

**OPINION NO. 89-093****Syllabus:**

1. The administrator and the medical director of the Ohio Emergency Medical Services Agency, appointed pursuant to R.C. 3303.09, and the members of the Ohio Emergency Medical Services Board are officers or employees, as defined in R.C. 109.36(A), and are, therefore, entitled to the civil immunity prescribed by R.C. 9.86, the indemnification privileges set forth in R.C. 9.87, and representation and defense by the Attorney General in accordance with R.C. 109.361.
2. Pursuant to R.C. 109.02, only the Attorney General may represent the Ohio Emergency Medical Services Agency or the Ohio Emergency Medical Services Board in a civil action brought against such agency or board.

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**To: Franklin B. Walter, Superintendent of Public Instruction, Department of Education, Columbus, Ohio**

**By: Anthony J. Celebrezze, Jr., Attorney General, November 7, 1989**

I have before me your opinion request concerning the Emergency Medical Services Agency (EMS Agency) and the Emergency Medical Services Board (EMS Board). Concerning the potential liability of the members of the Agency and the Board in the performance of their statutory duties, you specifically ask:

1. In carrying out their duties and responsibilities, are individual members of the EMS Agency or EMS Board immune from civil liability?
2. Would said individual member of the EMS Agency or EMS Board be eligible for indemnification from the state as an officer or employee pursuant to [R.C. 9.87]?
3. Would the EMS Agency or Board or an individual member of each entity be eligible for representation and defense by the Attorney General if a civil action is brought against the EMS Agency or Board or a member of either entity?

Before addressing the applicability of the statutory provisions governing the principles about which you ask to members of the EMS Agency and EMS Board specifically, I will first discuss the general nature of each statute. Your first question asks about the possible immunity from civil liability of members of the EMS

Agency and EMS Board. Civil immunity of public officers and employees is provided for in R.C. 9.86 which states:

Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no *officer or employee* shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law. This section does not affect the liability of the state in an action filed against the state in the court of claims pursuant to [R.C. Chap. 2743]. (Emphasis added.)

R.C. 9.86 thus provides that where an officer or employee is acting not manifestly outside the scope of his duties, he is not liable in a civil action under state law, except for civil actions arising out of the operation of a motor vehicle<sup>1</sup> or in which the state is the plaintiff, for damages or injury caused in the performance of his duties, unless he acted "with malicious purpose, in bad faith, or in a wanton or reckless manner."<sup>2</sup>

Your second question asks whether such persons are entitled to be indemnified by the state under R.C. 9.87, which states in part:

(A) The state shall, except as provided in division (B) of this section, indemnify an *officer or employee* from liability incurred in the performance of his duties by paying any judgment in, or amount negotiated in settlement of, any civil action arising under federal law, the law of another state, or the law of a foreign jurisdiction....

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<sup>1</sup> Separate provision is made in R.C. 9.83 for the state and its political subdivisions to insure their officers and employees against liability arising out of the operation of a motor vehicle, aircraft, or watercraft "in the course of their employment or official responsibilities for the state or the political subdivision."

<sup>2</sup> Concerning the state's waiver of immunity from liability, R.C. 2743.02 states in part:

(A)(1) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims....

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in [R.C. 109.36]. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(2) If a claimant proves in the court of claims that an officer or employee, as defined in [R.C. 109.36], would have personal liability for his acts or omissions but for the fact that the officer or employee has personal immunity under [R.C. 9.86], the state shall be held liable in the court of claims in any action that is timely filed pursuant to [R.C. 2743.16] and that is based upon the acts or omissions.

(B) The state shall not indemnify an *officer or employee* under any of the following circumstances:

(1) To the extent the officer or employee is covered by a policy of insurance for civil liability purchased by the state;

(2) When the officer or employee acts manifestly outside the scope of his employment or official responsibilities, with malicious purpose, in bad faith, or in a wanton or reckless manner;

(3) For any portion of a judgment that represents punitive or exemplary damages;

(4) For any portion of a consent judgment or settlement that is unreasonable.

....

(D) This section does not affect any of the following:

(1) The waiver arising under [R.C. 2743.02(A)];

(2) Any defense that would otherwise be available in an action alleging personal liability of an officer or employee;

(3) The operation of [R.C. 9.83]. (Emphasis added.)

R.C. 9.87(A), thus, establishes the general rule providing for the indemnification by the state of an officer or employee from liability incurred in the performance of his duties in a civil action arising under federal law, the law of another state, or the law of a foreign jurisdiction. R.C. 9.87 further sets forth limitations on, exceptions to, and the procedure to be followed in, the indemnification of officers and employees.

