

OPINION NO. 90-106**Syllabus:**

1. Pursuant to R.C. 3734.57(B) and (E)(3), a board of health may use funds derived from fees collected under R.C. 3734.57(B) and (E)(3) to hire legal counsel whose duties involve enforcement of R.C. 3734.01-.13 and rules, orders, and terms and conditions of permits, licenses, and variances adopted or issued under R.C. 3734.01-.13.
2. A county prosecuting attorney may appoint as an assistant prosecuting attorney an individual who is employed and compensated by a board of health pursuant to R.C. 3734.57(B) and (E)(3), without providing the individual with any compensation pursuant to R.C. 309.06, where the board of health requests that such appointment be made and the prosecuting attorney makes an independent determination as to the qualifications of the assistant prosecuting attorney and provides the assistant with appropriate supervision and support.
3. There is no requirement that compensation paid by a board of health to an employee of the board who has been appointed as an assistant prosecuting attorney must be paid from the county general fund.

To: Robert D. Horowitz, Stark County Prosecuting Attorney, Canton, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 31, 1990

I have before me your request for an opinion concerning the use of certain solid waste disposal fees to compensate an attorney who is appointed as an assistant county prosecutor. Your specific questions are:

- (1) May funds collected pursuant to R.C. Section 3734.57(B) and (E)(3) be used to compensate an assistant county prosecutor for duties performed pursuant to R.C. Section 3734.10?
- (2) If the answer to No. 1 is affirmative, may the assistant county prosecutor be paid directly from health district funds or must the funds be first transferred from the health district to the county general fund?

I note, as an initial matter, that a board of health is not a county board. See R.C. 3709.01; 1965 Op. Att'y Gen. No. 65-121 (syllabus, paragraph 1) ("[a] general health district as provided for in [R.C. Chapter 3709] is not a part of...county government"). As a result, a board of health is not subject to the provisions of R.C. 309.09 prohibiting a county officer from employing any counsel or attorney other than the county prosecuting attorney at the expense of the county, except as provided in R.C. 305.14. See generally *State ex rel. Jefferson County Children Services Board v. Hallock*, 28 Ohio St. 3d 179, 502 N.E.2d 1036 (1986); *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 108 (1981); 1989 Op. Att'y Gen. No. 89-099; 1986 Op. Att'y Gen. No. 86-036; 1983 Op. Att'y Gen. No. 83-078; 1931 Op. Att'y Gen. No. 3837, vol. III, p. 1482. The county prosecuting attorney is, however, designated by statute as legal adviser to a board of

health. See R.C. 3709.33.¹ The board of health may, accordingly, request legal advice from the county prosecutor, and the county prosecutor "shall act as the legal representative of the board" in legal proceedings. R.C. 3709.33. See generally 1931 Op. No. 3837.

I turn now to an examination of the source of the funds in question. R.C. 3734.57(B) authorizes the solid waste management policy committee of a county or joint solid waste management district to levy fees upon the disposal of solid wastes at solid waste disposal facilities located in the district and states that the fees may be used for various purposes, including "providing financial assistance to boards of health within the district, if solid waste facilities are located within the district, for the enforcement of [R.C. 3734.01-.13] and rules adopted and orders and terms and conditions of permits, licenses, and variances issued under those sections." R.C. 3734.57(E)(3) further describes the purposes for which such fees may be expended, as follows:

Moneys in the special fund of the county or joint district arising from the fees levied under divisions (B)(1) to (3) of this section shall be expended by the board of county commissioners or directors of the district in accordance with the district's solid waste management plan or amended plan approved under section 3734.55 or 3734.56 of the Revised Code exclusively for the following purposes:

...
 (3) *Providing financial assistance to boards of health within the district, if solid waste facilities are located within the district, for enforcement of sections 3734.01 to 3734.13 of the Revised Code and rules, orders, and terms and conditions of permits, licenses, and variances adopted or issued under those sections....* (Emphasis added.)

Your basic question is whether, when a board of health receives moneys pursuant to R.C. 3734.57(B) and (E)(3), the board may use the moneys to compensate an attorney who is employed by the board and is appointed as an assistant county prosecutor. I assume that the provision of the moneys to the board by the solid waste management district pursuant to R.C. 3734.57(B) and (E)(3) is in accordance with the district's approved solid waste management plan or amended plan, as required by R.C. 3734.57(E). See generally 1989 Op. Att'y Gen. No. 89-054; 1988 Op. Att'y Gen. No. 88-099.

