

OPINION NO. 92-011**Syllabus:**

1. R.C. 5101.83(B) and 9 Ohio Admin. Code 5101:1-47-21 prohibit participants in a Community Work Experience Program ("CWEP") from being given work assignments that result in the displacement of regular employees, the failure to fill positions with regular employees, or the reduction of work or promotional opportunities for regular employees.
2. R.C. 5101.83(B) and 9 Ohio Admin. Code 5101:1-47-21 do not require that CWEP participants be removed from a work project simply because layoffs occur at that project. There is no mandate to remove CWEP participants if their participation does not result in the displacement of regular employees, the failure to fill existing vacant positions with regular employees, or the reduction of work or promotional opportunities for regular employees, as described in R.C. 5101.83(B) and 9 Ohio Admin. Code 5101:1-47-21.

To: Brent A. Saunders, Gallia County Prosecuting Attorney, Gallipolis, Ohio

By: Lee Fisher, Attorney General, March 31, 1992

You have requested an opinion concerning the operation of a Community Work Experience Program ("CWEP"). Your situation involves a school district that, in the past, had CWEP workers provided by the Gallia County Work and Training Programs ("Work and Training"). The school district suffered a shortage of operating funds and borrowed substantial amounts of money. In order to qualify for certain loans provided by the State Board of Education, the school district reduced its work force. As a result of the reduction in force, Work and Training removed the CWEP participants from the school district.

Work and Training states that R.C. 5101.83(B) and 9 Ohio Admin. Code 5101:1-47-21(A) to (C) provide the basis for removing CWEP participants from the school district. Your question is whether these provisions require CWEP participants to be removed due to layoffs of the school district's regular employees.

R.C. 5101.83(A) establishes the CWEP, under which employable recipients of aid to dependent children or food stamps are assigned to work for a public purpose in

exchange for the assistance received by their household units. *Accord* R.C. 5101.80(B). *See generally* 1987 Op. Att'y Gen. No. 87-008. R.C. 5101.83(B) states, in part:

No work assignments shall be made that result in the displacement of persons who are already employed as regular full-time or part-time employees, who are or who have been involved in a dispute between a labor organization and the employer, who have been temporarily laid off and are receiving unemployment compensation under Chapter 4141. of the Revised Code, or who have been temporarily laid off and are subject to recall pursuant to a bona fide recall list of the employer. (Emphasis added.)

R.C. 5101.83(B) does not explicitly require CWEP participants to be removed from a work project whenever there are any layoffs at that project. Rather, R.C. 5101.83(B) prohibits the making of work assignments that result in the displacement of: (1) persons who are already employed as regular employees; (2) persons who are involved in a labor dispute; (3) persons who have been temporarily laid off and are receiving unemployment compensation; or (4) persons who have been temporarily laid off and are subject to recall pursuant to the employer's recall list. The clear purpose of R.C. 5101.83(B) is to prevent the assignment of CWEP participants to jobs that would otherwise be held by regular employees.

For purposes of R.C. 5101.83 and related provisions, the term "to displace" has been given the following definition: "'To displace' means to remove or discharge a person for the purpose of substituting in such person's place a participant in the job opportunities and basic skills training program." R.C. 5101.80(A). "Job opportunities and basic skills training program" includes CWEP. R.C. 5101.80(F). This definition suggests that, in order for the substitution of a CWEP participant for another person to constitute a displacement under R.C. 5101.83(B), there must be an intent to make such a substitution. R.C. 5101.80(A).

