

OPINION NO. 83-023**Syllabus:**

1. The authority to appoint an employee to the county department of welfare from a certified eligibility list or promotional list is held by the county director of welfare, subject to approval by the board of county commissioners. (1965 Op. Att'y Gen. No. 65-37 (unpublished) and 1958 Op. Att'y Gen. No. 1978, p. 247, overruled in part.) The board may not require that it interview all candidates before approving an appointment.
2. The board of county commissioners may not appoint a new employee to the county department of welfare without the welfare director's knowledge or consent.
3. The board of county commissioners has authority to designate additional welfare duties to be undertaken by the welfare department but does not have authority to designate a certain employee to undertake a specific work assignment or function.
4. The welfare director has the responsibility of assigning duties to department of welfare employees.

To: Vincent E. Gilmartin, Mahoning County Prosecuting Attorney, Youngstown, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 23, 1983

I have before me your request, addressed to my predecessor, for an opinion of the Attorney General regarding the questions set forth below:

1. Does the Mahoning County Board of County Commissioners have the authority under Ohio Revised Code to mandate that the Welfare Director make no appointments from a Certified Eligibility List or from a Promotional List until such time as all candidates for appointment have been interviewed by the Board of County Commissioners?
2. Does the Mahoning County Board of County Commissioners have the authority under the Ohio Revised Code and/or Department of Administrative Services Rules and Regulations to appoint an employee for the Welfare Department without the Welfare Director's knowledge or consent?
3. Does the Mahoning County Board of County Commissioners have the authority under the Ohio Revised Code to order and direct the

Welfare Director to send a specific employee to attend a workshop, or for any specific work assignment or function?

4. Does the Welfare Director have sole responsibility to make duty assignments in the Welfare Department or is this responsibility shared with the Board of County Commissioners?

In resolving the above stated questions, it is of primary importance to understand the relationship between a board of county commissioners and the county director of public welfare. The authority of a board of county commissioners is statutory in nature. As a result, the board has only such powers as are expressly conferred upon it by statute, and such implied powers as are necessary to carry into effect the powers expressly granted. Elder v. Smith, 103 Ohio St. 369, 133 N.E. 791 (1921); Gorman v. Heuck, 41 Ohio App. 453, 180 N.E. 67 (Hamilton County 1931). Likewise, a county welfare director's authority is limited by the provisions found in R.C. Chapter 329, which set forth the director's authority to operate a county department of welfare.

One of the express grants of power delegated to a board of county commissioners by the General Assembly is the authority to oversee the county department of welfare. R.C. 329.01 provides that the board of county commissioners is to appoint the county director of welfare, and R.C. 329.02 reads, in pertinent part, as follows: "Under the control and direction of the board of county commissioners, the county director of welfare shall have full charge of the county department of welfare." Further, R.C. 329.04 sets forth the powers and duties of the county department of welfare and states that the department shall exercise and perform them "under the control and direction of the board of commissioners." Thus, both the board of county commissioners and the director of welfare have certain powers to operate the department of welfare: the director has full charge of the operations of the department, but such power may be exercised only under the "control and direction" of the board of county commissioners.

Turning to the first question presented, I find it necessary to examine R.C. 329.02 more fully to determine whether a board of county commissioners may mandate that it interview the candidates before an employee is selected from a certified eligibility list or promotional list. With regard to the hiring of welfare department employees, R.C. 329.02 reads as follows: "The director, with the approval of the board of county commissioners, shall appoint all necessary assistants, superintendents of institutions under the jurisdiction of the department, and all other employees of the department, excepting that the superintendent of each institution shall appoint all employees therein." (Emphasis added.)

