

OPINION NO. 87-034**Syllabus:**

A board of county commissioners may not delegate or contract the entirety of its duties, obligations, and responsibilities in administering a county home to a private non-profit corporation.

To: Steve C. Shuff, Seneca County Prosecuting Attorney, Tiffin, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 29, 1987

I have before me your request for my opinion in which you inquire whether the duties, obligations, and responsibilities

of the board of county commissioners in administering a county home may be delegated or contracted to the Seneca County Commission on Aging. You have added that due to insufficient funds, the board of county commissioners is unable to continue operating the county home and, therefore, the board wishes to delegate or contract all the obligations and duties of operating the county home to the Seneca County Commission on Aging which would oversee and pay for the expenses along with assistance from a charitable trust which has been established to provide funds to the county home.

Since you have inquired whether the Seneca County Commission on Aging may take over the duties, obligations, and responsibilities of the board of county commissioners in administering the county home, I must review the provisions of state law empowering a board of county commissioners to establish and operate a county home. See State ex rel. Shriver v. Board of Commissioners, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (a board of county commissioners, as a creature of statute, has only those powers which are expressly conferred by statute or necessarily implied therefrom).

At the outset, I note that the operation of a county home is not a mandatory duty. Seran v. Biddle, 86 Ohio App. 1, 89 N.E.2d 669 (Stark Co. 1949) ("it has never been the mandatory duty of a county to take care of its paupers in an infirmary or county home owned and maintained by it"). 86 Ohio App. 5, 89 N.E.2d at 671. Where a county home is established, however, "[t]he board of county commissioners shall make all contracts for new buildings" and additions to the county home, "and shall prescribe rules for the management and good government of such home." R.C. 5155.01. The board "shall make a complete inspection of the physical and sanitary conditions of the county home buildings and grounds and an examination into the care and treatment of the residents." R.C. 5155.02. The board shall appoint a superintendent or administrator who "shall perform such duties as the board imposes upon him, and [such superintendent or administrator] shall be governed in all respects by [the board's] rules." R.C. 5155.03. All purchases made on behalf of the county home shall be authorized by the rules prescribed by the board, R.C. 5155.06, and any expenditures from the reserve fund shall be audited by the board. R.C. 5155.14. The board of county commissioners is authorized to contract with one or more competent physicians to furnish medical relief and medicines, and the board may discharge such physician for proper cause. R.C. 5155.27. Among other duties, the board of county commissioners is also authorized to close a county home and provide alternate care for the residents "[w]henver the buildings...become unsuitable for habitation, or whenever the population of such home is too small for economical and efficient operation, or for any other reason made of record." R.C. 5155.31.

You have indicated to a member of my staff that the Seneca County Commission on Aging is a private non-profit corporation which provides services to the elderly.¹ The board of county

¹ As a service provider the commission contracts with the Ohio Department of Aging which provides state and federal funds to the commission. See R.C. 173.01(A)

commissioners wishes to delegate or contract all of its duties, obligations, and responsibilities in administering the county home to the Seneca County Commission on Aging.

In 1979 Op. Att'y Gen. No. 79-067, my predecessor set forth the general rule that "[w]hen power or authority is granted to a governmental agency, such agency may exercise only that authority which is expressly conferred on it by statute. New Bremen v. Public Utilities Commission, 103 Ohio St. 23 (1921). It follows that the power to delegate authority, if not expressly conferred, is excluded." Id. at 2-223. Op. No. 79-067 explains those circumstances under which the authority to delegate official duties may be implied:

If a duty imposed by statute is purely ministerial, i.e., a "mere physical act," it may be delegated; the duty is not delegable, however, if it requires judgment and discretion in its performance. 1973 Op. Att'y Gen. No. 73-126 (overruled, in part, for other reasons, by 1977 Op. Att'y Gen. No. 77-064). The presumption exists that the Legislature has delegated duties to an agency named in a statute because the agency is deemed competent to exercise the judgment and discretion necessary for performance of the duties. Cf. 1977 Op. Att'y Gen. No. 77-064 (concluded that certain public officers may not designate alternates to serve in their capacity). It would contravene the legislative intent of such a statute, therefore, to allow a judgmental and discretionary act to be delegated to an entity other than the entity originally entrusted with the duty by statute.

Id. at 2-223; see Burkholder v. Lauber, 6 Ohio Misc. 152, 154, 216 N.E.2d 909, 911 (C.P. Fulton County 1965) ("[w]here the powers of judgment and discretion are by law reposed in a public officer, the presumption is that such officer was selected because of his fitness and competency to exercise that judgment and discretion, and unless the authority to do so is expressly conferred upon him, he may not delegate his powers

