OPINION NO. 81-053

Syllabus:

1. R.C. 5122.05 and 5122.10 require the head of a public hospital to receive any person whose admission is applied for under emergency procedures for observation, diagnosis, care, and treatment as authorized by R.C. 5122.10.

2. The head of a public hospital may not refuse, on the basis of lack of space, to admit any person whom a court has properly committed to such hospital.

3. R.C. 5122.02 authorizes the head of a public hospital to exercise discretion in determining whether to admit a person seeking voluntary admission. If admission of such person would result in the inability of the hospital to comply with statutory or court-ordered standards regarding treatment and facilities, the head of the hospital may consider such factor in determining whether to accept the application for voluntary admission.

To: Myers R. Kurtz, Director, Dept. of Mental Health, Columbus, Ohio
By: William J. Brown, Attorney General, September 23, 1981

I have before me your opinion request in which you ask whether the head of a hospital under the jurisdiction of the Department of Mental Health may, solely on the basis of lack of space within the hospital, refuse to admit a person who, pursuant to R.C. Chapter 5122, seeks voluntary admission or is involuntarily committed to such hospital. You have indicated that because of overcrowded conditions in the public hospitals, admission of all those who either apply for voluntary admission or are involuntarily committed may result in your Department's inability to comply with state statutes and federal court orders which set standards for the public hospitals under your jurisdiction.

There is no single standard governing the duty of the head of a public hospital to admit a person who is seeking voluntary admission or who is involuntarily committed to the hospital. Instead, it appears that the duty of the head of a public hospital to admit persons differs depending on whether admission is sought under voluntary or involuntary proceedings.

There are two manners in which a person may be involuntarily detained in a public hospital. The first is pursuant to an emergency procedure under R.C. 5122.10, and the second is pursuant to a court order.[1] R.C. 5122.10 authorizes certain trained individuals and peace officers to take a person into custody and transport him to a hospital if they have reason to believe that the person is a mentally ill person subject to hospitalization by court order under R.C. 5122.01(B)

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[1]R.C. 5122.05 reads in part as follows:

> (A) The head of a hospital may, and the head of a public hospital shall in all cases of psychiatric medical emergencies, receive for observation, diagnosis, care, and treatment any person whose admission is applied for under any of the following procedures:
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> (1) Emergency procedure, as provided in section 5122.10 of the Revised Code;
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> (2) Judicial procedure as provided in sections 2945.38, 2945.40, and 5122.11 to 5122.15 of the Revised Code. (Emphasis added.)

and that the person "represents a substantial risk of physical harm to himself or others if allowed to remain at liberty pending examination." R.C. 5122.05 and 5122.10 establish the duty of the head of a public hospital to receive persons brought to his hospital under such procedures. As noted above, R.C. 5122.05 requires the "head of a public hospital. . .in all cases of psychiatric medical emergencies, [to] receive for observation, diagnosis, care, and treatment any person whose admission is applied for under. . .[e]mergency procedure," as provided in R.C. 5122.10. R.C. 5122.10 reads in part as follows:

> A person transported or transferred to a hospital or mental health clinical facility under this section shall be examined by the staff of the hospital or facility within twenty-four hours after his arrival at the hospital or facility. If to conduct the examination requires that the person remain overnight, the hospital shall admit the person in an unclassified status until making a disposition under this section. (Emphasis added.)

In such a situation, the hospital shall examine the person, and, if an overnight stay is required, shall admit the person for the sole purpose of conducting the initial examination. After completion of the examination, unless a court has issued a temporary order of detention or the person has voluntarily admitted himself, R.C. 5122.10, continued confinement of the individual in the public hospital would require judicial proceedings. See generally R.C. 2945.38, 2945.40, 5122.11-.15.

