a CDHS is prohibited from attempting collection of a public assistance benefit overpayment in small claims court without legal representation by the county prosecuting attorney. Subsequent to the promulgation of those two rules, the General Assembly enacted R.C. 1925.18, *see* 1989-1990 Ohio Laws, Part I, 523 (Sub. S.B. 89, eff. June 13, 1990), which authorizes a county prosecuting attorney to designate an employee of a CDHS to appear in the small claims division of a municipal court on behalf of the CDHS.[1] In light of R.C. 1925.18, you ask whether the Department of Human Services

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[1] Article IV, §2(B)(1)(g) of the Ohio Constitution vests the Ohio Supreme Court with jurisdiction over admission to the practice of law, attorney discipline, and "all other matters relating to the practice of law." *See also* Ohio Const. art. IV, §5; R.C. 4705.01. Because the Ohio Constitution vests the power to regulate the practice of law in Ohio solely with the Ohio Supreme Court, it might be argued that R.C. 1925.18 infringes upon that authority because it permits a county prosecuting attorney to designate as his representative an employee of the CDHS who is not an attorney admitted to the practice of law. *See* R.C. 1925.18(A)(2)(a). The Ohio Supreme Court has stated, however, that the power to declare a law unconstitutional rests exclusively with the courts. S*ee Maloney v. Rhodes*, 45 Ohio St. 2d 319, 324, 345 N.E.2d 407, 411 (1976) ("[a]n attack upon the constitutional validity of a law must be made in a proper court. The judicial power to declare a law unconstitutional is exclusively within the judicial branch of government"); *State ex rel. Davis v. Hildebrant*, 94 Ohio St. 154, 169, 114 N.E. 55, 59 (1916) ("[t]he power of determining whether a law or constitutional provision is valid or otherwise is lodged solely in the judicial department"), *aff'd*, 241 U.S. 565 (1916); *see also* 1986 Op. Att'y Gen. No. 86-010 at 2-45; 1976 Op. Att'y Gen.

is required to amend rules 5101:1-25-35 and 5101:1-27-03 to make them comport with the provisions of R.C. 1925.18.

An Administrative Rule May Not Conflict with a State Statute

An administrative agency may, when so authorized, promulgate rules that facilitate the operation of what has been enacted by the General Assembly. *See State ex rel. Foster v. Evatt*, 144 Ohio St. 65, 102, 56 N.E.2d 265, 281 (1944), *cert. denied*, 324 U.S. 878 (1944); *Ransom & Randolph Co. v. Evatt*, 142 Ohio St. 398, 407-08, 52 N.E.2d 738, 742-43 (1944). An administrative agency, however, may not promulgate a rule that is arbitrary, unreasonable, or that conflicts with a related statute enacted by the General Assembly. *Youngstown Sheet & Tube Co. v. Lindley*, 38 Ohio St. 3d 232, 234, 527 N.E.2d 828, 830 (1988); *Kroger Grocery & Baking Co. v. Glander*, 149 Ohio St. 120, 125, 77 N.E.2d 921, 924 (1948); *Carroll v. Department of Admin. Serv.*, 10 Ohio App. 3d 108, 460 N.E.2d 704 (Franklin County 1983); 1982 Op. Att'y Gen. No. 82-044. An administrative rule that conflicts with a statute must yield to the statute's provisions. *Williams v. Morris*, 62 Ohio St. 3d 463, 468, 584 N.E.2d 671, 675 (1992); *North Sanitary Landfill, Inc. v. Nichols*, 14 Ohio App. 3d 331, 337, 471 N.E.2d 492, 500 (Montgomery County 1984). Accordingly, rules 5101:1-25-35 and 5101:1-27-03 do not have the force and effect of law, and, as a practical matter, should be amended by the Department of Human Services, if it is determined that those rules conflict in some essential way with the provisions of R.C. 1925.18.

Rules 5101:1-25-35 and 5101:1-27-03 Do Not Conflict with R.C. 1925.18

A review of the provisions of R.C. 1925.18, rule 5101:1-25-35, and rule 5101:1-27-03 discloses that rules 5101:1-25-35 and 5101:1-27-03 do not conflict with R.C. 1925.18. Division (B) of rule 5101:1-25-35 provides as follows:

> The CDHS does not have the authority to collect public assistance benefit overpayments through judicial proceedings unless the CDHS is *represented* by the county prosecuting attorney. Therefore, the CDHS is prohibited from attempting collection of an overpayment in small claims court, except in situations where the CDHS is *represented* by the county prosecutor. (Emphasis added.)

