

OPINION NO. 73-077

Syllabus:

1. A county board of mental retardation established under R.C. Chapter 5126., is unable to contract for the service of an administrator on a yearly basis in order to circumvent the civil service statutes of this state.

2. A board of county commissioners, but not a county board of mental retardation, may grant a salary in excess of the amount set forth in R.C. 143.10 for an administrator of a board of mental retardation.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William J. Brown, Attorney General, July 27, 1973

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

The Cuyahoga County Board of Mental Retardation organized under Chapter 5126 recently appointed an administrator under the provisions of Revised Code 5126.04 at an annual salary of Twenty-Four Thousand Dollars (\$24,000.00) per annum. The administrator was hired under Civil Service Classification No. 3029 (Administrator Mental Retardation Program) pay range number 25 (R.C. 143.091).

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1. Could the Cuyahoga County Board of Mental Retardation have contracted for the service of an administrator on a year to year basis and avoided the Civil Service aspect?

2. Did the Cuyahoga County Board of Mental Retardation exceed their authority in appointing an administrator at a salary in excess of that stated in Revised Code 143.10?

The Civil Service laws of this state are predicated upon Article XV, Section 10, Ohio Constitution, which reads as follows:

Appointment 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.

R.C. 143.01, which places all persons employed by the state or any of the enumerated political subdivisions thereof within the civil service, reads in part as follows:

As used in Sections 143.01 to 143.48, inclusive, 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.

* * * * *

(C) "Classified service" signifies the competitive classified civil service of the state, the several counties, cities, city health districts, general health districts, and city school districts thereof.

From the foregoing definition, it is readily apparent that an administrator of a county board of mental retardation is a member of the civil service and, as such, is subject to certain rules and regulations.

It should, of course, be recognized that R.C. 143.08 creates a distinction between "classified" and "unclassified" civil service employees. The former is subject to certain restrictions and afforded various privileges which do not apply to the latter. The fact that fewer restrictions are imposed upon "unclassified" employees, however, does not affect their inherent status as members of the state civil service. Therefore, merely because the position of administrator of a county board of mental retardation is admittedly "unclassified" rather than in the competitive service, such an administrator is not completely excluded from the operation of various civil service laws.

The statutes relating to the civil service have a decided, if limited, impact upon the terms and conditions of employment for those individuals occupying "unclassified" positions in the civil service. Although certain items may be left open for negotiation, an agreement which would seek to enlarge, abridge or circumvent the terms and conditions provided by statute, is clearly impermissible. Ohio Civil Service Employees Association v. Division 11 of the Ohio Department of Highways, 57 Ohio Op. 2d 83 (1970); Foren v. State Personnel Board, 37 Cal. 2d 634, 234 P.2d 981 (1951). Such agreements, if permitted to exist, could easily eviscerate the civil service statutes. Therefore, it is clear that a county board of mental retardation is unable to contract for the service of an administrator on a yearly basis in order to circumvent the civil service statutes.

Your second question concerns the legality of granting a salary in excess of the amount designated in R.C. 143.10 to an administrator of a county board of mental retardation. R.C. 143.09, which sets forth the assignment of pay ranges for employees of the state, reads in part as follows:

(A) All positions, offices, and employments paid in whole or in part by this state or paid out of any rotary fund of any state department, or state institution, except those excluded in sections 143.09 and 143.10 of the Revised Code, are assigned to the pay ranges established in section 143.10 of the Revised Code, as follows:

* * * * *

Since a board of mental retardation receives a substantial percentage of its funds from the state, it would appear that, unless an exception applies, an administrator of such a board would be bound by the pay ranges set forth in P.C. 143.10.

R.C. 143.091, which establishes the classifications and pay ranges for employees of the county departments of welfare, reads in part as follows:

(A) All positions, offices and employments in each county department of welfare, except positions used exclusively in the retarded children's program or in an institution operated by a county welfare department, are hereby assigned to the pay ranges established in section 143.10 of the Revised Code if the classification is enumerated in section 143.09 of the Revised Code. In accordance with procedures in section 143.101 of the Revised Code, the state employee compensation board may assign higher or lower pay ranges for such classes established by a county department of welfare, except that such authority does not apply to the foregoing excepted positions. Boards of county commissioners may use the classifications contained in this chapter for positions used exclusively in the retarded children's program or in institutions operated by county welfare departments. Classifications of employees not enumerated in section 143.09 of the Revised Code are assigned to the pay ranges established in section 143.10 of the Revised Code, as follows:

Classification Number	Classification Title	Pay Range Number
* * *	* * *	* * *
3029	Administrator-Mental Retardation Program	25

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(Emphasis added.)