Involuntary hospitalization of a mentally ill person in a public institution by court order may occur either through judicial proceedings in the probate court as outlined in R.C. 5122.11 through .15 or through proceedings under R.C. 2945.40.[2] Both R.C. 5122.11 and R.C. 2945.40 authorize temporary orders of detention for persons who are the subject of judicial proceedings under those sections. R.C. 5122.15 provides that, at the conclusion of the hearing to determine whether the individual is a "mentally ill person subject to hospitalization by court order," as defined in R.C. 5122.01(B), the court may order the person to a hospital operated by the Department of Mental Health. R.C. 5122.15(C)(1). R.C. 5122.15(D) states that an order made pursuant to division (C)(2) (to a nonpublic hospital), (3) (to the veterans' administration or other agency of the United States government), (5) (to receive private psychiatric or psychological care and treatment), or (6) (to any other suitable facility or person consistent with the diagnosis, prognosis, and treatment needs of the mentally ill person) is conditioned upon consent of the hospital, person, or facility to accept the person; an order made pursuant to (C)(4) (to a community mental health clinical facility) or (7) (to an inpatient unit administered by a licensed community mental health center) is conditioned upon the court's receipt of evidence of available space in the facility to which the person is committed. I note, however, that the statute does not place any conditions upon a commitment order under R.C. 5122.15(C)(1) to a hospital operated by the Department of Mental Health. Because involuntary hospitalization of mentally ill persons (except in the limited emergency situation outlined in R.C. 5122.10) occurs as a result of a judicial order, the duty of the head of a public hospital to admit a

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[2] R.C. 2945.40 establishes commitment procedures to be followed when a person is found not guilty by reason of insanity. The hearing to determine whether the person is mentally ill and subject to court ordered hospitalization is conducted by the trial court in generally the same manner provided by R.C. 5122.15(A)(1) to (5) and (A)(8) to (15). A commitment authorized by R.C. 5122.15(C) to (E) is then made pursuant to R.C. 5122.15(F), (H), and (I). Prior to the hearing, however, the court may make a temporary order of detention for seven court days or until the hearing, whichever occurs first.

person who has been involuntarily committed to that institution depends on the duty to obey a court order.[3]

Your question concerning the admission of involuntary patients is, therefore, specifically whether the head of a public hospital may, on the basis of lack of space within the hospital, refuse to admit a person who has been ordered there by a court. As a general rule, where a court has issued an order within its jurisdiction and power, disobedience of such order is contempt. See In re Thomas, 52 Ohio Op. 375, 117 N.E.2d 740 (P. Ct. Hamilton County 1954).[4] See also Beach v. Beach, 79 Ohio App. 397, 404-405, 74 N.E.2d 130, 135 (Crawford County 1946) ("[i]t is the wilful violation of an order of court which constitutes contempt"); see generally R.C. 2705.02 ("[a] person guilty of any of the following acts may be punished as for a contempt: (A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment or command of a court or an officer").

R.C. 5122.15, concerning involuntary commitment, reads in part as follows:

> (A) Full hearings shall be conducted in a manner consistent with this chapter and with due process of law. The hearings shall be conducted pursuant to section 2945.40 of the Revised Code in all cases in which the respondent is a person found not guilty by reason of insanity, and in all other cases, by a judge of the probate court or a referee designated by a judge of the probate court, and may be conducted in or out of the county in which the respondent is held. . . .
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> . . . .
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> (C) If, upon completion of the hearing, the court finds clear and convincing evidence that the respondent is a mentally ill person

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[3]R.C. 5119.28 reads in part as follows:

> Persons committed to any institution, division, or place, under the control and management of the department of mental health, are committed to the control, care, and custody of such department. The director of mental health may direct that persons committed to the department, or to any institution or place within the department, under the laws of this state shall be conveyed to the appropriate facility established and maintained by the department for examination, observation, and classification. . . . (Emphasis added.)

This statute establishes an alternative procedure for assignment of an involuntary patient by the Department to one of its own institutions. It is my understanding, however, that your question is not directed toward this method of assignment.

[4]In Thomas, the court decided that because the statute under consideration conditioned a court's authority to issue an order of commitment under certain circumstances upon consent of the designated hospital or institution, the statute limited the court's jurisdiction and, therefore, refusal to obey an order of commitment under the circumstances set forth in the statute was not contempt. In State ex rel. Songer v. Baber, 97 Ohio App. 501, 127 N.E.2d 538 (1954), the court found the statute at issue in Thomas to be unconstitutional because it gave an official arbitrary and unrestricted power to decide whether to consent to certain admissions and, as such, was an unlawful delegation of legislative authority. See also State ex rel. Steer v. Baber, 161 Ohio St. 211, 118 N.E.2d 530 (1954). Nevertheless, the Thomas case supports the proposition that disobedience of a court order constitutes contempt.

