

OPINION NO. 86-068**Syllabus:**

1. A regional council of governments may not appoint and commission persons as law enforcement officers of the council with full police powers throughout the territory of the member subdivisions.
2. Unless the duties of a deputy sheriff qualify the position of that deputy as a position in the unclassified service pursuant to R.C. 124.11(A), the position is in the classified service for purposes of R.C. Chapter 124, and the deputy may be removed only for the reasons and in the manner specified in R.C. 124.34.

To: Keith A. Shearer, Wayne County Prosecuting Attorney, Wooster, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, September 23, 1986

I have before me your request for an opinion concerning a situation in which two counties and a number of cities within those counties have entered into an agreement pursuant to R.C. Chapter 167 for the establishment of a regional council of governments. See R.C. 167.01. The organization is known as the Medway Drug Enforcement Council of Governments ("Medway") and has as its main purpose the reduction of drug trafficking and related crimes. Your letter notes that, in the past, undercover agents employed by Medway have been deputized by the sheriffs of the counties in which their activities take place, but that the sheriffs are reluctant to continue this procedure. You have, therefore, raised the following questions:

1. May a regional council of governments appoint and commission duly qualified agents as law enforcement officers with full police powers within the jurisdiction of the member subdivisions?
2. If not, may the sheriff of a participating county commission the agents of a regional council of governments as deputy sheriffs without being obligated to keep them on his staff when the

agents' effectiveness as undercover operators is terminated?

A regional council of governments is formed of the various political subdivisions that participate in its establishment, see R.C. 167.01, and is, therefore, not a county board. It appears, as a result, that a county prosecutor is under no duty to advise such a council. See R.C. 309.09; cf., e.g., 1985 Op. Att'y Gen. No. 85-071 (county prosecuting attorney is not legal adviser to joint fire district); 1985 Op. Att'y Gen. No. 85-012 (county prosecuting attorney is not legal adviser to regional organization for civil defense); 1981 Op. Att'y Gen. No. 81-059 (county prosecuting attorney is not legal adviser to joint recreation district or joint recreation board); 1979 Op. Att'y Gen. No. 79-019 (county prosecuting attorney is not legal adviser to multicounty felony bureau); 1961 Op. Att'y Gen. No. 2383, p. 366 (county prosecuting attorney is not legal adviser to regional planning commission). It follows that I am not generally able to advise a county prosecutor with respect to the powers of a regional council of governments. See R.C. 109.14.

In the instant case, however, your second question concerns the authority of the county sheriff, who is clearly a county officer entitled to your legal counsel under R.C. 309.09. See R.C. Chapter 311. Further, your first question reflects the concerns of the county commissioner who, pursuant to the provisions of the agreement establishing the council of governments, serves as the county's representative on the council. See R.C. 167.02(B). I find, therefore, that the questions raised in your request involve duties of your office about which I may, under R.C. 109.14, issue a formal legal opinion. Cf. Op. No. 85-071 (syllabus, paragraph two) ("[a] county prosecuting attorney has a duty to act as legal adviser to a township trustee who serves as a representative to a board of fire district trustees on matters relating to the activities of the joint fire district which arise from such individual's position as township trustee"). See generally 1983 Op. Att'y Gen. No. 83-064.

I consider first the authority of a regional council of governments with respect to the appointment and commissioning of law enforcement officers. A regional council of governments has express statutory authority to carry out studies, promote cooperative arrangements and agreements, make recommendations, and perform planning projects. See R.C. 167.03(A), (B). Such a council has no direct statutory authority to appoint and commission law enforcement officers. It does, however, have statutory authority to "employ such staff and contract for the services of such consultants and experts...as it deems necessary and appropriate in the manner and under procedures established by the by-laws of the council." R.C. 167.05. Further, R.C. 167.03(C) authorizes a regional council of governments, "by appropriate action of the governing bodies of the members, [to] perform such other functions and duties as are performed or capable of performance by the members and necessary or desirable for dealing with problems of mutual concern." In addition, R.C. 167.08 authorizes contracts that permit a regional council of governments to carry out functions specified in the contracts. R.C. 167.08 states:

