

**OPINION NO. 87-093****Syllabus:**

1. With the exception of those prosecuting attorneys listed in R.C. 1901.34(B), it is not the duty of the county prosecuting attorney to prosecute minor misdemeanor and traffic cases brought before a municipal court when the cases arise in unincorporated areas within the territory of the municipal court. Rather, pursuant to R.C. 1901.34(A), it is the duty of the village solicitor, city director of law, or similar chief legal officer of the municipality in which a municipal court is located to prosecute such cases.
2. Although R.C. 5123.04(G) authorizes the Director of the Department of Mental Retardation and Developmental Disabilities to enter into contracts on behalf of the Department, since R.C. 1901.34 mandates who has responsibility for prosecuting cases in municipal court, the Director does not have the authority to contract for the prosecution in municipal court of minor misdemeanor and traffic cases which arise at one of the Department's institutions.

**To: Robert E. Brown, Director, Ohio Department of Mental Retardation and Developmental Disabilities, Columbus, Ohio**

**By: Anthony J. Celebrezze, Jr., Attorney General, November 27, 1987**

I have before me your request for my opinion concerning the prosecution of minor misdemeanor and traffic citation cases arising at the Warrensville Developmental Center. The Center is located in Warrensville Township in Cuyahoga County and has its own security force. You have indicated that the prosecutor for Warrensville Township<sup>1</sup> has refused to prosecute cases in Bedford Municipal Court which arise from citations issued by the Center's security force.

Your questions are as follows:

1. Does the Cuyahoga County prosecuting attorney have the responsibility to prosecute in Bedford Municipal Court traffic citations and minor misdemeanors originating at Warrensville Developmental Center? If he does, and would prefer that the prosecutor for Warrensville Township prosecute those cases, is the Cuyahoga County Board of Commissioners obligated to pay him for those services?
2. Does the Department of Mental Retardation and Developmental Disabilities, through the

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<sup>1</sup> Based upon a conversation with the Bedford Municipal Court staff, I understand that the person identified in your letter as the prosecutor for Warrensville Township is a member of the staff of the Bedford City Law Director.

Warrensville Developmental Center, have the authority to contract with the Warrensville Township prosecutor to prosecute Warrensville Developmental Center cases in Bedford Municipal Court?

Before addressing your specific questions, a preliminary discussion of the powers and duties of the security force at the developmental center, and the procedures involved in traffic citation and minor misdemeanor cases, may be helpful. R.C. 5123.13 permits the Department of Mental Retardation and Developmental Disabilities to designate one or more employees at its institutions as special policemen. These policemen take an oath of office and give bond for proper discharge of their duties. Id. R.C. 5123.13 lists the following duties of the special police:

[to] protect the property of such institutions and the persons and property of patients in the institutions, suppress riots, disturbances, and breaches of the peace, and enforce the laws of the state and rules of the department for the preservation of good order. They may arrest without a warrant any person found committing a misdemeanor under a law of the state, and detain such person until a warrant can be obtained. (Emphasis added.)

These special police fall within the definition of "law enforcement officer" under R.C. 2901.01(K)(2)(law enforcement officer includes state agency employees who have power to arrest). See also Crim. R. 2. Law enforcement officers must follow the procedure for minor misdemeanors set out in R.C. 2935.26 and Crim. R. 4.1. In minor misdemeanor cases the officer must issue a citation rather than arrest the defendant.<sup>2</sup> The officer then must file the original citation with the court having jurisdiction over the offense. R.C. 2935.26; Crim. R. 4.1. See also M.C. Sup. R. 11. The procedure for traffic violations is similar. The officer must serve a copy of the completed ticket on the defendant and file a copy with the court. Traf. R. 3(E). Traf. R. 3(C) provides that "[a]ny ticket properly issued to a law enforcement officer shall be accepted for filing and disposition in any court having jurisdiction over the offense alleged." Assuming that the traffic and misdemeanor citations are properly issued by the Center's special police, these citations must be accepted for filing and disposition in Bedford Municipal Court.<sup>3</sup>

Turning now to your question of whether the county prosecuting attorney is responsible for prosecuting these cases in municipal court, I direct your attention to R.C. 1901.34(A) which states:

(A) Except as provided in divisions (B) and (D) of this section, the village solicitor, city director of

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<sup>2</sup> In certain cases, such as when the defendant refuses to identify himself or refuses to sign the citation, the officer must follow normal arrest procedures. R.C. 2935.26. See also Crim. R.4.