> subject to hospitalization by court order, the court shall order the respondent, for a period not to exceed ninety days to:
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> (1) A hospital operated by the department of mental health. . . .

This statute clearly establishes the power of the court, upon finding that a person is mentally ill and subject to hospitalization by court order, to order the person to a hospital operated by the Department of Mental Health. Furthermore, I am not aware of any statutory authority which conditions the court's authority to commit a person to a public hospital upon the availability of space within the hospital.[5] See R.C. 5122.15(D).

You have stated that admission of all involuntary patients committed to a hospital may result in the hospital's inability to provide statutorily prescribed and court-ordered standards for treatment and facilities. I assume that the statutory standards to which you refer are those contained in R.C. 5122.27. Although this section authorizes the transfer of patients or the termination of commitment of involuntary patients when the head of the hospital is unable to provide certain portions of the required treatment, there is no mention of setting aside the duty of the head of the hospital to admit patients as otherwise required by statute. Rather, where lack of space results in the hospital's inability to provide the treatment set forth in R.C. 5122.27(C) (treatment for mental illness), (E) (medical treatment), and (F) (humane care and treatment) for a patient whom the hospital must admit, R.C. 5122.27, itself, sets forth a remedy, other than refusing admission. The statute provides that where the head of a hospital cannot provide the treatment required by R.C. 5122.27(C), (E), and (F), the hospital shall, with notice to the proper parties, attempt to transfer the patient to a facility where such treatment is available. If, within a specified period, the hospital cannot effect a transfer, the involuntary hospitalization of a person pursuant to R.C. Chapter 5122 shall be automatically terminated, so long as a court has not issued an order to the contrary.

Concerning the potential conflict created by the hospital's admission of all persons under court order and the simultaneous duty to provide adequate treatment and facilities for such persons pursuant to court order, I can only restate that, as a general rule, where a court has issued an order within its jurisdiction and power, willful disobedience of such order constitutes contempt. Beach v. Beach, 79 Ohio App. 397, 74 N.E.2d 130 (Crawford County 1946). Whether it would be appropriate to seek relief from any court order is a determination which can only be made upon examination of the particular order.

In State ex rel. Schwartz v. Haines, 172 Ohio St. 572, 179 N.E.2d 46 (1962), the court addressed the problem of lack of space to house persons under judicial order of commitment. In that case, the juvenile court committed a minor to the care and custody of the Department of Mental Hygiene and Correction pursuant to R.C. 5119.18,[6] which read as follows:

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[5] I note, however, that R.C. 5122.41 establishes certain circumstances under which the head of a hospital need not receive a patient. That section reads in part as follows:

> If not otherwise furnished, the probate judge shall see that each patient hospitalized under section 5122.15 of the Revised Code is properly attired for transportation, and, in addition, the institution shall be furnished a complete change of clothing for such patient, which shall be paid for on the certificate of the probate judge and the order of the county auditor from the county treasury. Such clothing shall be new or as good as new. The head of the hospital need not receive the patient without such clothing. (Emphasis added.)

[6] 1953-1954 Ohio Laws 823 (Am. S.B. 155, eff. July 1, 1954), repealed in 1963 Ohio Laws 1681 (Am. Sub. H.B. 299, eff. Oct. 7, 1963).

> All minors, who in the judgment of the juvenile court require state institutional care and guardianship, shall be wards of the state and shall be committed to the care and custody of the department of mental hygiene and correction, which department thereupon becomes vested with the exclusive guardianship of such minors.

The Director of the Department, arguing that he was not compelled to accept minors properly committed by a proper court because he lacked space for housing, treatment, and training of such minors as otherwise required by law, refused to accept the minor.

The court concluded that the juvenile court had jurisdiction to commit the minor to the Department and that R.C. 5119.18 clearly established the Department's duty to accept a minor committed there upon a finding that the minor required state institutional care. In addressing the problem of lack of space and personnel within state institutions, the court commented that, "[t]he appropriation of public money to build, equip, maintain and staff facilities to rehabilitate juvenile delinquents who need state institutional care is a legislative problem and ultimately a question to be decided by the electorate." In Schwartz, the court found that lack of space did not constitute a basis for refusing to follow a clearly defined statutory duty to accept persons committed there by judicial order even though the facility was not able to provide adequate treatment and care for such persons as required by law. This case strongly suggests, therefore, that because the legislature has not limited a court's authority to commit a person to a public hospital on the basis of available space, the head of a public hospital must obey a court order of commitment and admit a person who has been properly committed, regardless of available space.[7]

