

OPINION NO. 97-054**Syllabus:**

1. Pursuant to R.C. 6117.01, the registered professional engineer in charge of the county sanitary engineering department and the board of county commissioners are, for purposes of R.C. Chapter 124, the "appointing authority" of the employees of the sanitary engineering department. The authority of the county commissioners with respect to the appointment of sanitary engineering department employees is limited to approval of any such appointments.
 2. R.C. 6117.01 does not permit the board of county commissioners to delegate to the person performing the duties of sanitary engineer, or to anyone else, the duties imposed upon the board by R.C. 6117.01 with respect to the supervision of the sanitary engineering department and the appointment and compensation of the department's personnel.
 3. R.C. 315.14 does not authorize the board of county commissioners to enter into an agreement with the county engineer whereby the county engineer will perform, in addition to the duties of the sanitary engineer, the duties
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imposed upon the county commissioners by R.C. 6117.01 regarding the operation and personnel of the sanitary engineering department.

To: William A. Bish, Williams County Prosecuting Attorney, Bryan, Ohio
By: Betty D. Montgomery, Attorney General, December 29, 1997

You have requested an opinion regarding the operation of a county sanitary engineering department. You specifically ask:

1. Where a Board of County Commissioners creates a Sanitary Engineering Department pursuant to Ohio Revised Code § 6117.01 and enters into an agreement pursuant to Ohio Revised Code § 315.14 with a County Engineer to serve as Sanitary Engineer, who is the appointing authority of the department for purposes of Ohio Revised Code [Chapter] 124?
2. If the Board of County Commissioners is the appointing authority of the Sanitary Engineering Department, is the Board permitted to delegate this authority to the Sanitary Engineer through an agreement pursuant to Ohio Revised Code § 315.14 or by any other means?

Let us begin by examining the statutory scheme for the establishment and operation of a county sewer district. Pursuant to R.C. 6117.01, a board of county commissioners may establish one or more sewer districts within the county outside of municipal corporations. Concerning the employment of a sanitary engineer and the creation of a sanitary engineering department, R.C. 6117.01 states in pertinent part:

Any such board [of county commissioners] may employ a registered professional engineer for such time and on such terms as it deems best, and may authorize such registered professional engineer to employ necessary assistants upon such terms as are fixed by said board. *The board may create and maintain a sanitary engineering department, to be under its supervision and in charge of a registered professional engineer, to be appointed by such board, for the purpose of aiding it in the performance of its duties under [R.C. 6117.01-.45], or its other duties regarding sanitation provided by law. Said board shall provide suitable rooms for the use of such department and shall provide for and pay the compensation of such registered professional engineer and all necessary expenses of such registered professional engineer and department which are authorized by such board. Any such registered professional engineer in charge of such department, with the approval of the board, may appoint necessary assistants and clerks and the compensation of any such assistants and clerks shall be fixed and paid by such board.* (Emphasis added.)

Thus, a board of county commissioners that establishes a sewer district under R.C. 6117.01 may also create a sanitary engineering department. In accordance with R.C. 6117.01, any such department is to be under the supervision of the board of county commissioners and "in charge of a registered professional engineer, to be appointed by such board." The engineer so appointed is commonly referred to as the county sanitary engineer. See R.C. 6117.06. The appointment of sanitary engineering department employees is also provided for in R.C. 6117.01, which

authorizes the sanitary engineer, "with the approval of the board," to appoint necessary assistants and clerks. As specified by R.C. 6117.01, the compensation of such assistants and clerks "shall be fixed and paid by such board."

With this background in mind, let us turn to your first question in which you ask who constitutes the appointing authority of the employees of the sanitary engineering department for purposes of R.C. Chapter 124. As used in R.C. Chapter 124, the term "appointing authority" means "the officer, commission, board, or body having the power of *appointment to, or removal from*, positions in any office, *department*, commission, board, or institution." R.C. 124.01(D) (emphasis added). R.C. Chapter 124 imposes various duties and confers certain powers upon appointing authorities with respect to their employees. *See, e.g.*, R.C. 124.27 (appointment of employees in the classified civil service); R.C. 124.30 (interim, temporary, or intermittent appointments); R.C. 124.321 (reduction in work force by layoff or abolishment of positions); R.C. 124.38 (establishment of alternative sick leave schedules by county appointing authorities).¹

Pursuant to R.C. 6117.01, the employees of a sanitary engineering department are appointed by the county sanitary engineer, "with the approval of" the board of county commissioners. The question thus arises as to whether, pursuant to R.C. 6117.01, the sanitary engineer, the board of county commissioners, or both are the "appointing authority" of the employees of the county sanitary engineering department.