Pursuant to R.C. 3734.57(E)(3), the moneys about which you have inquired may be distributed to boards of health "for enforcement of [R.C. 3734.01-.13] and rules, orders, and terms and conditions of permits, licenses, and variances adopted or issued under those sections..." R.C. 3734.01 to 3734.13 and rules adopted thereunder set forth requirements pertaining to the inspection and issuance of permits and licenses for solid waste facilities "in order to ensure that the facilities will be located, maintained, and operated, and will undergo closure and post-closure care, in a sanitary manner so as not to create a nuisance, cause or contribute to water pollution, create a health hazard, or violate 40 C.F.R. 257.3-2 or 40 C.F.R. 257.3-8, as amended." R.C. 3734.02(A); see also R.C. 3734.05-.09; R.C. 3734.12; 4 Ohio Admin. Code Chapters 3745-27 and 3745-37.

Boards of health have certain responsibilities for enforcing the provisions of R.C. Chapter 3734. R.C. 3734.04 requires that the board of health of each district maintaining a program on the approved list under R.C. 3734.08(A) or (B) "shall

¹ R.C. 3709.33 states:

In general health districts the prosecuting attorney of the county constituting all or a major part of such district shall act as the legal advisor of the board of health. In a proceeding in which the board is a party the prosecuting attorney of the county in which such proceeding is instituted shall act as the legal representative of the board.

provide for the inspection, licensing, and enforcement of sanitary standards for solid waste facilities" in conformity with R.C. Chapter 3734. A board of health is given general inspection and investigatory powers in connection with its licensing activities. R.C. 3734.07; *see also* R.C. 3734.08-.09. R.C. 3734.10 sets forth the following authority for a board of health to initiate investigations into matters involving solid waste disposal:

Upon written request by any person, the board of health or the director shall conduct such investigations and make such inquiries as are necessary to secure compliance with this chapter or the rules adopted thereunder. The director or *any board of health may, upon request or upon their own initiative, investigate or make inquiries into any alleged violation or act of improper solid waste disposal, improper infectious waste transportation or treatment, or improper hazardous waste storage, transportation, treatment, or disposal.* (Emphasis added.)

Both civil and criminal remedies are provided for violations of R.C. 3734.01-.13. *See, e.g.,* R.C. 3734.101; R.C. 3734.13; R.C. 3734.99.

The board of health may request that legal action be brought against particular violators, as follows:

The attorney general or *the prosecuting attorney of the county or the city director of law where a violation has occurred, is occurring, or may occur, upon request of the respective board of health of the health district, the legislative authority of a political subdivision in which a violation has occurred, is occurring, or may occur, or the director of environmental protection, shall prosecute to termination or bring an action for injunction against any person who has violated, is violating, or is threatening to violate any section of this chapter, rules adopted under this chapter, or terms or conditions of permits, licenses, variances, or orders issued under this chapter.*

R.C. 3734.10 (emphasis added). Hence, it is clear that the investigatory power of a board of health and the prosecutorial duties of the county prosecutor are closely related and, in fact, are complementary parts of the implementation and enforcement of R.C. 3734.01-.13. *See also* R.C. 3709.33.

In conversations with my staff, you indicated that the proposal in question is that the board of health hire an attorney whose duties would relate to the enforcement of R.C. 3734.01-.13 and rules, orders, and terms and conditions of permits, licenses, and variances adopted or issued under those sections. You, as prosecuting attorney, would appoint that attorney as an assistant county prosecutor, and the attorney would act under your supervision to provide the health district with legal counsel, to participate in investigations, and to bring enforcement actions as appropriate.

The essential effect of the proposal that you have described is that the health district would employ an individual who would serve as an assistant prosecuting attorney. In the instant case, the board of health is authorized to undertake inspections, to initiate investigations, and to request the prosecutor to prosecute particular violations involving solid waste disposal. As discussed above, the functions of the health district and the county prosecuting attorney with respect to solid waste disposal enforcement are complementary parts of the implementation and enforcement of R.C. 3734.01-.13. I conclude, accordingly, that R.C. 3734.57(B) and (E)(3) provide statutory authority for the board of health to hire an attorney who, by virtue of his appointment as an assistant prosecuting attorney, is able to perform duties that serve the functions of both the health district and the county prosecutor in matters relating to the enforcement of R.C. 3734.01-.13.

It appears that it is permissible for a health district to use funds derived from R.C. 3734.57(B) and (E)(3) to hire legal counsel. As discussed above, a board of health is not a county board and, accordingly, is not subject to the provisions of R.C.

