September 11, 2007

The Honorable Gerald L. Heaton
Logan County Prosecuting Attorney
117 East Columbus Avenue
Suite 200
Bellefontaine, Ohio 43311-2053

SYLLABUS: 2007-031

The superintendent of a county home, rather than the board of county commissioners, is the appointing authority, as defined in R.C. 124.01(D), of the officers and employees of a county home for purposes of R.C. Chapter 124.

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OPINION NO. 2007-031

The Honorable Gerald L. Heaton
Logan County Prosecuting Attorney
117 East Columbus Avenue
Suite 200
Bellefontaine, Ohio 43311-2053

Dear Prosecutor Heaton:

You have requested an opinion whether the superintendent of a county home, the board of county commissioners,[1] or both are the "appointing authority" of the officers and employees[2] of a county home for purposes of R.C. Chapter 124.[3] You ask, further, if the board of county

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[1] Under R.C. 5155.011(B), a board of county commissioners may transfer by resolution or agreement operational control of a county home to the board of county hospital trustees of a county hospital located in the county. Because you have not stated that the board of county commissioners has transferred operational control of the county home to a board of county hospital trustees, it is assumed, for the purpose of this opinion, that the board of county commissioners has not done so.

[2] Our review of your questions indicates that you are concerned with the officers and employees of a county home who are subordinate to the superintendent of the county home. This opinion, therefore, does not address who is the appointing authority of the superintendent of a county home for purposes of R.C. Chapter 124.

[3] R.C. Chapter 124 imposes various duties and confers certain powers upon county appointing authorities with respect to officers and employees in the county civil service. *See* 1997 Op. Att'y Gen. No. 97-054 at 2-330; *see, e.g.*, R.C. 124.27 (appointment of employees in the classified civil service); R.C. 124.30 (interim, temporary, or intermittent appointments); R.C. 124.321 (reduction in work force by layoff or abolishment of positions); R.C. 124.38 (establishment of alternative sick leave schedules by county appointing authorities). *See generally* R.C. 124.06 ("[n]o person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted, or reduced as an officer or employee in the civil service, in any

commissioners is the appointing authority of the officers and employees of a county home, whether the board may delegate its powers and duties under R.C. Chapter 124 to the superintendent of the county home. Based on the following analysis, the superintendent of a county home, rather than the board of county commissioners, is the appointing authority of the officers and employees of a county home for purposes of R.C. Chapter 124.

Appointment of County Officers and Employees

R.C. 124.01(D) defines an "appointing authority," as used in R.C. Chapter 124, as follows: "Except as otherwise provided in [R.C. Chapter 124], … [a]ppointing 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." Thus, the appointing authority of the officers and employees of a county home for purposes of R.C. Chapter 124 is not the county in general, but rather any officer or entity vested by law with the power to appoint or remove the officers and employees of the county home. *See* 1998 Op. Att'y Gen. No. 98-012 at 2-63 n.1; 1992 Op. Att'y Gen. No. 92-044 at 2-173; *see also* 1981 Op. Att'y Gen. No. 81-003 at 2-11.

Numerous statutes empower individual county officers and entities to appoint persons to serve in county positions. 2003 Op. Att'y Gen. No. 2003-033 at 2-277; 1992 Op. Att'y Gen. No. 92-044 at 2-173. As explained in 2003 Op. Att'y Gen. No. 2003-033 at 2-277 n.2:

> *A board of county commissioners, itself, may appoint certain county employees. See, e.g.*, R.C. 305.13 (authority to appoint a clerk); R.C. 305.16 (authority to employ "a superintendent, and such watchmen, janitors, and other employees as are necessary for the care and custody of the court house, jail, and other county buildings, bridges, and other property under its jurisdiction and control"). *In other instances, a board of county commissioners has the power to approve appointments made by other county officers or entities. See, e.g.*, R.C. 307.804 (appointment of employees for the county microfilming center); R.C. 329.02 (in part, requiring the county director of job and family services, "with the approval of the board of county commissioners, [to] appoint all necessary