The appropriate officials, authorities, boards, or bodies of counties, municipal corporations, townships, special districts, school districts, or

other political subdivisions may contract with any council established pursuant to sections 167.01 to 167.07, inclusive, of the Revised Code to receive any service from such council or to provide any service to such council. Such contracts may also authorize the council to perform any function or render any service in behalf of such counties, municipal corporations, townships, special districts, school districts, or other political subdivisions, which such counties, municipal corporations, townships, special districts, school districts, or other political subdivisions may perform or render. (Emphasis added.)

R.C. 167.03(C) and R.C. 167.08 have been construed as providing a regional council of governments with authority to carry out a wide variety of activities. See, e.g., 1969 Op. Att'y Gen. No. 69-013 (a council of governments may perform joint purchasing on behalf of its members, subject to competitive bidding requirements). In order to answer your question, it is necessary to determine whether the powers granted by those provisions, together with the general capacity to employ under R.C. 167.04, permit a regional council of governments, pursuant to appropriate action by its members, to appoint and commission law enforcement officers with full police powers throughout the territory of the member subdivisions.

It is important to note that the function of appointing and commissioning law enforcement officers to exercise full police powers throughout the territory of the member counties and cities exceeds the authority that any individual member subdivision has. A law enforcement officer who serves a particular political subdivision is, in general, authorized to exercise his powers within the territory of the political subdivision that has appointed him. See generally, e.g., R.C. 2935.03; City of Fairborn v. Munkus, 28 Ohio St. 2d 207, 277 N.E.2d 227 (1971) (the general common-law rule, subject to change by statute, is that the power of a municipal police officer is limited to the boundaries of his municipality); 1971 Op. Att'y Gen. No. 71-076. Specific statutory provisions govern the situations in which law enforcement services may be provided for one political subdivision by law enforcement officers of another political subdivision. See, e.g., R.C. 311.04 (providing that deputy sheriffs may be assigned to serve in another county during an emergency); R.C. 311.07 (authorizing a county sheriff to call upon another sheriff or the appropriate official of a municipal corporation or township to furnish law enforcement assistance in the event of riot, insurrection, or invasion); R.C. 311.29 (authorizing sheriffs to enter into contracts for the provision of police services to various political subdivisions and other bodies); R.C. 505.43 (authorizing contracts for police protection between a township and one or more townships, municipal corporations, or county sheriffs); R.C. 505.431 (authorizing township police to provide police protection to a county, municipal corporation, or township without a contract in certain circumstances); R.C. 737.04 (authorizing contracts between municipal corporations for police protection); R.C. 737.041 (authorizing municipal police to provide police protection to a county, municipal corporation, or township without a contract in certain circumstances). See generally 1968 Op. Att'y Gen. No. 68-155. Except pursuant to statutory provisions, law enforcement officers are not authorized to exercise full police powers in other jurisdictions. See generally City of Fairborn v. Munkus; Op. No. 71-076.

