

OPINION NO. 77-025

Syllabus:

1) A board of county commissioners may act as a community action agency and implement federally mandated hiring preferences without violating the provisions of R.C. Chapter 124 that pertain to the appointment of employees in the classified civil service, if the Director of the Department of Administrative Services has, pursuant to R.C. 124.11 (A) (12), placed positions of employment with the agency in the unclassified service. (1968 Op. Att'y. Gen. No. 68-087, and Syllabus No. 1, 1968 Op. Att'y. Gen. No. 68-088, modified)

2) A board of county commissioners may act as a community action agency without violating the provisions of R.C. Chapter 124 that pertain to the appointment of employees in the classified civil service, if the board receives a waiver of federally mandated hiring preferences from the Community Services Administration. (1968 Op. Att'y. Gen. No. 68-087 and Syllabus No. 1, 1968 Op. Att'y. Gen. No. 68-088, modified)

To: James R. Unger, Stark County Pros. Atty., Canton, Ohio
By: William J. Brown, Attorney General, May 19, 1977

I have before me your request for my opinion which reads as follows:

"The Stark County Commissioners are prepared to establish and operate a Community Action Agency (C.A.A.) as a quasi-public agency under a federally funded program here in Stark County. However, we have noted that 1968 O.A.G. 087 and 1968 O.A.G. 088 written by your predecessor, Mr. William B. Saxbe, seem to prohibit the operation of a C.A.A. by a political subdivision such as Stark County.

"Mr. Saxbe's opinions were based upon an apparent conflict between Ohio's Civil Service Laws and the O.E.O. hiring preferences mandated by the federal government. He held that because of this conflict, inter alia,

Countys could not operate such programs themselves.

"It has come to our attention that O.E.O. Instruction #6302-2 (1971) has seemingly provided that the O.E.O. hiring preferences for poor and other persons, will be waived for public agencies subject to civil service laws who wish to operate C.A.A. programs. This Instruction was apparently prompted by Mr. Saxbe's Rulings.

"On the basis of the foregoing we now request your opinion on the following questions:

1. Would the employees of such a quasi-public C.A.A. be subject to Civil Service Laws as applied to the County?
2. Does O.E.O. Instruction #6302-2 eliminate the federal-state conflict which prompted Mr. Saxbe's 1968 Rulings if the Civil Service Laws apply?
3. May Stark County lawfully establish and operate a C.A.A. as a quasi-public agency here in Stark County under a federally assisted program without apparent conflict?"

The development and operation of community action programs by locally designated agencies is authorized by the Economic Opportunity Act, 42 U.S.C.A. § 2781 et seq. The basic purpose of this federally sponsored program is to coordinate local, state, private and federal resources so that they might better promote the self-sufficiency of low income families and individuals residing within the area served by the community action agency.

42 U.S.C.A. § 2790, which authorizes the designation of community action agencies, provides in part as follows:

"(a) A community action agency shall be a State or political subdivision of a State (having elected or duly appointed governing officials), or a combination of such political subdivisions, or a public or private nonprofit agency or organization which has been designated by a State or such a political subdivision or combination of such subdivisions, or an Indian tribal government which -

- (1) has the power and authority and will perform the functions

set forth in section 2795 of this title, including the power to enter into contracts with public agencies and organizations to assist in fulfilling the purposes of this subchapter, and

(2) is determined to be capable of planning, conducting, administering and evaluating a community action program and is currently designated as a community action agency by the Director."

You indicate in your request that the Board of County Commissioners of Stark County is prepared to designate itself as the Community Action Agency pursuant to the foregoing provision. Although the duties of implementing and operating the program will, in large part, rest with a separate administering board, the county commissioners will act as the governing board of the agency. It will be the board of county commissioners that would hold official designation and formal recognition from the Community Services Administration.

A board of county commissioners clearly possesses the general power to operate a federally funded program such as the one under consideration. R.C. 307.85, which confers this power upon the board, provides in part as follows:

"(A) The board of county commissioners of any county may participate in, give financial assistance to, and cooperate with other agencies or organizations, either private or governmental, in establishing and operating any federal program enacted by the Congress of the United States, and for such purpose may adopt any procedures and take any action not prohibited by the constitution of Ohio nor in conflict with the laws of this state."