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manner or by any means other than those prescribed in this chapter, and the rules of the director of administrative services or the municipal or civil service township civil service commission within their respective jurisdictions"). The powers and duties conferred upon a county appointing authority by R.C. Chapter 124 may, of course, be subject to the terms of a collective bargaining agreement. 1997 Op. Att'y Gen. No. 97-054 at 2-330 n.1. *See generally City of Cincinnati v. Ohio Council 8, AFSCME*, 61 Ohio St. 3d 658, 576 N.E.2d 745 (1991) (syllabus, paragraph one) ("[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)").

> assistants and superintendents of institutions under the jurisdiction of the department, and all other employees of the department"). *In such situations, the board of county commissioners is included within the definition of "appointing authority" for purposes of R.C. Chapter 124. See State ex rel. Belknap v. Lavelle*, 18 Ohio St. 3d 180, 181, 480 N.E.2d 758 n.1 (1985). *Otherwise, the power to appoint most county employees does not reside, either in whole or in part, in the board of county commissioners. See, e.g.*, R.C. 309.06(A) (stating, in part, "[t]he prosecuting attorney may appoint any assistants, clerks, and stenographers who are necessary for the proper performance of the duties of his office and fix their compensation"); R.C. 313.05(A) (power of county coroner to appoint deputy coroners and other employees); R.C. 325.17 (authorizing the county auditor, county treasurer, county sheriff, county engineer, and county recorder, among others, to "appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees for their respective offices, fix the compensation of such employees and discharge them"); R.C. 5126.024(C) (authorizing the superintendent of a county board of mental retardation and developmental disabilities to employ persons for any positions authorized by the MR/DD board). (Emphasis added.)

In addition, individual county officers and entities may remove persons from county positions. *See State ex rel. Minor v. Eschen*, 74 Ohio St. 3d 134, 139, 656 N.E.2d 940 (1995) ("the power of removal is regarded as incident to the power of appointment"); 2004 Op. Att'y Gen. No. 2004-001 at 2-3 (the power of a board to appoint persons to another board includes the concomitant power to remove persons from that board); 1992 Op. Att'y Gen. No. 92-017 at 2-60 ("the law generally recognizes that, absent constitutional or statutory provisions specifying otherwise, the power to remove an appointee from a public office or position is implied by the power to make such appointment"). Accordingly, resolution of your questions turns on who may appoint or remove the officers and employees of a county home. *See* 1998 Op. Att'y Gen. No. 98-012 at 2-63 n.1 ("[a] county officer is the 'appointing authority' of a county employee when the officer has the power to appoint or remove the employee from his county position").

Appointment and Removal of the Officers and Employees of a County Home

R.C. 5155.01 and R.C. 5155.03 provide for the appointment of the officers and employees of a county home.[4] R.C. 5155.01 states, in part, that, "[t]he *superintendent or*

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[4] This opinion does not consider the authority of the superintendent of a county home or a board of county commissioners to appoint or remove the officers and employees of a county home when the county has acquired home rule powers pursuant to Ohio Const. art. X, § 1 or has adopted a charter pursuant to Ohio Const. art. X, §§ 3 and 4. *See Geauga County Bd. of Comm'rs v. Munn Rd. Sand & Gravel*, 67 Ohio St. 3d 579, 583 n.2, 621 N.E.2d 696 (1993); 2006 Op. Att'y Gen. No. 2006-052 at 2-520 n.2.

administrator[5] *may employ* an administrative assistant and additional necessary personnel, at rates of wages to be fixed by the board of county commissioners, as may not be found available on the part of the residents of the facility." (Footnote and emphasis added.) R.C. 5155.03 provides, further, that a board of county commissioners "may, by resolution, provide *for the appointment by the superintendent or administrator* of an assistant superintendent or administrator, who shall perform the duties at the county home prescribed by the superintendent or administrator." (Emphasis added.)