You have also inquired about the statutory duty imposed upon the head of a public hospital to accept persons who apply for voluntary admission to a public hospital. R.C. 5122.02, which establishes the procedure for admission of patients who are or who are believed to be mentally ill, reads in part as follows:

> (A) Except as provided in division (D) of this section, any person, eighteen years of age or older who is, appears to be, or believes himself to be mentally ill may make written application for voluntary admission to the head of a hospital.
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> (B) Except as provided in division (D) of this section, the application may also be made on behalf of a minor by a parent, guardian of the person, or the one having custody of the minor, and on behalf of an adult incompetent person by the guardian or the one having custody of the incompetent person.
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> Any person whose admission is applied for under division (A) or (B) of this section may be admitted for observation, diagnosis, care, or treatment, in any hospital unless the head of the hospital finds that hospitalization is inappropriate. (Emphasis added.)

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[7]As noted above, R.C. 5122.05 provides that "the head of a public hospital shall in all cases of psychiatric medical emergencies, receive for observation, diagnosis, care, and treatment any person whose admission is applied for under. . .[j]udicial procedure. . . ." The use of "shall" in this provision supports the mandatory nature of the duty of the head of a public hospital to comply with court orders issued pursuant to R.C. 2945.38, 2945.40, and 5122.11-.15, at least in cases of psychiatric medical emergency. See generally Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (in statutory construction the word "shall" is construed as mandatory unless there is a clear and unequivocal legislative intent to the contrary).

The underlined portion of the above quotation establishes the duty of the head of a hospital in regard to the admission of voluntary patients.[8] I believe that the meaning of the foregoing provisions is plain and unambiguous.[9] The use of the phrase, "may be admitted," therefore, clearly indicates that the decision as to whether the applicant will be admitted is discretionary with the head of the hospital.[10] See State ex rel. John Tague Post No. 188, American Legion v. Klinger, 114 Ohio St. 212, 151 N.E. 47 (1926) (where there is nothing in the connection of the language or in the sense or policy of a statute to require an unusual interpretation, the use of the word "may" is merely permissive and discretionary). The only limitation placed on this discretion is that where the head of the hospital finds that "hospitalization is inappropriate," the person applying for admission may not be admitted.[11] The decision made by the head of a hospital is, of course, limited by

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[8]Ohio Const. art. VII, §1 states:

> Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the state; and be subject to such regulations as may be prescribed by the general assembly. (Emphasis added.)

While it has been stated that "[t]he duty and responsibility of the state is thus clearly prescribed," State ex rel. Public Institutional Building Authority v. Neffner, 137 Ohio St. 390, 396, 30 N.E.2d 705 (1940), this constitutional provision is general in its terms. It specifically provides that the state's duty with respect to care and treatment of the mentally ill is governed by the statutory scheme established by the General Assembly. See R.C. 5122.02 and related provisions.

[9]See Slingluff v. Weaver, 66 Ohio St. 621, 64 N.E. 574 (1902) (second branch of the syllabus), which states as follows:

> [I]f the words [of a statute] be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.

[10]Mandatory portions of R.C. 5122.02 are found in divisions (D), (E), and (F), which refer to persons found not guilty by reason of insanity and persons found incompetent to stand trial.

[11]See Note, District of Columbia Hospitalization of Mentally Ill Act, 65 Colum. L. Rev. 1062 (1965). The article states that, generally, the head of a public hospital is given broad discretion in determining whether to admit voluntary patients. In an effort to avoid the overcrowded and understaffed conditions present in public hospitals throughout the country, the heads of many public hospitals exercise their discretion to refuse admission to a significant number of voluntary applicants. D.C. Code §21-511, however, reads in part as follows:

> A person may apply to a public. . .hospital in the District of Columbia for admission to the hospital as a voluntary patient for the purposes of observation, diagnosis, and care and treatment of a mental illness. Upon the request of such a person. . .the administrator of the public hospital. . .shall, if an examination by an admitting psychiatrist reveals the need for hospitalization, . . .admit the person as a voluntary patient. . . . (Emphasis added.)