309.09 that prohibit a county officer from employing an attorney other than the county prosecutor at county expense, except pursuant to R.C. 305.14. R.C. 3734.57(B) and (E)(3) permit funds derived pursuant to their provisions to be expended for enforcement purposes, and the activities of an attorney in analyzing the law and bringing legal proceedings are essential elements of the enforcement of statutes, rules, orders, and terms and conditions of permits, licenses and variances. See, e.g., *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 736 (1980) (prosecutors "are natural targets for §1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law"); *Holy Spirit Association v. Peterson*, 489 F.Supp. 428 (N.D. Ill. 1979) (chief of police and city attorney were officials charged with enforcement of a municipal ordinance); *City of Gary v. Cox*, 512 N.E.2d 452, 454 (Ind. Ct. App. 1987) ("[l]aw enforcement necessarily involves a broad continuum of duties"); *Seymour National Bank v. State*, 422 N.E.2d 1223, 1228 (Ind. 1981) (Hunter, J., dissenting) ("the 'enforcement' of laws is not the exclusive bailiwick of police officers....[T]he legislature has employed the term 'enforcement' in a wide range of government-controlled activities which, depending upon the particular statutory context, gives rise to various connotations and interpretations of the word 'enforcement'"); *Black's Law Dictionary* 474 (5th ed. 1979) (defining "enforcement" as "[t]he act of putting something such as a law into effect; the execution of a law..."). Compare R.C. 3734.57 with, e.g., R.C. 329.02 (as discussed in Op. No. 83-078, which concludes, at 2-317, that "[t]he general terms 'necessary assistants' and 'all other employees of the department' contained in R.C. 329.02 do not...apply to the employment of legal counsel by the [county] department [of human services] since the latter is specifically provided for in R.C. 309.09(A)"). See generally, e.g., R.C. 2933.43(D)(4) (providing for the establishment of a law enforcement trust fund by a county prosecuting attorney, to be used only for authorized purposes). While R.C. 3734.57 does not state expressly that the moneys in question may be used to compensate an attorney, that conclusion is implied by the language and the purpose of the statute. See R.C. 3734.04; R.C. 3734.07-10; R.C. 3734.57. Compare R.C. 3734.57 with, e.g., R.C. 305.14; R.C. 309.09; R.C. 319.54(G) (five per cent of all certified delinquent taxes and assessments collected by the county treasurer on any tax duplicate of the county shall be deposited in the delinquent real estate tax and assessment collection fund...The moneys in the fund,...one-half of which shall be appropriated to the county prosecuting attorney, shall be used solely in connection with the collection of delinquent real property taxes and assessments"); Op. No. 89-099; 1989 Op. Att'y Gen. No. 89-015.

It is necessary next to consider whether a county prosecuting attorney may appoint as an assistant prosecutor an attorney who is compensated by a board of health. R.C. 309.06 provides general authority for the county prosecutor to appoint assistant prosecutors and fix their salaries, as follows:

On or before the first Monday in January of each year, the judge of the court of common pleas, or, if there is more than one judge, the judges of such court in joint session, may fix an aggregate sum to be expended for the incoming year for the compensation of assistants, clerks, and stenographers of the prosecuting attorney's office.

The prosecuting attorney may appoint such assistants, clerks, and stenographers as are necessary for the proper performance of the duties of his office and fix their compensation, not to exceed, in the aggregate, the amount fixed by the judges of such court. Such compensation, after being so fixed, shall be paid to such assistants, clerks, and stenographers biweekly, from the general fund of the county treasury, upon the warrant of the county auditor. (Emphasis added.)

In the situation that you have described, a county prosecutor would appoint the individual in question as an assistant prosecutor, with such authority and duties as are defined by the prosecutor, and would fix the assistant's compensation at zero. The assistant would be compensated by the health district for services rendered to the health district. Services rendered as an assistant prosecuting attorney would also benefit the health district, and the attorney could properly be compensated by the health district for such services.

No provision of R.C. 309.06 requires an assistant prosecuting attorney to receive a particular amount of compensation – or, indeed, any compensation. The proposal that a prosecuting attorney appoint as an assistant an individual whom he does not pay does not, accordingly, appear to be in conflict with R.C. 309.06. Since compensation for the individual would not be provided by the prosecutor pursuant to R.C. 309.06, the provision of R.C. 309.06 that compensation "shall be paid...from the general fund of the county treasury" would not be applicable. *See generally State ex rel. Zaleski*, 12 Ohio St. 3d 109 at 113 n. 5, 465 N.E.2d 861 at 864 n. 5 (1984).

