

OPINION NO. 2002-004**Syllabus:**

1. A board of county commissioners has no authority to create a county probation department or to appoint probation officers for such department.
2. A board of county commissioners has no authority to create a department of county government that would control or supervise a county probation department or to appoint an administrator of such department.
3. The Morrow County board of commissioners is without authority to create a department of county government that would control or supervise a program that provides crime victim or witness services within the county or to appoint an administrator of such department.

To: Gregory A. Perry, Morrow County Prosecuting Attorney, Mt. Gilead, Ohio
By: Betty D. Montgomery, Attorney General, February 21, 2002

You have requested an opinion concerning the authority of a board of county commissioners to create either a probation department or a department that oversees various court-related programs, including the probation department and the county's victim/witness

program. Based upon additional information you have provided us, we understand your questions to be as follows:

1. In the absence of a county probation department created pursuant to [R.C. 1901.33 or R.C. 2301.27], may a board of county commissioners, without implementing any alternative form of government pursuant to [R.C. Chapter 302], create a county probation department, appoint probation officers, and authorize them to arrest probation violators and carry firearms in the performance of their duties?
2. May a board of county commissioners, without implementing any alternative form of county government pursuant to [R.C. Chapter 302], create a new county department of court support services to oversee court-related programs such as the county probation department and victim/witness program, and appoint an administrator to head the newly created department?
3. Must probation officers appointed to serve a department created by a board of county commissioners possess the qualifications described in R.C. 2301.27?

You have asked us to address your questions in terms of the powers of a board of commissioners of a county that has not established an alternative form of county government under R.C. Chapter 302.¹ Your letter also asks us to assume that the proposed probation department will not be created under R.C. 2301.27 (creation of county probation department by court of common pleas) or R.C. 1901.33 (appointment of employees, including probation officers, by municipal court judges). With these limitations in mind, let us begin with your first question concerning the authority of a board of county commissioners to establish a probation department, appoint probation officers, and authorize such probation officers to carry firearms and to arrest probation violators.

In answering any questions concerning the authority of a board of county commissioners, we must begin with the principle that a board of county commissioners is a creature of statute with only those powers and duties conferred upon it by statute. *See Geauga County Bd. of Comm'rs v. Munn Road Sand & Gravel*, 67 Ohio St. 3d 579, 582, 621 N.E.2d 696, 699 (1993) (“[c]ounties ... may exercise only those powers affirmatively granted by the General Assembly”). Thus, whether a board of county commissioners may establish a county probation department, appoint probation officers, and authorize them to arrest probation viola-

¹*See generally, e.g.,* R.C. 302.13(A) (authorizing the board of commissioners of a county operating under R.C. Chapter 302 to establish, among others, “a department of law, a department of personnel, a department of detention and correction, a department of water and sewers, and such other departments, divisions, and sections under the supervision of the county executive, as it determines to be necessary for the efficient administration of the county’s business, and [to] provide for the merger of such departments, divisions, and sections”); R.C. 302.13(B) (in part, authorizing such boards to “[d]etermine the compensation of appointive heads of departments and divisions under the supervision of the board of county commissioners”). This opinion, therefore, will not address the powers of a board of county commissioners under the alternative form of county government prescribed by R.C. Chapter 302. In addition, because Morrow County has not adopted a charter in accordance with Ohio Const. art. X, § 3, this opinion will not address the powers that may be vested in a board of county commissioners pursuant to charter.

tors and carry firearms in the performance of their duties depends upon whether the General Assembly has authorized the board to do so.

