

OPINION NO. 85-012**Syllabus:**

1. A regional organization for civil defense created pursuant to R.C. 5915.07 is not a county agency. (1954 Op. Att'y Gen. No. 4224, p. 460, approved and followed.)
2. A regional organization for civil defense is not entitled to the general legal counsel of a prosecuting attorney or of the Attorney General, but may hire legal counsel as needed for the performance of its duties.
3. A regional organization for civil defense is not required by statute to comply with the civil service merit system established pursuant to R.C. Chapter 124; it may, however, voluntarily submit itself to compliance with the standards set forth in that system for the purpose of satisfying eligibility requirements for participation in a federal program.

4. A regional organization for civil defense is an "employer" for purposes of R.C. Chapter 145, and its employees are required to belong to the Public Employees Retirement System unless they come within exemptions established by statute or rule.

To: Raymond R. Galloway, Major General, Adjutant General, Worthington, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, April 9, 1985

I have before me your request for an opinion on the following four questions concerning the Miami Valley Disaster Services Authority (MVDSA):

1. Is MVDSA considered to be a county agency?
2. Is MVDSA permitted to employ private counsel to represent it in legal matters?
3. Is MVDSA obligated to follow civil service laws?
4. Is MVDSA required to belong to the Public Employees Retirement System?

It is my understanding that MVDSA is a regional organization for civil defense established by Montgomery and Greene Counties pursuant to R.C. 5915.07, which states in relevant part:

Two or more counties that have established a county-wide organization for civil defense pursuant to this section may, with the consent of the legislative authorities of all or a majority of the political subdivisions of each county involved, including the largest municipal corporation in each county, enter into an agreement in writing establishing a regional organization or authority for civil defense in accordance with such regulations as are promulgated by the governor.¹ (Footnote added.)

The fact that a regional organization for civil defense, such as MVDSA, is created by two or more counties makes it clear that it is not a subordinate agency of a single county. As was stated in 1954 Op. Att'y Gen. No. 4224, p. 460 at 464: "a regional organization [for civil defense] is established as a semi-autonomous entity having an existence apart from and in a sense independent of the several subdivisions which joined in its creation." See 1983 Op. Att'y Gen. No. 83-057. It is, therefore, clear that MVDSA is not a county agency.

It is my understanding that your interest in determining whether MVDSA is a county agency relates to the capacity of MVDSA to obtain the legal representation of a prosecuting attorney. R.C. 309.09(A) states, 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..." Since a regional organization for civil defense is not a county agency or board, it is not entitled under R.C. 309.09 to the representation of a prosecuting attorney. In this respect, it is similar to other regional bodies created pursuant to statute which are not entitled to the general legal counsel of a prosecuting attorney. See, e.g., 1983 Op. Att'y Gen. No. 83-064 (joint board of county commissioners formed for the purpose of the creation of a multicounty juvenile detention and rehabilitation facility); 1981 Op. Att'y Gen. No. 81-059 (joint recreation district or board); 1979 Op. Att'y Gen. No. 79-019 (multicounty felony bureau); 1975 Op. Att'y Gen. No. 75-014 (joint county community mental health and retardation board); 1963 Op. Att'y Gen. No. 95, p. 157 (joint county airport agency); 1958 Op. Att'y Gen. No. 2736, p. 567 (regional planning commission).

¹ It is my understanding that no such regulations are currently in effect. See 1983 Op. Att'y Gen. No. 83-057, n. 3.