The use of the term "employ" in R.C. 5155.01 clearly indicates that the superintendent of a county home has the power to appoint an administrative assistant and additional personnel. *See generally Black's Law Dictionary* 564 (8th ed. 2004) ("employ" means "[t]o hire"). Also, the plain language of R.C. 5155.03 authorizes the superintendent of a county home to appoint an assistant superintendent or administrator when the board of county commissioners empowers the superintendent to do so. Thus, under R.C. 5155.01 and R.C. 5155.03, the superintendent of a county home is an appointing authority, as defined in R.C. 124.01(D), of the officers and employees of the county home for purposes of R.C. Chapter 124. *See generally Hancock County Home v. Welker*, Case No. 1-80-14, 1980 Ohio App. LEXIS 10816, at *12-13 (Allen County July 31, 1980) (for purposes of R.C. 124.27, the superintendent of a county home is the appointing authority).

Authority of a Board of County Commissioners to Appoint and Remove Officers and Employees of a County Home

With respect to the status of the board of county commissioners as an appointing authority of the officers and employees of a county home, no language in R.C. 5155.01, R.C. 5155.03, or elsewhere in the Revised Code empowers such a board to appoint the officers or employees of a county home or approve the appointments made by the superintendent of a county home.[6] Under R.C. 5155.01, the authority of a board of county commissioners is

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[5] R.C. 5155.03 authorizes a superintendent of a county home "to use the title 'administrator.'"

[6] 1997 Op. Att'y Gen. No. 97-054 at 2-331 determined that "where a board of county commissioners is given the power of 'approval' over the appointment of certain employees, such power is part of the 'appointment' process, without which an appointment is not complete." *See State ex rel. Belknap v. Lavelle*, 18 Ohio St. 3d 180, 181 n.1, 480 N.E.2d 758 (1985); 1983 Op. Att'y Gen. No. 83-023 at 2-85 and 2-86; 1956 Op. Att'y Gen. No. 6316, p. 152. When a board of county commissioners has the authority to approve the appointment of a person to a county office or position, such authority "operates to place the county commissioners within the definition of an 'appointing authority.'" *State ex rel. Belknap v. Lavelle*, 18 Ohio St. 3d 180, 181 n.1, 480 N.E.2d 758; *accord* 1997 Op. Att'y Gen. No. 97-054 at 2-331; *see* 1983 Op. Att'y Gen. No. 83-023 at 2-85 and 2-86; 1956 Op. Att'y Gen. No. 6316, p. 152.

No statute expressly authorizes a board of county commissioners to approve appointments made by the superintendent of a county home. Nevertheless, the superintendent of a county home is "governed in all respects by the board's … rules." R.C. 5155.03; *see also* R.C. 5155.01 (the board of county commissioners "shall prescribe rules for the management and good government of the [county] home"). It thus could be argued that, under its rulemaking powers, a board of county commissioners may enact a rule requiring its approval of all appointments made by the superintendent of a county home. *See generally Hancock County Home v. Welker*, Case No. 1-80-14, 1980 Ohio App. LEXIS 10816, at *13 (Allen County July 31, 1980) (the superintendent of a county home "is given explicit power by statute to employ personnel and the testimony shows no restriction on this power by any action or rule of the county commissioners"); *Abbott v. Myers*, 20 Ohio App. 2d 65, 72, 251 N.E.2d 869 (Franklin County 1969) (under R.C. 5155.01 and R.C. 5155.03, the board of county commissioners "is empowered to control the appointment and removal of employees").