Examination of the statutory powers of boards of county commissioners reveals that the General Assembly has expressly authorized such boards to create certain entities within county government. *See, e.g.*, R.C. 120.13(A) (county public defender commission); R.C. 301.25 (establishment of a "suitable office or agency" to administer a program for needy persons in the county to provide "noninstitutional support, care, assistance, or relief"); R.C. 307.07(A) (office of economic development); R.C. 307.282 (stating in part, "[a] board of county commissioners of any county that intends to adopt a resolution levying a tax under [R.C. 5739.026], any part of which is to be used to provide revenues for distribution through a community improvements board, shall adopt a resolution creating such a board"); R.C. 307.80 (county microfilming board); R.C. 307.84 (county automatic data processing board). We have found no statute, however, that authorizes a board of county commissioners to create a probation department or to appoint probation officers.

Instead, the General Assembly has expressly provided for the creation of county probation departments and the appointment of probation officers by other means. Pursuant to R.C. 2301.27(A)(1):

The court of common pleas may establish a county department of probation. The establishment of the department shall be entered upon the journal of the court, and the clerk of the court of common pleas shall certify a copy of the journal entry establishing the department to each elective officer and board of the county. The department shall consist of a chief probation officer and the number of other probation officers and employees, clerks, and stenographers that is fixed from time to time by the court. The court shall appoint those individuals, fix their salaries, and supervise their work.... Probation officers have all the powers of regular police officers and shall perform any duties that are designated by the judge or judges of the court. All positions within the department of probation shall be in the classified service of the civil service of the county. (Emphasis added.)

Thus, R.C. 2301.27(A)(1) authorizes the court of common pleas, rather than the board of county commissioners, to establish a county probation department and to appoint probation officers. *See generally State ex rel. Hillyer v. Tuscarawas County Bd. of Comm'rs*, 70 Ohio St. 3d 94, 100, 637 N.E.2d 311, 316 (1994) ("R.C. 2301.27 allows courts of common pleas to appoint probation officers, fix their salaries, and supervise their work").

The General Assembly has provided several alternatives to the establishment of a county probation department by a court of common pleas under R.C. 2301.27(A)(1). Specifically, R.C. 2301.27(A)(2) authorizes the judges of the courts of common pleas of two or more counties to establish a joint probation department for those counties. Another alternative is provided by R.C. 2301.32(B), which authorizes a court of common pleas that does not create a probation department under R.C. 2301.27 to enter into an agreement with the Adult Parole Authority "under which the court of common pleas may place defendants on probation in charge of the authority, and, in consideration of those placements, the county shall pay to the state from time to time the amounts that are provided for in the agreement."

R.C. 2301.27(B) provides another alternative to the establishment of a county probation department by the court of common pleas. Pursuant to R.C. 2301.27(B)(1):²

In lieu of establishing a county department of probation under division (A) of this section and in lieu of entering into an agreement with the adult parole authority as described in [R.C. 2301.32(B)], *the court of common pleas may request the board of county commissioners to contract with, and upon that request the board may contract with, any nonprofit, public or private agency, association, or organization for the provision of probation services and supervisory services for persons placed under community control sanctions. The contract shall specify that each individual providing the probation services and supervisory services shall possess the training, experience, and other qualifications prescribed by the adult parole authority. The individuals who provide the probation services and supervisory services shall not be included in the classified or unclassified civil service of the county.* (Emphasis added.)

R.C. 2301.27(B)(1) thus authorizes a board of county commissioners to exercise very limited power with respect to the provision of probation services within the county. The authority of the county commissioners to act under R.C. 2301.27(B)(1) is conditioned upon a request by the court of common pleas to do so. Should the court of common pleas make such a request, R.C. 2301.27(B)(1) authorizes the county commissioners to provide for the performance of probation and supervision services, but only through a contract with a “non-profit, public or private agency, association, or organization.” R.C. 2301.27(B)(1) does not authorize the board of county commissioners itself to establish a county probation department or to appoint probation officers.

