May 9, 2003

Kenneth W. Ritchey, Director
Ohio Department of Mental Retardation
and Developmental Disabilities
1810 Sullivant Avenue
Columbus, Ohio 43223-1239

SYLLABUS: 2003-013

1. The superintendent of a county board of mental retardation and developmental disabilities (county MR/DD board), rather than the county MR/DD board, is the "appointing authority," as defined in R.C. 124.01(D), of a management employee holding a contract of employment for a term greater than one year.

2. Pursuant to R.C. 124.388, the superintendent of a county MR/DD board, as the appointing authority, may place on paid administrative leave a management employee, regardless of the term of the employee's contract of employment and without the approval of the county MR/DD board. R.C. 124.388 authorizes the use of administrative leave only in circumstances where the health and safety of an employee or of any person or property entrusted to the employee's care could be adversely affected, and further provides that the length of such leave shall not exceed the length of the situation for which the leave was granted.

3. R.C. 5126.23(C) authorizes the superintendent of a county MR/DD board or his designee to conduct a predisciplinary conference for the removal, suspension, or demotion of a management employee for the reasons set forth in R.C. 5126.23, regardless of the term of the employee's contract of employment, and, without the approval of the board, to make a decision regarding the proposed removal, suspension, or demotion. In the event that the employee does not request a hearing before the county MR/DD board or a referee in accordance with R.C. 5126.23(D), the superintendent's decision is final.

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OPINION NO. 2003-013

Kenneth W. Ritchey, Director
Ohio Department of Mental Retardation
and Developmental Disabilities
1810 Sullivant Avenue
Columbus, Ohio 43223-1239

Dear Director Ritchey:

You have requested an opinion concerning county boards of mental retardation and developmental disabilities. After speaking with a member of your staff, we have restated your questions as follows:

1. Does R.C. 124.388 authorize the superintendent of a county board of mental retardation and developmental disabilities or the board itself to place a management employee holding a contract of employment of more than one year on paid administrative leave?

2. Does R.C. 5126.23 authorize the superintendent of a county MR/DD board to conduct a predisciplinary conference for the removal, suspension, or demotion of a management employee and to make a decision, without the approval of the board, regarding the proposed removal, suspension, or demotion?

We begin by noting that a county board of mental retardation and developmental disabilities (county MR/DD board) and its superintendent are creatures of statute with those powers and duties vested in them by statute. *See Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). Thus, whether a county MR/DD board or its superintendent is authorized to proceed with the personnel actions you describe depends upon whether the General Assembly has conferred such powers upon either by statute.

Your first question asks whether R.C. 124.388 authorizes the superintendent of a county board of mental retardation and developmental disabilities or the board itself to place on paid

administrative leave a management employee[1] holding a contract of employment of more than one year.[2]

Pursuant to R.C. 124.388:

> An *appointing authority may*, in its discretion, place an employee on administrative leave with pay. Such leave is to be used only in circumstances where the health or safety of an employee or of any person or property entrusted to the employee's care could be adversely affected. Compensation for administrative leave shall be equal to the employee's base rate of pay. The length

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[1] As used in R.C. 5126.21-.29, the term "management employee" means a "person employed by a board in a position having supervisory or managerial responsibilities and duties, and includes employees in the positions listed in [R.C. 5126.22(A) (including, among others, assistant superintendent, director of business, director of personnel)]." R.C. 5126.20(C). *See generally* R.C. 5126.20(F) (defining "supervisory responsibilities and duties" for purposes of R.C. 5126.21-.29 as including "the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees of the board; to responsibly direct them; to adjust their grievances; or to effectively recommend such action, if the exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment"); R.C. 5126.20(G) (defining "managerial responsibilities and duties," as used in R.C. 5126.21-.29, as including "formulating policy on behalf of the board, responsibly directing the implementation of policy, assisting in the preparation for the conduct of collective negotiations, administering collectively negotiated agreements, or having a major role in personnel administration").

