

**OPINION NO. 92-026****Syllabus:**

1. The board of county commissioners of a county which has not adopted a charter pursuant to Ohio Const. art. X, §3 has no authority to adopt rules pursuant to R.C. 6111.032 that create criminal offenses for violations of such rules.
2. The board of county commissioners of a county which has not adopted a charter pursuant to Ohio Const. art. X, §3 has no authority to establish monetary penalties for violations of rules it adopts pursuant to R.C. 6111.032, R.C. 6103.02 and R.C. 6117.01.

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**To: Donald W. White, Clermont County Prosecuting Attorney, Batavia, Ohio**  
**By: Lee Fisher, Attorney General, June 26, 1992**

I have before me your request for an opinion from my predecessor on the following questions:

- 1) May a Board of County Commissioners adopt rules pursuant to Ohio Revised Code Section 6111.032 which create criminal offenses of both felony and misdemeanor levels for violations of such rules?
- 2) May a Board of County Commissioners establish administrative fines and penalties under Ohio Revised Code Section 6111.032 which could be levied by the Sanitary Engineer of a Sewer District established under Section 6117.01 for imposition against any person or firm in violation of the rules adopted under Ohio Revised Code Section 6111.032?
- 3) May a Board of County Commissioners establish administrative fines and penalties under Ohio Revised Code Section 6103.02 which could be levied by the Sanitary Engineer of a Sewer District established under Section 6117.01 for imposition against any person or firm in violation of the rules adopted under Ohio Revised Code Section 6103.02?

4) May a Board of County Commissioners establish administrative fines and penalties under Ohio Revised Code Section 6117.01 which could be levied by the Sanitary Engineer of a Sewer District established under Section 6117.01 for imposition against any person or firm in violation of the rules adopted under Ohio Revised Code Section 6117.01?

Your first question asks whether a board of county commissioners may adopt rules pursuant to R.C. 6111.032 which create criminal offenses of both felony and misdemeanor levels for violations of such rules. As a creature of statute, a board of county commissioners has only the authority expressly conferred by statute and the authority that may be implied therefrom as reasonably necessary to make the express powers effective. *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 117 N.E. 6 (1917). Thus, whether the board of county commissioners has the power to create criminal offenses for violations of rules adopted pursuant to R.C. 6111.032 depends upon the authority expressly and impliedly granted such board by statute.

In this regard, I note that there are no statutes which grant a county the general authority to create criminal offenses. Moreover, since R.C. 2901.03(A) provides that "[n]o conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code," only the General Assembly may establish criminal offenses. I note, however, that the Ohio Constitution enables a county to organize as a municipal corporation and thereby exercise all or any of the designated powers vested by the constitution or laws of Ohio in a municipal corporation. Ohio Const. art. X, §3. Since a municipal corporation has the constitutionally granted power to adopt and enforce within its limits police, sanitary and similar regulations which are not in conflict with the general laws, Ohio Const. art. XVIII, §3, a county organized pursuant to Ohio Const. art. X, §3 likewise has the authority to adopt and enforce such police regulations. *See also* 1989 Op. Att'y Gen. No. 89-106. However, since Clermont County is not organized pursuant to Ohio Const. art. X, §3, the board of county commissioners of Clermont County does not possess such authority.

Further, an examination of R.C. 6111.032 reveals no specific authority for the board of county commissioners to create criminal offenses for violations of rules promulgated by the board pursuant to such section. R.C. 6111.032 provides, in relevant part, that

{t}he legislative authority of a municipal corporation or the governing board of a county or special district owning or operating a publicly owned treatment works or sewerage system shall, subject to compliance with the exercise of lawful authority granted to or rules adopted by the director of environmental protection pursuant to section 6111.03 of the Revised Code, exercise primary authority to adopt, modify, and repeal, and to administer and enforce rules with respect to [several areas including establishment and construction of treatment works, sewage and disposal systems, and water pollution control facilities].

R.C. 6111.032(A). This section further provides that "[t]he rules adopted by the legislative authority [of a municipal corporation] or governing board [of a county or special district]<sup>1</sup>...shall be applicable, and enforceable by civil or other actions...." R.C. 6111.032(B) (footnote added). R.C. 6111.032 does not expressly grant the board of county commissioners the power to create criminal offenses for violations of the rules it promulgates pursuant to such section, nor do I find that such a power necessarily may be implied. The General Assembly has directed that the rules adopted pursuant to R.C. 6111.032 "shall be...enforceable by civil or other actions...." R.C. 6111.032(B). The word "or" is generally construed as disjunctive.

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<sup>1</sup> A member of your staff has provided the information that the board of county commissioners of Clermont County is a "governing board" for purposes of R.C. 6111.032.