Rather, the General Assembly has established a statutory framework within which the decision to establish a county probation department is within the discretion of the court of common pleas. *See generally State ex rel. Gordon v. Zangerle*, 136 Ohio St. 371, 26 N.E.2d 190 (1940) (syllabus, paragraph three) (stating in part, “[G.C. 1554-1 (now at R.C. 2301.27)], in authorizing a judge or judges of the Court of Common Pleas to create a probation department of the county, appoint persons to positions therein and fix their salaries, does not constitute a delegation of legislative power, nor confer other than *judicial power* upon the judicial branch of the government” (emphasis added)). Moreover, in the event that the court of common pleas establishes a county probation department, it is the court that has the power to appoint the department’s probation officers, R.C. 2301.27(A), and to supervise the department. *See generally, e.g.,* R.C. 2301.28 (imposing upon a court of common pleas that has established a county probation department under R.C. 2301.27(A) certain duties, “in addition to employing the department in investigation and in the administration of its own orders of probation”); R.C. 2301.29 (in part, authorizing the court to “exercise supervision over the [county probation department created under R.C. 2301.27(A)] by adopting rules that are not inconsistent with law or with the rules of the adult parole authority and that shall be observed and enforced by the probation officers of the department”); R.C. 2301.30 (stating in part, “[t]he court of common pleas of a county in which a county department of probation is established under [R.C. 2301.27(A)] shall require the department, in the rules

²*See also* R.C. 2301.27(B)(2) (authorizing boards of commissioners of adjoining counties, upon request of judges of courts of common pleas, to contract for probation and supervisory services on behalf of common pleas judges of such counties).

through which the supervision of the department is exercised or otherwise," to do certain things).

The General Assembly has made similar provision for the appointment of probation officers by judges of other courts within a county. *See, e.g.*, R.C. 1901.33(A) (authorizing the judge or judges of a municipal court to appoint, among others, probation officers, who "have all the powers of regular police officers and shall perform any duties that are designated by the judge or judges of the court"); R.C. 1907.201(A) (stating, in part, "[t]he judge or judges of a county court may appoint ... one or more probation officers, an assignment commissioner, a deputy assignment commissioner, and other court aides on a full-time, part-time, per diem, hourly, or other basis, who shall *serve at the pleasure of the appointing judge or judges* and who shall receive *compensation as prescribed by the board of county commissioners* from the county treasury or other authorized funds" (emphasis added)); R.C. 2151.13 (stating, in part: "[t]he *juvenile judge may appoint* such bailiffs, probation officers, and other employees as are necessary and may designate their titles *and fix their duties, compensation, and expense allowances*. The juvenile court may by entry on its journal authorize any deputy clerk to administer oaths when necessary in the discharge of his duties. *Such employees shall serve during the pleasure of the judge*" (emphasis added)). We are aware of no provision of law that authorizes a board of county commissioners to establish a probation department or to appoint probation officers to serve any of these courts.

The statutory framework for the appointment of probation officers generally, as well as the specific statutory methods for the creation of a county probation department by a court of common pleas, indicate that the General Assembly intended to vest in the judges of the various courts the discretion to determine whether, and the extent to which, their courts require the services of probation officers. *See generally State ex rel. Gordon v. Zangerle*, 136 Ohio St. at 381, 26 N.E.2d at 196 ("it seems to be well settled that the authorization to appoint employees, whose duties are not strictly judicial, but necessary as an aid to the exercise of judicial functions, is within legislative power unless prohibited by constitutional provision, and this principle has been applied to probation officers").

In light of the specific methods prescribed by statute for the creation of a county probation department, none of which includes establishment of a county probation department or the appointment of probation officers by a board of county commissioners, we conclude, in answer to your first question, that a board of county commissioners has no authority to create a county probation department or to appoint probation officers for such department. *See generally Akron Transportation Co. v. Glander*, 155 Ohio St. 471, 480, 99 N.E.2d 493, 497 (1951) ("[i]t is one of the well recognized canons of statutory construction that when a statute directs a thing may be done by a specified means or in a particular manner it may not be done by other means or in a different manner"). *See also State v. Droste*, 83 Ohio St. 3d 36, 39, 697 N.E.2d 620, 622 (1998) ("[u]nder the general rule of statutory construction *expressio unius est exclusio alterius*, the expression of one or more items of a class implies that those not identified are to be excluded").