Your third question concerns, in part, representation of the persons about whom you ask by the Attorney General under R.C. 109.361, which states in pertinent part:

Upon the receipt of a written request by any officer or employee, the attorney general shall, except as provided in [R.C. 109.362] and except for civil actions in which the state is the plaintiff, represent and defend the *officer or employee* in any civil action instituted against the officer or employee. (Emphasis added.)

Thus, except as provided in R.C. 109.362 and except for civil actions in which the state is the plaintiff, an officer or employee is entitled to representation and defense by the Attorney General in a civil action instituted against the officer or employee. See generally *Wrenn v. Ohio Dept. of Mental Health and Mental Retardation*, 16 Ohio App. 3d 160, 474 N.E.2d 1201 (Franklin County 1984).

For purposes of R.C. 109.36-366, the words "officer or employee" have the meaning set forth in R.C. 109.36(A), which states:

"Officer or employee" means any person who, at the time a cause of action against him arises, is serving in an elected or appointed office or position with the state; is employed by the state; or is rendering medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract with a department, agency, or institution of the state. Officer or employee does not include any person elected, appointed, or employed by any political subdivision of the state.

Further, the word "state," as used in R.C. 109.36-366, has the meaning assigned by R.C. 109.36(B), as follows:

"State" means the state of Ohio, including but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

I note in addition that, pursuant to R.C. 9.85, the terms "officer or employee" and "state," as used in R.C. 9.86 and R.C. 9.87, have the same meanings as prescribed by R.C. 109.36(A) and R.C. 109.36(B), respectively. Thus, if the persons about whom you ask qualify as officers or employees, as defined in R.C. 109.36(A), they are entitled to the civil immunity prescribed by R.C. 9.86, the indemnification privileges

of R.C. 9.87, and representation by the Attorney General as set forth in R.C. 109.361. In order to make such a determination, it is necessary to examine the statutes governing the formation of the EMS Agency and the EMS Board.

R.C. 3303.09 establishes the Emergency Medical Services Agency, in part, as follows:

There is hereby created the Ohio emergency medical services agency in the department of education. The superintendent of public instruction shall appoint an administrator for the agency, who shall serve at the pleasure of the superintendent.

The superintendent of public instruction shall appoint a medical director for the Ohio emergency medical services agency....The medical director shall be employed as a consultant by the department of education. The medical director shall direct the administrator with regard to emergency medical services issues according to rules adopted by the state board of education.

Thus, pursuant to R.C. 3303.09, the EMS Agency is created as an entity within the Department of Education. The Agency's administrator and medical director are appointed by the Superintendent of Public Instruction. No other statute of which I am aware provides for other persons to be employed directly by the EMS Agency.<sup>3</sup> I will, therefore, limit my discussion of EMS Agency personnel to only the administrator and the medical director.

In order to qualify as officers or employees, the administrator and the medical director of the EMS Agency must come within the definition stated in R.C. 109.36(A), as set forth above. Pursuant to R.C. 3303.09, the administrator of the EMS Agency is appointed by, and serves at the pleasure of, the Superintendent of Public Instruction, who, pursuant to R.C. 3301.11, is the executive and administrative officer of the state board of education, which is part of the Department of Education, R.C. 3301.13. The Department of Education clearly comes within the meaning of state, as set forth above in R.C. 109.36(B). Whether the administrator serves in an appointed office or position with the Department of Education or is merely employed by the Department, a matter I need not decide, he is included within the definition of an "officer or employee," as defined in R.C. 109.36(A).

With respect to the medical director of the EMS Agency, I note that R.C. 3303.09 expressly states that he "shall be employed as a consultant by the department of education." The medical director is employed to provide consulting services with regard to emergency medical services issues. Although he may not qualify as an "officer or employee" by "rendering medical...services" to the state, *see 1983 Op. Att'y Gen. No. 83-013*, he is clearly "employed by the state," and is, therefore, an employee, as defined in R.C. 109.36(A).

Your questions also concern members of the EMS Board. R.C. 3303.10,<sup>4</sup> which creates the Board, states in pertinent part:

3 The EMS Agency is established within the Department of Education. Pursuant to R.C. 3301.13 the Department consists of "the state board of education, the superintendent of public instruction, and a staff of such professional, clerical, and other employees as may be necessary to perform the duties and to exercise the required functions of the department." It appears, therefore, that persons necessary to staff the EMS Agency would be hired by the Department of Education, as provided for in R.C. 3301.13.

4 Pursuant to Am. Sub. S.B. 145, 118th Gen. A. (1989) (eff., in part, July 26, 1989), section 3 (uncodified):

During a period commencing on the effective date of this act and expiring January 1, 1990, [R.C. 3303.10] is suspended insofar as it authorizes the Ohio Emergency Medical Services Board to advise and make recommendations to the State Board of

There is hereby created the Ohio emergency medical services board, consisting of twenty-six voting members and eleven nonvoting members. One of the voting members shall be the director of health or his representative. One shall be the chairman of the emergency medical services advisory council created under [R.C. 3303.24] or his representative. One shall be the chancellor of the board of regents or his representative. All other voting members shall be appointed by the superintendent of public instruction....