While a board of county commissioners does possess the authority to enact rules for the management and good government of a county home, such authority may not be used by the board to thwart the exercise of those powers explicitly conferred upon the superintendent of a county home by the General Assembly. R.C. 5155.01 and R.C. 5155.03 unequivocally empower the superintendent of a county home to appoint the officers and employees of the county home. In neither statute has the General Assembly conditioned the appointment of such employees upon the approval of the board of county commissioners. Absent such a statutory condition, it reasonably follows that the General Assembly intended for the superintendent of a county home to appoint the officers and employees of the county home without the approval of the board of county commissioners. *See generally In re Appeal of McCallum*, Case No. CA-600, 1982 Ohio App. LEXIS 5961, at *18 (Morrow County 1982) ("[a]n analogy is made to R.C. 329.02 which has been interpreted to require action by both a County Welfare Director and the Board of County Commissioners to constitute the action of an appointing authority for the purpose of [R.C. Chapter 124]. Under the statutory provisions, the County Director of Welfare can appoint employees only with the approval of the Board of County Commissioner[s]. No such check, however, is imposed upon either the Director of the Youth Commission or the Deputy [D]irector of [C]orrectional Services under [R.C.] 5139.01 or [R.C.] 5139.02, and we distinguish the cases cited by Appellant on that basis. We find that the provisions of R.C. 5139.01 *et seq*[.] are clear and that the Director of the Youth Commission is an appointing authority authorized to execute an order of removal pursuant to R.C. 124.34").

Moreover, if the General Assembly had intended to confer such authority upon the board of county commissioners, it could have used express language similar to that used elsewhere in the Revised Code. *Cf.* R.C. 329.02 (the county director of job and family services, "with the approval of the board [of county commissioners], shall appoint all necessary assistants and superintendents of institutions under the jurisdiction of the department, and all other employees of the department"); R.C. 6117.01 (the employees of a county sanitary engineering department

explicitly limited to fixing the "rates of wages" to be paid to the officers and employees appointed by the superintendent of a county home. Also, R.C. 5155.03 merely authorizes a board of county commissioners to create the position of assistant superintendent or assistant administrator. The board is not responsible for appointing a person to fill the position of assistant superintendent or assistant administrator. Instead, the position of assistant superintendent or assistant administrator is filled by appointment by the superintendent of a county home. R.C. 5155.03. A board of county commissioners thus has no authority to appoint the officers or employees of a county home.

In addition, no constitutional or statutory provision provides for the removal of county home officers or employees. Absent such a provision, the authority to remove a person from a county home office or position is vested with the officer or entity responsible for appointing the person. *See State ex rel. Minor v. Eschen*, 74 Ohio St. 3d 134, 139, 656 N.E.2d 940; 2004 Op. Att'y Gen. No. 2004-001 at 2-3; 1992 Op. Att'y Gen. No. 92-017 at 2-60. As stated previously, the superintendent of a county home has the power to appoint the officers and employees of the county home. As such, the superintendent, rather than the board of county commissioners, is

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are appointed by the county sanitary engineer, "with the approval of the board [of county commissioners]"). *See generally Lake Shore Elec. Ry. Co. v. P.U.C.O.*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (had the legislature intended a particular meaning, "it would not have been difficult to find language which would express that purpose," having used that language in other connections); *State ex rel. Enos v. Stone*, 92 Ohio St. 63, 67, 110 N.E. 627 (1915) (had the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result). In the absence of such language it thus appears that the General Assembly did not intend for a board of county commissioners to approve appointments made by the superintendent of a county home. *See generally Metro. Sec. Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927) ("[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended"); 1979 Op. Att'y Gen. No. 79-025 at 2-88 (General Assembly's failure to authorize purchase of liability insurance by townships where other entities are specifically authorized to do so is indicative of decision not to permit such purchase by townships). A board of county commissioners, therefore, may not enact a rule that requires the board to approve appointments made by the superintendent of a county home. *See generally* 2003 Op. Att'y Gen. No. 2003-033 at 2-277 n.2 ("[t]he power a board of county commissioners may exercise in the appointment of those county employees for whom it is the appointing authority does not, however, include the power to regulate the appointment of individuals by other county appointing authorities"); 1984 Op. Att'y Gen. No. 84-092 (syllabus) ("[t]he board of county commissioners, when it is not the appointing authority, is without authority to grant to county employees not covered by a collective bargaining agreement compensation equivalent to that obtained by other county employees pursuant to a collective bargaining agreement, except to the extent that it is exercising its limited statutory authority with respect to certain fringe benefits").