Your second question asks whether a board of county commissioners may establish a "county department of court support services to oversee court-related programs such as the county probation department and victim/witness program, and appoint an administrator to head the newly created department."³ In answering this question, we begin by noting that no statute expressly authorizes a board of county commissioners to create such a depart-

³Information you have provided indicates that you are not asking about the authority of the court of common pleas to establish its own department to oversee the various court-

ment. *Cf., e.g.*, R.C. 121.37(B)(1) (stating in part, “[e]ach board of county commissioners shall establish a county family and children first council”); R.C. 124.14(G)(1) (stating, in part, “[e]ach board of county commissioners may, by a resolution adopted by a majority of its members, establish a county personnel department”); R.C. 308.03 (authorizing county commissioners to create a regional airport authority); R.C. 6117.01(C) (in part, authorizing county commissioners to create sanitary engineering department).

Thus, whether a board of county commissioners may establish such a department depends upon whether such authority may be inferred from other duties expressly conferred by statute upon such board. *See generally State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6, 7 (1917) (a statutory grant of power “may be either express or implied, but the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective”).

Because the precise nature of the oversight and other activities to be performed by the proposed department of court support services is unclear, it might be difficult to determine whether there may exist any statute or statutes from which the county commissioners’ authority to create such a department may be inferred. We do not find this to be problematic, however, because the provision of the services mentioned in your letter are already addressed by statute.

Your question notes that one of the functions to be performed by the proposed department is oversight of the county probation department. As discussed in answer to your first question, the General Assembly, through the enactment of R.C. 2301.27, has authorized a court of common pleas to establish a county probation department. The General Assembly has expressly vested in the judges of the court of common pleas the authority to create a county probation department and to control and supervise its operation. Accordingly, we can find no statutory power or duty vested in a board of county commissioners the execution of which necessarily requires the board to create a department to control or supervise the operation of a county probation department created by the court of common pleas. We must conclude, therefore, that a board of county commissioners is without authority to create a department of county government that would control or supervise a county probation department created under R.C. 2301.27(A).

Part of your second question refers to the proposed department’s oversight of the county’s victim/witness program. In this regard, we note that the General Assembly has enacted R.C. 307.62, which provides a board of county commissioners very limited authority with respect to assisting victims of crime. Pursuant to R.C. 307.62(B),⁴ a board of county

related services mentioned in your second question. This opinion, therefore, will not address that separate question.

⁴ R.C. 307.62(B) states, in pertinent part:

In addition to any money from another source appropriated for the same purpose, the board of county commissioners of any county may appropriate to a county agency, or grant to a private, nonprofit corporation or association, the money derived from a tax levied pursuant to [R.C. 5705.19(II)], for the public purpose of providing and maintaining in the county a crime victim assistance program.... (Emphasis added.)

See generally R.C. 5705.19(II) (authorizing a board of county commissioners to propose a tax levy outside the ten-mill limitation “[f]or the support by a county of a crime victim assistance

commissioners may appropriate certain moneys to a county agency or may grant such moneys to a private, nonprofit corporation or association for the purpose of “providing and maintaining in the county a crime victim assistance program.” R.C. 307.62(B) further specifies that a crime victim assistance program may include “crisis intervention services, emergency services, support services, court-related services, crime prevention services, or victim and offender mediation services,” as those terms are defined in R.C. 307.62(A). R.C. 307.62(B) prohibits the use of moneys appropriated or granted thereunder for the payment of certain professional services provided by non-employees, and imposes various conditions upon the use of any moneys granted under the statute.