*Pizza v. Sunset Fireworks Co.*, 25 Ohio St. 3d 1, 494 N.E.2d 1115 (1986).<sup>2</sup> Thus, the mandate must be read to mean that the rules promulgated pursuant to R.C. 6111.032(A) shall be enforceable by either civil actions or by other actions. Accordingly, the duty of the board of county commissioners to enforce its rules may be accomplished through civil actions. The enforcement of rules through civil actions obviously does not require the board of county commissioners to establish criminal offenses for violations of such rules. Since implied powers are limited to those which are reasonably necessary to make the express powers effective, and enforcement of rules promulgated pursuant to R.C. 6111.032(A) does not necessitate the establishment of criminal offenses, I find that R.C. 6111.032 does not grant the board of county commissioners the implied power to create criminal offenses for violations of its rules.<sup>3</sup> Therefore, I find that the board of county commissioners of a county which has not adopted a charter pursuant to Ohio Const. art. X, §3 may not adopt rules pursuant to R.C. 6111.032 that create criminal offenses for violations of such rules.

Your remaining questions ask whether the board of county commissioners may establish administrative fines and penalties under R.C. 6111.032, R.C. 6103.02 and R.C. 6117.01, which could be levied by the sanitary engineer of a sewer district established pursuant to R.C. 6117.01 for violation of the rules adopted by the board pursuant to these sections. A member of your staff has provided the information that by penalty you mean a monetary penalty. Moreover, I note that a fine is a payment of a sum of money which is imposed as a penalty for an offense, *Toledo, Columbus & Ohio River R.R. v. Miller*, 108 Ohio St. 388, 140 N.E. 617 (1923), and is therefore a "monetary penalty."<sup>4</sup> Thus, for purposes of this opinion, I shall assume

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<sup>2</sup> The literal meaning of the word "or" denotes a choice between one or the other of two designated things. In certain circumstances, the word "or" can be construed to mean "and," and vice versa. However, "the words should not be treated as interchangeable when their accurate and literal meaning does not render the sense dubious." *In re Estate of Marrs*, 158 Ohio St. 95, 99, 107 N.E.2d 148, 150 (1952). I find that, in this instance, the literal meaning of the word "or" is appropriate as it does not render the sense dubious.

<sup>3</sup> The mandate in R.C. 6111.032(B) to enforce the rules promulgated pursuant to R.C. 6111.032(A) applies not only to the governing board of a county or special district owning or operating a publicly owned treatment works or sewerage system, but also to the legislative authority of a municipal corporation. This opinion, however, is limited to the authority of the board of county commissioners of a county operating such system, and therefore it does not address the authority of the legislative authority of a municipal corporation to create criminal offenses for violations of the rules it promulgates pursuant to R.C. 6111.032. I do note, however, that R.C. 715.67 provides in part that "[a]ny municipal corporation may make the violation of any of its ordinances a misdemeanor, and provide for the punishment thereof by fine or imprisonment, or both." Enforcement of such an ordinance would not be a "civil action," but, rather, an "other action" pursuant to R.C. 6111.032(B).

Additionally, the Director of Environmental Protection has the authority pursuant to R.C. 6111.03(H) to issue orders without monetary penalties to enforce R.C. Chapter 6111. Further, R.C. 6111.09(A) provides for the imposition of monetary penalties, referred to as "civil penalties," for violations of R.C. 6111.07, and R.C. 6111.99 prescribes fines for violations of sections 6111.04, 6111.042, 6111.05, 6111.07(A) and (C), 6111.42, and 6111.44-.47 of the Revised Code. These penalties and fines may only be imposed through judicial proceedings, brought by an authorized law enforcement authority such as the Attorney General.

<sup>4</sup> Ordinarily, a "fine" is a sum of money exacted of a person guilty of a crime. *Toledo, Columbus & Ohio River R.R. v. Miller*, 108 Ohio St. 388, 140 N.E. 617 (1923). You have used the term, however, to denote a

that you are seeking my opinion as to the authority of the board of county commissioners to establish monetary penalties for violations of the rules promulgated by the board of county commissioners pursuant to R.C. 6111.032, R.C. 6103.02 and R.C. 6117.01.

I note, as a preliminary matter, that "[a] penalty in its original and legal sense means a penal punishment....Like corporal punishment, it is inflicted by or in right of the public, and a recovery enures in whole or in part to the public." *Hawkins v. Furnace Co.*, 40 Ohio St. 507, 514 (1884). Prescribing a penalty is a legislative function. *State ex rel. Thompson v. The New York Central R.R.*, 89 Ohio App. 145, 100 N.E.2d 879 (Hardin County 1950). Thus, in order to prescribe a penalty, an entity must possess the power to legislate. There are no statutes, however, which grant the board of county commissioners general legislative powers.<sup>5</sup> The board of county commissioners, therefore, possesses no general authority to impose monetary penalties for violations of its rules. *See, e.g.*, 1959 Op. Att'y Gen. No. 571, p. 293 (the board of county commissioners has no legislative power and is therefore without authority to impose fines or penalties for parking meter violations ) Whether the board of county commissioners has the authority to establish monetary penalties for violations of the rules it promulgates pursuant to R.C. 6111.032, R.C. 6103.02, and R.C. 6117.01 depends, therefore, on whether the board of county commissioners is granted such power pursuant to these statutes.