.... Of the nonvoting members, one shall be the director of highway safety or his representative. One shall be the president of the state board of pharmacy or his representative. One shall be the adjutant general or his representative. All other nonvoting members shall be appointed by the superintendent of public instruction....

...Any member shall continue in office subsequent to the expiration date of his term until his successor takes office, or until a period of sixty days has elapsed, whichever occurs first. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall hold office for the remainder of the unexpired term....The superintendent of public instruction may remove any member from office for neglect of duty, malfeasance, misfeasance, or nonfeasance.

The language of R.C. 3303.10 plainly evidences the legislative intent that members of the EMS Board be considered public officers.

The statewide nature of the EMS Board is apparent upon examination of the Board's duties, set forth in R.C. 3303.10, *see n. 4, supra*, as follows:

(A) Approve or disapprove a proposed statewide emergency medical services plan and any revisions to the plan, as prepared by the Ohio emergency medical services agency. Any proposed plan or proposed plan revisions that are submitted to the board shall be considered approved if they are not disapproved by the board within forty-five days of submission to the board.

(B) Advise applicants for state or federal emergency medical services funds and review and comment on applications for such funds.

(C) Serve as a statewide clearinghouse for discussion, inquiry, and complaints concerning emergency medical services. The board shall instruct the administrator to make such investigations of complaints as the board finds necessary.

(D) Advise and make recommendations to the Ohio emergency medical services agency on all aspects of its responsibilities.

(E) Advise and make recommendations to the state board of education on rules and standards for emergency medical services, including standards for revocation of certificates of EMT-A's, ADV EMT-A's, and paramedics and for other disciplinary action against certificate holders.

(F) Make recommendations to the general assembly on legislation to improve the delivery of emergency medical services.

It is clear, therefore, that the EMS Board functions as a statewide body and may be considered a state board. Thus, for purposes of R.C. 109.36(A) and (B), the members of the EMS Board are state officers.

Concerning representation by the Attorney General, your third question also asks whether the EMS Agency and the EMS Board are entitled to representation by the Attorney General in civil actions brought against the Agency or the Board. R.C. 109.02 states:

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Education on rulemaking under [R.C. 3303.11, .12, .15, and .201] that relates to the provision of emergency medical services. Upon the expiration of such period of suspension, [R.C. 3303.10], in either the present form of such section or as it is hereafter amended or reenacted, again becomes fully operational.

*The attorney general is the chief law officer for the state and all its departments....No state officer, board, or the head of a department or institution of the state shall employ, or be represented by, other counsel or attorneys at law. The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When required by the governor or the general assembly, he shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, he shall prosecute any person indicted for a crime. (Emphasis added.)*

As discussed above, pursuant to R.C. 3303.09, the EMS Agency is created within the Department of Education. As stated in R.C. 3301.13: "The department of education shall be subject to all provisions of law pertaining to departments, offices, or institutions established for the exercise of any function of the state government; excepting that it shall not be one of the departments provided for under [R.C. 121.01(A)]." The Department of Education is, therefore, subject to all laws pertaining to departments established for the exercise of the functions of state government. Thus, the Department of Education, of which the EMS Agency is a part, is prohibited by R.C. 109.02 from employing counsel, other than the Attorney General, to represent it in a civil action.

You also ask whether the EMS Board would be entitled to representation by the Attorney General in a civil action filed against the Board. As set forth above, R.C. 109.02 prohibits a state board from employing or being represented by counsel other than the Attorney General. Having concluded with respect to R.C. 109.361 that members of the EMS Board are officers entitled to representation by the Attorney General, I must also conclude that, pursuant to R.C. 109.02, the EMS Board may not be represented in a civil action by counsel other than the Attorney General.

Thus, in answer to the portion of your third question concerning the EMS Agency and EMS Board, R.C. 109.02 prohibits the Agency and the Board from being represented in a civil action by counsel other than the Attorney General.

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

1. The administrator and the medical director of the Ohio Emergency Medical Services Agency, appointed pursuant to R.C. 3303.09, and the members of the Ohio Emergency Medical Services Board are officers or employees, as defined in R.C. 109.36(A), and are, therefore, entitled to the civil immunity prescribed by R.C. 9.86, the indemnification privileges set forth in R.C. 9.87, and representation and defense by the Attorney General in accordance with R.C. 109.361.
2. Pursuant to R.C. 109.02, only the Attorney General may represent the Ohio Emergency Medical Services Agency or the Ohio Emergency Medical Services Board in a civil action brought against such agency or board.