R.C. 307.62(B) thus limits the authority of a board of county commissioners with respect to “providing and maintaining in the county a crime victim assistance program” as described therein—the board may either appropriate money to a county agency or make a grant of money to a private, nonprofit corporation or association for the provision of such services. R.C. 307.62(B) does not, however, either expressly or by necessary implication, authorize a board of county commissioners to establish a department of county government to control or supervise the provision of the various services encompassed within a crime victim assistance program as described in R.C. 307.62. The authority to appropriate moneys to a county agency does not include the authority to create an agency to which to appropriate such moneys. In other words, the power to appropriate or make a grant of public moneys to an agency of county government and the power to create such an agency to receive those moneys exist separately and independently of each other, and the former cannot necessarily be said to include or encompass the latter. *See, e.g.*, R.C. 307.282 (stating, in part, “[a] board of county commissioners of any county that intends to adopt a resolution levying a tax under [R.C. 5739.026], any part of which is to be used to provide revenues for distribution through a community improvements board, shall adopt a resolution creating such a board”). *See generally State v. Waddell*, 71 Ohio St. 3d 630, 631, 646 N.E.2d 821, 822 (1995) (“[c]ourts must give effect to the words of a statute, and may not modify an unambiguous statute by ... inserting words not used”).

Rather, when the General Assembly has intended to authorize county commissioners to create a department of county government to perform a particular function, it has done so in express terms. *See, e.g.*, R.C. 124.14(G)(1) (stating, in part, “[e]ach board of county commissioners may, by a resolution adopted by a majority of its members, establish a county personnel department”); R.C. 6117.01(C) (stating, in part, that a board of county commissioners “may create and maintain a sanitary engineering department, which shall be under its supervision and which shall be headed by the county sanitary engineer”). Thus, had the General Assembly intended to authorize a board of county commissioners to create a new department of county government to oversee a crime victim assistance program, it could have employed language used elsewhere in the Ohio Revised Code that plainly and clearly compelled that result. *See generally State ex rel. Enos v. Stone*, 92 Ohio St. 63, 110 N.E. 627 (1915).

In addition to the provisions of R.C. 307.62, the General Assembly has provided a mechanism through which certain counties, based upon their population, may adopt a “comprehensive plan” for carrying out various functions of the criminal and juvenile justice systems, including assistance to crime victims or witnesses. *See* R.C. 181.51(D).⁵

program that is provided and maintained by a county agency or a private, nonprofit corporation or association under [R.C. 307.62]”).

⁵ R.C. 181.51(D) defines the term “[c]omprehensive plan,” as used in R.C. 181.51-.56, as meaning:

Specifically, R.C. 181.54(A) authorizes a county to "enter into an agreement with the largest city within the county to establish a metropolitan county criminal justice services agency, if the population of the county exceeds five hundred thousand or the population of the city exceeds two hundred fifty thousand." Among the responsibilities of such an agency is the implementation of the comprehensive plans for, among other things, assistance to crime victims or witnesses, for its services area. R.C. 181.54(B)(6). R.C. 181.54 does not, however, authorize a board of county commissioners, absent an agreement with the largest city in the county, to establish a metropolitan county criminal justice services agency to implement crime victims or witnesses services within the county.

The General Assembly has made similar provision for certain less populous counties that do not have a metropolitan county criminal justice services agency. Pursuant to R.C. 181.56(D), "[a]ny county or combination of contiguous counties within an administrative planning district may form a criminal justice coordinating council or a juvenile justice coordinating council for its respective programs, if the county or group of counties has a total population in excess of two hundred fifty thousand." Any such council shall "comply with the conditions set forth in [R.C. 181.55(B) and (C)], and exercise within its jurisdiction the powers and duties set forth in [R.C. 181.54(B)]." R.C. 181.56(D). Among the responsibilities of such councils is the implementation of the comprehensive plans for their services areas. R.C. 181.54(B)(6). *See generally* note five, *supra*.

Morrow County's population is less than 250,000. Thus, R.C. 181.56 does not authorize the Morrow County board of commissioners, acting alone, to form a criminal justice coordinating council or a juvenile justice coordinating council that would oversee the provision of crime victim services in Morrow County.