[2] You have not stated that the employees about whom you ask are covered by a collective bargaining agreement entered into under R.C. Chapter 4117. *See, e.g.*, *Lake County Bd. of Mental Retardation & Developmental Disabilities v. Professional Ass'n for the Teaching of the Mentally Retarded*, 71 Ohio St. 3d 15, 641 N.E.2d 180 (1994) (finding a county board of mental retardation and developmental disabilities to be a public employer subject to the collective bargaining provisions of R.C. Chapter 4117). *See generally City of Cincinnati v. Ohio Council 8, AFSCME*, 61 Ohio St. 3d 658, 576 N.E.2d 745 (1991) (syllabus, paragraph one) (stating, in part, "[t]he provisions of a collective bargaining agreement entered into pursuant to R.C. Chapter 4117 prevail over conflicting laws, including municipal home-rule charters enacted pursuant to Section 7, Article XVIII of the Ohio Constitution, except for those laws specifically exempted by R.C. 4117.10(A)"). We express no opinion on whether management employees of a county MR/DD board are "public employees" entitled to engage in collective bargaining under R.C. Chapter 4117, but will assume for purposes of discussion that there is no collective bargaining agreement governing the terms and conditions of employment of the management employees you describe. *See generally* R.C. 4117.01(C)(7) and (10) (excluding management level employees and supervisors from the definition of "public employee" for purposes of R.C. Chapter 4117).

> of such leave is solely at the discretion of the appointing authority, except that the length of the leave shall not exceed the length of the situation for which the leave was granted. An appointing authority may also grant administrative leave of two days or less for employees who are moved in accordance with [R.C. 124.33]. (Emphasis added.)

Thus, R.C. 124.388 authorizes the "appointing authority" of an "employee"[3] to place that employee on administrative leave with pay. The statute further provides that such leave "is to be used only in circumstances where the health or safety of an employee or of any person or property entrusted to the employee's care could be adversely affected," and "the length of such leave shall not exceed the length of the situation for which the leave was granted."

The term "appointing authority," as used in R.C. Chapter 124, means "the officer, commission, board, or body having the power of *appointment* to, *or removal* from, positions in any office, department, commission, board, or institution." R.C. 124.01(D) (emphasis added).[4] Let us, therefore, examine the relative authority of a county MR/DD board and its superintendent with respect to the appointment and removal of a management employee holding a contract of employment for a term of more than one year.

R.C. 5126.05(A)(7) imposes upon a county MR/DD board, within certain limitations, various employment-related duties, including the duty to "*[a]uthorize* all positions of employment, establish compensation, ... *approve* contracts of employment for management employees that are for a term of more than one year, *employ* legal counsel under [R.C. 309.10], and contract for employee benefits," (emphasis added). In addition, R.C. 5126.023(A) requires each county MR/DD board to "either *employ* a superintendent or obtain the services of the superintendent of another county board of mental retardation and developmental disabilities" (emphasis added). Beyond its authority under R.C. 5126.05(A)(7) to employ legal counsel in accordance with R.C. 309.10 and its authority under R.C. 5126.023(A) to employ a superintendent, a board has no other authority to employ personnel for a county MR/DD board.

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[3] As used in R.C. Chapter 124, the word "employee" means "any person holding a *position* subject to appointment, removal, promotion, or reduction by an appointing officer." R.C. 124.01(F) (emphasis added). *See generally* 2 Ohio Admin. Code 123:1-47-01(A)(62) ("[p]osition" means "the group of job duties intended to be performed by an individual employee as assigned by the appointing authority"). Employees of a county MR/DD board are "employees" for purposes of R.C. Chapter 124. *See, e.g.*, R.C. 124.11(A)(19) (including management employees of a county MR/DD board within the unclassified civil service).

[4] R.C. 124.06 prohibits the appointment of anyone to a position in the civil service in any manner other than those prescribed by R.C. Chapter 124 and the rules of the Director of Administrative Services or the appropriate local civil service commission. Pursuant to R.C. 124.09(A), the Director of Administrative Services has adopted rules for employment in the civil service. *See* 2 Ohio Admin. Code Chapter 123:1 (division of human resources).

