

December 3, 2013

The Honorable Jessica A. Little
Brown County Prosecuting Attorney
510 E. State Street, Suite 2
Georgetown, Ohio 45121

SYLLABUS:

2013-039

1. A board of county commissioners may grant employees of a county department of job and family services retroactive lump sum pay increases more than once per year and may determine the amount of money included in each pay increase.
2. Before a county auditor may issue a warrant authorizing payment of retroactive lump sum pay increases to classified employees of a county department of job and family services, an estimate, payroll, or account that sets forth the amount of money to be paid to each employee must be provided to the county auditor. The certificate described in R.C. 9.41 must be attached to this estimate, payroll, or account.



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OPINION NO. 2013-039

The Honorable Jessica A. Little
Brown County Prosecuting Attorney
510 E. State Street, Suite 2
Georgetown, Ohio 45121

Dear Prosecutor Little:

You have requested an opinion concerning retroactive lump sum pay increases¹ given to employees of a county department of job and family services (CDJFS).² Specifically, you ask:

1. May a county provide CDJFS employees retroactive lump sum pay increases more than once per year and, if so, may those increases be provided in different amounts?
2. When a county provides CDJFS employees retroactive lump sum pay increases, must new payroll certificates be issued under R.C. 9.41 to reflect those pay increases?³

¹ A retroactive pay increase is an increase in salary that is adopted at a particular time and made effective as of an earlier date. 1981 Op. Att’y Gen. No. 81-011, at 2-36. In order to make the pay increase effective as of the earlier date, an employer may provide the employee with a one-time, lump sum payment. The employee receives the difference between the employee’s old rate of pay and the employee’s new rate of pay, minus any applicable deductions, *e.g.*, taxes, for hours worked during the period between the increase’s retroactive effective date and the date it was adopted. *See generally id.* (as a result of a retroactive pay increase, an “employee is actually paid compensation in addition to that previously agreed upon for services rendered during the period between the effective date of the increase and the point when the increase is granted”).

² Brown County has not acquired home rule powers, *see* Ohio Const. art. X, § 1; R.C. 9.482; R.C. 307.15, adopted a charter, *see* Ohio Const. art. X, §§ 3 and 4, or adopted an alternative form of county government, *see* Ohio Const. art. X, § 1; R.C. Chapter 302. Therefore, this opinion considers your questions in light of the provisions of law governing the statutory form of county government.

³ We have reworded your questions based on conversations you had with a member of my staff.

A CDJFS is established pursuant to R.C. 329.01 and is responsible for administering a variety of public assistance programs.⁴ *See, e.g.*, R.C. 329.042 (administration of federal supplemental nutrition assistance program); R.C. 5101.60-.72 (program on elder abuse); R.C. 5108.03 (provision of benefits and services under the prevention, retention, and contingency program). A board of county commissioners appoints a county director of job and family services (county director), who has “full charge” of the CDJFS, “[u]nder the control and direction of the board of county commissioners.” R.C. 329.02; *see also* R.C. 329.01. Most CDJFS employees are appointed by the county director, with the approval of the board of county commissioners,⁵ and are in the classified civil service.⁶ *See* R.C. 329.02-.022.

Authority to Grant Retroactive Lump Sum Pay Increases

Your first question asks whether a county may grant CDJFS employees retroactive lump sum pay increases more than once per year and, if so, whether those increases may be provided in different amounts. No provision of the Revised Code expressly authorizes or prohibits the provision of retroactive lump sum pay increases to CDJFS employees. We must consider whether the authority to provide such pay increases may be implied by the authority to compensate CDJFS employees.⁷

⁴ In addition to administering public assistance programs, a county department of job and family services (CDJFS) may also serve as the county’s public children services agency, workforce development agency, or child support enforcement agency. *See* R.C. 330.04; R.C. 3125.10; R.C. 5153.02; *see also* R.C. 307.981. You have indicated that the Brown County Department of Job and Family Services serves only as the county’s public children services agency. Additionally, Brown County is not a member of a joint-county department of job and family services. *See* R.C. 329.40. Finally, you have indicated that Brown County does not have a county personnel department. *See* R.C. 124.14(G). We will address your questions in light of these facts.