It is also necessary to determine whether an employee of a health district may serve as an assistant prosecuting attorney. I am of the opinion that such an employee may serve in the capacity of an assistant prosecuting attorney in the situation that you have described. It is clear that the health district and the county prosecuting attorney have common goals in that situation, and I am assuming that an attorney who works for the enforcement of R.C. 3734.01–.13 will be acting in a manner that serves the purposes of both the health district and the county prosecuting attorney. An assistant county prosecutor may, in general, carry out such duties of the prosecuting attorney as the prosecuting attorney authorizes and directs the assistant to perform. *See, e.g.*, 1988 Op. Att'y Gen. No. 88–094; 1988 Op. Att'y Gen. No. 88–049 at 2–223 ("an assistant prosecuting attorney is empowered to act for, and in place of, the prosecuting attorney in most matters"); 1986 Op. Att'y Gen. No. 86–035; 1945 Op. Att'y Gen. No. 184, p. 163 (syllabus) ("[a]n assistant appointed by the prosecuting attorney may, whenever authorized or directed by him, act for and in the place of such prosecuting attorney in all civil and procedural matters..."); 1943 Op. Att'y Gen. No. 6186, p. 363 at 365–66 (assistant prosecuting attorneys may perform such part of the official duties of the prosecuting attorney as he assigns to them). An assistant prosecuting attorney who works for a health district would, thus, be given authorization to perform prosecutorial duties that relate to the enforcement of R.C. 3734.01–.13. On the facts presented, the tasks performed by the attorney will serve the purposes of both the health district and the prosecuting attorney. If at any time a conflict should arise, the prosecutor may, of course, terminate the appointment of the individual as his assistant.

You have indicated that the health district has requested that a member of its staff be appointed as an assistant prosecuting attorney in order to provide the district with immediate access to legal counsel. I am assuming that the county prosecuting attorney will make an independent determination that the attorney in question is qualified to serve as an assistant prosecuting attorney, and that the county prosecuting attorney will provide such supervision and support to the assistant prosecutor as is required to assure that the functions of the county prosecutor are carried out in a competent fashion. *See generally, e.g.*, R.C. 305.02(G) ("[a] person appointed...assistant prosecuting attorney shall give bond and take the oath of office prescribed by [R.C. 309.03] for the prosecuting attorney"); R.C. 309.06 ("[t]he prosecuting attorney may appoint such assistants...as are necessary for the proper performance of the duties of his office"); *State ex rel. Neffner v. Hummel*, 142 Ohio St. 324, 334, 51 N.E.2d 900, 904 (1943) (for purposes of certain civil service provisions, an "assistant" is "an agent through whom the duties and purposes of the department are accomplished"); *State ex rel. Thomas v. Henderson*, 123 Ohio St. 474, 478, 175 N.E. 865, 866 (1931) ("[t]he appointment of an assistant implies that such assistant would be under the direction of the prosecuting attorney himself"); *State ex rel. Myers v. Blake*, 121 Ohio St. 511, 516–17, 169 N.E. 599, 601 (1929) ("[t]he subordinate of one in an official position is necessarily an assistant, looking toward the accomplishment of the common object"); *Thomas v. Board of County Commissioners*, 88 Ohio St. 489, 493–94, 104 N.E. 536, 537 (1913) ("[t]he very purpose of having assistants to the [city] solicitor, or any other public officer, is to secure the participation by them in the performance of the duties of the office....It is well known that in many instances such assistants have full control of matters of great importance in the courts and elsewhere. They receive their authority to perform their duties solely because they are assistants and have been given the work to do by the city solicitor"); *State ex rel. Drew v. Smith*, 8 Ohio Dec. Rep. 136 (Hamilton Dist. Ct. 1880); *State ex rel. Falconer v. Cooper*, 12 Ohio N.P. (n.s.) 659, 665 (C.P. Hamilton County 1912) ("an assistant prosecuting attorney is not an officer in the sense that the word is used in the state Constitution, but...he is a person authoritatively appointed to assist an officer in an office

provided by law"). The functions carried out by the individual in question would serve the purposes of both the health district and the prosecuting attorney, and would be performed on behalf of both the health district and the prosecuting attorney. The statutory scheme appears to permit a single individual to serve in both capacities. *Compare* R.C. 3734.57 with Op. No. 86-035 and Op. No. 83-078.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. Pursuant to R.C. 3734.57(B) and (E)(3), a board of health may use funds derived from fees collected under R.C. 3734.57(B) and (E)(3) to hire legal counsel whose duties involve enforcement of R.C. 3734.01-.13 and rules, orders, and terms and conditions of permits, licenses, and variances adopted or issued under R.C. 3734.01-.13.
2. A county prosecuting attorney may appoint as an assistant prosecuting attorney an individual who is employed and compensated by a board of health pursuant to R.C. 3734.57(B) and (E)(3), without providing the individual with any compensation pursuant to R.C. 309.06, where the board of health requests that such appointment be made and the prosecuting attorney makes an independent determination as to the qualifications of the assistant prosecuting attorney and provides the assistant with appropriate supervision and support.
3. There is no requirement that compensation paid by a board of health to an employee of the board who has been appointed as an assistant prosecuting attorney must be paid from the county general fund.