

Note from the Attorney General's Office:

1979 Op. Att'y Gen. No. 79-084 was questioned by
1987 Op. Att'y Gen. No. 87-102.

OPINION NO. 79-084**Syllabus:**

1. Members of a county or joint county public defender commission and county or joint county public defenders are invested with independence in the exercise of sovereign functions of the state. As such, they are county officers, not employees, and a board of county commissioners has no authority to purchase liability insurance pursuant to R.C. 307.441 for their benefit.
2. In the absence of a specific statutory authorization, a board of county commissioners may not purchase personal liability insurance for members of a county or joint county public defender commission.
3. In the absence of specific statutory authorization therefor, a board of county commissioners may not purchase malpractice and/or personal liability insurance for a county or joint county public defender appointed pursuant to R.C. 120.14 or R.C. 120.24. However, a board of county commissioners may, under R.C. 307.441(E), procure malpractice and/or personal liability insurance, insuring against liability arising from the performance of official duties, for the staff attorneys and other employees of a county or joint county public defender office.
4. A board of county commissioners may include members of county or joint county public defender commissions, county or joint county public defenders, and their staff attorneys and employees, in a self-insurance program established pursuant to R.C. 307.442.

To: J. Tullis Rogers, Ohio Public Defender, Columbus, Ohio
By: William J. Brown, Attorney General, November 19, 1979

I have before me your request for my opinion regarding the following questions:

1. May county commissioners provide and/or pay for personal liability insurance for members of a county or joint county public defender commission?
2. May county commissioners pay for malpractice insurance for county public defenders?

It is a well established principle of law that county offices are created by statute, and have only such powers as are expressly granted by the General Assembly, or are necessarily implied therefrom. State ex rel. Hoel v. Goubeaux, 110 Ohio St. 287 (1924); McDonald v. City of Columbus, 12 Ohio App. 2d 150 (Franklin Co., 1967). Thus, a board of county commissioners, clothed only with such powers as are delegated by statute, can expend funds solely by clear authority of law. State ex rel. Smith v. Maharry, 97 Ohio St. 272 (1918); 1969 Op. Att'y Gen. No. 69-138. This is particularly true with respect to the purchase of liability insurance, the rationale often being that where there is no liability to be insured against, there can be no implied authority to use public funds to purchase such insurance. E.g., 1972 Op. Att'y Gen. No. 72-007; 1971 Op. Att'y Gen. No. 71-034; 1971 Op. Att'y Gen. No. 71-028; 1969 Op. Att'y Gen. No. 69-085; 1967 Op. Att'y Gen. No. 67-001; 1956 Op. Att'y Gen. No. 7245, p. 750. Thus, the authority to provide liability insurance for public officers or employees must be expressly granted by statute, see, e.g., 1974 Op. Att'y Gen. No. 74-098; contra 1978 Op. Att'y Gen. No. 78-064 (opining that authority to provide for necessary and proper expenses of board of elections includes authority to procure liability insurance for board members), except where there is some statutory liability to be insured against. 1979 Op. Att'y Gen. No. 79-025; 1950 Op. Att'y Gen. No. 2498, p. 730. It must be determined, therefore, if any statutory provision permits a board of county commissioners to purchase either liability or malpractice insurance for members of a county or joint county public defender commission and county public defenders. For the purposes of this opinion, liability insurance means only such insurance as insures against personal liability arising from misfeasance, nonfeasance, or malfeasance in the performance of official duties.

R.C. Chapter 120, which creates the county public defender commission and public defender offices, does not expressly authorize county commissioners to procure policies of insurance insuring the board or county public defenders against malpractice or any other claim that may result in personal liability. The general authority of a county or joint county public defender commission to "determine the qualifications and size of the supporting staff and facilities and other requirements needed to maintain and operate the office. . ." of the public defender, R.C. 120.14(B) and R.C. 120.24(B), may not be read as giving such a commission discretionary power to determine that liability insurance is a requirement needed to maintain and operate the office. See, e.g., 1972 Op. Att'y Gen. No. 72-076. Contra Op. No. 78-064, supra. However, R.C. 307.441 enumerates certain persons for whom county commissioners may purchase insurance for liability arising from the performance of official duties.

R.C. 307.441, as amended by H.B. No. 847 (1979), in divisions (A) through (D) authorizes county commissioners to purchase liability insurance for the county recorder, the clerk of the common pleas court, and their deputies, the prosecuting and assistant prosecuting attorneys, the coroner, auditor, engineer, each county commissioner, the treasurer, and their assistants. R.C. 307.441(G) states that the board of county commissioners may procure such insurance for the county director of welfare, welfare employees, members of welfare advisory boards, or foster parents. These divisions are specific in scope and cannot be broadened to include members of a county public defender commission or public defenders.

