

OPINION NO. 72-061**Syllabus:**

1. Section 5119.10, Revised Code, grants to the Division of Correction of the Department of Mental Hygiene and Correction, the power to investigate and supervise the operation and construction of county and municipal jails, workhouses, and other penal and reformatory institutions, in conjunction with other public agencies.

2. Since Section 5119.10, Revised Code, grants to the Division of Correction the power to investigate and supervise county and municipal penal and reformatory institutions and agencies, but does not specify a method for enforcement of that power, it implies authorization to use any method of enforcement which is necessary to effectuate the power expressly granted.

To: Kenneth D. Gaver, Director, Department of Mental Hygiene and Correction, Columbus, Ohio

By: William J. Brown, Attorney General, August 4, 1972

I have before me your request for my opinion, which reads in part as follows:

"Ohio Revised Code 5119.10, sets forth the powers and duties of the Division of Correction. Paragraph C of that section charges the Division of Correction with:

"The investigation and supervision of county and

municipal jails, workhouses, and other penal or reformatory institutions and agencies:

"My query is with regard to the scope of this section and what enforcement ability we would have if we were to establish minimum standards for jails and workhouses.

"Thus, does the law provide for the Department to:

1. Set forth minimum standards and criteria for construction, remodeling and approval of plans.
2. Set forth standards for criteria of operation and definition of function concerning, locking, visiting, feeding and health conditions.
3. If such is possible what criteria of enforcement would be necessary and what possible penalty would be justified if jails fail to meet the standards and criteria.

"Your opinion is hereby solicited and I will await your reply before making necessary plans to enforce the highly needed provisions of Section C in the State of Ohio."

Section 5119.10, Revised Code, reads as follows:

"The following powers and duties, except as provided by section 5119.09 of the Revised Code, shall be exercised by the division of correction:

"(A) All powers and duties which the department of mental hygiene and correction or any division, agency, or officer thereof has with respect to the management and operation of the penal and reformatory institutions and services of the state;

"(B) The management and control of prison industries in state institutions:

"(C) The investigation and supervision of county and municipal jails, workhouses, and other penal or reformatory institutions and agencies;

"(D) Management and supervision of the adult parole authority created by section 5149.02 of the Revised Code.

"Other powers and duties may be assigned by the director of mental hygiene and correction to the division of correction.

"This section does not apply to the youth commission or its institutions or employees."

Section 5119.09, supra, refers to the Division of Business Administration, and is not relevant to your question. Section 5119.10, supra, grants to the Division of Correction broad powers in general terms, but provides no method of enforcement. Basically, you ask two questions: what is the exact scope

of the powers granted, and what enforcement procedure is available?

The scope of the Division's power to investigate and supervise is not precisely definable, because of the generality of the terms used, and also because of the open-ended provision allowing the director of the Department to assign other powers and duties to the Division. However, rules and regulations governing the operation of the institutions, such as those mentioned in the second numbered paragraph of your letter, would appear to be covered. Rules and regulations governing the construction and remodeling of the institutions may not be as clearly authorized as standards for operation, but since the nature of the physical plant determines possible methods of operation, the power to supervise construction and remodeling plans is also implied.

An understanding of the background of Section 5119.10 (C), *supra*, requires reference to the decisions of United States District Court Judge Don J. Young, in *Jones v. Wittenberg*, 323 F. Supp. 93 and 330 F. Supp. 707 (1971), a class action brought by prisoners in the Lucas County Jail. The Court described the deplorable conditions to which the prisoners were subjected, and held, *inter alia*, that they constituted cruel and unusual punishment. The Court states at 323 F. Supp. 98, as follows:

"It is well settled that the administration of state detention facilities is a state function. * * *

* * * * * * * * *

"Even if it were a case of first instance, there can be no doubt that what is being done to the plaintiffs is being done by state officers, and under the color of state law. This court finds that the case comes clearly within the civil rights statutes."

At 323 F. Supp. 97; the Court states as follows:

"The conditions in the Lucas County Jail have been criticized by numerous grand juries, which under Ohio law are required to examine and report on conditions in the jail once during their term. Various civic and professional groups have also criticized the jail from time to time."

