

OPINION NO. 83-078

Syllabus:

A county director of welfare may not employ an attorney to represent the department of welfare in juvenile court proceedings or to perform other legal services on behalf of the department. Pursuant to R.C. 305.14, however, a court of common pleas, upon application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to act on behalf of the county welfare department.

To: Gregory W. Happ, Medina County Prosecuting Attorney, Medina, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 2, 1983

I have before me your request for my opinion concerning the authority of a county welfare department to hire an attorney to perform legal services on behalf of the welfare department without the approval of the county prosecutor. It is my understanding that in this instance the Medina County Department of Welfare has hired an attorney to represent the department in juvenile court proceedings, and approval for the hiring was obtained only from the board of county commissioners pursuant to R.C. 329.02.

Under R.C. 329.02, the director of a county department of welfare may hire, with the approval of the board of commissioners, all necessary assistants, superintendents of institutions, and other employees of the department. R.C. 329.02 provides in pertinent part: "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.) The general terms "necessary assistants" and "all other employees of the department" contained in R.C. 329.02 do not, however, apply to the employment of legal counsel by the department since the latter is specifically provided for in R.C. 309.09(A). See Cincinnati v. Thomas Soft Ice Cream, 52 Ohio St. 2d 76, 369 N.E.2d 778 (1977) (where there is no manifestation of legislative intent that a general statutory provision should prevail over a special provision, the special provision takes precedent).

As to the employment of legal counsel, R.C. 309.09(A) provides in part:

The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, including all tax supported public libraries, and any of them may require written opinions or instructions from him in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other - counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code. (Emphasis added.)

This statute has been cited by several of my predecessors in support of the proposition that the county prosecuting attorney is under a duty to represent

county departments. See, e.g., 1969 Op. Att'y Gen. No. 69-148 (municipal and county building departments should be represented by the city attorney and county prosecuting attorney, respectively); 1962 Op. Att'y Gen. No. 2840, p. 144 (county director of civil defense is a county officer, and the county prosecuting attorney is his legal advisor); 1959 Op. Att'y Gen. No. 172, p. 85 (under R.C. 309.09, the prosecuting attorney is required to act as legal counsel for the county child welfare board). It stands equally for the proposition that, except as provided therein,¹ a county officer is prohibited from employing any attorney other than the county prosecuting attorney. State ex rel. Corrigan v. Seminatore, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981).

The director of a county department of welfare is an officer within the judicial definition of county officer contained in State v. Brennan, 49 Ohio St. 33, 38-39, 29 N.E. 593, 594 (1892):

And where such duties are wholly performed within the limits of a county, and for the people of that county, the salary to be paid by the disbursing officer of the county, from the funds of the county, the office is a county office, and, as one who is lawfully invested with an office is an officer, the person lawfully filling such place is necessarily a county officer.

See R.C. 329.01 (county director of welfare is appointed by board of county commissioners); R.C. 329.02 (county director of welfare must submit annual budget of the department to the board of county commissioners); R.C. 329.04 (county department of welfare shall exercise and perform its duties "under the control and direction of the board of county commissioners"). As such he is subject to the prohibition against hiring any other counsel or attorney at the expense of the county. R.C. 309.09(A).

R.C. 305.14 is an exception to the prohibition set forth in R.C. 309.09(A). It states:

The court of common pleas, upon the application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to assist the prosecuting attorney, the board, or any other county officer in any matter of public business coming before such board or officer, and in the prosecution or defense of any action or proceeding in which such board or officer is a party or has an interest, in its official capacity.

The board of county commissioners may also employ legal counsel, as provided in section 309.09 of the Revised Code, to represent it in any matter of public business coming before such board, and in the prosecution or defense of any action or proceeding in which such board is a party or has an interest, in its official capacity.

R.C. 305.14 outlines two procedures by which the board of county commissioners may employ legal counsel other than the prosecuting attorney. The first involves a

¹ In addition to R.C. 305.14, the exception referred to in R.C. 309.09(A), R.C. 309.09(B) provides that a board of county commissioners may employ an attorney other than the prosecuting attorney, without the approval of the court, to represent the board in its official capacity and to advise it on legal matters, provided that the total compensation paid, in any year, for such legal services does not exceed the total annual compensation of the prosecuting attorney. R.C. 309.09(B) is not, however, applicable to the situation addressed herein, since the authority conferred in that division is limited to the employment of an attorney "to represent the board of county commissioners in its official capacity and to advise it on legal matters." R.C. 309.09(B) does not authorize the employment of an attorney to represent the county department of welfare in juvenile court proceedings or to otherwise perform legal services on behalf of that department.

mutual application by the prosecuting attorney and the board of commissioners to the court of common pleas. Upon such application the court of common pleas may authorize the board of county commissioners to employ legal counsel to act on behalf of any county officer. The second involves the ability of the board of county commissioners to hire an attorney under R.C. 309.09(B) to represent the board. See note 1, infra.

It is, therefore, my opinion, and you are advised, that a county director of welfare may not employ an attorney to represent the department of welfare in juvenile court proceedings or to perform other legal services on behalf of the department. Pursuant to R.C. 305.14, however, a court of common pleas, upon application of the prosecuting attorney and the board of county commissioners, may authorize the board to employ legal counsel to act on behalf of the county welfare department.