However, R.C. 307.441(E) provides:

The board of county commissioners of each county may procure a policy or policies of insurance insuring any county employee against liability arising from the performance of his official duties. (Emphasis added.)

If members of a county public defender commission and county public defenders are county employees, then clearly the board of county commissioners may procure liability insurance, which includes malpractice insurance, for their benefit.

R.C. Chapter 307 does not define the term "employee." It must be determined, therefore, whether the General Assembly intended the term to include all persons performing services for the county, or whether it was intended that a distinction be made between a county employee and a county officer. For several reasons, set forth hereinafter, it is my opinion that "employee," as that word is used in R.C. 307.441, cannot be interpreted to include those persons who by virtue of their powers and duties qualify as officers of the county.

At the outset, it must be noted that a long line of cases has held that the phrase "public officer" is a term of art separate and distinct from a "public employee," when used in a statute or the constitution. See, e.g., Scofield v. Strain, 142 Ohio St. 290 (1943); State ex rel. Attorney General v. Jennings, 57 Ohio St. 415 (1998). One must assume that in enacting R.C. 307.441(E), the General Assembly was familiar with these established definitions, and that had it intended to broaden the definition of "employee," it would have done so by appropriate language. Fuller v. Glander, 146 Ohio St. 283 (1946).

Several other factors militate against an interpretation of "employee" that would include a public officer. For example, the term "employee" is often broadly defined for the purpose of a particular chapter of the Revised Code to include any person holding a non-elective office, or any person employed and paid by the state or a subdivision thereof. E.g., R.C. 145.01(A); R.C. 9.40. It is significant that when the General Assembly has desired to give a particular construction to a word, it has done so by definition. Larkins v. Routson, 115 Ohio St. 639 (1927). Thus, one can reasonably assume that the General Assembly, in failing to define "employee" in R.C. 307.441, did not intend to give it a broader meaning than that which is judicially ascribed to the term. When the General Assembly has desired to give "employee" an interpretation that encompasses individuals who might otherwise qualify as officers, it has done so by specific statutory definition. See, e.g., R.C. 145.01(A), R.C. 9.40.

Moreover, unlike R.C. 307.441(E), several other Code sections that grant governmental entities the power to purchase certain types of liability insurance, give the entity the power to do so on behalf of both "officers and employees." See R.C. 9.83(A); R.C. 165.02(J); R.C. 307.44; R.C. 306.04(K); R.C. 308.06(N). This legislative use of certain language in one instance and different language in another may well indicate that different results were intended. Metropolitan Securities Co. v. Warren State Bank, 117 Ohio St. 69 (1927). The failure to include "officers" in R.C. 307.441(E) is therefore indicative of an intent to exclude officers from the scope of the statute.

Further, a restrictive interpretation of the term is, in my opinion, required in light of the legislative history of R.C. 307.441. Originally, R.C. 307.441 provided for the purchase of liability insurance only for the recorder and common pleas court clerk. S.B. No. 36 (1967). In 1974 R.C. 307.441 was amended to include the sheriff and deputies, and the prosecuting attorney and assistants. Am. S.B. No. 518 (1974). A year later, the county coroner, engineer, auditor, treasurer, each county commissioner, and all of their assistants, were added and a subdivision (E) was enacted which required county commissioners to procure insurance for all of the officials named in the statute if they procured a policy for any one of them. At the same time, R.C. 340.11 and R.C. 5126.05 were enacted, providing that the

community mental health and retardation board and the county board of mental retardation could purchase liability insurance for board members or employees of the boards. Am. S.B. No. 143 (1975).

In 1978, Am. S.B. No. 423 was introduced to modify the provisions of R.C. 307.44(E), as it then existed, and to enact R.C. 307.442 to permit county commissioners to establish a self-insurance program for covered county officials, employees, and appointees. The bill was amended in committee, and renumbered to include the provision authorizing the commissioners to purchase liability insurance for county employees — the present R.C. 307.441(E). (Ohio Senate Journal, March 2, 1978, p. 1462). Finally, Am. H.B. No. 847 (1979) amended R.C. 307.441 by adding division (G) authorizing the commissioners to purchase insurance for the director of welfare, welfare employees, and members of advisory boards. That bill also enacted R.C. 5153.131, which permits county children services boards to procure insurance for board members, employees, volunteers or foster parents.

The legislative history of these statutory provisions shows a constant expansion of the power of county officials to procure personal liability insurance insuring against liability arising out of official actions. Yet, other than the authorization to purchase such insurance for employees, the persons for whom it may be obtained are specifically enumerated. Therefore, "employee," as used in R.C. 307.441(E), should not be interpreted so as to include county officers. As such, if members of a county or joint county public defender commission and a county or joint county public defender are county officers, and not employees, there is no authority under R.C. 307.441 to procure insurance protecting them against personal liability arising from the performance of their official duties. Thus, I must determine the status of members of a county or joint county public defender commission and county or joint county public defenders.