⁵ Pursuant to R.C. 329.02, employees of each institution under the jurisdiction of the CDJFS are appointed by the institution’s superintendent rather than by the county director of job and family services (county director) and the board of county commissioners. The board of county commissioners may also appoint administrators to oversee services provided by the CDJFS. R.C. 329.02-.021.

⁶ The county director, administrators appointed under R.C. 329.021, and up to five administrative positions with a CDJFS are not in the classified civil service. R.C. 329.02-.022.

⁷ A CDJFS is funded through a combination of federal, state, and local money. *See, e.g.*, R.C. 329.09; R.C. 5101.11; R.C. 5101.21; R.C. 5705.191; 14B Ohio Admin. Code 5101:9-7-50 (rule by reference); *see also* 2004 Op. Att’y Gen. No. 2004-031, at 2-279 n. 5. Whether federal law prohibits a CDJFS from using federal money, or state or local money used to match a federal grant, to provide its employees retroactive lump sum pay increases is a matter that must be determined by local officials or the courts. *See* 2013 Op. Att’y Gen. No. 2013-017, at 2-171 (“[i]t is beyond the scope of the formal

Pursuant to R.C. 124.14(E)(1), “[e]mployees of each [CDJFS] shall be paid a salary or wage established by the board of county commissioners.” Thus, a board of county commissioners is authorized to fix the compensation of CDJFS employees.⁸ Implicit in the power to fix the compensation of public employees “is the power to increase the amount of that compensation when, in the exercise of a reasonable discretion, [the entity with authority to set the compensation] determines that such action is appropriate or necessary, *provided, however, that the exercise of that authority is not limited or otherwise restricted by complementary statutory provisions.*” 1989 Op. Att’y Gen. No. 89-009, at 2-38 (overruled, in part, on other grounds by 2008 Op. Att’y Gen. No. 2008-018) (emphasis added); *see also* 2008 Op. Att’y Gen. No. 2008-012, at 2-137 (“the authority possessed by the various county appointing authorities to fix their employees’ compensation includes the authority, *subject to any statutory restrictions*, to determine the salary component, and any increases therein, of their employees’ compensation” (emphasis added)). Thus, a board of county commissioners has the implied authority to increase the amount of compensation paid to CDJFS employees provided that no limiting or constricting statutory language curtails, inhibits, or extinguishes the board’s authority in that regard.⁹ *See generally Ebert v. Stark Cnty. Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 33, 406 N.E.2d 1098 (1980) (the authority to compensate is subject to constricting statutes). We must, therefore, consider whether a statutory provision constricts a board of

opinion process for the Attorney General to provide authoritative interpretations of federal law”); *accord* 2012 Op. Att’y Gen. No. 2012-018, at 2-159 n.5.

⁸ A board of county commissioners does not set the compensation of CDJFS employees who have been placed in a collective bargaining unit by the State Employment Relations Board (SERB), unless those employees have elected no representative in an election conducted by SERB, or all employee organizations have withdrawn from such an election. *See* R.C. 124.14(E)(2). A collective bargaining agreement entered into pursuant to R.C. Chapter 4117 will “govern[] the wages, hours, and terms and conditions of public employment covered by the agreement.” R.C. 4117.10(A). Accordingly, the advice in this opinion does not apply to CDJFS employees whose positions are covered by a collective bargaining agreement.

⁹ That the proposed pay increases will be applied retroactively does not make them impermissible. *See* 1995 Op. Att’y Gen. No. 95-027, at 2-135 n.2 (“the authority to compensate employees may include the authority to grant retroactive pay increases”). While Article II, § 29 of the Ohio Constitution generally prohibits retroactive pay increases for certain public employees, the Attorney General has previously advised that this constitutional provision does not apply to counties. 1981 Op. Att’y Gen. No. 81-011, at 2-38 (Article II, § 29 of the Ohio Constitution “is not applicable to political subdivisions such as municipalities, school districts, counties and townships and, therefore, does not prohibit the governing authorities of such subdivisions from granting retroactive pay increases to their employees”); *accord Ojalvo v. Bd. of Trs. of Ohio State Univ.*, No. 88AP-773, 1989 WL 106340, at **5-8 (Franklin County Sept. 14, 1989). Thus, the fact that the proposed pay increases will be applied retroactively does not, in itself, prevent the county from granting them to CDJFS employees.