The language of R.C. 167.03(C) and R.C. 167.08 is broad, stating that a council may perform "such other functions and duties as are performed or capable of performance by the members," R.C. 167.03(C), and that the council may "perform any function or render any service" which the contracting subdivisions may perform or render, R.C. 167.08. It is, however, clear that the authority of a regional council of governments is not unlimited. As is specified in the statutory provisions themselves, such a council may, pursuant to R.C. 167.03(C) and R.C. 167.08, perform only such functions as its member subdivisions are authorized to perform or as contracting political subdivisions may perform and authorize the council to perform on their behalf. See 1982 Op. Att'y Gen. No. 82-103 at 2-283 ("the council's authority to act on behalf of its members under R.C. 167.03(C) or 167.08 is derived from its members and cannot exceed the authority which the members have" (citation omitted)); 1979 Op. Att'y Gen. No. 79-018 at 2-57 ("[a] political subdivision may authorize a [council of governments] to perform only such functions and duties as the political subdivision is capable of performing"); 1971 Op. Att'y Gen. No. 71-010 at 2-22 ("[a] council...is given no 'governmental powers' that are not provided to its members"). Where the authority of a particular member subdivision is limited, the authority of the council is similarly limited. See Op. No. 82-103 at 2-283 ("[i]f a member political subdivision is restricted in carrying out a particular activity by requirements imposed by statute, the council's ability to act on behalf of the subdivision must be similarly restricted"); Op. No. 69-013 (syllabus, paragraph two) ("[a] Council of Governments may not jointly purchase items without competitive bids on behalf of its members, the cost of which to each political subdivision would exceed the statutory amount for which competitive bidding is required"). Further, certain functions may not be delegated to a regional council of governments. See Op. No. 79-018 at 2-62 ("[w]hile a [council of governments] might, if properly authorized, carry out the ministerial duty of collecting user charges on behalf of a political subdivision, it cannot be empowered to make the decision to charge such fees"); 1974 Op. Att'y Gen. No. 74-080 (a regional council has no power to levy a tax and may not receive school foundation payments under R.C. Chapter 3317); Op. No. 71-010 at 2-22 ("a council is given no power to tax to raise revenue, but must rely on appropriation of funds from its member political subdivisions, or the acceptance of funds from other sources" (emphasis in original)). See generally Bell v. Board of Trustees, 34 Ohio St. 2d 70, 74, 296 N.E.2d 276, 278 (1973) ("[i]n the operation of any public administrative body, subdelegation of authority, impliedly or expressly, exists--and must exist to some degree. The real issue for decision is at what point delegation must stop and the [public body] itself must act" (citations omitted)).

As discussed above, a regional council of governments has no direct authority to appoint and commission law enforcement officers. Further, it does not appear that the members of the council may, under R.C. 167.03(C) or R.C. 167.08, authorize the council to appoint and commission law enforcement officers with full police powers throughout the territory of all member subdivisions, since such authority would exceed that which the individual members themselves have. See generally Brady v. French, 6 Ohio N.P. 122, 125 (Cincinnati Super. Ct. 1898) ("[t]he [county] commissioners themselves have no power to collect a dollar of taxes, yet it would be contended they have the power to employ a collector to do for them what they have no power to do for themselves. Such an agency, I am quite

sure, would be without a parallel either with respect to private persons or public officials"). While R.C. Chapter 167 permits a member subdivision to authorize the regional council to perform a particular function on its behalf, R.C. Chapter 167 does not provide that the council may aggregate the powers of various subdivisions and thereby become a multi-jurisdictional entity with powers exceeding those of the individual members. Cf. R.C. 167.03(C) ("the council may...perform such other functions and duties as are performed or capable of performance by the members..." (emphasis added)); R.C. 167.08 ("contracts may...authorize the council to perform any function or render any service in behalf of such [contracting] counties, municipal corporations, townships, special districts, school districts, or other political subdivisions, which such [bodies] may perform or render" (emphasis added)).

Based upon the foregoing, I conclude that your first question must be answered in the negative. A regional council of governments may not appoint and commission persons as law enforcement officers of the council with full police powers throughout the territory of the member subdivisions. I do not question the conclusion that a regional council of governments may provide its members with various services that assist them in reducing drug trafficking and related crimes. I find in this opinion only that such services may not include the appointment and commissioning by the council of its own multi-jurisdictional police force.