There are many criteria for determining whether a person is an employee or an officer. These include durability of tenure, the manner of qualifying for the position, and the duties imposed. State ex rel. Gordon v. Zangerle, 136 Ohio St. 371, 381 (1940). As was stated in State ex rel. Landis v. Board of Comm'rs. of Butler County, 95 Ohio St. 157, 159 (1917):

The chief and most-decisive characteristic of a public office is determined by the quality of the duties with which the appointee is invested, and by the fact that such duties are conferred upon the appointee by law. If official duties are prescribed by statute, and their performance involves the exercise of continuing, independent, political or governmental functions, then the position is a public office and not an employment.

Accord, Scofield v. Strain, supra.

Therefore, a public officer, as opposed to an employee, is one who is invested by statute with a portion of the sovereignty of the state, authorized to exercise executive, legislative, or judicial functions. State ex rel. Milburn v. Pethel, 153 Ohio St. 1 (1950).

Application of the foregoing criteria to members of a county or joint county public defender commission and public defenders clearly indicates that they qualify as public officers. A county or joint county public defender commission is a creature of statute. R.C. Chapter 120 authorizes county commissioners to establish and appoint five or six member public defender commissions, and fixes the terms of office and compensation. R.C. 120.13; R.C. 120.23. The powers and duties of these commissions are prescribed by statute and include the power to appoint the county public defender, to determine size and qualifications of supporting staff, and to contract with municipalities for legal representation. R.C. 120.14 and R.C. 120.24.

So too, the position of a county or joint county public defender is established by statute. He or she is appointed by the public defender commission, must meet certain statutory qualifications, and may be removed only for good cause. R.C.

120.15 and R.C. 120.24. In the case of a county public defender, the term of office is not to exceed four years. R.C. 120.13. The county commissioners may fix compensation not to exceed the pay ranges assigned under R.C. 124.14 for the position of the Ohio public defender. R.C. 120.40. Furthermore, R.C. 120.15, R.C. 120.16, R.C. 120.24 and R.C. 120.25 specifically delineate the powers and duties of a county or joint county public defender.

Thus, in several respects, members of a county or joint county public defender commission and a county or joint county public defender meet the qualifications for a public office. Their positions are created by statute, for a fixed term, with guidelines for the payment of compensation, and their powers and duties are enumerated by statute. Accord, 1976 Ohio Ethics Comm., Advisory Opinion No. 76-001 (stating that membership on a county public defender commission is a county office).

I am, of course, aware that the positions in question possess certain characteristics that may be indicative of public employment. For instance, the budget prepared by the public defender commission is subject to approval by the county commissioners, who may, subject to certain notice requirements, terminate the commission. R.C. 120.14(C); R.C. 120.24(C); R.C. 120.13(E). The commission is to "cooperate" with the Ohio public defender commission in maintaining the rules established by the latter pursuant to R.C. 120.03. Further, the Ohio public defender commission may terminate the county or joint county public defender office's right to receive a 50% reimbursement from the state for failure to maintain such standards. R.C. 120.18; R.C. 120.28.

An individual occupying a public position who is subject to the direct control and supervision of a higher authority is usually said to be an employee, State ex rel. Newman v. Skinner, 128 Ohio St. 325 (1934), unless the duties are those of a subordinate officer, created by the Legislature and placed by it under the general control of another body. State ex rel. Milburn v. Pethel, supra. Former opinions of the Attorney General have held a county civil defense director and the director of mine safety to be officers, even though each was subject to some measure of control by another person or body, since a sufficient measure of discretion and independence was delegated to the officer by statute. 1974 Op. Att'y Gen. No. 74-021; 1958 Op. Att'y Gen. No. 1661, p. 58.

A county or joint county public defender has responsibility for the conduct of the daily operation of the office, and is invested with discretionary powers in determining indigency, prosecuting post-conviction remedies, and in the conduct of trials. Members of county or joint county public defender commissions similarly exercise discretion in the formulation of the budget requirements, and in generally overseeing the public defender office. Accordingly, it is my opinion that R.C. Chapter 120 grants members of county and joint county public defender commissions and public defenders a sufficient measure of independence and discretion in the performance of their powers to classify each as a county officer. Cf., Callahan v. Kambour, 49 Misc. 2d 280, 267 N.Y.S. 2d 259 (1965) (holding that a public defender who appoints employees subject to authorization by a county board of supervisors is a public officer, not an employee over whose activities there remains considerable supervision). I must, therefore, conclude that R.C. 307.441(E) grants no power to county commissioners to procure personal liability or malpractice insurance, insuring members of a county or joint county public defender commission or county or joint county public defenders against liability arising from the performance of their official duties.