While the Section applies to county departments of welfare, and programs for retarded children are no longer under such

departments (see infra), the fact that "Administrator--Mental Retardation Program" is mentioned here, and not in R.C. 143.09, indicates that the legislature nevertheless intended this statute to apply to such administrator.

This Section expresses an intent to exclude from the pay ranges specified in R.C. 143.10, "positions used exclusively in the retarded children's program or in institutions operated by county welfare departments." If such positions are enumerated in R.C. 143.09, they are nevertheless excepted; if they are not enumerated in R.C. 143.09, and are in R.C. 143.091, the board of county commissioners "may use the classifications contained in this chapter", but apparently is not required to do so. Hence, the exception also applies to those employees whose positions are enumerated in R.C. 143.091, including the administrator of the mental retardation program.

If the administrator of a county board of mental retardation, therefore, is to receive a salary in excess of the amount designated in R.C. 143.10, he must come within either of the two exceptions enumerated in R.C. 143.091. The second exception, that relating to institutions operated by county welfare departments, is of only marginal applicability today. At the time R.C. 143.091 was passed, prior to the enactment of R.C. Chapter 5126., all programs for mentally retarded children were operated by county welfare departments, or by "county child welfare boards." According to Opinion No. 1338, Opinions of the Attorney General for 1964, "[t]he term 'county child welfare board' includes a county department of welfare which has assumed the administration of child welfare under Chapter 5153, Revised Code." Since the enactment of R.C. Chapter 5126., the operation of programs for the mentally retarded has shifted, almost completely, to the county boards of mental retardation. This exception, therefore, is limited in its applicability to those ancillary programs for the training of retarded children which may still be operated by a county welfare department.

In order to determine whether the administrator of a county board of mental retardation may be classified as an employee used exclusively in a retarded children's program, it is necessary to analyze the precise function of that board. A county board of mental retardation is, pursuant to R.C. 5126.03, required to administer and supervise those facilities established under R.C. Chapter 5127., which provides for the organization of various training centers and workshops for mentally retarded persons. These programs are created for the benefit of retarded persons in general, irrespective of the age of the trainees. It would seem, therefore, upon first impression, that employees of a county board of mental retardation have some peripheral involvement with retarded persons of adult age, and therefore cannot come within the exception set forth in R.C. 143.091 relating to employees used exclusively in retarded children's programs.

I feel, however, that a careful examination of R.C. 143.091 and related statutes reveals an intent on behalf of the legislature to place the employees of county boards of mental retardation within this exception. Although the training programs established pursuant to R.C. Chapter 5127. are for the benefit of retarded adults as well as retarded children, R.C. Chapter 5127. is the only Chapter in the Revised Code

dealing with the training of children so severely retarded that they are incapable of profiting by any educational program provided by a public school. If the persons operating these programs were to be excluded from the first exception set forth in R.C. 143.091, that exception would be rendered meaningless, for there are no other retarded children's programs specifically authorized by statute. Furthermore, the history of retarded children's programs in this state lends additional support to the proposition that employees of a county board of mental retardation are included within that exception. As previously mentioned, the administration and supervision of training programs for mentally retarded children was, pursuant to R.C. 5153.161, originally vested in the county child welfare board, or county welfare department. In 1967, however, R.C. 5153.161 was repealed, and all references in R.C. Chapter 5127. to the county child welfare board were eliminated and the words "County Board of Mental Retardation" were substituted. (132 Ohio Laws, 1807-1811). The county boards of mental retardation were created by the same act, and matters formerly under the jurisdiction of the county child welfare boards are now the concern of the county boards of mental retardation.