It is clear, therefore, that the director's power to appoint employees within the welfare department may be exercised only with the approval of the board of county commissioners. As was stated in Abbott v. Myers, 20 Ohio App. 2d 65, 71, 251 N.E.2d 869, 874 (Franklin County 1969):

With relation to the welfare department employees, the . . . provisions of Section 329.02, Revised Code, . . . give the board of county commissioners and the welfare director reciprocal rights and responsibilities with relation to the appointment and removal of employees. Although the director has power to appoint, and thus to remove, employees, his authority is restricted in that it may be exercised only with the approval of the board. Likewise any implied authority that the board of county commissioners might have to appoint or remove would have to be carried out through the director under the provision that he shall have full charge of the county department of welfare "under the control and direction of the board of county commissioners."

Further, in 1958 Op. Att'y Gen. No. 1978, p. 247, at 249, one of my predecessors opined upon a similar matter regarding the appointment of employees within the department of welfare and concluded:

[I]t is apparent that the director has been given the statutory power to appoint personnel to positions within the department. Before such appointment is effective, however, the board of county commissioners must approve, and to this extent the legislature has divided the authority to appoint, for the post-approval of the board is a pro tanto participation in the power to appoint.

See also 1966 Op. Att'y Gen. No. 66-186; 1965 Op. Att'y Gen. No. 65-37 (unpublished); 1956 Op. Att'y Gen. No. 6316, p. 152; 1947 Op. Att'y Gen. No. 2551, p. 648. Thus, it is apparent that pursuant to R.C. 329.02 the board of county commissioners must give approval to the selection of an employee by the welfare director before such appointment is final.

Your first question asks about appointments from a certified eligibility list or from a promotional list. R.C. 329.02 provides that assistants and other employees of a county department of welfare shall be in the classified service. R.C. Chapter 124 governs the making of appointments to such positions. See R.C. 124.01(C) (defining classified service). R.C. 124.26 provides for the preparation of eligible lists by the Director of Administrative Services. Such lists consist of rankings of candidates who are eligible for particular types of positions, in the order of their relative excellence based upon the results of examinations. Under R.C. 124.27, the head of a department in which a position in the classified service is to be filled shall notify the Director of Administrative Services of that fact and the Director shall, except in certain instances, certify the names and addresses of the three candidates standing highest on the eligible list for the class or grade to which the position belongs. R.C. 124.27 further provides that the appointing authority shall fill the position by appointing one of the three persons so certified. It is clear, pursuant to R.C. 329.02, that appointment from a certified eligibility list to a position in a county department of welfare may be made by the director of welfare only with approval of the county commissioners. See, e.g., Abbott v. Myers; 1956 Op. No. 6316.

Promotional lists are prepared pursuant to R.C. 124.31, which states in part:

(A) Vacancies in positions in the classified service shall be filled insofar as practicable by promotions. The director of administrative services shall provide in his rules for keeping a record of efficiency for each employee in the classified service, and for making promotions in the classified service on the basis of merit, to be ascertained as far as practicable by promotional examinations, by conduct and capacity in office, and by seniority in service, and shall provide that vacancies shall be filled by promotion in all cases where, in the judgment of the director, it is for the best interest of the service.

(B) All examinations for promotions shall be competitive and in writing. . . .

In all cases where vacancies are to be filled by promotion, the director shall certify to the appointing authority only the names of the three persons having the highest rating. The method of examination for promotions, the manner of giving notice thereof, and the rules governing the same shall be in general the same as those provided for original examinations, except as otherwise provided in sections 124.01 to 124.64 of the Revised Code.

Pursuant to R.C. 124.31, the Director of Administrative Services shall provide that vacancies be filled by promotion where, in his judgment, it is for the best interest of the service. Where a vacancy is to be so filled, the Director shall certify to the appointing authority the names of three persons having the highest rating, and the position shall be filled by appointment of one of those persons. R.C. 124.27, 124.31; 1 Ohio Admin. Code 123:1-23-12.