Similarly, rule 5101:1-27-03 states, in pertinent part, that a "CDHS is prohibited from attempting collection of public assistance benefit overpayments in small claims court without the *representation* of the county prosecutor." (Emphasis added.) Therefore, pursuant to rules 5101:1-25-35(B) and 5101:1-27-03, a CDHS must be represented by the county prosecuting attorney in an action in small claims court to collect a public assistance benefit overpayment.

R.C. 1925.18 authorizes the county prosecuting attorney to designate an employee of the

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No. 76-021 at 2-66. For the purpose of this opinion, therefore, it will be assumed that R.C. 1925.18 is constitutional.

CDHS to act as his representative in a small claims court action to collect a public assistance benefit overpayment:

> (A)(1) Subject to division (A)(2) of this section,[2] a prosecuting attorney of a county may designate any employee of a county department of human services *to act as his representative* in the commencement and prosecution or defense of any action in the small claims division of a municipal or county court on behalf of the department.
> ....
> (B) Division (A) of this section does not preclude the appearance of the prosecuting attorney on behalf of a county department of human services as provided in section 309.09 of the Revised Code.[3] (Footnotes and emphasis added.)

Webster's Third New International Dictionary 1926 (3rd ed. 1971) defines "representative" as "standing for or in the place of another **:** acting for another or others **:** constituting the agent for another [especially] through delegated authority." *Accord Black's Law Dictionary* 1302 (6th ed. 1990). An employee of a CDHS who is designated by the county prosecuting attorney to act as the county prosecuting attorney's representative in a small claims court action to collect a public assistance benefit overpayment thus acts for and in the place of the prosecuting attorney in such action. *See generally* R.C. 1.42 (words not defined by statute are accorded their plain or common meaning).

No language in R.C. 1925.18 indicates that the CDHS employee who is designated as the representative of the county prosecuting attorney acts independently of the county prosecuting attorney in attempting collection of public assistance benefit overpayments. Accordingly, a CDHS is represented by the county prosecuting attorney in an action in small claims court to collect a public assistance benefit overpayment when the county prosecuting attorney designates an employee of the CDHS to act as his representative in such action.

Because R.C. 1925.18 does not authorize the CDHS to attempt collection of public

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[2] R.C. 1925.18(A)(2) provides as follows:

> (a) If the prosecuting attorney designates as his representative an employee of the department who is not an attorney, the employee may file and present the claim or defense of the department in the action if the employee does not, in the absence of the representation of the department by an attorney, engage in cross-examination, argument, or other acts of advocacy.
> (b) If the prosecuting attorney designates as his representative an employee of the department who is an attorney, the employee may file and prosecute or defend fully the claim or defense of the department in the action.

[3] Pursuant to R.C. 309.09(A), the county prosecuting attorney is required to represent the CDHS in all suits and actions which such department directs or to which it is a party.

assistance benefit overpayments without legal representation by the county prosecuting attorney, rules 5101:1-25-35(B) and 5101:1-27-03, which prohibit a county department of human services from attempting collection of public assistance benefit overpayments in the small claims division of a municipal or county court without the representation of the county prosecuting attorney, do not conflict with R.C. 1925.18. Therefore, the Department of Human Services is not required to amend rules 5101:1-25-35(B) and 5101:1-27-03.

Conclusions

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1.R.C. 1925.18 authorizes a county prosecuting attorney to designate an employee of a county department of human services to act as the prosecuting attorney's representative in the commencement and prosecution or defense of any action in the small claims division of a municipal or county court on behalf of the county department of human services.

2.15 Ohio Admin. Code 5101:1-25-35(B) and 5101:1-27-03, which prohibit a county department of human services from attempting collection of public assistance benefit overpayments in the small claims division of a municipal or county court without the representation of the county prosecuting attorney, do not conflict with R.C. 1925.18.

Respectfully,

LEE FISHER
Attorney General

March 18, 1994

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30 East Broad Street
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SYLLABUS: 94-005

1.R.C. 1925.18 authorizes a county prosecuting attorney to designate an employee of a county department of human services to act as the prosecuting attorney's representative in the commencement and prosecution or defense of any action in the small claims division of a municipal or county court on behalf of the county department of human services.

2.15 Ohio Admin. Code 5101:1-25-35(B) and 5101:1-27-03, which prohibit a county department of human services from attempting collection of public assistance benefit overpayments in the small claims division of a municipal or county court without the representation of the county prosecuting attorney, do not conflict with R.C. 1925.18.