A similar question was addressed in 1983 Op. Att'y Gen. No. 83-023, concerning the appointment of county welfare department (currently county human services department) employees. As are employees of the sanitary engineering department, employees of a county department of human services are appointed by an individual, "with the approval of the board of county commissioners." R.C. 329.02. In discussing "whether the board's power of approval includes the power to interview all candidates before a selection is made," Op. No. 83-023 explained the scope of the county commissioners' power of "approval" over the appointment of county human services employees, as follows:

Appointment of a candidate from a certified eligibility list or a promotional list involves the selection of one individual from three whose names are certified.²

¹ Certain of the powers and duties conferred upon appointing authorities by R.C. Chapter 124 may, of course, be subject to the terms of a collective bargaining agreement. *See generally City of Cincinnati v. Ohio Council 8, AFSCME*, 61 Ohio St. 3d 658, 576 N.E.2d 745 (1991) (syllabus, paragraph one) ("[t]he provisions of a collective bargaining agreement entered into pursuant to R.C. Chapter 4117 prevail over conflicting laws, including municipal home-rule charters enacted pursuant to Section 7, Article XVIII of the Ohio Constitution, except for those laws specifically exempted by R.C. 4117.10(A)").

² R.C. 124.27 and R.C. 124.31 provide, in part, that the "appointing authority" is to make appointments to positions in the classified service from among the persons appearing on the list certified to it by the Director of Administrative Services. *See generally* R.C. 124.14(G)(2) (in a county that has established a county personnel department, the "board of county commissioners may, by a resolution adopted by a majority of its members, designate the county personnel department of the county to exercise the powers, duties, and functions of the department of administrative services and the director of administrative services specified in [R.C. 124.01-.64

R.C. 329.02 clearly contemplates that the [human services] director, who is given the power of appointment (subject to approval), is the one who will make that selection. The board of county commissioners may approve or disapprove the selection, but it may not assume the director's authority to exercise his discretion, subject to the requirement that his selection meet with the board's approval. Since the board of county commissioners is authorized by statute only to approve or disapprove appointments, and not to interview or select appointees itself, I conclude that its authority does not extend to establishing a procedure under which it must interview all candidates before it will approve an appointment from a certified eligibility list or promotional list.

Op. No. 83-023 at 2-85 through 2-86 (footnote added; various citations omitted). Op. No. 83-023 thus acknowledges that, although the role of the county commissioners in the appointment of human services employees is limited to that of approval, such approval is part of the appointment procedure. *State ex rel. Belknap v. Lavelle*, 18 Ohio St. 3d 180, 181, 480 N.E.2d 758, 759 n.1 (1985) (R.C. 329.02 places the county commissioners within the definition of "appointing authority," as defined in R.C. 124.01(D), with respect to employees of the county welfare (now human services) department); 1956 Op. Att'y Gen. No. 6316, p. 152 (concluding that R.C. 329.02 grants the power of appointment jointly to the director and the board of county commissioners). Thus, where a board of county commissioners is given the power of "approval" over the appointment of certain employees, such power is part of the "appointment" process, without which an appointment is not complete.

The foregoing analysis also applies to the situation about which you ask. R.C. 6117.01 authorizes the sanitary engineer, "with the approval of the board [of county commissioners]," to appoint employees of the sanitary engineering department. Because the appointment of sanitary engineering department employees is not complete without the approval of the board of county commissioners, R.C. 6117.01, the sanitary engineer and the county commissioners jointly exercise the power of appointment of such employees. Although the county commissioners, in the appointment of sanitary engineering department employees, exercise only the power of approval, *see* Op. No. 83-023, that approval is an essential part of the appointment process. Thus, both the sanitary engineer and the county commissioners are, for purposes of R.C. Chapter 124, the "appointing authority" of the employees of the sanitary engineering department. *See generally* R.C. 124.14(G)(2) (making reference to the board of county commissioners as an appointing authority or "co-appointing authority" of various county employees).