Your second question is whether MVDSA may employ private counsel to represent it in legal matters. As discussed above, a regional organization for civil defense is not entitled to the general legal counsel of a prosecuting attorney under R.C. 309.09. Since, as is discussed more fully below, such an agency is not a state agency, see 1983 Op. Att'y Gen. No. 83-059, it is not entitled to representation by, or legal counsel of, the Attorney General under R.C. 109.02 and 109.12. I am aware of no provision of law which designates any public official as legal counsel for a regional organization for civil defense, or which expressly authorizes such an organization to employ legal counsel. It is, however, evident from the fact that such an organization has responsibilities for the civil defense of an area of the state, see R.C. 5915.01(C) (defining "[c]ivil defense"); R.C. 5915.07, that the organization might require the services of an attorney. See generally Op. No. 83-059; Op. No. 83-057. It is a general rule that a creature of statute has those powers which are expressly delegated by statute and those implied powers which are necessary to carry into effect the powers expressly delegated. See State ex rel. Kuntz v. Zangerle, 130 Ohio St. 84, 197 N.E. 112 (1935). See generally 1957 Op. Att'y Gen. No. 735, p. 269. It may, therefore, be concluded that, when a regional organization for civil defense, in the exercise of its statutory powers and duties, has the need for legal counsel, it may take reasonable steps to employ such counsel. See Op. No. 83-064 at 2-269 (joint boards of county commissioners "must necessarily and reasonably have the ability to employ legal counsel to advise them" with respect to the exercise of their statutory functions); Op. No. 79-019 at 2-69 through 2-70 (since legal counsel is not provided for a multicounty felony bureau, "it must be presumed that such an organization is free to seek private representation"; the bureau must pay for such representation from its own funds and may employ the prosecuting attorney or his assistants, provided that no conflict results). See generally 1958 Op. No. 2736; 1927 Op. Att'y Gen. No. 279, vol. 1, p. 489.

Your third question asks whether MVDSA is obligated to follow civil service laws. It is my understanding that this question relates to the merit system established under R.C. Chapter 124 and referenced in R.C. 124.06, as follows:

No person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted, or reduced as an officer or employee in the civil service, in any manner or by any means other than those prescribed in this chapter, and the rules of the director of administrative services or the municipal or civil service township civil service commission within their respective jurisdictions.

R.C. 124.01 states, in part:

As used in Chapter 124. of the Revised Code:

(A) "Civil service" includes all offices and positions of trust or employment in the service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof.

(B) "State service" includes all such offices and positions in the service of the state, the counties, and general health districts thereof, except the cities, city health districts, and city school districts.

(C) "Classified service" means the competitive classified civil service of the state, the several counties, cities, city health districts, general health districts, city school districts thereof, and civil service townships.

Thus, the Ohio civil service system includes only persons who are in the service of the state or in the service of a county, city, city health district, general health district, or city school district within the state.

The definition contained in R.C. 124.01(A) does not specify that employees of a regional organization for civil defense are subject to Ohio civil service provisions. It is clear that such employees are not "in the service of" a city, city health district, general health district, or city school district. Even as it has been concluded above that a regional organization for civil defense is not a county

agency, it must be concluded that employees of such an organization are not "in the service" of a county. See Op. No. 83-057; 1954 Op. No. 4224. Further, it does not appear that employees of such a regional organization may be considered to be "in the service" of the state. The court in In re Ford, 3 Ohio App. 3d 416, 446 N.E.2d 214 (Franklin County 1982), considered the meaning of the words "in the service of the state" as used in R.C. 124.01 and concluded that "there appears to be some intent that service of the state requires not only service with a state agency but also compensation from funds belonging to the state, whether from the general fund or some special fund." 3 Ohio App. 3d at 420, 446 N.E.2d at 218. The court stated:

R.C. 124.01 includes only specified political subdivisions within the definition of civil service, so that employment with all other political subdivisions, such as townships, local school districts, conservancy districts, court districts, and other political subdivisions, whether constituting more than one or only part of one county, are not included within the definition of civil service.

3 Ohio App. 3d at 419, 446 N.E.2d at 217. See 1965 Op. Att'y Gen. No. 65-47 (employees of a regional airport authority are not in the service of the state or the county and are not subject to state civil service provisions); 1962 Op. Att'y Gen. No. 3073, p. 486 (employees of a community college district are not in the service of the state or one of the political subdivisions named in the statute and are not subject to state civil service provisions).

A regional organization for civil defense is an entity separate from the several political subdivisions which create it, see Op. No. 83-057; 1954 Op. No. 4224, but its functions are related to those subdivisions and its responsibilities are focused upon the geographical area in which those subdivisions are located. See R.C. 5915.07. It is clearly not a state agency. See Op. No. 83-059 (county-wide organization for civil defense is a "political subdivision" for purposes of R.C. 117.01(A)). Cf. In re Ford (State Teachers Retirement System exercises jurisdiction and authority throughout the state); 1980 Op. Att'y Gen. No. 80-087 (employees of a general health district are in the civil service but are not employees of the state); Op. No. 65-47.