The foregoing indicates that, at the time the legislature passed R.C. 143.091 (also in 1967: 132 Ohio Laws, 151-153), it was clearly anticipating the enactment of legislation creating the county boards of mental retardation and included the first exception set forth therein specifically for the benefit of the employees of such boards. If that exception were not construed to cover employees of county boards of mental retardation, the same persons who were once exempt from the standard pay ranges set forth in R.C. 143.10 would suddenly and illogically become subject thereto merely because the control of programs for the mentally retarded was shifted from the county child welfare boards to the county boards of mental retardation. There is no indication that the legislature intended such a result.

In light of the foregoing, therefore, I think it clear that the administrator of a county board of mental retardation is squarely within the exception set forth in R.C. 143.091 relating to employees used exclusively in retarded children's programs, and is, consequently, not bound by the salary restrictions set forth in R.C. 143.10.

It should be noted, however, that by the express terms of R.C. 143.091, discretion in determining the salary for such an administrator rests with the board of county commissioners and not with the county board of mental retardation. It has been suggested that vesting this power with the county commissioners was only intended as an interim measure and that once the county board of mental retardation was established, it was to have power to determine the appropriate salary for its own administrator. That such powers were to rest with the board of county commissioners only until they could be assumed by the newly established board of mental retardation may well have been the understanding of certain persons at the time R.C. 143.091 was enacted. But there is nothing in the language of either R.C. 143.091 or R.C. Chapter 5126. that would either compel or justify such conclusion. Here, as always, the legislative intent must be derived from the language of the statute. Slingluff v. Weaver, 66 Ohio St. 621 (1902); Seely v. Expert, Inc., 26 Ohio St. 2d 61, 71 (1971); Opinion No. 71-082, Opinions of the Attorney General for 1971.

R.C. 5126.03, which sets forth the powers and duties of a county board of mental retardation, reads in part as follows:

The county board of mental retardation, subject to the rules, regulations, and standards of the chief of the division of mental retardation and developmental disabilities shall:

* * * * *

(C) Employ such personnel and provide such services, facilities, transportation, and equipment as are necessary.

R. C. 5126.04, which specifically provides for the appointment of an administrator, reads as follows:

The county board of mental retardation shall appoint an administrator or executive secretary who shall administer the work of the board of mental retardation, subject to the regulations of such board.

With the approval of the board, such administrator or executive secretary shall appoint all other employees necessary to fulfill the duties invested in such board.

Admittedly, the foregoing statutes confer broad powers upon a county board of mental retardation in operating the required facilities and in regulating the hiring of all employees, and in appointing the administrator. None of the powers enumerated, however, nullifies the power conferred upon the board of county commissioners by R.C. 143.091 with respect to the determination of the administrator's salary.

There is no basis for the belief that the specific provision relating to salaries in R.C. 143.091 was rendered inoperative by the subsequent enactment of R.C. Chapter 5126. It is well recognized that before a statute or any provision thereof can be implicitly repealed by superseding legislation, an irreconcilable inconsistency between the two provisions must exist. Kinsey v. Bower, 147 Ohio St. 66 (1946); Sylvania Euses v. Toledo, 118 Ohio St. 187 (1928); and see R.C. 1.52 (F). No such inconsistency exists between the provisions of R.C. 143.091 and R.C. Chapter 5126. To the contrary, it appears that the relevant provisions set forth a statutory scheme that is both coherent and reasonable. It seems eminently sensible that the board of county commissioners, which is, pursuant to R.C. 5126.03, required to provide funds needed by the board of mental retardation, should determine such fiscal matters as the appropriate salary to be paid an administrator; and that the board of mental retardation, which is familiar with the needs of the mentally retarded and the operation of a training program for their benefit, should define the standards to be applied in the selection of its employees, as well as appoint the administrator. See Opinion No. 70-121, Opinions of the Attorney General for 1970.

In specific answer to your questions it is my opinion, and you are so advised, that:

1. A county board of mental retardation established under R.C. Chapter 5126., is unable to contract for the service of an administrator on a yearly basis in order to circumvent the civil service statutes of this state.

2. A board of county commissioners, but not a county board of mental retardation, may grant a salary in excess of the amount set forth in R.C. 143.10 for an administrator of a board of mental retardation.