<sup>3</sup> The Bedford Municipal Court has territorial jurisdiction over Warrensville Township. R.C. 1901.02. The court also has subject-matter jurisdiction over traffic offenses and minor misdemeanors occurring therein. R.C. 1901.20.

law, or similar chief legal officer for each municipal corporation within the territory of a municipal court shall prosecute all cases brought before the municipal court for criminal offenses occurring within the municipal corporation for which he is the solicitor, director of law, or similar chief legal officer. Except as provided in division (B) of this section, the village solicitor, city director of law, or similar chief legal officer of the municipal corporation in which a municipal court is located shall prosecute all criminal cases brought before the court arising in the unincorporated areas within the territory of the municipal court. (Emphasis added.)

The Supreme Court of Ohio has held that "[i]n statutory construction, the word 'may' shall be construed as permissive and the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage." Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971)(syllabus, first paragraph). In R.C. 1901.34(A), then, the word "shall" imposes a legal obligation on the village solicitor, city director of law, or similar chief legal officer of the municipal corporation in which a municipal court is located. See also 1968 Op. Att'y Gen. No. 68-117 at p. 2-169 (R.C. 1901.34 "is not permissive nor is it indefinite or uncertain in its terms but rather it is mandatory, and the legislature used the word 'shall' rather than 'may' or other words of less force and direction"). This legal obligation includes the prosecution in municipal court of all criminal cases which arise in unincorporated areas within the court's jurisdiction.

An analysis of the statutory scheme of R.C. 1901.34 reinforces my conclusion. Since R.C. 1901.34(A) imposes a duty on the city prosecutor to prosecute all criminal cases arising in unincorporated areas, the county prosecutor does not have this duty unless it is imposed in R.C. 1901.34(B). R.C. 1901.34(B) lists certain county prosecutors who must prosecute all state law violations occurring in their respective counties. Division (B) also lists certain county prosecutors who must prosecute all state law violations occurring in the unincorporated areas of their counties. Since the Cuyahoga County prosecutor is not one of those listed, it follows that the general rule of R.C. 1901.34(A) applies: the duty to prosecute in Municipal Court all criminal cases arising in unincorporated areas lies with the city director of law or similar chief legal officer of the municipal corporation in which the court is located. See State ex rel. Boda v. Brown, 157 Ohio St. 368, 372, 105 N.E.2d 643, 646 (1952)(under the statutory construction rule of expressio unius est exclusio alterius, "the express mention of but one class of persons in a statute implies the exclusion of all others").

Warrensville Township, and the Warrensville Developmental Center located in the township, are "unincorporated areas" within the meaning of the statute. See Carroll v. Washington Township Zoning Commission, 56 Ohio St. 2d 164, 383 N.E.2d 569 (1978)(a township is not a municipal corporation). As discussed above, the special police of the developmental center are law enforcement officers and have the authority to file traffic tickets and minor misdemeanor citations with the Bedford Municipal Court. Therefore, pursuant to R.C. 1901.34(A), the city director of law or similar chief legal

officer of Bedford has the duty to prosecute the criminal cases arising in the Warrensville Developmental Center.<sup>4</sup> See 1977 Op. Att'y Gen. No. 77-008 (in municipal court hearings dealing with driver's license suspensions arising out of arrests in unincorporated areas, Registrar of Bureau of Motor Vehicles shall be represented, pursuant to R.C. 1901.34, by solicitor, attorney, or law director of city in which the municipal court is located). See also 1969 Op. Att'y Gen. No. 69-095 (pursuant to R.C. 1901.34, city solicitor or law director shall prosecute township misdemeanor zoning violation cases in municipal court); 1966 Op. Att'y Gen. No. 66-159 at 2-336 (the "plain direction" to city solicitor of city in which municipal court is located is to prosecute all cases arising in unincorporated areas).

I note that R.C. 309.08 provides, in part:

The prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party...and such other suits, matters, and controversies as he is required to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals.