Rather, pursuant to R.C. 5126.024:

> The *superintendent* of the county board of mental retardation and developmental disabilities *shall*:
>
> ...
>
> (C) *Employ* persons for *all* positions authorized by the board, *approve contracts* of employment for management employees that are for a term of one year or less, and approve personnel actions that involve employees in the classified civil service as may be necessary for the work of the board.... (Emphasis added.)

R.C. 5126.024(C) thus imposes upon the superintendent of a county MR/DD board the duty to employ persons for any of those positions authorized by the county MR/DD board under R.C. 5126.05(A)(7). The superintendent's authority to employ is limited, however, by the county MR/DD board's authority under R.C. 5126.05(A)(7) to "*approve* contracts of employment for management employees that are for a term of more than one year" (emphasis added). *See* R.C. 5126.21(A)(1) (contracts of employment for management employees).[5] *Cf.* R.C. 5126.024(C) (in part, requiring the *superintendent's* approval of any management employee contract for a term of one year or less).

It has been suggested that the board's power under R.C. 5126.21(A)(1) to "approve" management employee contracts that are for a term of more than one year renders the board, rather than the superintendent, the "appointing authority" of such employees. For the reasons that follow, however, we do not concur with this proposition.

Pursuant to R.C. 5126.024(C), it is the superintendent of a county MR/DD board to whom the authority to employ persons has been granted. A county MR/DD board's approval under R.C. 5126.21(A)(1) of management employee contracts that are for a term of more than one year does not constitute part of the appointment or employment of such an employee. Rather, as explained by the court in *State ex rel. Oaks v. Miami County Bd. of Mental*

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[5] R.C. 5126.21(A)(1) states:

> Each *management employee* of a county board of mental retardation and developmental disabilities *shall hold a limited contract for a period of not less than one year and not more than five years*, except that a management employee hired after the beginning of a program year may be employed under a limited contract expiring at the end of the program year. The *board shall approve all contracts of employment for management employees that are for a term of more than one year*. A management employee shall receive notice of the superintendent's intention not to rehire the employee at least ninety days prior to the expiration of the contract. If the superintendent fails to notify a management employee, the employee shall be reemployed under a limited contract of one year at the same salary plus any authorized salary increases. (Emphasis added.)

Retardation, No. 2001 CA 4, 2001 Ohio App. LEXIS 4363 (Ct. App. Miami County Sept. 28, 2001), R.C. 5126.21(A)(1) simply confers upon all management employees a one-year contract, unless the county MR/DD board approves a contract for a term greater than one year. Thus, the county MR/DD board's approval of a management employee's contract of employment under R.C. 5126.21(A)(1) is limited to granting a management employee who is employed by the superintendent under R.C. 5126.024(C) a contract of employment that extends beyond one year.[6]

In answer to your first question, we find that, the superintendent of a county MR/DD board, rather than the county MR/DD board, is the "appointing authority," as defined in R.C. 124.01(D), of a management employee holding a contract of employment for a term greater than one year. Thus, R.C. 124.388 authorizes the superintendent of a county MR/DD board, as the appointing authority, to place on paid administrative leave, assuming the conditions for such leave are met, a management employee, whether or not the term of the employee's contract is more than one year, and without the approval of the county MR/DD board.

Your second question asks whether R.C. 5126.23 authorizes the superintendent of a county board of mental retardation and developmental disabilities to conduct a predisciplinary conference for the removal, suspension, or demotion of a management employee and to make a decision thereon without the approval of the board. In order to answer this question, it may be

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[6] Board approval of an employment contract under R.C. 5126.21(A)(1) must be distinguished from the more frequently encountered situation in which the power to appoint itself is subject to another's approval, *e.g.*, R.C. 329.02. As explained by the court in *State ex rel. Belknap v. Lavelle*, 18 Ohio St. 3d 180, 181 n.1, 480 N.E.2d 758 (1985):

> "'Appointing authority' means the officer, commission, board, or body having the power of appointment to, or removal from, positions in any office, department, commission, board, or institution." R.C. 124.01(D). R.C. 329.02 provides that the county welfare director "*with the approval of the board of county commissioners***,** shall appoint all necessary assistants, superintendents of institutions under the jurisdiction of the department, and all other employees of the department * * *." (Emphasis added.) It is clear from this provision that the county welfare director cannot hire anyone without the county commissioners' approval. The assent of the commissioners is essential for employment in the welfare department. The statute therefore operates to place the county commissioners within the definition of an "appointing authority."