Thus, boards of county commissioners are empowered to take any action with respect to the creation and operation of a federal program that is not prohibited by state law.

Although 42 U.S.C.A. § 2790 clearly permits the governing body of a political subdivision to designate itself as the community action agency, it requires that the agency be free under state law to exercise certain specified powers.

Among those powers that an agency must possess under state law is the ability to implement certain federally mandated hiring preferences. O.E.O. Instruction 6302-2 (Eff. 2-26-71), which discusses these preferences in some detail, provides in part as follows:

"9. A C.A.A. must be free with regard to the community action program and subject to the waiver provision stated below, from employment rules or restrictions which would prevent:

- a. The hiring of any qualified poor person, in preference to other qualified persons who are not poor.
- b. The hiring of any qualified person who lives in the neighborhood or area where the job is to be performed, in preference to other qualified persons who do not live there.
- c. The employment of persons without any fixed upper age limit.
- d. Restrictions of non-professional jobs to particular types of persons because of their relationship to the program or its beneficiaries (for example, parents of pre-school children, manpower program trainees, the elderly, tenants of a particular project or block).
- e. The hiring of any person who can perform a non-professional job, even though he lacks a formal education.
- f. The hiring of an otherwise qualified person solely because he has a criminal record, unless such a restriction is required by O.E.O. policies governing the employment of persons with criminal records.
- g. The employment of persons without regard to their race, religion, sex, color, or national origin.
- h. The payment to program employees of the current Federal minimum wage for employment in interstate commerce."

The existence of the foregoing condition, because of its obvious conflict with state civil service laws, raises a serious question concerning the ability of a political subdivision, such as a board of county commissioners, to act as a community action agency.

Article XV, Section 10, Ohio Constitution provides as follows:

"Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

This section has been implemented by the enactment of R.C. Chapter 124 which sets forth the civil service laws of this state. R.C. 124.01 provides in part as follows:

"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."

R.C. 124.11(B) provides that all civil service employees who are not specifically included in the unclassified service shall be members of the classified service. There is no provision set forth in R.C. 124.11(A) that would categorically exempt the employees of a federally sponsored agency governed by the county from the lists of the classified service. It would appear, therefore, that employees of a community action agency governed by the board of county commissioners are county employees subject to the provisions of R.C. Chapter 124. that relate to the appointment of employees in the classified service.

It was on the basis of the foregoing provisions that my predecessor in, 1968 Op. Att'y. Gen. No. 68-087, concluded that neither the state nor any of its political subdivisions could act as a Community Action Agency inasmuch as the federally imposed employment guidelines are not consonant with the Ohio Constitution and civil service statutes of this state. See also: 1968 Op. Att'y. Gen. No. 68-088.

Although the foregoing conclusion is still accurate as a general proposition, there are provisions of both state and federal law that permit the recognition of certain exceptions.

It will be noted at the outset that the federal employment guidelines conflict with the state civil service laws only in a limited sense. Application of these guidelines would not prohibit the selection of employees on the basis of merit and fitness. The guidelines do not require the appointment of an individual who lacks the requisite qualifi-

cations for a position. The guidelines merely require the consideration of certain characteristics that are implicitly recognized by R.C. Chapter 124 to be collateral to an individual's fitness for a position.

Inasmuch as R.C. 124.27 currently requires an appointing authority to select prospective employees from the three candidates standing highest on the eligible list and inasmuch as an individual's standing on the list is not affected by the characteristics set forth in the federal guidelines, an appointing authority is not permitted under state law to hire employees of the classified service on the basis of such characteristics. This fact does not, however, prevent a board of county commissioners from acting as a community action agency in all cases.

There is, first of all, a degree of flexibility built into the civil service laws. R.C. 124.11, provides in part as follows:

"(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service and which shall be exempt from all examinations required by this chapter.

* * * * *

"(12) Such teachers and employees in the agricultural experiment stations; such student employees in normal schools, colleges, and universities of the state; and such unskilled labor positions as the director of administrative services or any municipal civil service commission may find it impracticable to include in the classified service; provided such exemptions shall be by order of the commission or the director of the commission or the director with the reasons for each such exemption; . . ."