Further, it does not appear that employees of a regional organization for civil defense are paid with state funds. Rather, it is my understanding that they are paid with funds of the organization itself. See generally R.C. 5915.11; Op. No. 83-059; Op. No. 83-057; 1954 Op. No. 4224. You have informed me that the state obtains from the federal government certain funds which it pays, by state warrant, to MVDSA as reimbursement for a percentage of local funds that are spent for civil defense purposes. It is, however, clear that the mere fact that some funds may be paid to the organization by state warrant is not sufficient to make employees of the organization state employees. See Spitaleri v. Metro Regional Transit Authority, 67 Ohio App. 2d 57, 426 N.E.2d 183 (Summit County 1980) (employees of a regional transit authority are not considered to be paid by the state simply because the authority receives some state funds). Rather, the fact that the employees of the organization are paid directly by the organization, together with the fact that the organization is established and operated on a regional basis, compels the conclusion that employees of the organization are not in the service of the state for purposes of R.C. 124.01. I conclude, therefore, that such employees are not, by statute, entitled to civil service protection.

I note, however, that you have informed me that the State of Ohio participates in the State and Local Emergency Management Assistance Program (EMA) under the Federal Civil Defense Act of 1950, as amended, 50 U.S.C. App. §§2251-2303. Under that program, the state receives funds from the Federal Emergency Management Agency (FEMA), and contributes to MVDSA and other local agencies up to one half of necessary local civil defense personnel and administrative expenses. 50 U.S.C. App. §2286; 44 C.F.R. §302.1.

In order to remain eligible for federal financial contributions under the EMA program, a state must have on file with FEMA a current state administrative plan.

50 U.S.C. App. §2286; 44 C.F.R. §§302.2(u), 302.3. 44 C.F.R. §302.3(a)(5) provides that no amendments to such a plan are approvable if they would result in failure of the plan to satisfy, inter alia, the following criterion:

Provides for the establishment and maintenance of methods of personnel administration in public agencies administering or supervising the civil defense program, at both the State and local government levels, in conformity with the Standards for a Merit System of Personnel Administration (5 CFR Part 900), which incorporate the Intergovernmental Personnel Act Merit Principles (Pub. L. 91-648, section 2, 84 Stat. 1908) prescribed by the Office of Personnel Management pursuant to section 208 of the Intergovernmental Personnel Act of 1970, as amended.

See 5 C.F.R. Part 900.

With respect to the requirement that a state plan provide that personnel standards be administered on a merit basis, 44 C.F.R. §302.4 states:

(a) Background. Section 208 of the Intergovernmental Personnel Act, as amended (42 U.S.C. 4728) authorizes Federal agencies to require, as a condition of participation in Federal assistance programs, systems of a personnel administration consistent with personnel standards prescribed by the Office of Personnel Management (OPM). OPM has promulgated Standards for a System of Personnel Administration (5 CFR Part 900) which prescribe intergovernmental personnel standards on a merit basis as a condition of eligibility in the administration of grant programs. OPM has approved FEMA adoption of these standards by the regulations in this part.

(b) Standard. Participation by each grantee and each subgrantee under the program covered in this part is subject to compliance with the following conditions regarding merit personnel systems:

Methods of personnel administration will be established and maintained in public agencies administering or supervising the administration of the civil defense program in conformity with the Standards for a Merit System of Personnel Administration 5 CFR Part 900, which incorporate the Intergovernmental Personnel Act Merit Principles (Pub. L. 91-648 Section 2, 84 Stat. 1909) prescribed by the Office of Personnel Management pursuant to Section 208 of the Intergovernmental Personnel Act of 1970 as amended.

Section 302.3(a)(5) of this part provides, in part, that State administrative plans that fail to provide for fulfilling this condition are not approvable.

