

OPINION NO. 85-050**Syllabus:**

1. A board of county commissioners has the authority to reduce the salary of a humane society agent to an amount less than that paid in previous years, so long as the board determines that the reduced amount is "just and reasonable" and provided that the salary to be paid is not less than twenty-five dollars per month. The board of county commissioners may reduce the salary of a humane society agent even though the county has already appropriated a larger sum for such agent's salary.
2. A county probate judge has no authority to reduce the salary of a humane society agent.
3. A county probate judge may order the discharge of a humane society agent, dispense with his salary, and approve the county humane society's appointment of another agent without a finding that there is no necessity for an agent, if the judge finds that the agent is no longer competent to discharge the duties of humane society agent.

To: Robert P. DeSanto, Ashland County Prosecuting Attorney, Ashland, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, August 15, 1985

I have before me your request for my opinion concerning the appointment and compensation of the county humane society agent. Your questions are as follows:

1. Does the board of county commissioners have the authority to reduce the salary of a humane society agent to an amount less than that paid in prior years, provided that the salary to be paid is not less than the twenty-five dollars per month required by R.C. 1717.07? If the answer is yes, then may they do so during a current year where his salary has already been appropriated?
2. Does the county probate judge have the authority to reduce the salary of a humane society agent in such a manner?
3. May the county probate judge order the discharge of a humane society agent, dispense with his salary, and appoint another such agent without a finding that there is no necessity for a humane society agent?

In order to respond to your questions, I must examine the following pertinent provisions of R.C. Chapter 1717, which provides for the creation of county humane societies.

"A society for the prevention of acts of cruelty to animals may be organized in any county by the association of not less than seven persons," R.C. 1717.05. The object of such society is "the inculcation of humane principles and the enforcement of laws for the prevention of cruelty, especially to children and animals," R.C. 1717.02. See generally 1983 Op. Att'y Gen. No. 83-050. R.C. 1717.06 provides for the appointment of agents of a county humane society as follows:

A county humane society organized under section 1717.05 of the Revised Code may appoint agents, who are residents of the county or municipal corporation for which the appointment is made, for the purpose of prosecuting any person guilty of an act of cruelty to persons or animals. Such agents may arrest any person found violating sections 1717.01 to 1717.14, inclusive, of the Revised Code, or any other law for protecting persons or animals or preventing acts of

cruelty thereto. Upon making such arrest the agent forthwith shall convey the person arrested before some court or magistrate having jurisdiction of the offense, and there make complaint against him on oath or affirmation of the offense.

All appointments of agents under this section shall be approved by the mayor of the municipal corporation for which they are made. If the society exists outside a municipal corporation, such appointments shall be approved by the probate judge of the county for which they are made. Such mayor or probate judge shall keep a record of such appointments.

R.C. 1717.07 provides for the compensation of agents of a county humane society, and reads:

Upon the approval by the mayor of a municipal corporation of the appointment of an agent under section 1717.06 of the Revised Code, the legislative authority of such municipal corporation shall pay monthly to such agent, from the general revenue fund of the municipal corporation, such salary as the legislative authority deems just and reasonable. Upon the approval by the probate judge of a county of such an appointment, the board of county commissioners of such county shall pay monthly to such agent, from the general revenue fund of the county, such salary as the board deems just and reasonable. Such board and such legislative authority may agree upon the amount each is to pay such agent monthly. The salary to be paid monthly to such agent by the legislative authority of a village shall be not less than five dollars; by the legislative authority of a city, not less than twenty dollars; and by the board of county commissioners of a county, not less than twenty-five dollars. Not more than one such agent in each county shall receive remuneration from the board under this section.