In the second decision, the Court ordered detailed relief in the form of changes of operation and facilities. The Court retained continuing jurisdiction, to ensure compliance (330 F. Supp. 721). At 330 F. Supp. 712, the Court states as follows:

"As pointed out in the Court's former memorandum, responsibility for the operation of county jails, and thus for the infringements upon the rights of the plaintiffs, is badly fragmented by the laws of Ohio. Powers and duties are granted and imposed by the statutes upon the Board of County Commissioners, the County Sheriff, and the Court of Common Pleas. * * *"

The legislature has provided the much needed control

at the state level, in Section 5119.10, *supra*. That Section clearly establishes a state-wide authority to supervise local authorities in their operation of these institutions. It is the legislative remedy for the fragmentation of responsibility which, as the Jones case, *supra*, observed, is still a reality. It should be unnecessary to add that the Division of Correction should pay the closest attention to the court's decisions in formulating its rules and regulations.

Your second question involves the procedure available to enforce the power to inspect and supervise when no procedure is specified. The cardinal rule of statutory construction is, of course, to give effect to the intent of the legislature, as it is revealed by the language of the statute. In the instant case, the legislature has clearly granted broad powers to the Division of Correction, yet has left the method of enforcement in question. If the intent of the legislature is to be followed, some method of enforcement must be inferred. I have found no Ohio authority, but the general rule has been established in many states, and, apparently, rejected in none. That rule, and the more general ones from which it is derived, are stated in 3 Sutherland on Statutory Construction, 19-22, Section 5402, as follows:

"Where a statute confers powers or duties in general terms, all powers and duties incidental and necessary to make such legislation effective are included by implication.* * *

"The rule whereby a statute is, by necessary implication, extended has been most frequently applied in the construction of laws delegating powers to public officers and administrative agencies.* * *

"If a statute which creates a right does not indicate expressly the remedy, one is implied, and resort may be had to the common law, or the general method of obtaining relief which has displaced or supplemented the common law * * *."

1 Am. Jur. 2d 603-604, Actions, Section 75, states as follows:

"The common-law procedure is regarded as the proper remedy where a right is created or a duty is required by statute and no adequate statutory remedy is provided for its enforcement or breach, * * *."

Many cases apply this principle, and extend it to other procedures than those provided by the common law. The basic principle of all these cases is stated in Daily Record Co. v. Armel, 54 N.W. 2d 503, 507 (1952), as follows:

"Wherever a power or right is conferred by statute, everything necessary to carry out such power or protect such right and make it effectual and complete will be implied."

The procedures which are impliedly authorized have been characterized as "necessary" and "proper and lawful means"

(State v. Nestos, 187 N.W. 233, 235 (1922)), and "some existing and appropriate remedy" (Van Sickle v. Belknap, 28 N.E. 305, 129 Ind. 558 (1891)). See also, Folks v. Barren Co., 232 S.W. 2d 1010 (1950), Petition of Biben, 61 A. 2d 598, 115 Vt. 383 (1948), Girard Trust Co. v. Tampashores Development Co., 117 So. 786, 95 Fla. 1010 (1928), and In re Warner's Estate, 35 So. 2d 296, 160 Fla. 460 (1948).

As I previously stated, there appears to be no Ohio authority on this specific point. However, the principle from which it logically follows, is well established in Ohio: that which is clearly implied by a statute is as much a part of it as its express terms. (See 50 O. Jur. 2d 164, Statutes, Section 186, and cases cited therein.) This principle ultimately derives from McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 (1819), which established the doctrine of implied powers. (In re Warner's Estate, supra, at 35 So. 2d 298.)

Consequently, in accordance with the general rule, the Division of Correction has implied authority to use any method which is necessary to effectuate the powers expressly granted to it. I understand that you have in mind the withholding of federal and state funds which the Division and the Department have discretion in allocating from those institutions which fail to comply with the Division's orders. Hence, a discussion of the various methods of enforcement which might be available to the Division is unnecessary.

In specific answer to your question it is my opinion, and you are so advised, that:

1. Section 5119.10, Revised Code, grants to the Division of Correction of the Department of Mental Hygiene and Correction, the power to investigate and supervise the operation and construction of county and municipal jails, workhouses, and other penal and reformatory institutions, in conjunction with other public agencies.

2. Since Section 5119.10, Revised Code, grants to the Division of Correction the power to investigate and supervise county and municipal penal and reformatory institutions and agencies, but does not specify a method for enforcement of that power, it implies authorization to use any method of enforcement which is necessary to effectuate the power expressly granted.