That the General Assembly intended the power to "employ" board employees to be different from the power to "approve" a contract of employment for such employees is further exhibited in R.C. 5126.024(C), which uses both words in describing the various powers of the superintendent. *See generally East Ohio Gas Co. v. P.U.C.O.*, 39 Ohio St. 3d 295, 299, 530 N.E.2d 875 (1988) (it is a basic rule of statutory construction "that words in statutes should not be construed to be redundant, nor should any words be ignored").

helpful briefly to examine the civil service scheme prescribed by R.C. Chapter 124, which applies to, among others, management employees of a county MR/DD board.

County MR/DD board employees, as county employees, are included within the civil service scheme established by R.C. Chapter 124. *See* note three, *supra*. As a general rule, "[a]n unclassified employee is appointed at the discretion of the appointing authority and serves at the pleasure of such authority." *State ex rel. Hunter v. Summit County Human Resource Comm'n*, 81 Ohio St. 3d 450, 453, 692 N.E.2d 185 (1998). *See Eudela v. Ohio Dept. of Mental Health and Mental Retardation*, 30 Ohio App. 3d 113, 506 N.E.2d 947 (Franklin County 1986) (syllabus, paragraph one) ("[a]n unclassified employee is appointed at the discretion of the appointing authority, accrues no tenure, and ... can be dismissed from his position without cause absent any discrimination or malfeasance").

The General Assembly, however, has granted management employees of a county MR/DD board, who are in the unclassified civil service, R.C. 124.11(A)(19), certain rights with respect to removal, suspension, and demotion.[7] As provided, in part, by R.C. 5126.23:

> (B) An employee[8] may be removed, suspended, or demoted in accordance with this section for violation of written rules set forth by the board or for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, or other acts of misfeasance, malfeasance, or nonfeasance.
>
> (C) Prior to the removal, suspension, or demotion of an employee pursuant to this section, the employee shall be notified in writing of the charges against him. Except as otherwise provided in division (H) of this section, not later than thirty days after receiving such notification, a predisciplinary conference shall be held to provide the employee an opportunity to refute the charges against him. At least seventy-two hours prior to the conference, the employee shall be given a copy of the charges against him.
>
> If the removal, suspension, or demotion action is directed against a *management employee*, the conference shall be held by th*e superintendent* or a person he designates, and the *superintendent* shall notify the management employee within fifteen days after the conference of the decision made with respect to the charges....
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> (D) Within fifteen days after receiving notification of the results of the predisciplinary conference, an employee may file with the *board* a written demand for a hearing before the board or before a referee, and the *board* shall set

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[7] *Cf*. R.C. 124.34 (granting only to *classified* civil service employees certain protections against reduction in pay or position, fines, suspension, or removal).

[8] As used in R.C. 5126.23, "employee" means "a management employee or superintendent of a county board of mental retardation and developmental disabilities." R.C. 5126.23(A).

> a time for the hearing which shall be within thirty days from the date of receipt of the written demand, and the board shall give the employee at least twenty days notice in writing of the time and place of the hearing. (Footnote and emphasis added.)

R.C. 5126.23 thus sets forth the reasons for which a management employee or superintendent may be removed, suspended, or demoted and grants such employees certain notice, hearing, and appeal rights in this process.[9]

The application and operation of R.C. 5126.23 was recently discussed by the court in *State ex rel. Oaks v. Miami County Bd. of Mental Retardation*, No. 2001 CA 4, 2001 Ohio App. LEXIS 4363 (Ct. App. Miami County Sept. 28, 2001). In that case, a management employee, Oaks, challenged her removal by the superintendent of the county MR/DD board. Oaks asserted, among other things, that she could be removed only by the county MR/DD board. In rejecting this claim, the *Oaks* court stated, in part:

> As an *unclassified management employee*, the only requirements for Oaks' removal were contained in R.C. 5126.23. She was entitled to be notified of the charges against her, which she was. She was entitled to a pre-disciplinary conference within thirty days of that notification, and one was held. She was entitled to be notified of the decision within fifteen days of the conference, and she was notified. Finally, she was entitled to request a post-disciplinary hearing, which she failed to do. Therefore, the Board, through [its superintendent], complied with all the requirements of R.C. 5126.23, and Oaks' termination was valid.