It appears, therefore, that appointments from promotional lists are made in essentially the same manner as appointments from certified eligibility lists, see 1 Ohio Admin. Code Chapters 123:1-15 (Eligible Lists), 123:1-17 (Appointments), 123:1-23 (Promotions), and it would follow that such appointments may be made by the

director of welfare only with the approval of the county commissioners. There is, however, some authority for the proposition that a county director of welfare may make promotions without the approval of the board of county commissioners. In 1945 Op. Att'y Gen. No. 130, p. 92, my predecessor stated that the welfare director may make a reduction, dismissal or layoff of any employee without the approval of the board of county commissioners. Based on the reasoning set forth in 1945 Op. No. 130, another of my predecessors stated:

It seems clear that since the director of the department of welfare is given the power to appoint, even though his appointments are subject to the approval of the board, a necessary incident of such power is the power to promote an employee appointed by him, subject, of course, to the applicable statutes governing civil service employees; and in that respect the statute provides no power of approval by the board.

1958 Op. No. 1978 at 251. See 1965 Op. No. 65-37 (unpublished).

My predecessor considered promotions to constitute a type of action distinct from initial appointments. It is my opinion that such a distinction is not valid under existing law. Rather, a promotion is simply one type of appointment, see, e.g., R.C. 124.27 ("[a]ll original and promotional appointments" shall be for a probationary period); 1 Ohio Admin. Code 123:1-1-15-01 and 123:1-23-01 (distinguishing between "promotional" and "open-competitive" eligible lists), and, as such, is subject to the requirement of R.C. 329.02 that the county commissioners approve appointments. See 1956 Op. No. 6316 (containing a well-reasoned consideration of the relation between a welfare director and a board of county commissioners, stating that the board of county commissioners is vested with executive control over the welfare director, and concluding, at 158, that "a director of a county department of welfare 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"). See also Abbott v. Myers (welfare director may appoint or remove employees only with approval of the board of county commissioners); 1981 Op. Att'y Gen. No. 81-082 (because director's power to appoint is subject to approval of commissioners, director's power to fix compensation is also subject to approval of commissioners); 1966 Op. No. 66-186; 1963 Op. Att'y Gen. No. 620, p. 613.

Further, when 1958 Op. No. 1978 and 1965 Op. No. 65-37 (unpublished) were issued, R.C. 124.31 (governing promotions) did not exist in its present form. Its predecessor, R.C. 143.24, provided for certification to the appointing authority of only the name of the person having the highest rating. Thus, no discretion was involved on the part of the appointing authority. See, e.g., 1967-1968 Ohio Laws, Part I, 162 (Am. Sub. H.B. 93) (changing certification from one to three persons). Due to the fact that R.C. 124.31 requires that the Director of Administrative Services certify to the appointing authority the names of the three persons having the highest ratings, the appointing authority now has discretion in selecting an employee to fill the position. The selection of an employee from a promotional list by the welfare director is, therefore, a process virtually identical to the selection of a new employee from a certified eligibility list. See R.C. 124.26-.27; 1 Ohio Admin. Code 123:1-23-01. It follows that approval by the board must be given for the promotion of an employee within the welfare department, as well as for the appointment of an employee who is newly hired. For the reasons outlined above, I overrule 1958 Op. No. 1978 and 1965 Op. No. 65-37 (unpublished) to the extent that these opinions stand for the proposition that a county welfare director may make appointments from a promotional list without obtaining the approval of the board of county commissioners.

Having concluded that the board of county commissioners must approve both initial appointments and promotions made by the county welfare director before they are effective, I turn to the heart of your first question—whether the board's power of approval includes the power to interview all candidates before a selection is made. From the resolution which accompanied your letter, it is my understanding that your concern is with a situation in which the county commissioners seek, before any appointment is made, to interview all candidates

whose names have been certified to the director for initial appointment or promotion. The relevant statutes do not directly address the propriety of such a procedure. Thus, I analyze the question in light of the general rule, discussed above, that a board of county commissioners has only the powers expressly conferred by statute and such implied powers as are necessary to carry into effect the powers expressly granted.

As noted above, the county commissioners have the general power of "control and direction" over the welfare director and the welfare department. R.C. 329.02, 329.04. With respect to the appointment of employees, the power of the county commissioners is defined by statute as that of approval. R.C. 329.02. Implicit in the use of this word is the idea that the director shall select a candidate and the commissioners shall determine whether to approve that selection. R.C. 329.02 gives the director "full charge" of the program, and no provision of R.C. Chapter 329, either expressly or by implication, authorizes the commissioners to assume the director's powers or duties.