Turning to your first question, R.C. 1717.07 requires a board of county commissioners, upon the approval of an agent's appointment by the probate court, to pay the agent monthly "such salary as the board deems just and reasonable," so long as such monthly salary is not less than twenty-five dollars. While the board of county commissioners has a mandatory duty to pay an agent at least twenty-five dollars per month, *see* 1933 Op. Att'y Gen. No. 861, vol. I, p. 767, I see no reason why the county commissioners may not reduce the salary of an agent to an amount which is not less than twenty-five dollars per month, even though such amount is less than that which he was paid in previous years. An agent of a county humane society is not a public officer or employee. *See* 1933 Op. Att'y Gen. No. 338, vol. I, p. 360 (a county humane society agent is not a public officer, but is a private agent); 1928 Op. Att'y Gen. No. 2630, vol. III, p. 2193 (a county humane society agent is not an officer of the county); 1914 Op. Att'y Gen. No. 872, vol. I, p. 503 (a county humane society agent is not subject to civil service). *But cf. State v. Osborn*, 63 Ohio Misc. 17, 409 N.E.2d 1077 (Montgomery County Ct. 1980) (the fourth amendment to the United States Constitution is applicable to searches conducted by an agent of a county humane society). Thus, a county humane society agent is not subject to those provisions which restrict the reduction of a public officer's or public employee's compensation. *See, e.g.,* Ohio Const. art. II, §20; R.C. 124.34. R.C. 1717.07 grants the board of county commissioners a great deal of discretion in fixing the agent's salary. The board may, therefore, reduce an agent's salary so long as the board determines that the reduced amount is "just and reasonable," and so long as the agent is paid at least twenty-five dollars per month.

You have questioned whether the board of county commissioners may reduce an agent's salary during a year in which his salary has already been appropriated. Merely because the board of county commissioners has appropriated funds for a particular purpose does not mean that the board is compelled to expend such funds. County funds may not be expended until they have been appropriated as provided in R.C. Chapter 5705 and public funds may be spent only for the purpose for which they are appropriated. *See* R.C. 5705.10; R.C. 5705.38; R.C. 5705.39; R.C. 5705.41. There is, however, no obligation on the part of the board to expend funds once they have been appropriated. An appropriation measure may, under certain restrictions,

be amended and reduced, see R.C. 5705.40; 1984 Op. Att'y Gen. No. 84-033; 1959 Op. Att'y Gen. No. 349, p. 198; 1933 Op. Att'y Gen. No. 192, vol. I, p. 239, and transfers may be made from one appropriation item to another, see R.C. 5705.14-.16; R.C. 5705.40. Further, "[a]t the close of each fiscal year, the unencumbered balance of each appropriation shall revert to the respective fund from which it was appropriated and shall be subject to future appropriations." R.C. 5705.40. See 1951 Op. Att'y Gen. No. 640, p. 379. Thus, even though the county commissioners have appropriated an amount to be paid the agent for the fiscal year, the commissioners need not pay the agent the entire sum so appropriated and may reduce the salary of the agent.

Your second question concerns whether the probate judge has the authority to reduce the salary of an agent of a county humane society. Pursuant to R.C. 1717.06, the probate judge has the authority to approve the appointment of an agent by a humane society existing outside a municipal corporation. See State ex rel. Coshocton Humane Society v. Ashman, 90 Ohio St. 200, 107 N.E. 337 (1914) (syllabus) (a probate judge, when considering the appointment of an agent of a humane society, "has discretion to determine not only whether the person named is a proper person for the discharge of such duties, but also whether there is such necessity for the appointment as would justify the payment of the expense out of the public treasury"). See also State ex rel. Diehl v. Colwell, 123 Ohio St. 535, 176 N.E. 117 (1931), aff'd 124 Ohio St. 329, 178 N.E. 312 (1931) (approving Ashman and further concluding that the probate judge may determine that there no longer exists the necessity for the services of the agent); 1935 Op. Att'y Gen. No. 4595, vol. II, p. 1127; 1933 Op. No. 861. Further, an agent is not entitled to compensation from the county until his appointment has been approved by the probate judge. R.C. 1717.07; State ex rel. Diehl v. Colwell; State ex rel. Coshocton Humane Society v. Ashman; 1933 Op. No. 338. See also 1933 Op. No. 861. A probate judge, however, has no authority to fix or alter the compensation of an agent once he has approved the agent's appointment. Such power is vested solely in the board of county commissioners pursuant to R.C. 1717.07. The probate judge may, if he finds that the services of the agent are no longer necessary, order the discharge of the agent and dispense with his compensation. State ex rel. Diehl v. Colwell. The probate judge may not, however, otherwise reduce the salary of the agent.