It is my understanding that the current administrative plan for Ohio indicates that the state and its subgrantees (including MVDSA) will satisfy the merit system requirements of federal law by complying with the civil service requirements of R.C. Chapter 124 and rules promulgated thereunder. Although MVDSA is not bound by state statute to comply with such requirements, it clearly may voluntarily submit itself to compliance with the standards set forth in R.C. Chapter 124 and related rules for the purpose of satisfying the eligibility requirements of the EMA program. See generally 5 C.F.R. §900.604.²

² 5 C.F.R. §900.604 states, in part:

(a) Certification by Chief Executives. (1) Certification of agreement by a chief executive of a State or local jurisdiction to maintain a system of personnel administration in conformance with

Your fourth question is whether MVDSA is required to belong to the Public Employees Retirement System (PERS). PERS is established and governed by the provisions of R.C. Chapter 145. R.C. 145.03 states, in part:

A public employees retirement system is hereby created for the employees of the state and of the several local authorities mentioned in [R.C. 145.01]. Membership in the system is compulsory upon being employed. . . .

R.C. 145.03 goes on to permit the exemption of certain students, part-time employees, and temporary or emergency employees.

It is evident from R.C. 145.03 that it is the individual employee, rather than the employer, who is a member of PERS. See R.C. 145.01(B) (defining "[m]ember" as "any person included in the membership" of PERS). Nonetheless, an employer of employees who are members of the system has certain obligations of paying and reporting and does, in that sense, belong to the system. See, e.g., R.C. 145.12; R.C. 145.48; R.C. 145.51. See generally Brown v. Toledo Mental Hygiene Clinic, 63 Ohio App. 2d 73, 409 N.E.2d 251 (Lucas County 1977); 1980 Op. Att'y Gen. No. 80-063.

R.C. 145.01 defines persons who are considered to be public employees, and entities which are considered to be employers, for purposes of PERS. It states, in relevant part:

As used in Chapter 145. of the Revised Code:

(A) "Public employee" means any person holding an office, not elective, under the state or any county, municipal corporation, park district, conservancy district, sanitary district, health district, township, metropolitan housing authority, state retirement board, Ohio historical society, public library, county law library, union cemetery, joint hospital, institutional commissary, state university, or board, bureau, commission, council, committee, authority, or administrative body as the same are, or have been, created by action of the general assembly or by the legislative authority of any of the units of local government named in this division, or employed and paid in whole or in part by the state or any of the authorities named in this division in any capacity not covered by section 3307.01 [State Teachers Retirement System] or 3309.01 [Public School Employees Retirement System] of the Revised Code. "Public employee" also means one who is a member of the retirement system who continues to perform the same or similar duties under the direction of a contractor who has contracted to take over what before the date of such contract was a publicly operated function. The governmental unit with whom such contract has been made shall be deemed the employer for the purposes of administering Chapter 145. of the Revised Code.

Any civilian employees of the national guard and the air national guard, employed in or with a unit of the Ohio national guard or the

these Standards satisfies any applicable Federal merit personnel requirements of the Federal assistance or other programs to which personnel standards on a merit basis are applicable.

(2) Chief executives will maintain these certifications and make them available to the Office of Personnel Management.

(3) In the absence of certification by the chief executive, compliance with the Standards may be certified by the heads of those State and local agencies that are required to have merit personnel systems as a condition of Federal assistance or other intergovernmental programs.

See Federal Emergency Management Agency, Federal Assistance Handbook: Emergency Management, Direction and Control Programs, Par. 2.6 (CPG 1-3 (Revised)/January 1984).

Ohio air national guard, except those employed by the national guard bureau, shall be considered as employees of the adjutant general of the state for the purpose of Chapter 145. of the Revised Code, although such employees may be paid by federal funds. "Public employee" means also any person who performs or has performed services under the direction of an employer, as defined in division (D) of this section, notwithstanding his compensation for such services has been or is paid by one other than such employer. Credit for such service shall be included as total service credit, provided, the employee makes the payments required by Chapter 145. of the Revised Code, and his employer makes the payments required by sections 145.48 and 145.51 of the Revised Code.

In all cases of doubt, the public employees retirement board shall determine whether any person is a public employee, and its decision is final.