R.C. 329.02 does not provide a particular form for approval of appointments or a specific procedure to be followed by the board of county commissioners when exercising their authority to approve employee selection. It may be inferred that, in the absence of specific statutory provisions regarding the method of approval to be used by the board of county commissioners, any reasonable method is proper. See generally State ex rel. Hunt v. Hildebrand, 93 Ohio St. 1, 112 N.E. 138 (1915), aff'd, 241 U.S. 565 (1916) (syllabus, paragraph four) ("[w]here an officer is directed by . . . a statute of the state to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed"); Jewett v. Valley Ry. Co., 34 Ohio St. 601 (1878). Whether an interview of all candidates prior to approval of any appointee is reasonable is, however, subject to question. Such a procedure would permit the board to make its own selection from among the candidates and, in effect, to substitute its discretion for that of the director by failing to approve any appointee except the one which it selects.

Appointment of a candidate from a certified eligibility list or a promotional list involves the selection of one individual from three whose names are certified. See R.C. 124.27 ("[the appointing authority] shall fill such position by appointment of one of the three persons certified to him"); R.C. 124.31; 1 Ohio Admin. Code 123:1-17-02. R.C. 329.02 clearly contemplates that the welfare director, who is given the power of appointment (subject to approval), is the one who will make that selection. The board of county commissioners may approve or disapprove the selection, but it may not assume the director's authority to exercise his discretion, subject to the requirement that his selection meet with the board's approval. See, e.g., 1958 Op. No. 1978 (there was an obvious intention to split the power to appoint); 1956 Op. No. 6316 (the director is expressly authorized to make appointments, and the board is given executive control over the department). Since the board of county commissioners is authorized by statute only to approve or disapprove appointments, and not to interview or select appointees itself, I conclude that its authority does not extend to establishing a procedure under which it must interview all candidates before it will approve an appointment from a certified eligibility list or promotional list. See, e.g., Abbott v. Myers at 71, 251 N.E.2d at 874 (authority of the board of county commissioners to appoint or remove "would have to be carried out through the director under the provision that he shall have full charge of the county department of welfare 'under the control and direction of the board of county commissioners'").

Thus, in answer to your first question, I conclude that both the board of county commissioners and the director of welfare have certain authority regarding the hiring and promoting of employees within the county department of welfare. Before any appointment or promotion can become effective, the board of county commissioners must approve such action. The board may exercise its power of approval in any reasonable manner. It is, however, my opinion that it would be unreasonable for the commissioners, in exercising their authority to approve an appointment to the welfare department from a certified eligibility list or

promotional list, to require that they interview all candidates prior to determining whether to approve the candidate selected by the director.

Based upon the above discussion, the second question presented in your request—whether the board of county commissioners has the authority to hire new employees without the welfare director's consent or knowledge—must be answered in the negative. The power to appoint a county welfare department employee is a two step process, requiring that the initial appointment be made by the director of the welfare department and approval be given by the board of county commissioners.

For ease of discussion, I will consider the third and fourth questions of your request together. Both questions concern the delegation of job duties to employees within the welfare department and require an examination as to who holds this responsibility, the welfare director or the board of county commissioners.

Both R.C. 329.02 and R.C. 329.04 vest a certain amount of authority over the county department of welfare in the board of county commissioners. As previously stated, R.C. 329.02 provides that the welfare director shall have full charge of the county department of welfare "under the control and direction" of the board of county commissioners, and R.C. 329.04 provides that the welfare department shall exercise and perform its duties "under the control and direction" of the board of county commissioners. Further, R.C. 329.04(F) states that "[t]he board may designate the county department of welfare to exercise and perform any additional welfare powers and duties which the board has." From these provisions, it is apparent that the board of county commissioners may assign to the department of welfare additional job functions related to welfare. Of course, the board may delegate only such "welfare powers and duties" as it has the power to exercise. See 1956 Op. No. 6316.