Your second question concerns the authority of the board of county commissioners to delegate to the sanitary engineer the board's responsibilities with respect to the personnel of the sanitary engineering department. The background information you have provided suggests that the board of county commissioners would like to have the sanitary engineer exercise full authority, without oversight by the county commissioners, over the hiring of sanitary engineering department employees and the terms and conditions of their employment. For the reasons that follow,

and R.C. Chapter 325], except for the powers and duties of the state personnel board of review, which powers and duties shall not be construed as having been modified or diminished in any manner by division (G)(2) of this section, with respect to the employees for whom the board of county commissioners is the appointing authority or co-appointing authority").

however, we conclude that the county commissioners are without authority to relinquish the duties imposed upon them by R.C. 6117.01 in regard to the sanitary engineering department.

Concerning the authority of a public body to delegate its duties, 1994 Op. Att'y Gen. No. 94-030 at 2-135, states:

It is a general rule that "the authority of a public body to delegate official duties to another entity, whether public or private, is limited, and, in the absence of specific statutory authority therefor, may only be exercised with respect to purely ministerial duties." 1987 Op. Att'y Gen. No. 87-083 at 2-558 n.1; *accord* 1987 Op. Att'y Gen. No. 87-034 at 2-237; 1979 Op. Att'y Gen. No. 79-067 at 2-223. The rule is based on the presumption "that the General Assembly has delegated duties to a public body or agency named in a statute because that body or agency 'is deemed competent to exercise the judgment and discretion necessary for performance of the duties.'" Op. No. 87-083 at 2-559 n.1 (quoting Op. No. 79-067 at 2-223); *accord* Op. No. 87-034 at 2-237.

R.C. 6117.01 expressly provides for the involvement of the board of county commissioners in the establishment and operation of a sanitary engineering department in a variety of ways. We must, therefore, examine those duties in order to determine whether such duties are ministerial or discretionary in nature.

First, the board of county commissioners is authorized to establish a sanitary engineering department "for the purpose of aiding *it* in the performance of its duties under [R.C. 6117.01-.45], or its other duties regarding sanitation provided by law." R.C. 6117.01(emphasis added). In establishing a sanitary engineering department, the board of county commissioners is required to place such department "under its supervision." *Id.* As discussed above, R.C. 6117.01 specifically requires the county commissioners' approval in order to effect the appointment of sanitary engineering department employees. Moreover, R.C. 6117.01 expressly reserves the duty to fix and pay the compensation of the sanitary engineering department employees to the board of county commissioners, rather than the sanitary engineer. The scheme established by R.C. 6117.01, therefore, indicates that the General Assembly intended the county commissioners not only to exercise supervision of the entire sanitary engineering department, but also to discharge specific duties with respect to the appointment and compensation of sanitary engineering department employees. *See generally Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) ("[i]n statutory construction, ... '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").

It is clear that supervision of the sanitary engineering department, approval of the appointment of department personnel, and the determination of staff compensation involve the exercise of judgment and are, therefore, discretionary, rather than merely ministerial, acts. Accordingly, in the absence of express authorization by the General Assembly to delegate the duties imposed upon the board of county commissioners by R.C. 6117.01 with respect to the board's supervision of the sanitary engineering department and its duties regarding department personnel, we must conclude that the board of county commissioners may not delegate such duties to the person performing the duties of sanitary engineer, or to anyone else. *See CB Transportation, Inc. v. Butler County Bd. of Mental Retardation*, 60 Ohio Misc. 71, 82, 397 N.E.2d 781, 788 (C.P. Butler County 1979) ("[t]he presumption is that the board or officer whose

judgment and discretion is required, was chosen because they were deemed fit and competent to exercise that judgment and discretion and unless power to substitute another in their place has been given, such board or officer cannot delegate these duties to another").