I find support for this conclusion in the fact that the provision of law enforcement services by persons appointed and commissioned as peace officers of a regional council of governments, with jurisdiction throughout the territory encompassed by the members of the council, would be inconsistent with the statutory scheme enacted by the General Assembly to govern the provision of police services throughout the state. For example, in R.C. 109.71-.79, the General Assembly has established a program for assuring that Ohio peace officers receive adequate training. R.C. 109.71 creates the Peace Officer Training Council. R.C. 109.77 requires, with certain exceptions, that a person receiving an appointment as a peace officer must have been awarded a certificate attesting to his satisfactory completion of an appropriate training program. R.C. 109.71(A) defines "peace officer"¹ as follows:

As used in sections 109.71 to 109.77 of the Revised Code:

(A) "Peace officer" means:

(1) A deputy sheriff, marshal, deputy marshal, member of the organized police department of a municipal corporation, member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code,

¹ Effective December 31, 1987, the definition of "peace officer" appearing in R.C. 109.71 will be amended by the deletion of references to "metropolitan housing authority" and "member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code." Am. S.B. 278, 116th Gen. A. (1986) (eff., in part, March 6, 1986).

or township constable, who is commissioned and employed as a peace officer by a political subdivision of this state or by a metropolitan housing authority, and whose primary duties are to preserve the peace, to protect life and property, and to enforce the laws of Ohio, ordinances of a municipal corporation, or regulations of a board of county commissioners or board of township trustees, or any such laws, ordinances, or regulations;

(2) A policeman who is employed by a railroad company and appointed and commissioned by the governor pursuant to sections 4973.17 to 4973.22 of the Revised Code;

(3) Employees of the department of taxation engaged in the enforcement of Chapter 5743. of the Revised Code, and designated by the tax commissioner for peace officer training for purposes of the delegation of investigation powers under section 5743.45 of the Revised Code;

(4) An undercover drug agent;

(5) Liquor control investigators in the enforcement division and the intelligence division of the department of liquor control engaged in the enforcement of Chapter 4301. of the Revised Code;

(6) An employee of the department of natural resources who is a park officer designated pursuant to section 1541.10, a forest officer designated pursuant to section 1503.29, a game protector designated pursuant to section 1531.13, or a state watercraft officer designated pursuant to section 1547.521 of the Revised Code;

(7) An employee of a park district who is designated pursuant to section 511.232 or 1545.13 of the Revised Code.

(8) An employee of a conservancy district who is designated pursuant to section 6101.75 of the Revised Code. (Emphasis added.)

Pursuant to R.C. 109.71(B), "undercover drug agent" has the meaning set forth in R.C. 109.79(B)(2). R.C. 109.79 states, in part:

(B) As used in this section:

....

(2) "Undercover drug agent" means any person who:

(a) is employed by a county, township, or municipal corporation for the purposes set forth in division (B)(2)(b) of this section but who is not an employee of a county sheriff's department, of a township constable, or of the police department of a municipal corporation or township;

(b) In the course of his employment by a county, township, or municipal corporation, investigates and gathers information pertaining to persons who are suspected of violating Chapter 2925. or 3719. of the Revised Code, and generally does not wear a uniform in the performance of his duties. (Emphasis added.)

No reference to a regional council of governments appears in R.C. 109.71-.79, and it appears that no individual appointed or commissioned by such a council would come within the definition of "peace officer" contained in R.C.109.71(A). Thus, if a regional council of governments were to appoint and commission its own law enforcement officers, those individuals would not be subject to the training requirements of R.C.

109.71-.79. Such a result would be inconsistent with the statutory scheme established by R.C. 109.71-.79. While the existing scheme does not require that all law enforcement officers receive training, see, e.g., 1985 Op. Att'y Gen. No. 85-060 (special constables appointed under R.C. 1907.201 and 1907.211 are not "peace officers" under R.C. 109.71(A)(1) and, therefore, need not receive certification from the Ohio Peace Officer Training Council); 1984 Op. Att'y Gen. No. 84-020; 1984 Op. Att'y Gen. No. 84-008, it does cover all deputy sheriffs and municipal police officers. It would appear to thwart this scheme to permit counties and municipalities to secure police protection through a regional council of governments without meeting the training requirements established under R.C. 109.71-.79, since compliance with those training requirements would be necessary if law enforcement officers were appointed directly by the appropriate officers of the counties or municipalities.

