

OPINION NO. 89-083**Syllabus:**

1. A county prosecuting attorney has a duty, pursuant to R.C. 309.09(A), to represent a board of township trustees in a removal proceeding against its township fire chief, pursuant to R.C. 505.38(A), notwithstanding the fact that such fire chief is also a township trustee.
2. A county prosecuting attorney has no duty, pursuant to R.C. 309.09(A), to represent a township fire chief in a removal proceeding, pursuant to R.C. 505.38(A), even if such fire chief is also a township trustee.
3. A board of county commissioners is prohibited from paying from county funds for the services of private counsel retained by township officers in removal proceedings against a township fire chief, pursuant to R.C. 505.38(A).

To: Gregory A. White, Lorain County Prosecuting Attorney, Elyria, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 16, 1989

I have before me your request for my opinion concerning the prosecuting attorney's duty to serve as legal counsel for township officers and the use of county moneys to procure private counsel if the prosecuting attorney does not perform such duty. Specifically you ask:

1. Does a county prosecuting attorney have a duty pursuant to Ohio Revised Code Section 309.09(A) to represent two members of a board of township trustees in removal proceedings against the

township's fire chief pursuant to Ohio Revised Code Sections 505.38 and 733.35 through 733.39 when the fire chief is also a township trustee?

2. Does a county prosecuting attorney have a duty pursuant to Ohio Revised Code Section 309.09(A) to represent a township fire chief against whom removal proceedings have been initiated when such fire chief is also a township trustee?
3. If there is such a duty in either or both cases and if a county prosecuting attorney fails to perform such duty due to the conflict of interest that arises from representing two township officers against a fire chief who is also a township trustee, is the board of county commissioners required to pay from county funds for the services of the private attorney or attorneys retained? If there is no mandatory requirement, may the county commissioners so pay?

Your first question asks whether a county prosecuting attorney has a duty, pursuant to R.C. 309.09(A), to represent a board of township trustees in a removal proceeding against its township fire chief, pursuant to R.C. 505.38(A),¹ when such fire chief is also a township trustee. R.C. 309.09(A) requires the prosecuting attorney of the county to "be the legal adviser for all township officers." As a result, a county prosecuting attorney "is required to prosecute and defend any action which may affect [a] board" of township trustees. *Kline v. Board of Twp. Trustees*, 13 Ohio St. 2d 5, 7-8, 233 N.E.2d 515, 517 (1968); see also 1988 Op. Att'y Gen. No. 88-049; 1913 Op. Att'y Gen. No. 231, vol. II, p. 1222. The duty of a county prosecuting attorney to represent a board of township trustees, however, is not absolute, but depends upon such board's authority to participate in a legal proceeding or controversy. See 1988 Op. Att'y Gen. No. 88-088 at 2-423 ("[t]he duty of the county prosecuting attorney and the authority of a board of township trustees to hire additional legal counsel, however, is dependent upon the existence of the authority of the board of township trustees to participate in a legal controversy"); 1988 Op. Att'y Gen. No. 88-066 at 2-336 (in 1966 Op. Att'y Gen. No. 66-061 "it was concluded that there was no authority for a board of township trustees to participate in an annexation proceeding."² Implicit in that conclusion is the corollary rule that since the board had no authority to participate, the prosecuting attorney had no duty to represent the board" (footnote added)). Hence, whether a county prosecuting attorney must represent a board of township trustees in a removal proceeding against its township fire chief will depend upon such board's authority to participate in the removal proceedings.

It is a long-established proposition of law that a board of township trustees may only exercise those powers and responsibilities which are prescribed by statute or necessarily implied therefrom, in order to perform the duties entrusted to them. *Yorkavitz v. Board of Twp. Trustees*, 166 Ohio St. 349, 142 N.E.2d 655 (1957);

¹ Information provided by a member of your staff indicates that Elyria Township is not a civil service township. Thus, the removal provisions of R.C. 505.38(A) apply and not those of R.C. 505.38(C).

² Since the issuing of 1966 Op. Att'y Gen. No. 66-061, R.C. 505.62 has been enacted and R.C. 709.032 amended to permit a board of township trustees to hire an attorney to represent the township at an annexation hearing before the board of county commissioners, 1979-1980 Ohio Laws, Part I, 409 (Am. S.B. 151, eff. Jan. 17, 1980), and subsequent appeals pursuant to R.C. Chapter 2506, 1983-1984 Ohio Laws, Part I, 2196 (Sub. H.B. 175, eff. Sept. 26, 1984) (amending R.C. 505.62). See generally 1988 Op. Att'y Gen. No. 88-066. Although a board of township trustees is authorized to participate in an annexation proceeding, the rule set forth in Op. No. 66-061, that a board is entitled to representation by the prosecuting attorney only if such board is authorized to participate in the suit, still remains viable.