county commissioners' authority to establish the compensation of CDJFS employees in a manner that prevents the board from granting retroactive lump sum pay increases to those employees. If, for example, a statutory provision limits the authority to fix the compensation of CDJFS employees by establishing a maximum salary or wage that those employees may receive, it may prevent a board of county commissioners from granting retroactive lump sum pay increases to those employees.

The pertinent statutory provisions governing the compensation of CDJFS employees are R.C. 124.14(E) and R.C. 329.022. As previously explained, R.C. 124.14(E)(1) grants a board of county commissioners authority to establish the salaries or wages of CDJFS employees. We must determine whether R.C. 329.022 limits that authority in any way.

R.C. 329.022 states, in part:

Within the appropriation for personal services, each county department of job and family services may employ the necessary employees who, except for the county director of job and family services as provided in [R.C. 329.02], shall be in the classified service.¹⁰ *Compensation for positions in each service, group, or grade established by the director of administrative services shall not be less than the*

¹⁰ R.C. 329.022 requires that the aggregate compensation of CDJFS employees be “[w]ithin the appropriation for personal services.” This means that the salaries of CDJFS employees may not be set at amounts that, in the aggregate, exceed the total appropriated to the CDJFS by the board of county commissioners for personal services. *Cf.* 2008 Op. Att’y Gen. No. 2008-012, at 2-138 (“[a]s a practical matter, therefore, the sum appropriated to an appointing authority’s office by the county commissioners for the purpose of personal services limits an appointing authority’s power, in the aggregate, to fix the compensation of its employees”); *see generally* R.C. 5705.38(C) (a board of county commissioners annually adopts an appropriation measure that sets forth “separately the amounts appropriated for each [county] office, department, and division, and, within each, the amount appropriated for personal services”). R.C. 329.022 may, therefore, limit a board of county commissioners’ authority to grant retroactive lump sum pay increases to CDJFS employees when the CDJFS’s annual appropriation for personal services is depleted or approaching depletion. This limitation may be removed, however, if the board of county commissioners adopts an amended appropriation measure providing the CDJFS additional moneys for personal services. *See* R.C. 5705.40 (subject to certain restrictions, an appropriation measure may be amended or supplemented); 1959 Op. Att’y Gen. No. 349, p. 198 (syllabus) (when a board of county commissioners makes an annual appropriation covering the amount of payrolls for certain county employees, the board may amend such appropriations pursuant to R.C. 5705.40).

For purposes of this opinion, we assume that the retroactive lump sum pay increases will be paid with money that has been properly appropriated to the CDJFS for personal services and that, in making the payments, the CDJFS will not exceed its annual appropriation for personal services.

minimum nor more than the maximum rates established by the director [of administrative services] for such positions. (Emphasis and footnote added.)

R.C. 329.022, therefore, appears to require that the salaries of CDJFS employees be within a pay range established by the Director of Administrative Services (Director). However, the Director has not established pay ranges for CDJFS employees. At one time, the Director promulgated administrative rules that established both job classifications and pay ranges for employees of a county department of human services, now a CDJFS. *See* [1995-1996 Ohio Monthly Record] Ohio Admin. Code 123:1-7-19, at p. 20 (assigning employees of a county department of human services, now a CDJFS, to job classifications and pay ranges). These administrative rules have, however, been rescinded, and the Director no longer establishes job classifications or pay ranges for CDJFS employees.¹¹ Accordingly, the language of R.C. 329.022 requiring the compensation of CDJFS employees to be not “less than the minimum nor more than the maximum rates established by the director [of administrative services]” cannot be read as a constriction on a board of county commissioners’ authority to establish the salaries of those employees.