vested with the power to remove persons from county home offices or positions.[7] *See generally Hancock County Home v. Welker*, Case No. 1-80-14, 1980 Ohio App. LEXIS 10816, at *13 (the

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[7] Under R.C. 5155.01 and R.C. 5155.03, it could be argued that a board of county commissioners may enact a rule prohibiting the removal of a person from a county home office or position by the superintendent of the county home without the board's approval. *See Hancock County Home v. Welker*, Case No. 1-80-14, 1980 Ohio App. LEXIS 10816, at *13; *Abbott v. Myers*, 20 Ohio App. 2d 65, 72, 251 N.E.2d 869. If a board of county commissioners were authorized to enact such a rule, the superintendent of a county home could not remove an officer or employee of the county home without the approval of the board. *See generally* 1956 Op. Att'y Gen. No. 6316, p. 152, at 158 (insofar as R.C. 329.02 requires a board of county commissioners to approve the appointments made by the director of the county department of welfare, "[i]t necessarily follows that [the] director … cannot dismiss, lay off or reduce in pay any employee of the department without the approval of the board of county commissioners; nor may a position within the department be abolished without such approval"). In such a situation, the power of "approval" over the removal of county home officers and employees is part of the "removal" process, without which a removal is not complete. And, such an exercise of power by a board of county commissioners is the exercise of the power of removal from offices and positions in a county home and operates to place the board of county commissioners within the definition of an appointing authority. *Cf.* 1997 Op. Att'y Gen. No. 97-054 at 2-331 ("[a]lthough the county commissioners, in the appointment of sanitary engineering department employees, exercise only the power of approval, that approval power is an essential part of the appointment process. Thus, both the sanitary engineer and the county commissioners are, for purposes of R.C. Chapter 124, the 'appointing authority' of the employees of the sanitary engineering department" (citation omitted)).

We believe, however, that the rulemaking power conferred upon a board of county commissioners may not be used to impede the removal authority conferred upon the superintendent of a county home by virtue of his being the appointing authority, as defined in R.C. 124.01(D), of the officers and employees of the county home for purposes of R.C. Chapter 124. R.C. 5155.01 and R.C. 5155.03 empower the superintendent of a county home to appoint the officers and employees of the county home. Further, under common-law principles, the concomitant power to remove such officers and employees is vested in the superintendent of a county home insofar as no constitutional or statutory provision mandates otherwise. *See State ex rel. Minor v. Eschen*, 74 Ohio St. 3d 134, 139, 656 N.E.2d 940 (1995); 2004 Op. Att'y Gen. No. 2004-001 at 2-3; 1992 Op. Att'y Gen. No. 92-017 at 2-60; *see also Hancock County Home v. Welker*, Case No. 1-80-14, 1980 Ohio App. LEXIS 10816, at *13 (the superintendent of a county home is the appointing authority of the officers and employees of a county home and, as such, is authorized "to sign any order of discharge"). Therefore, in the absence of statutory language authorizing the board of county commissioners to approve the appointment or removal of the officers and employees of a county home, it appears that the General Assembly intended for the superintendent of a county home, as an appointing authority, to remove the officers and

superintendent of a county home is the appointing authority authorized to sign any order of discharge).