Trustees of New London Twp. v. Miner, 26 Ohio St. 452 (1875). It is, therefore, necessary to examine the statutory scheme concerning the removal of a township fire chief in order to determine if a board of township trustees is authorized to participate in the removal proceedings against its township fire chief.

With regard to the appointment and removal of township fire chiefs, R.C. 505.38(A) provides, in part:

In each township or fire district which has a fire department, the head of such department shall be a fire chief, appointed by the board of township trustees, except that in a joint fire district the fire chief shall be appointed by the board of fire district trustees. The board shall provide for the employment of such fire fighters as it considers best, and shall fix their compensation....*Such appointees shall continue in office until removed therefrom as provided by sections 733.35 to 733.39 of the Revised Code.* To initiate removal proceedings, and for such purpose, the board shall designate the fire chief or a private citizen to investigate the conduct and prepare the necessary charges in conformity with sections 733.35 to 733.39 of the Revised Code.

In case of the removal of a fire chief or any member of the fire department of a township or district, an appeal may be had from the decision of the board to the court of common pleas of the county in which such township or district fire department is situated, to determine the sufficiency of the cause of removal. Such appeal from the findings of the board shall be taken within ten days. (Emphasis added.)

R.C. 733.35 through R.C. 733.39, inclusive, set forth the causes, procedure and powers in regard to the removal of municipal officers. R.C. 733.36 authorizes the removal of municipal officers by a municipal corporation's legislative authority. A "board of township trustees exercises, by virtue of Section 505.38, Revised Code, that power conferred upon municipal legislative authorities and municipal executives by Sections 733.35 to 733.39, Revised Code." 1957 Op. Att'y Gen. No. 912, p. 376 (syllabus, paragraph two). Consequently, a board of township trustees has the authority to participate in the removal proceedings against its township fire chief. It follows, therefore, that a county prosecuting attorney has a duty to represent a board of township trustees in removal proceedings against its township fire chief. The fact that a township fire chief is also a township trustee does not affect a county prosecuting attorney's duty to represent a board of township trustees in removal proceedings against its township fire chief. Therefore, I conclude that a county prosecuting attorney has a duty, pursuant to R.C. 309.09(A), to represent a board of township trustees in a removal proceeding against its township fire chief, pursuant to R.C. 505.38(A), notwithstanding the fact that such fire chief is also a township trustee.

Your second question asks whether a county prosecuting attorney has a duty, pursuant to R.C. 309.09(A), to represent a township fire chief in a removal proceeding, pursuant to R.C. 505.38(A), when such fire chief is also a township trustee. As stated above, a county prosecuting attorney has a duty to represent "all township officers." R.C. 309.09(A). A township fire chief is an officer of the township and, hence, entitled to representation by a county prosecuting attorney. *See generally Essex v. Ault*, 20 Ohio C.C. (n.s.) 478, 29 Ohio C.C. Dec. 631 (Lorain County 1904) (the position of chief of a volunteer fire department is an office); *DeRomedis v. Village of Yorkville*, 21 Ohio N.P. (n.s.) 340, 343, 29 Ohio Dec. 348, 351-52 (C.P. Jefferson County 1918) ("the chief of the fire department is a public officer.... It is held in the cases cited that the chief of police and chief of the fire department are clothed with public functions and vested with a portion of the sovereignty of the people" (citations omitted)); 1919 Op. Att'y Gen. No. 379, vol. I, p. 618 (village fire chief is an officer).

I note, however, that R.C. 309.09(A) requires the prosecuting attorney "to represent the township officers in their official capacity and not in their individual capacity." 1913 Op. No. 231 at 1222; *see also* 1933 Op. Att'y Gen. No. 169, vol. I, p. 200 at 202 (G.C. 2917, now R.C. 309.09(A), "refer[s] only to such legal services as may be required by a township officer in connection with his official duties"). *See*

generally 1954 Op. Att'y Gen. No. 4567, p. 570 at 572-73 ("[i]f it reasonably appears to you, upon a preliminary examination into the facts and circumstances, that the coroner acted in good faith and out of a well intended attempt to perform duties required of him by law, then and in that event, he is entitled to be represented by you"). In 1913 Op. No. 231 at 1222, my predecessor stated:

By virtue of this section [G.C. 2917 now R.C. 309:09] the prosecuting attorney is the legal adviser of all township officers. This statute contemplates that the prosecuting attorney shall advise such township officers in their official capacity and not in their personal or individual capacity. When a prosecuting attorney advises an officer he represents the interests of the public.

Whether or not a prosecuting attorney shall represent an officer of a township in a suit against such township officer must depend upon the particular facts in each case. If the interest of the township, that is the public, is involved in such action it would be the duty of the prosecuting attorney to represent the township in such action, through its proper officer or officers, and to protect its interests. If, however, the action involves only the personal liability of an officer, as for misconduct or negligence in office, the prosecuting attorney would not be required to represent such officer in such action.