I now turn to an examination of R.C. 6111.032, R.C. 6103.02, and R.C. 6117.01. I note that each of these statutes authorizes the board of county commissioners to adopt and enforce rules. For example, R.C. 6111.032, discussed above, authorizes the board of county commissioners to adopt and enforce rules with respect to several areas relating to the operation of publicly owned treatment works and sewerage systems. Further, the board of county commissioners is authorized by R.C. 6103.02 to

adopt, publish, administer, and enforce rules for the construction, maintenance, protection, and use of public water supplies in the county outside of municipal corporations, and of public water supplies within municipal corporations in its county wherever such water supplies are constructed or operated by such board or are supplied with water from water supplies constructed or operated by such board, including the establishment of connections.

R.C. 6103.02(A). Finally, R.C. 6117.01 authorizes boards of county commissioners to

adopt, publish, administer, and enforce rules for the construction, maintenance, protection, and use of sewers and sewer improvements in its county outside of municipal corporations, and of sewers and sewer improvements within municipal corporations in its county wherever such sewers are constructed or operated by such board or discharge into sewers or sewage treatment plants constructed or operated by such board, including the establishment and use of connections.

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monetary penalty for violation of a rule promulgated by the board of county commissioners. Therefore, for purposes of this opinion, I have considered the term "fine" to mean a sum of money imposed as a penalty for violation of a rule promulgated by the board of county commissioners.

<sup>5</sup> I have already noted, however, that a county may organize as a municipal corporation and thereby exercise all or any of the designated powers vested by the constitution or laws of Ohio in a municipal corporation. Ohio Const. art. X, §3. In such a case, a county may have the authority to establish penalties for violations of rules under certain circumstances. *See, e.g.*, R.C. 715.67. However, since Clermont County is not organized pursuant to Ohio Const. art. X, §3, I do not address that question in this opinion.

None of these statutes, R.C. 6111.032, R.C. 6103.02 or R.C. 6117.01, provides express authority for the board of county commissioners to establish monetary penalties for violations of the rules promulgated pursuant to each section. Therefore, the question becomes whether the language of the respective statutes necessarily implies the authority to establish such monetary penalties.

R.C. 6111.032(B) provides that the rules promulgated pursuant to R.C. 6111.032 shall be enforceable by civil or other actions within the territory served by the sewerage system or treatment works. The broadly worded phrase "by civil or other actions" indicates that it was the intention of the General Assembly to allow the legislative authorities and governing boards the discretion to determine the specific manner in which their rules shall be enforced. R.C. 6111.032, therefore, does not provide any authority with respect to the manner in which the rules may be enforced, but instead clearly implies that the legislative authorities and governing boards must exercise their discretion to enforce such rules within the authority that they otherwise have been granted. Since there are no statutes which grant the board of county commissioners the authority generally to establish monetary penalties, I find that the board of county commissioners has no authority to establish monetary penalties for violations of the rules promulgated pursuant to R.C. 6111.032.

With respect to R.C. 6103.02, I find nothing that implies the authority of the board of county commissioners to establish penalties for violations of the rules adopted thereunder. Moreover, the General Assembly, in the same statute, authorizes the board to "fix reasonable rates to be charged for water supplied" and to certify unpaid water rents or charges "together with any penalties" to the county auditor. R.C. 6103.02(A). Clearly, had the General Assembly intended to authorize the board of county commissioners to establish penalties for violations of its rules with respect to the construction, maintenance, protection and use of public water supplies, it could have easily provided such authority in the same manner it provided authority for penalties for unpaid water rents or charges. Since legislative intent is to be determined primarily from statutory language, *Stewart v. Board of Elections*, 34 Ohio St. 2d 129, 296 N.E.2d 676 (1973), I conclude that by failing to refer to penalties with respect to the rules of the board of county commissioners while specifically mentioning penalties with respect to water rates, the General Assembly evinced an intention that the board of county commissioners not be permitted to establish penalties for violations of its rules.

Similarly, R.C. 6117.01 implies no authority for the board of county commissioners to establish penalties for violations of the rules it adopts pursuant thereto, although it does authorize the board of county commissioners to fix rates to be charged for the use of sewers or sewerage or disposal works and to certify unpaid sewer rents or charges "together with any penalties" therefor to the county auditor. Accordingly, I conclude that the board of county commissioners has no authority to establish monetary penalties for violations of rules it promulgates pursuant to R.C. 6117.01.

Based upon the foregoing, it is my opinion, and you are hereby advised, that:

1. The board of county commissioners of a county which has not adopted a charter pursuant to Ohio Const. art. X, §3 has no authority to adopt rules pursuant to R.C. 6111.032 that create criminal offenses for violations of such rules.
2. The board of county commissioners of a county which has not adopted a charter pursuant to Ohio Const. art. X, §3 has no authority to establish monetary penalties for violations of rules it adopts pursuant to R.C. 6111.032, R.C. 6103.02 and R.C. 6117.01.