Because the board of county commissioners does not have the power to appoint or remove persons from county home offices or positions, it follows that the board is not the appointing authority, as defined in R.C. 124.01(D), of the officers and employees of a county home for purposes of R.C. Chapter 124.[8] Therefore, the superintendent of a county home, rather

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employees of the county home without the approval of the board of county commissioners. *See generally In re Appeal of McCallum*, Case No. CA-600, 1982 Ohio App. LEXIS 5961, at *18 ("[a]n analogy is made to R.C. 329.02 which has been interpreted to require action by both a County Welfare Director and the Board of County Commissioners to constitute the action of an appointing authority for the purpose of [R.C. Chapter 124]. Under the statutory provisions, the County Director of Welfare can appoint employees only with the approval of the Board of County Commissioner[s]. No such check, however, is imposed upon either the Director of the Youth Commission or the Deputy [D]irector of [C]orrectional Services under 5139.01 or 5139.02, and we distinguish the cases cited by Appellant on that basis. We find that the provisions of R.C. 5139.01 *et seq*[.] are clear and that the Director of the Youth Commission is an appointing authority authorized to execute an order of removal pursuant to R.C. 124.34"); *Hancock County Home v. Welker*, Case No. 1-80-14, 1980 Ohio App. LEXIS 10816, at *13 (determining that an order of discharge signed only by the superintendent of a county home is valid).

[8] Language in R.C. 5155.03 may suggest that the board of county commissioners is the appointing authority of the officers and employees of a county home. In this regard, R.C. 5155.03 states, in part:

> The board [of county commissioners] … shall not appoint one of its own board members superintendent or administrator, nor shall any commissioner or trustee be eligible to any other office in the county home, or receive any compensation as physician or otherwise, directly or indirectly, *wherein the appointing power is vested in the board of county commissioners*…. (Emphasis added.)

While the language of this provision of R.C. 5155.03 may appear in the abstract to indicate that the board of county commissioners is the appointing authority of the officers and employees in a county home, such an interpretation of the provision does not effectuate the intent of the General Assembly as expressed in the other provisions of R.C. 5155.01 and R.C. 5155.03. *See generally Johnson's Markets, Inc. v. New Carlisle Dep't of Health*, 58 Ohio St. 3d 28, 35, 567 N.E.2d 1018 (1991) ("all statutes which relate to the same general subject matter must be read *in pari materia*. And, in reading such statutes *in pari materia*, and construing them together, this court must give such a reasonable construction as to give the proper force and effect to each and all such statutes. The interpretation and application of statutes must be viewed in a manner to carry out the legislative intent of the sections" (citations omitted)).

than the board of county commissioners, is the appointing authority, as defined in R.C. 124.01(D), of the officers and employees of a county home for purposes of R.C. Chapter 124.

Authority of a Board of County Commissioners to Delegate Its Powers and Duties under R.C. Chapter 124 to the Superintendent of a County Home

Your second question asks, if the board of county commissioners is the appointing authority of the officers and employees of a county home, whether the board may delegate its powers and duties under R.C. Chapter 124 to the superintendent of the county home. Because we have determined that the superintendent of a county home, rather than the board of county commissioners, is the appointing authority, as defined in R.C. 124.01(D), of the officers and employees of a county home for purposes of R.C. Chapter 124, it is unnecessary for us to address your second question.

Conclusion

In summary, it is my opinion, and you are hereby advised that the superintendent of a county home, rather than the board of county commissioners, is the appointing authority, as defined in R.C. 124.01(D), of the officers and employees of a county home for purposes of R.C. Chapter 124.

Respectfully,

MARC DANN
Attorney General

As explained in the text above, pursuant to R.C. 5155.01 and R.C. 5155.03, the General Assembly has vested the superintendent of a county home with the power to appoint the officers and employees of the county home. The only exception to this grant of authority is set forth in R.C. 5155.03. This exception requires the board of county commissioners to "appoint" the superintendent of a county home. It thus follows that the "appointing power" of a board of county commissioners referred to in R.C. 5155.03 is the power of a board of county commissioners to appoint the superintendent of a county home. Accordingly, the language referring to "the appointing power … vested in the board of county commissioners" does not mean that the board of county commissioners is the appointing authority of the officers and employees of a county home.