The General Assembly has provided various means by which a board of county commissioners may participate in crime victim assistance. No such statute, however, authorizes the board of commissioners of a county whose population is less than two hundred fifty

a document that *coordinates, evaluates, and otherwise assists*, on an annual or multi-year basis, any of the functions of the criminal and juvenile justice systems of the state or a specified area of the state, that conforms to the priorities of the state with respect to criminal and juvenile justice systems, and that conforms with the requirements of all federal criminal justice acts. These functions may include, but are not limited to, any of the following:

- (1) Crime and delinquency prevention;
- (2) Identification, detection, apprehension, and detention of persons charged with criminal offenses or delinquent acts;
- (3) *Assistance to crime victims or witnesses*, except that the comprehensive plan does not include the functions of the attorney general pursuant to [R.C. 109.91 and R.C. 109.92];
- (4) Adjudication or diversion of persons charged with criminal offenses or delinquent acts;
- (5) Custodial treatment of criminal offenders, delinquent children, or both;
- (6) Institutional and noninstitutional rehabilitation of criminal offenders, delinquent children, or both. (Emphasis added.)

thousand to establish a department of county government to carry out that function. We conclude, therefore, that the Morrow County board of county commissioners, acting independently, is without authority to create a department in county government to control or supervise the provision of crime victim assistance services. *See generally Akron Transportation Co. v. Glander.*

Moreover, we have found no other statute from which one might infer the Morrow County board of commissioners' authority to create such a department. *Cf. generally* R.C. 109.42(B) (imposing upon various public officers and employees, including the county prosecuting attorney and assistant prosecuting attorneys, a duty to distribute the victim's bill of rights pamphlet prepared by the Attorney General under R.C. 109.42(A)).

Finally, your request mentions that the proposed department would also oversee the provision of services for witnesses. Although several statutes authorize a board of county commissioners to employ or compensate expert witnesses in certain instances,⁶ we have found no statute that either expressly or by necessary implication authorizes a board of county commissioners to establish a department to oversee a witness services program. *Cf.* R.C. 2930.10(A) (requiring a court in which a criminal prosecution or delinquency proceeding is held to make a reasonable effort to minimize any contact among, *inter alia*, the victim, witnesses, and the accused "before, during, and immediately after all court proceedings").

In answer to your second question, we conclude, therefore, that a board of county commissioners has no authority to create a department that controls or supervises a county probation department or to appoint an administrator of such a department. In addition, we find that the Morrow County board of commissioners has no authority to create a department that controls or supervises the provision of crime victim or witness services within the county, or to appoint an administrator of such a department.

Because we have concluded in answer to your first question that a board of county commissioners has no authority to establish a county probation department or to appoint county probation officers, we need not address your final question concerning the qualifications of any such appointees.

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

1. A board of county commissioners has no authority to create a county probation department or to appoint probation officers for such department.
2. A board of county commissioners has no authority to create a department of county government that would control or supervise a county

⁶*See, e.g.,* R.C. 307.06 ("[w]henver it is necessary for the board of county commissioners to determine the value of any real property owned by the county, or which it proposes to acquire by purchase, lease, or appropriation, the board may employ competent appraisers to advise it of the value of such property, or expert witnesses to testify thereto in an appropriation proceeding, and shall pay a reasonable compensation for such services"); R.C. 307.52 ("[u]pon the certificate of the prosecuting attorney or his assistant that the services of an expert or the testimony of expert witnesses in the examination or trial of a person accused of the commission of crime, or before the grand jury, were or will be necessary to the proper administration of justice, the board of county commissioners may allow and pay the expert such compensation as it deems just and proper and as the court approves").

probation department or to appoint an administrator of such department.

3. The Morrow County board of commissioners is without authority to create a department of county government that would control or supervise a program that provides crime victim or witness services within the county or to appoint an administrator of such department.