Both your questions ask us to assume that the duties of the sanitary engineer are being performed by the county engineer pursuant to an agreement entered into with the county commissioners in accordance with R.C. 315.14.³ Whether or not the county engineer is hired to act as sanitary engineer, however, the respective duties of the sanitary engineer and the county commissioners concerning the operation and personnel of the sanitary engineering department remain the same.

The authority of the county commissioners to enter into an agreement with the county engineer for the performance of the duties of the sanitary engineer is established by R.C. 315.14, which describes various duties of the county engineer and states in pertinent part:

[The county engineer] shall make all surveys required by law and perform all necessary services to be performed by a registered surveyor or registered professional engineer in connection with the construction, repair, or opening of all county roads or ditches constructed under the authority of the board *and shall perform such other duties as the board requires, provided that the duties described in [R.C. Chapters 343, 6103, and 6117] shall be performed only pursuant to an agreement between the county engineer and the board.* The board shall determine the compensation for performance of the duties described in [R.C. Chapters 343, 6103, and 6117] and shall pay the county engineer from funds available under such chapters or from the general fund of the county. (Emphasis added.)

Accordingly, although R.C. 315.14 authorizes the board of county commissioners to assign the county engineer such other duties as it may prescribe, R.C. 315.14 specifically conditions the county engineer's performance of "the duties described in [R.C. Chapter 6117]" upon agreement between the county engineer and the county commissioners as to the performance of such duties.

Because one of the qualifications of the position of county engineer is that the person be a registered professional engineer, R.C. 315.02, and because the only qualification for the position of sanitary engineer is that the person be "a registered professional engineer," R.C. 6117.01, it is logical to assume that "the duties described in [R.C. Chapter 6117]" for which the county commissioners may engage the county engineer are those duties described in R.C. Chapter 6117 that are required to be performed by "a registered professional engineer." Whether or not the "registered professional engineer" in charge of the sanitary engineering department is also the county engineer, R.C. 6117.01 requires the county commissioners to maintain the sanitary engineering department under its supervision. R.C. 6117.01 does not provide for the county engineer's assumption of the duties of the county commissioners when the county engineer is also appointed to serve as sanitary engineer. Moreover, nothing in R.C. 315.14 suggests that the

³ See generally 1996 Op. Att'y Gen. No. 96-025 (syllabus) ("[p]ursuant to R.C. 315.14, a board of county commissioners is authorized to enter into an agreement with the county engineer whereby the board compensates the county engineer for performing the duties of a county sanitary engineer").

General Assembly intended to permit the county commissioners to relinquish their duties under R.C. 6117.01 with respect to the sanitary engineering department when they appoint the county engineer to serve as the county's sanitary engineer. *See generally City of Parma Heights v. Schroeder*, 26 Ohio Op. 2d 119, 122, 196 N.E.2d 813, 816 (C.P. Cuyahoga County 1963) ("one cannot do indirectly what he cannot lawfully do directly"). We conclude, therefore, that R.C. 315.14 does not authorize the board of county commissioners to enter into an agreement with the county engineer whereby the county engineer will perform, in addition to the duties of the sanitary engineer, the duties imposed upon the county commissioners by R.C. 6117.01 regarding the operation and personnel of the sanitary engineering department.

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

1. Pursuant to R.C. 6117.01, the registered professional engineer in charge of the county sanitary engineering department and the board of county commissioners are, for purposes of R.C. Chapter 124, the "appointing authority" of the employees of the sanitary engineering department. The authority of the county commissioners with respect to the appointment of sanitary engineering department employees is limited to approval of any such appointments.
2. R.C. 6117.01 does not permit the board of county commissioners to delegate to the person performing the duties of sanitary engineer, or to anyone else, the duties imposed upon the board by R.C. 6117.01 with respect to the supervision of the sanitary engineering department and the appointment and compensation of the department's personnel.
3. R.C. 315.14 does not authorize the board of county commissioners to enter into an agreement with the county engineer whereby the county engineer will perform, in addition to the duties of the sanitary engineer, the duties imposed upon the county commissioners by R.C. 6117.01 regarding the operation and personnel of the sanitary engineering department.