There is, however, a distinction between the board's designating an additional function to be performed by the department of welfare and its personally selecting employees and delegating day-to-day job assignments. While it is clear that the board of county commissioners has general authority over the department of welfare and may designate that the welfare director assume additional welfare-related responsibilities, it does not follow that the board may delegate day-to-day job assignments or select certain employees to attend workshops.¹ As noted above, the board has only such authority as it is expressly or by implication granted by statute. The General Assembly has granted the county commissioners authority to control and direct the welfare department and its director, see R.C. 329.02, 329.04, but it has not, expressly or by implication, empowered them to assume the powers of the director. Rather, R.C. 329.02 grants to the welfare director "full charge" of the welfare department. It is my opinion that having "full charge" of a department necessarily includes the authority to make specific duty assignments or to select

¹ R.C. 325.20 provides that "[e]xcept as otherwise provided by law, no elected county officer, and no deputy or employee of the county, shall attend, at county expense, any association meeting or convention, unless authorized by the board of county commissioners. Before such allowance may be made, the head of the county office desiring it shall make application to the board in writing showing the necessity of such attendance and the probable costs to the county. If a majority of the members of the board approves the application, such expenses shall be paid from the moneys appropriated to such office for traveling expenses." Under this section, the board of county commissioners has authority to approve or disapprove the attendance of welfare department employees or the welfare director at any convention or association meeting. This statute contemplates, however, that the head of the county office, here the welfare director, will initiate the application setting forth the necessity and costs of such attendance. See generally 1958 Op. No. 1978. While R.C. 329.02 and 329.04 would appear to authorize the commissioners to direct the welfare director to attend a particular meeting or to direct him to send a representative, no provision of statute authorizes the commissioners to assume the director's authority of designating a particular person to act as a representative.

employees to perform certain functions. As was stated in 1965 Op. No. 65-37 (unpublished), at 5, "changes in duty assignments are solely in the power of the director and require no approval of the board of county commissioners." This conclusion is consistent with the concept that the welfare director is in a position to be more knowledgeable than the board of county commissioners about the skill, capability, and other responsibilities of his employees. It operates to give the director meaningful authority within his department and is consistent with the statutory scheme assigning different powers and duties to the board and the director. See Abbott v. Myers at 71, 251 N.E.2d at 874 (the legislature did not intend that the board and director act in concert and as equals in conducting a hearing concerning an employee allegedly on strike where the hearing was to be held by the "officer or body having power to remove such employee"). See generally R.C. 121.07; 1981 Op. Att'y Gen. No. 81-089 (syllabus, paragraph one) ("[w]hile the Ohio Public Defender Commission has the duty to generally supervise the functioning of the public defender system in Ohio pursuant to R.C. 120.01, such duty does not extend to the management, supervision, and control of the daily operations of the State Public Defender's Office"); 1980 Op. Att'y Gen. No. 80-007.

Therefore, in answer to your third and fourth questions, I conclude that the board of county commissioners may designate that the welfare department undertake additional welfare duties, but the board may not designate specific employees to perform certain job functions or make day-to-day duty assignments, as this power is vested solely in the welfare director.

Based on the foregoing, it is my opinion, and you are so advised, that:

1. The authority to appoint an employee to the county department of welfare from a certified eligibility list or promotional list is held by the county director of welfare, subject to approval by the board of county commissioners. (1965 Op. Att'y Gen. No. 65-37 (unpublished) and 1958 Op. Att'y Gen. No. 1978, p. 247, overruled in part.) The board may not require that it interview all candidates before approving an appointment.
2. The board of county commissioners may not appoint a new employee to the county department of welfare without the welfare director's knowledge or consent.
3. The board of county commissioners has authority to designate additional welfare duties to be undertaken by the welfare department but does not have authority to designate a certain employee to undertake a specific work assignment or function.
4. The welfare director has the responsibility of assigning duties to department of welfare employees.