....
 (D) "Employer" means the state or any county, municipal corporation, park district, conservancy district, sanitary district, health district, township, metropolitan housing authority, state retirement board, Ohio historical society, public library, county law library, union cemetery, joint hospital, institutional commissary, state medical college, state university, or board, bureau, commission, council, committee, authority, or administrative body as the same are, or have been, created by action of the general assembly or by the legislative authority of any of the units of local government named in this division not covered by section 3307.01 or 3309.01 of the Revised Code. In addition, "employer" means the employer of employees described in division (A) of this section. (Emphasis added.)

The definitions contained in R.C. 145.01(A) and (D) are broad ones. See generally State ex rel. Boda v. Brown, 157 Ohio St. 368, 105 N.E.2d 643 (1952). They encompass, as an employer, any board, bureau, commission, council, committee, authority, or other administrative body created by the legislative authority of any of the named units of local government (including counties) and, as an employee, any person employed and paid in whole or in part by such a body. A regional organization for civil defense is, under R.C. 5915.07, established by two or more counties, with the consent of various other political subdivisions. R.C. 5915.07 designates such a body as "a regional organization or authority," thereby bringing it within the language used in R.C. 145.01(A) and (D). A regional organization or authority for civil defense is, thus, an "[e]mployer," for purposes of R.C. Chapter 145, and a person who is employed and paid (in whole or in part) by such an organization is a "[p]ublic employee" for purposes of that chapter.

A number of exceptions to the general definition of public employee and the general membership requirement of R.C. 145.03 appear in various statutes and rules. See, e.g., R.C. 124.85 (persons receiving disability benefits or service retirement pensions or allowances from other Ohio public retirement systems); R.C. 124.86 (CETA employees); R.C. 145.012 (inmates of correctional institutions, patients in hospitals for the mentally ill, and residents in institutions for the mentally retarded); R.C. 145.02 (persons included in other Ohio public retirement systems); R.C. 145.031-.033 (certain employees of Hamilton County bodies); 1 Ohio Admin. Code 145-5-01 (employees of humane societies); 1 Ohio Admin. Code 145-5-02 (foster grandparents). The only exception which is directly relevant to your question appears in 1 Ohio Admin. Code 145-5-03, which states: "Persons involved in disaster clean-up (such as a tornado assistance program) are not 'public employees' within the meaning of [R.C. 145.01(A)], in view of the temporary nature of this emergency work." See R.C. 145.03("a) temporary or emergency employee whose employment will not exceed three calendar months may be exempted from compulsory membership by signing a written application for exemption within the first month after being employed"). Any persons who may be employed by MVDSA on a temporary basis solely for disaster cleanup will, thus, not be public employees and will not be required to belong to PERS.

In light of the foregoing, I conclude that a regional organization for civil defense is an employer for purposes of R.C. Chapter 145 and that employees of such

an organization are, pursuant to R.C. 145.03, required to belong to PERS unless they are exempted, for specified reasons, by statute or rule. See State ex rel. Boda v. Brown. I note that R.C. 145.01(A) specifies that, in cases of doubt, the Public Employees Retirement Board "shall determine whether any person is a public employee, and its decision is final." See generally 1975 Op. Att'y Gen. No. 75-075; 1955 Op. Att'y Gen. No. 5308, p. 280. While I do not consider the conclusion reached herein to be doubtful, it is my understanding that, as a matter of practice, employees of MVDSA have been treated by PERS as public employees for purposes of R.C. Chapter 145. My conclusion is consistent with such practice.

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

1. A regional organization for civil defense created pursuant to R.C. 5915.07 is not a county agency. (1954 Op. Att'y Gen. No. 4224, p. 460, approved and followed.)
2. A regional organization for civil defense is not entitled to the general legal counsel of a prosecuting attorney or of the Attorney General, but may hire legal counsel as needed for the performance of its duties.
3. A regional organization for civil defense is not required by statute to comply with the civil service merit system established pursuant to R.C. Chapter 124; it may, however, voluntarily submit itself to compliance with the standards set forth in that system for the purpose of satisfying eligibility requirements for participation in a federal program.
4. A regional organization for civil defense is an "employer" for purposes of R.C. Chapter 145, and its employees are required to belong to the Public Employees Retirement System unless they come within exemptions established by statute or rule.