("[t]he department [of aging] shall be the sole state agency to administer funds granted by the federal government under the 'Older Americans Act of 1965'"); R.C. 173.01(B) (the department shall "[a]dminister state funds appropriated for its use for administration and for grants and may use appropriated state funds as state match for federal grants"); R.C. 173.01(G) (the department shall "[h]ave authority to contract with public or private groups to perform services for the department"). See also 1 Ohio Admin. Code Chapter 173-1. Note, however, that "[t]he department shall not supplant or take over for the counties or municipal corporations or from other state agencies or facilities any of the specific responsibilities borne by them...The department shall cooperate with such federal and state agencies, counties, and municipal corporations and private agencies or facilities" to further the purposes of R.C. Chapter 173. R.C. 173.01(A). Clearly, therefore, the state department of aging may not take over the responsibilities of the county in providing assistance to older adults, and, the department must cooperate with agencies like the Seneca County Commission on Aging.

and duties to another" (citation omitted));² Kelley v. City of Cincinnati, 7 Ohio N.P. 360, 361 (C.P. Hamilton County 1900) ("[i]t is a well settled rule that where a power is given to a corporate body, and exercise of that power requires judgment and discretion, the power cannot be delegated" (citations omitted)); 1985 Op. Att'y Gen. No. 85-008; 1984 Op. Att'y Gen. No. 84-074; 1982 Op. Att'y Gen. No. 82-019.

Although some of the duties of a board of county commissioners may be purely ministerial, and therefore delegable, you have inquired whether the board of county commissioners may delegate or contract the entirety of its duties to the Seneca County Commission on Aging. It is clear that this is not authorized by law since at least some of the board's duties involve the exercise of judgment and discretion, most significant of which is its mandatory duty to prescribe rules for the management and good government of such home. See R.C. 5155.01. In 1943 Op. Att'y Gen. No. 43-5954, my predecessor considered whether a board of county commissioners could turn over the control and management of a county home to the trustees of a county hospital. He explained at p. 189 that:

[T]he entire management of the county home is devolved upon the county commissioners and, under their control, upon the superintendent....[I]t seems clear that the county commissioners would have no power to place the operation of a county home under the control and management of a board of trustees [of a county hospital], whose authority is limited to the operation

² I note that the Revised Code provides limited express authority to a board of county commissioners with regard to dealings with non-profit senior citizens' organizations. R.C. 307.092 provides that:

the board of county commissioners may sell, lease, or transfer any real property belonging to the county and not needed for public use to a non-profit senior citizens' organization to be used for public purposes involving the provision of housing, health, social services, or recreational activities for the benefit of older persons, upon such terms and conditions as may be agreed upon by the board of county commissioners and the organization.

Although you have not inquired about a transfer of property, if the county chooses to act pursuant to R.C. 307.092, it retains a degree of control in that "[t]he nonprofit senior citizens' organization shall report annually to the board of county commissioners on the nature of the activities for which the property is being used and shall provide such other information regarding the property that the board may require." In addition, "[a]ny deed conveying real property under this section may state that if the real property is used at any time for purposes other than those enumerated in this section, all right, title, and interest in the property shall revert to the county." R.C. 307.092. R.C. 307.694 conveys express authority to "spend moneys for the support of senior citizens services or facilities."

of a hospital; nor could the county commissioners abdicate the powers and escape the responsibilities which the law imposes upon them as managers of the county home.

Although R.C. 339.021 now authorizes a board of county commissioners to designate a county home, having suitable buildings and facilities, as a county hospital, the board is required to continue some of its duties with regard to the operation of the facility. See 1969 Op. Att'y Gen. No. 69-140. For example, the board of county commissioners shall serve ex-officio as members of the board of trustees of the county hospital, the board of county commissioners shall establish such rules and regulations as may be expedient for the admission of persons to the facility, and the board shall fix the annual budget for the facility. R.C. 339.021. Moreover, upon designation as a county hospital, the facility is no longer regarded as a county home, but as a county hospital, governed by R.C. Chapter 339. There is no express authority to delegate the entire management and operation of a county home to a private, non-profit corporation. Similarly, there is no authority, either express or implied, for the county to do by contract³ that which it may not do through delegation of its duties. See generally 1985 Op. No. 85-008 (a county may not contract for the operation and management of a county jail by a for-profit entity in lieu of the sheriff because the sheriff is vested with duties requiring the exercise of discretion). Therefore, once a county undertakes to operate and maintain a county home, although there is no duty to do so, it may not abdicate all responsibility in regard thereto by delegation or contract.

It is, therefore, my opinion, and you are advised that a board of county commissioners may not delegate or contract the entirety of its duties, obligations, and responsibilities in administering a county home to a private non-profit corporation.

³ R.C. Chapter 140, however, provides authority for a board of county commissioners to lease a hospital facility as defined in R.C. 140.01(E) to a hospital agency for use as a hospital facility "upon such terms and conditions as are agreed upon by the parties." See R.C. 140.05. Thus, there may be situations in which a county home or county nursing home may be leased to a non-profit hospital corporation for use as a hospital facility. Additional authority to enter into a lease arrangement with a non-profit Ohio corporation organized for charitable purposes may be acquired by designating a county home as a county hospital, and thereafter leasing the facility for use as a general hospital. See R.C. 339.021; R.C. 339.09. Your description of the functions to be performed by the Seneca County Commission on Aging in your particular situation does not appear to qualify for either of the above arrangements.