As distinguished from a county or joint county public defender, no specific provision for the appointment of attorneys or staff to assist the public defender is set out in R.C. Chapter 120. R.C. 120.14(B) and R.C. 120.24(B) simply provide that the county or joint county public defender commission "shall determine the qualifications and size of the supporting staff . . ." of the public defender office. No terms of office or employment are fixed, nor are the powers or duties of a county or joint county public defender's staff set out by statute. Since some of the chief characteristics of an office, as distinguished from an employment, are

durability of tenure, with duties conferred by statute and a designation or title, and independent power with respect to a delegation of a part of the sovereignty of the state, the staff of a public defender would clearly qualify as employees. See State ex rel. Gordon v. Zangerle, supra; State ex rel. Newman v. Skinner, supra; State ex rel. Attorney General v. Jennings, supra. Accordingly, county commissioners may, pursuant to R.C. 307.441(E), purchase malpractice and/or personal liability insurance for the staff attorneys and other personnel of a county or joint county public defender office.

Although county commissioners may not purchase liability insurance for county or joint county public defenders or commission members, they may include these officials in a self-insurance program established pursuant to R.C. 307.442. R.C. 307.442 provides an alternative method by which county commissioners may protect covered county officials and employees against liability arising from the performance of official duties. It states, in pertinent part:

[T]he board may, to the extent that it considers necessary, establish and maintain a county or joint county self-insurance program to indemnify or hold harmless the county officials specified in section 307.441 of the Revised Code and county employees and appointees, or any of the foregoing against liability, expense, loss, and damage which arises, or is claimed to have arisen, from the performance or nonperformance of official duties. (Emphasis added.)

Thus, a self-insurance program may be established which indemnifies "the county officials specified in section 307.411 of the Revised Code and county employees and appointees,"

Because of the General Assembly's piecemeal approach to the authorization of the purchase of liability insurance, one might read R.C. 307.442 as authorizing the establishment of a self-insurance program only for those officials, employees, and appointees who are named in R.C. 307.441. It could be argued that, had the General Assembly intended to encompass every person employed by a county, it would have simply so stated, instead of referring to the "officials specified" in R.C. 307.441 and "county employees and appointees." However, a literal reading of R.C. 307.442 requires a conclusion that this language encompasses the persons named in R.C. 307.441, and any other county employee or appointee, which, in practical effect, means every person employed by the county.

This result is supported by an examination of the history of Am. S.B. No. 423 (1978) (amending R.C. 307.441, and enacting R.C. 307.442). As introduced, Am. Sub. No. 423 proposed a self-insurance program for "the county officials specified in section 307.441 of the Revised Code and county employees and appointees," This latter language could not have been intended to refer to the current R.C. 307.441(E), authorizing the purchase of liability insurance for county "employees", inasmuch as that section was not contained in the introduced version of S.B. No. 423. Rather, this provision was later added to the bill in committee. (Ohio Senate Journal, March 2, 1978, p. 1462). Further, even though many of the persons named in R.C. 307.441 would be considered employees or appointees (e.g., deputy sheriffs and assistant prosecuting attorneys), it appears that at the time of introduction of S.B. No. 423, the General Assembly was referring to all of these persons specified in R.C. 307.441 as "officials". R.C. 307.441(E), renumbered as division (F) after introduction of what is now division (E), stated that if a board of county commissioners insured any county "official" in divisions (A) to (D) of the statute, it must insure all county "officials" as authorized in those divisions. Thus, the language "and county employees and appointees" in R.C. 307.442 was apparently in addition to, and an expansion of, the "officials" found in R.C. 307.441. I must conclude, therefore, that members of a county or joint county public defender commission and a county or joint county public defender, being county "appointees," may be included in a self-insurance program established pursuant to R.C. 307.442. Of course, the staff of a public defender office are "employees," and may be included in such a program.

Accordingly, it is my opinion, and you are so advised, that:

1. Members of a county or joint county public defender commission and county or joint county public defenders are invested with independence in the exercise of sovereign functions of the state. As such, they are county officers, not employees, and a board of county commissioners has no authority to purchase liability insurance pursuant to R.C. 307.441 for their benefit.
2. In the absence of specific statutory authorization, a board of county commissioners may not purchase personal liability insurance for members of a county or joint county public defender commission.
3. In the absence of specific statutory authorization therefor, a board of county commissioners may not purchase malpractice and/or personal liability insurance for a county or joint county public defender appointed pursuant to R.C. 120.14 or R.C. 120.24. However, a board of county commissioners may, under R.C. 307.441(E), procure malpractice and/or personal liability insurance, insuring against liability arising from the performance of official duties, for the staff attorneys and other employees of a county or joint county public defender office.
4. A board of county commissioners may include members of county or joint county public defender commissions, county or joint county public defenders, and their staff attorneys and employees, in a self-insurance program established pursuant to R.C. 307.442.