Your third question is whether the probate judge may order the discharge of a humane society agent, dispense with his salary, and appoint another agent without a finding that there is no necessity for an agent. Before I address your specific question, I note that the probate judge has no authority to act independently of the county humane society in the selection of a county humane society agent. R.C. 1717.06 empowers the county humane society to appoint agents, and further provides that where the humane society exists outside of a municipal corporation such appointments must be approved by the probate judge. Thus, in the event that an agent is discharged, the humane society would have the right to select another agent, and the probate judge would then have the power to approve or disapprove such selection.

I turn now to the question whether the probate judge may order the discharge of a humane society agent, dispense with his salary, and approve the appointment of another agent without a finding that there is no necessity for an agent. In Ashman, the issue presented was whether a probate judge must approve the appointment of a person who was found to be competent to discharge the duties of an agent. The court declared that under the provisions of what is now R.C. Chapter 1717,

a probate judge, when called upon to approve the appointment of an agent for such society, has discretion to determine not only whether the person named is a proper person for the discharge of such duties, but also whether there is such necessity for the appointment as would justify the payment of the expense out of the public treasury.

¹ The fact that the appointment of another agent is being contemplated indicates that the judge would be unable to find that there is no necessity for the services of an agent.

State ex rel. Coshocton Humane Society v. Ashman (syllabus). See 1933 Op. No. 861. From Ashman, it may be discerned that a probate judge, in determining whether to approve the appointment of an agent, may consider both the person's fitness to carry out the duties of an agent and whether there is a public necessity for the appointment of a county humane society agent.

In State ex rel. Diehl v. Colwell, the court concluded that the power of the probate judge to determine whether there is a public necessity for the appointment of a humane society agent "includes the power to determine whether there is necessity for the continuance of the service of such agent, as well as whether there is necessity for the establishment of such service." State ex rel. Diehl v. Colwell (syllabus, paragraph two). The court further concluded that if the probate judge finds that there is no longer a necessity for the services of an agent, the judge may issue an order dispensing with the salary of the agent and order his discharge. Id. (syllabus, paragraph three). See 1935 Op. No. 4595.

Although Diehl dealt specifically with the power of the probate judge to remove an agent upon a determination that there no longer exists a public necessity for the services of an agent, I believe that the analysis and conclusion of Diehl may be extended to the situation where a probate judge determines that an agent is no longer capable of performing his duties. The court in Diehl found the power to revoke an agent's appointment as necessarily implied from the power to appoint. Id., 123 Ohio St. at 540, 542, 176 N.E. 117 at 119-20. As Ashman recognizes, the probate judge may consider an agent's fitness in determining whether to approve the agent's appointment. Thus, I believe that the judge may revoke an agent's appointment on the basis of the agent's ability to perform his duties as well as on the basis that there no longer exists a public necessity for the services of the agent. Ashman and Diehl suggest, however, that the probate judge's discretion in approving the appointment of or removing a humane society agent is limited to a consideration of the agent's fitness and the necessity for the services of such an agent. Thus, in response to your third question, I conclude that the probate judge may order the discharge of a humane society agent, dispense with his salary, and approve the county humane society's appointment of another agent without a finding that there is no necessity for an agent, if the judge finds that the agent is no longer competent to discharge the duties of humane society agent.

In conclusion, it is my opinion, and you are advised, that:

1. A board of county commissioners has the authority to reduce the salary of a humane society agent to an amount less than that paid in previous years, so long as the board determines that the reduced amount is "just and reasonable" and provided that the salary to be paid is not less than twenty-five dollars per month. The board of county commissioners may reduce the salary of a humane society agent even though the county has already appropriated a larger sum for such agent's salary.
2. A county probate judge has no authority to reduce the salary of a humane society agent.
3. A county probate judge may order the discharge of a humane society agent, dispense with his salary, and approve the county humane society's appointment of another agent without a finding that there is no necessity for an agent, if the judge finds that the agent is no longer competent to discharge the duties of humane society agent.