An arrangement that would permit a regional council of governments to appoint and commission its own law enforcement officers with jurisdiction throughout the member subdivisions would, similarly, appear to be inconsistent with the civil service scheme established under R.C. Chapter 124. Under R.C. Chapter 124, positions of employment "in the service of the state and the counties, cities, city health districts, general health districts, and city school districts thereof" are included within the civil service, R.C. 124.01(A), and are subject to the provisions of R.C. Chapter 124 and applicable rules, R.C. 124.06. See generally R.C. 124.34 (concerning tenure of office of persons in the classified service). See also R.C. 124.01(C) (including the competitive classified civil service of civil service townships within the classified service for purposes of R.C. Chapter 124). Specific provisions govern police departments that are subject to civil service laws. See R.C. 124.41 ("[n]o person shall be eligible to receive an original appointment to a police department, as a policeman or policewoman, subject to the civil service laws of this state" unless he has met certain qualifications); R.C. 124.44 (providing that vacancies in positions above the rank of patrolman in a police department shall be filled by promotion pursuant to competitive promotional examinations); R.C. 124.50.

It appears that persons who are employed by a regional council of governments are not subject to the civil service provisions of R.C. Chapter 124. Cf. In re Ford, 3 Ohio App. 3d 416, 446 N.E.2d 214 (Franklin County 1982) (employment with a political subdivision not listed in R.C. 124.01 is not included within the definition of civil service); Op. No. 85-012 (syllabus, paragraph three) ("[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..."); 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). An interpretation of R.C. Chapter 167 which permits law enforcement officers appointed by regional councils of government, rather than by the appropriate officials of various counties, cities, and similar bodies, to be removed from the civil service system appears, therefore, to be inconsistent with the statutory scheme established by the General Assembly, and I reject such an interpretation. See generally Ohio Const. art. XV, §10 ("[a]ppointments 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").

I note further that an arrangement that would permit a regional council of governments to appoint its own multi-jurisdictional police force would not fit within the statutes and rules governing the arrest powers of law enforcement officers. The Ohio Rules of Criminal Procedure contain provisions governing arrests and the issuance of warrants, summonses and citations. See Ohio R. Crim. P. 4, 4.1. Ohio R. Crim. P. 2 contains the following definition:

"Law enforcement officer" means a sheriff, deputy sheriff, constable, municipal police officer, marshal, deputy marshal, or state highway patrolman, and also means any officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, the authority to arrest violators is conferred, when such officer, agent, or employee is acting within the limits of such statutory authority. The definition of "law enforcement officer" contained in this rule shall not be construed to limit, modify, or expand any statutory definition, to the extent such statutory definition applies to matters not covered by the Rules of Criminal Procedure.

An individual appointed by a regional council of governments is not expressly mentioned in this rule, and it is not clear that such an individual could be considered to have statutory authority to arrest violators or issue citations. See Ohio R. Crim. P. 4, 4.1. The definition of "peace officer" which appears in R.C. 2935.01 for purposes of R.C. Chapter 2935, governing arrests, references certain specific law enforcement officers, but does not include individuals appointed by a regional council of governments, unless those individuals can be considered, e.g., deputy sheriffs or members of municipal police departments. An individual appointed by a regional council of governments is, further, not specifically mentioned in statutory provisions governing the authority of various officers to make arrests or issue citations. See R.C. 2935.03; R.C. 2935.26. It is, therefore, not clear what arrest powers an appointee of a regional council might have, and it is apparent that the General Assembly's scheme for state-wide police protection did not contemplate the establishment of a multi-jurisdictional force by a regional council of governments.

Your second question asks whether the sheriff of a participating county may commission agents of a regional council of governments as deputy sheriffs without being obligated to keep them on his staff when their effectiveness as undercover agents is terminated. The nature of the employment of deputy sheriffs was extensively examined in Yarosh v. Becane, 63 Ohio St. 2d 5, 406 N.E.2d 1355 (1980). In the Yarosh case, the court concluded that the appointment of deputy sheriffs is governed by the civil service laws set forth in R.C. Chapter 124. The court in Yarosh stated:

R.C. 124.11 divides the civil service into the classified and unclassified service. Positions in the classified service are those for which merit and fitness can be determined by examination. Employees in the classified service can only be removed for good cause and only after the procedures enumerated in R.C.