Unlike most other states' analogous provisions, the District of Columbia statute limits the discretion of the head of a public hospital by requiring him to admit a voluntary applicant whose examination reveals the need for hospitalization.

any factors which would constitute an abuse of discretion. See State ex rel. Venn v. Baber, 26 Ohio Op. 446, 12 Ohio Supp. 50 (C.P. Hamilton County 1943) (the superintendent of a state institution for the insane is a public official). See also State ex rel. Kahle v. Rupert, 99 Ohio St. 17, 122 N.E. 39 (1918) (a public officer is required to exercise an intelligent discretion in the performance of his official duty). For example, if a person seeking voluntary admission were to represent a substantial risk of physical harm to others or to himself, the head of the hospital would certainly be required to accord due weight to that fact in making a determination on the application for admission.[12]

It appears that there are no statutory or judicial guidelines in Ohio concerning the standards to which the head of a public hospital must adhere in determining whether to admit a person upon voluntary application. The court in Rone v. Fireman, 473 F.Supp. 92 (N.D. Ohio 1979), did, however, discuss the right of voluntary and involuntary patients to treatment under R.C. 5122.27. Concerning physical requirements, the court stated, at 121:

> The requirement of a humane environment under Ohio Law encompasses both psychological and physical factors. . . . Thus an area in which an individual can be on his own and a space for personal belongings are essential to a patient's privacy. Similarly, separate toilet facilities and adequate sanitary and personal hygiene products foster a patient's perception of his dignity. Additionally, this standard requires that the physical conditions of the patient's environment be safe and not hazardous to his person. Further, there must be adequate room for therapeutic activities and programs, and such space must be conducive to intervention.

Because a voluntary patient, like an involuntary patient, has a statutory right to the treatment and conditions set forth in R.C. 5122.27, the hospital's ability to provide such statutory minimums appears to be a valid consideration in the decision by the head of a public hospital concerning whether to admit a voluntary patient.

You have also indicated that several hospitals under the jurisdiction of the Department of Mental Health are under federal court order to provide certain staff/patient ratios, patient services and physical facilities. In the case of voluntary patients, if the admission of such persons would result in the hospital's inability to comply with the court-ordered standards, consideration of that factor would certainly be appropriate in light of a public official's duty to act in accordance with the law.

As noted above, an applicant's need for treatment would clearly be an important factor for consideration in making a determination on an application for voluntary admission, particularly in a situation in which the head of the hospital believed that a person seeking voluntary admission represented a substantial risk of

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[12]In Erndt v. Medical College of Ohio Hosp., No. 80-0370-2 (Ohio Ct. Cl. July 10, 1981), the executrix of an estate brought suit against two public hospitals, claiming that the proximate cause of decedent's suicide was defendants' negligence in failing and refusing to admit him as a patient. The court stated, slip op. at 13, that, "[f] or the plaintiff to gain a verdict in this cause of action, the plaintiff must proved [sic] by a preponderance of the evidence that a defendant or the defendants were negligent and, that such negligence was the proximate cause of the deceased's suicide," thereby suggesting that failure to admit a person to a hospital could, in certain instances, constitute a basis for recovery on a claim based on medical malpractice. The court concluded, however, that under the particular facts of that case, plaintiff did not establish that negligence on the part of defendants was the proximate cause of the decedent's suicide. Based on Erndt, the head of a public hospital should be aware that the hospital may be subject to suit for negligence in refusing admission of a voluntary applicant.

physical harm to others or to himself. Of course, in any instance in which voluntary admission is refused, admission may be sought under the emergency procedures of R.C. 5122.10 or the judicial commitment procedures of R.C. 5122.11.

It is, therefore, my opinion, and you are advised, that:

1. R.C. 5122.05 and 5122.10 require the head of a public hospital to receive any person whose admission is applied for under emergency procedures for observation, diagnosis, care, and treatment as authorized by R.C. 5122.10.

2. The head of a public hospital may not refuse, on the basis of lack of space, to admit any person whom a court has properly committed to such hospital.

3. R.C. 5122.02 authorizes the head of a public hospital to exercise discretion in determining whether to admit a person seeking voluntary admission. If admission of such person would result in the inability of the hospital to comply with statutory or court-ordered standards regarding treatment and facilities, the head of the hospital may consider such factor in determining whether to accept the application for voluntary admission.