2001 Ohio App. LEXIS 4363, at *12 (emphasis added).

The *Oaks* court separately addressed the employee's claim that R.C. 5126.21(A)(1), which requires board approval of all contracts of employment for a term of more than one year, entitled her, as an employee with continuing contract status, to be removed only by the board, and not by the superintendent. The *Oaks* court rejected this argument, as follows:

> Although we find that Oaks did not have a continuing contract, our result would not be different if she had. R.C. 5126.20(E) specifically states that a continuing contract employee may be "removed pursuant to *section 5126.23 of the Revised Code*." As we have already discussed, Oaks' termination complied with the requirements of R.C. 5126.23. As for Oaks' assertion that the Board was

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[9] R.C. 5126.23(H) provides, in part: "Notwithstanding divisions (C) to (G) of this section, a county board and an employee may agree to submit issues regarding the employee's removal, suspension, or demotion to binding arbitration." Because you have not indicated that the binding arbitration provisions of R.C. 5126.23(H) are involved in the situation you describe, we are assuming that there is no such agreement.

> required to remove her because a continuing contract is a contract of more than one year, R.C. 5126.23(C) specifically states that "if the removal, suspension, or demotion action is directed against a management employee, the conference shall be held by the superintendent." It says nothing about Board approval. The statute clearly sets forth removal procedures for Oaks' position. These procedures are identical whether Oaks was a continuing contract employee or a one-year contract employee, and they were followed by [the superintendent] in removing Oaks. Therefore, Oaks' termination was valid.

2001 Ohio App. LEXIS 4363, at *12-*13. Thus, if the superintendent of a county MR/DD board, in accordance with R.C. 5126.23(B) and (C), conducts a predisciplinary conference for the purpose of the removal, suspension, or demotion of a management employee, the superintendent's decision regarding such removal, suspension, or demotion is final, unless the employee requests a hearing before the county MR/DD board or a referee pursuant to R.C. 5126.23(D).

In answer to your second question, we conclude, therefore, that R.C. 5126.23(C) authorizes the superintendent of a county MR/DD board or his designee to conduct a predisciplinary conference for the removal, suspension, or demotion of a management employee for the reasons set forth in R.C. 5126.23, whether or not the employee's contract of employment exceeds one year, and, without the approval of the board, to make a decision regarding the proposed removal, suspension, or demotion. In the event that the employee does not request a hearing before the county MR/DD board or a referee in accordance with R.C. 5126.23(D), the superintendent's decision is final.

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

1. The superintendent of a county board of mental retardation and developmental disabilities (county MR/DD board), rather than the county MR/DD board, is the "appointing authority," as defined in R.C. 124.01(D), of a management employee holding a contract of employment for a term greater than one year.

2. Pursuant to R.C. 124.388, the superintendent of a county MR/DD board, as the appointing authority, may place on paid administrative leave a management employee, regardless of the term of the employee's contract of employment and without the approval of the county MR/DD board. R.C. 124.388 authorizes the use of administrative leave only in circumstances where the health or safety of an employee or of any person or property entrusted to the employee's care could be adversely affected, and further provides that the length of such leave shall not exceed the length of the situation for which the leave was granted.

3. R.C. 5126.23(C) authorizes the superintendent of a county MR/DD board or his designee to conduct a predisciplinary conference for the removal,

suspension, or demotion of a management employee for the reasons set forth in R.C. 5126.23, regardless of the term of the employee's contract of employment, and, without the approval of the board, to make a decision regarding the proposed removal, suspension, or demotion. In the event that the employee does not request a hearing before the county MR/DD board or a referee in accordance with R.C. 5126.23(D), the superintendent's decision is final.

Respectfully,

JIM PETRO
Attorney General