124.34 and the rules and regulations thereunder are followed. Positions in the unclassified service require qualities that the General Assembly has deemed are not determinable by examination. Employees in the unclassified service do not receive the protections afforded employees in the classified service.

63 Ohio St. 2d at 9, 406 N.E.2d at 1359. In determining whether deputy sheriffs are in the classified or unclassified service, the court examined the provisions of R.C. 124.11(A) and concluded: "Deputies or assistants who are employed by and are directly responsible to an elected county official and who are in a fiduciary or administrative relationship with that official are in...positions [included within the unclassified service under R.C. 124.11(A)(9)]." 63 Ohio St. 2d at 10, 406 N.E.2d at 1359; see R.C. 124.11(A)(9). The court further stated that whether a deputy sheriff is in the classified or unclassified service is dependent upon the particular duties performed by the deputy.² Thus, unless the duties performed by the deputy sheriffs about whom you ask are the types of duties which create a fiduciary or administrative relationship between the sheriff and such deputies, the deputies are in the classified service and are subject to removal only in the manner set forth in R.C. 124.34. See In re Termination of Employment, 40 Ohio St. 2d 107, 321 N.E.2d 603 (1974) (syllabus, paragraph two) ("[d]eputy sheriffs are members of the unclassified civil service only when they are assigned to, and perform, duties such that they hold 'a fiduciary or administrative relationship' to the sheriff"); 1979 Op. Att'y Gen. No. 79-111. The scheme governing the appointment and removal of deputy sheriffs is specifically governed by statute, rather than by the county in which the deputy serves, and there is no statutory authority for a county or a regional council of governments to modify such scheme. I conclude, therefore, that, unless a particular deputy sheriff's position is, because of the nature of its duties, in the unclassified service pursuant to R.C. 124.11(A), the position is in the classified service for purposes of R.C. Chapter 124, and the deputy may be removed only for the reasons and in the manner specified in R.C. 124.34.

² Yarosh must be contrasted with State ex rel. Geyer v. Griffin, 80 Ohio App. 447, 76 N.E.2d 294 (Allen County 1946). In Griffin, the court stated that a sheriff has "absolute discretion to determine what deputies shall be employed, the length of their employment, and the duties of his office to be performed by them..." 80 Ohio App. at 458, 76 N.E.2d at 300. This case has been used in support of the conclusion that the county sheriff may appoint "special deputies." See 1981 Op. Att'y Gen. No. 81-009; 1977 Op. Att'y Gen. No. 77-027; 1968 Op. Att'y Gen. No. 68-112; 1967 Op. Att'y Gen. No. 67-123 (modified by 1984 Op. Att'y Gen. No. 84-008); 1965 Op. Att'y Gen. No. 65-177. While it is true that a sheriff may limit the authority of a deputy as he sees fit--thus the term "special deputy," see, e.g., 1984 Op. Att'y Gen. No. 84-008 (approved, in part, by 1985 Op. Att'y Gen. No. 85-060)--Yarosh clearly holds that deputies who are not in a fiduciary or administrative relationship to their appointing sheriff are in the classified service. Accord, 1979 Op. Att'y Gen. No. 79-111. See generally 1982 Op. Att'y Gen. No. 82-085.

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

1. A regional council of governments may not appoint and commission persons as law enforcement officers of the council with full police powers throughout the territory of the member subdivisions.
2. Unless the duties of a deputy sheriff qualify the position of that deputy as a position in the unclassified service pursuant to R.C. 124.11(A), the position is in the classified service for purposes of R.C. Chapter 124, and the deputy may be removed only for the reasons and in the manner specified in R.C. 124.34.