R.C. 5101.83(B) authorizes the Director of Human Services, acting under R.C. Chapter 119, to adopt rules for the development of work projects to which employable recipients of aid to dependent children or food stamps may be assigned. Pursuant to this authority, the Department of Human Services has adopted 9 Ohio Admin. Code 5101:1-47-21, which states, in part:

(A) *Participants in the job opportunities and basic skills training (JOBS) program shall not be assigned to work program activities which result in the displacement of other persons.*

(B) *Displacement occurs when a participant's assignment results in removing or discharging employees or otherwise denying such assignment to persons who:*

(1) *Are already employed as regular full-time or part-time employees.*

(2) *Are or have been employed full time or part time as participants in SEP or in other publicly subsidized employment and training programs.*

(3) *Are or have been involved in a dispute between a labor organization and the employer or sponsor.*

(4) *Have been laid off and are either:*

(a) *Receiving unemployment compensation.*

(b) *Subject to recall under the established policies of the employer or sponsor.*

(C) *SEP, OJT, and CWEP participants shall not be used to fill existing vacant positions or to perform work which has the effect of reducing the work or promotional opportunities of employees. They may, however, perform the same type of work as the employees perform. "Reducing the work of employees" means reducing the number of hours, wages, or employment benefits of regular or part-time employees, or reducing the number of positions that the employer certifies would otherwise be filled by regular employees.*

(D) *The CDHS must assure that a complaint procedure is available for regular employees who feel displacement has occurred because of a CWEP participant assignment. Decisions made by the*

CDHS under this procedure may be appealed to the U.S. department of labor (DOL) pursuant to the provisions of Chapter 5101:1-35 of the Administrative Code. (Emphasis added.)

Like R.C. 5101.83(B), rule 5101:1-47-21 prohibits work assignments that result in the displacement of other persons. Rule 5101:1-47-21 expands upon R.C. 5101.83(B) by making it explicit that "displacement" includes denying an assignment to a person who has been laid off. Rule 5101:1-47-21 also states expressly that CWEP participants shall not be used to fill existing vacant positions or to perform work that has the effect of reducing the work or promotional opportunities of employees. CWEP participants may not perform work if their performance results in a reduction of the number of hours, wages, or employment benefits of regular employees or a reduction in the number of positions that the employer certifies would otherwise be filled by regular employees. A complaint procedure is available for employees who feel that displacement has occurred. 9 Ohio Admin. Code 5101:1-47-21(D).

There are factual questions involved in a determination as to whether the assignment of a CWEP participant to a particular job displaces another person or has the effect of reducing the work or promotional opportunities of employees. It is not possible, in this opinion, to state definitively whether, in the situation you have described, the CWEP participants may continue to work for the school district. The question to be determined is whether the continued assignment of the CWEP participants to the positions in question results in the displacement of other persons. Factors to consider include: (1) whether the CWEP participants are filling existing vacant positions; (2) whether CWEP participants are reducing the number of hours, wages, or employment benefits of regular employees; and (3) whether CWEP participants are reducing the number of positions that the employer certifies would otherwise be filled by regular employees.

If, in a particular situation, CWEP participants are not displacing other persons, then it does not appear that the CWEP participants must be removed simply because layoffs of regular employees have occurred. R.C. 5101.83(B) and rule 5101:1-47-21 do not mandate that CWEP participants be removed when layoffs occur if their participation does not result in the displacement of regular employees, the failure to fill existing vacant positions with regular employees, or the reduction of work or promotional opportunities for regular employees, as described in R.C. 5101.83(B) and rule 5101:1-47-21.

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

1. R.C. 5101.83(B) and 9 Ohio Admin. Code 5101:1-47-21 prohibit participants in a Community Work Experience Program ("CWEP") from being given work assignments that result in the displacement of regular employees, the failure to fill positions with regular employees, or the reduction of work or promotional opportunities for regular employees.
2. R.C. 5101.83(B) and 9 Ohio Admin. Code 5101:1-47-21 do not require that CWEP participants be removed from a work project simply because layoffs occur at that project. There is no mandate to remove CWEP participants if their participation does not result in the displacement of regular employees, the failure to fill existing vacant positions with regular employees, or the reduction of work or promotional opportunities for regular employees, as described in R.C. 5101.83(B) and 9 Ohio Admin. Code 5101:1-47-21.