The Rules of the Director of the Department of Administrative Services do not contain a provision that would place all of the employees of a community action agency in the unclassified service. But cf: Rule 123: 1-39-01, Administrative Rules of the Director of Administrative Services (placing trainees in special programs in conjunction with federal grants in the unclassified service) It is quite possible, however, that many positions within the agency may warrant placement in the unclassified service pursuant to R.C. 124.11(A)(12). I understand that certain positions in the agency would, by their very nature, consist of duties requiring little or no specific skills or that they would be filled by individuals who would be placed primarily in a training role. Exemption under R.C. 124.11(A)(12) would, therefore, be appropriate in such case.

Once a position is placed in the unclassified service, the appointing authority is free to implement the hiring preferences set forth in the federal guidelines.

Thus, a board of county commissioners may act as a community action agency and implement federally mandated hiring preferences without violating the provisions of R.C. Chapter 124 that pertain to the appointment of employees in the classified civil service, if the Director of the Department of Administrative Services has, pursuant to R.C. 124.11(A) (12), placed positions of employment with the agency in the unclassified service.

A separate method by which a board of county commissioners acting as a community action agency may comply with both state civil service laws and federal hiring preferences is through the operation of the waiver set forth in O.E.O. Instruction 6302-02. Referring to the hiring restrictions from which a community action agency must be free, the waiver provides as follows:

"The requirement to be free of restrictions preventing 'a' through 'f' above shall be waived, by the O.E.O. [Now Community Services Administration] Regional or Headquarters office recognizing the C.A.A., for public C.A.A.s (government C.A.A.s or separate public agencies) which are subject to civil service laws or regulations which impose such restrictions, provided that:

- a. The C.A.A. delegate the conduct of all programs and activities funded under the Economic Opportunity Act other than basic central administration to other agencies which, with such exceptions as O.E.O. may agree to for compelling programmatic reasons, are free of such restrictions; and
- b. The C.A.A. commit itself to make every effort to seek changes in such civil service laws or regulations so as to eliminate such restrictions.

"With regard to condition 'b' above, the waiver shall be extended beyond a year only upon receipt of documentation by the C.A.A. that adequate efforts to change restrictive regulations have, in fact, been made."

It is neither necessary nor appropriate to discuss at length the operation of the foregoing waiver. It is sufficient to note that the waiver permits a political subdivision that is bound by state civil service legislation to act as a community action agency. The waiver is limited in both scope and duration and it does not eliminate entirely the tension between

the hiring preferences built into the federal program and the civil service laws of the state. It does, however, provide an effective method of reconciling state and federal hiring requirements for those political subdivisions that are prepared to comply with the conditions of the waiver.

In conclusion, a board of county commissioners may act as a community action agency without violating the provisions of R.C. Chapter 124 that pertain to the appointment of employees in the classified civil service, if the board receives a waiver of federally mandated hiring preferences from the Community Services Administration.

It should be noted that my predecessor, in concluding that a political subdivision could not act as a community action agency, relied solely upon the conflict between the federal hiring guidelines and the state civil service laws. The conclusions set forth herein go no further than to hold that this conflict is not inherent and that a political subdivision may, under certain circumstances, comply with both federal and state law. To the extent indicated, therefore, the conclusions set forth in 1968 Op. Att'y. Gen. No. 68-087 and 1968 Op. Att'y. Gen. No. 68-088 are hereby modified.

The possibility that some aspect of a community action program, as it is ultimately implemented by the board of county commissioners, might conflict with the Constitution or state statutes other than those provisions relating to the civil service, is an issue that is not addressed in this opinion. Federal programs, such as the one under consideration, confer considerable latitude upon local officials. The scope and the details of a program's operation are, for the most part, left to the discretion of the community action agency. It is impossible, therefore, at this time and on the basis of the information submitted in your request, to determine whether a board of county commissioners is always permitted by state law to exercise all of the powers that are necessary to the operation of a community action program.

In conclusion, therefore, it is my opinion and you are hereby advised that:

1) A board of county commissioners may act as a community action agency and implement federally mandated hiring preferences without violating the provisions of R.C. Chapter 124 that pertain to the appointment of employees in the classified civil service, if the Director of the Department of Administrative Services has, pursuant to R.C. 124.11 (A)(12), placed positions of employment with the agency in the unclassified service. (1968 Op. Att'y. Gen. No. 68-087, and Syllabus No. 1, 1968 Op. Att'y. Gen. No. 68-088, modified)

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