See generally 1954 Op. No. 4567 (syllabus) ("it is the duty of the prosecuting attorney to examine carefully all the facts and circumstances on which the action is based and to determine whether such facts and circumstances indicate a well intentioned attempt on the part of the defendant to perform duties attending his official position"). Thus, the determination as to whether a suit or proceeding is brought against a township officer in his official or individual capacity is to be made by the appropriate county prosecuting attorney. I have no authority to exercise on behalf of another governmental officer discretion which has been delegated to him. *See generally* 1989 Op. Att'y Gen. No. 89-038; 1988 Op. Att'y Gen. No. 88-007. However, a removal proceeding is so clearly brought against a township fire chief in his individual capacity that "I do not feel that I am substituting my judgment for the prosecuting attorney's judgment in making such a determination." 1976 Op. Att'y Gen. No. 76-069 at 2-242. Therefore, I find that a county prosecuting attorney has no duty, pursuant to R.C. 309.09(A), to represent a township fire chief in a removal proceeding, pursuant to R.C. 505.38(A), even if such fire chief is also a township trustee.³

Your final question asks whether, if a county prosecuting attorney has a duty to represent a board of township trustees, township fire chief, or both, in removal proceedings against a township fire chief and such prosecuting attorney does not perform such duty or duties, a board of county commissioners is required to pay from county funds for the services of private counsel retained by such township officers. Additionally, if there is no mandatory requirement upon a board of county commissioners to pay from county funds for the services of private counsel retained, may a board of county commissioners pay from county funds for the services of private counsel retained.

R.C. 309.09(A) describes the procedure that must be followed for a township officer to receive representation from someone other than the county prosecutor:

When the board of township trustees deems it advisable or necessary to

³ Since the township fire chief is also a township trustee, a question could arise whether the county prosecuting attorney has a duty to represent the fire chief in his capacity as township trustee. A county prosecutor only has a duty to represent a township trustee in matters related to his position as township trustee. *See generally* 1985 Op. Att'y Gen. No. 85-071 at 2-278 ("[t]he duty of the county prosecutor to serve as legal adviser of township trustees who serve on a board of fire district trustees extends, however, only to matters arising from their positions as township trustees, and not to all matters before the joint fire district"). The removal of the individual as fire chief does not arise from his position as township trustee.

have additional legal counsel it may employ an attorney other than the prosecuting attorney of the county, either for a particular matter or on an annual basis, to represent the township and its officers in their official capacities and to advise them on legal matters. *No such counsel or attorney may be employed, except on the order of the board of township trustees, duly entered upon its journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund.* (Emphasis added.)

See also R.C. 505.62 (township may hire attorney to represent township in annexation proceedings). "It is one of the well recognized canons of statutory construction that when a statute directs a thing may be done by a specified means or in a particular manner it may not be done by other means or in a different manner." *Akron Transp. Co. v. Glander*, 155 Ohio St. 471, 480, 99 N.E.2d 493, 497 (1951) (quoting *Utah Rapid Transit Co. v. Ogden City*, 89 Utah 546, 551, 58 P.2d 1, 3 (1936), *overruled on other grounds sub nom. Rich v. Salt Lake City Corp.*, 20 Utah 2d 339, 437 P. 2d 690 (1968)). R.C. 309.09(A) sets forth the procedure whereby a township officer can retain private counsel at township expense. The language of R.C. 309.09(A) clearly mandates that private counsel retained "shall be paid from the township fund." See generally *Dorrian v. Scioto Conserv. Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) ("[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"). Additionally, it is a general rule that public moneys be spent only on the basis of clear and unequivocal statutory authority. See generally *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 117 N.E. 6 (1917) (syllabus, paragraph three) ("[i]n case of doubt as to the right of any administrative board [such as a board of county commissioners] to expend public moneys under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power"); *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571, 572 (1916) (per curiam) ("[t]he authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county"). I have been unable to locate any statutes which expressly authorize or allow a board of county commissioners to pay from county funds for the services of private counsel retained by township officers. See generally *Jones v. Commissioners of Lucas County*, 57 Ohio St. 189, 48 N.E. 882 (1897) (in financial affairs, the board of county commissioners has only such authority as it is granted by statute). Consequently, a board of county commissioners is prohibited from paying from county funds for the services of private counsel retained by township officers in removal proceedings against a township fire chief, pursuant to R.C. 505.38(A).

Therefore, it is my opinion, and you are hereby advised, that:

1. A county prosecuting attorney has a duty, pursuant to R.C. 309.09(A), to represent a board of township trustees in a removal proceeding against its township fire chief, pursuant to R.C. 505.38(A), notwithstanding the fact that such fire chief is also a township trustee.
2. A county prosecuting attorney has no duty, pursuant to R.C. 309.09(A), to represent a township fire chief in a removal proceeding, pursuant to R.C. 505.38(A), even if such fire chief is also a township trustee.
3. A board of county commissioners is prohibited from paying from county funds for the services of private counsel retained by township officers in removal proceedings against a township fire chief, pursuant to R.C. 505.38(A).