Therefore, the county prosecutor is generally responsible for the prosecution of cases in which the state is a party, which includes criminal cases involving violations of state statutes. See generally City of Toledo v. Tucker, 99 Ohio App. 346, 133 N.E.2d 411 (Lucas Co. 1954) (in municipal court, prosecutions for violations of state laws must be brought and conducted in the name of the state, and prosecutions for violations of municipal ordinances must be brought in the name of the municipal corporation). However, since R.C. 1901.34 specifically addresses who must prosecute cases in municipal court, the specific provisions of R.C. 1901.34 prevail over the general provision of R.C. 309.08. See Cincinnati v. Thomas Soft Ice Cream, 52 Ohio St. 2d 76, 369 N.E.2d 778 (1977) (syllabus, paragraph one) ("Where there is no manifest legislative intent that a general provision of the Revised Code prevail over a special provision, the special provision takes precedence").

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<sup>4</sup> Another section of the Revised Code which addresses who has the duty to prosecute in municipal courts is R.C. 2938.13 which provides that "[i]n any case prosecuted for violation of a municipal ordinance the village solicitor or city director of law, and for a statute, he or the prosecuting attorney, shall present the case for the municipal corporation and the state respectively...."

R.C. 2938.13 is part of R.C. Chapter 2938 which deals with magistrate courts, which are those courts inferior to common pleas including municipal courts. However, R.C. 1901.34 will govern since it specifically addresses prosecutorial responsibility in municipal court. See Cincinnati v. Thomas Soft Ice Cream, 52 Ohio St. 2d 76, 369 N.E.2d 778 (1977) (syllabus, paragraph one) ("Where there is no manifest legislative intent that a general provision of the Revised Code prevail over a special provision, the special provision takes precedence"). See also State v. Magana, 115 Ohio App. 106, 184 N.E.2d 525 (Franklin Co. 1961) (right to trial by jury in municipal court is governed by R.C. 1901.24 rather than R.C. 2938.04, since a specific statute prevails over a general).

Thus, in answer to your first question, I conclude that the Cuyahoga County Prosecuting Attorney does not have the responsibility to prosecute in municipal court traffic citations and minor misdemeanors originating at the Warrensville Developmental Center. This being so, it is not necessary to address the second part of your first question.

I turn now to your second question. You ask whether the Department of Mental Retardation and Developmental Disabilities has the authority to contract with the Warrensville Township prosecuting attorney for prosecution of cases arising in the Warrensville Developmental Center. R.C. 5123.03(G) authorizes the department to manage certain institutions and facilities. In addition to certain express powers, the department has "the authority necessary for the full and efficient exercise of the executive, administrative, and fiscal supervision over the [department's] institutions..." Id. R.C. 5123.04(G) authorizes the director of the department to enter into contracts on behalf of the department. Taken together, these two statutes indicate that the director of the department may enter into contracts that are necessary for supervision of the department's institutions. However, since the city law director or similar chief legal officer of Bedford has the statutory duty to prosecute those cases arising in the department's Warrensville Developmental Center, a contract between the department and the prosecutor for Warrensville Township is unnecessary and beyond the authority of the department. See Teale v. Stillinger, 95 Ohio St. 129, 115 N.E. 1010 (1916)(contract providing additional compensation for performance of official duty is null and void). See also State ex rel. A. Bentley & Sons Co. v. Pierce, 96 Ohio St. 44, 117 N.E. 6 (1917)(syllabus, third paragraph)("In case of doubt as to the right of any administrative board to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power").

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

1. With the exception of those prosecuting attorneys listed in R.C. 1901.34(B), it is not the duty of the county prosecuting attorney to prosecute minor misdemeanor and traffic cases brought before a municipal court when the cases arise in unincorporated areas within the territory of the municipal court. Rather, pursuant to R.C. 1901.34(A), it is the duty of the village solicitor, city director of law, or similar chief legal officer of the municipality in which a municipal court is located to prosecute such cases.
2. Although R.C. 5123.04(G) authorizes the Director of the Department of Mental Retardation and Developmental Disabilities to enter into contracts on behalf of the Department, since R.C. 1901.34 mandates who has responsibility for prosecuting cases in municipal court, the Director does not have the authority to contract for the prosecution in municipal court of minor misdemeanor and traffic cases which arise at one of the Department's institutions.