Thus, neither R.C. 124.14(E) nor R.C. 329.022 limits a board of county commissioners’ authority to fix the compensation of CDJFS employees in a manner that prevents the board from granting retroactive lump sum pay increases to those employees. Therefore, pursuant to its statutory

¹¹ The Director of Administrative Services (Director) has not established pay ranges for CDJFS employees since 1996. *See* [1995-1996 Ohio Monthly Record] Ohio Admin. Code 123:1-7-19, at p. 20. Until recently, the Director adopted administrative rules that established a job classification plan for CDJFS employees. Rather than assigning employees to pay ranges, these rules provided that CDJFS employees should be paid a salary established by the board of county commissioners in accordance with R.C. 124.14. *See* [2001-2002 Ohio Monthly Record] Ohio Admin. Code 123:1-7-19, at pp. 2554-56; [2001-2002 Ohio Monthly Record] Ohio Admin. Code 123:1-7-27, at pp. 2558-59.

Effective October 6, 2013, these rules were rescinded so that the Director no longer establishes job classifications for CDJFS employees. *See* Ohio Legislative Service Comm’n, Register of Ohio, *Recently Adopted Rules for Department of Administrative Services*, available at <http://www.registerofohio.state.oh.us/jsps/publicdisplayrules/processPublicDisplayRules.jsp?agencyNumberString=123&actionType=final&doWhat=GETBYFILINGAGENCY&Submit=Search> (last visited Nov. 25, 2013). That the Director no longer establishes job classifications or pay ranges for CDJFS employees is consistent with recent changes made to R.C. Chapter 124 by the General Assembly. Over the last several years, the General Assembly has gradually reduced the Director’s responsibility and authority over the county civil service system and shifted that responsibility and authority to county officials. *See* 2013 Op. Att’y Gen. No. 2013-033, slip op. at 3-5; *see also* Am. Sub. H.B. 59, 130th Gen. A. (2013) (eff. Sept. 29, 2013, with certain sections effective on other dates); Am. Sub. H.B. 487, 129th Gen. A. (2012) (eff. Sept. 10, 2012, with certain sections effective on other dates); 2005-2006 Ohio Laws, Part V, 8880, 8919 (Sub. H.B. 187, eff. July 1, 2007, with certain sections effective on other dates).

authority to set the compensation of CDJFS employees, a board of county commissioners may grant CDJFS employees retroactive lump sum pay increases. *See* 1981 Op. Att’y Gen. No. 81-011, at 2-43 (“the authority of boards of county commissioners ... to grant retroactive pay increases to their employees is implicit in the authority to fix the compensation of their employees”).

Having determined that a county may grant retroactive lump sum pay increases to CDJFS employees, we now consider whether such pay increases may be provided more than once per year and, if so, whether those pay increases may be provided in different amounts. As previously explained, R.C. 124.14(E) grants a board of county commissioners broad authority to establish the salaries or wages of CDJFS employees. Neither R.C. 124.14(E) nor any other provision of the Revised Code prescribes the manner in which a board of county commissioners shall establish the compensation of those employees. Absent such direction, a board of county commissioners has the implied authority to exercise reasonable discretion in setting the compensation of CDJFS employees. *See generally State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 459, 166 N.E.2d 365 (1960) (“[w]here a statute clearly confers power to do a certain thing without placing any limitation as to the manner or means of doing it, and no statute can be found prescribing the exact mode of performing that duty or thing, the presumption is that it should be performed in a reasonable manner *not in conflict with any law of the state*”); *State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39 (1918) (a public officer is required to exercise an intelligent discretion in the performance of his official duty); *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915) (syllabus, paragraph four) (“[w]here an officer is directed by the constitution or a statute of the state to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed”). Thus, a board of county commissioners may, in the exercise of its discretion, grant CDJFS employees retroactive lump sum pay increases more than once per year. *Cf.* 1989 Op. Att’y Gen. No. 89-009, at 2-38 (overruled, in part, on other grounds by 2008 Op. Att’y Gen. No. 2008-018) (“implicit in the power of a board of township trustees to fix the compensation of township officers and employees is the power to increase the amount of that compensation when, in the exercise of a reasonable discretion, the board determines that such action is appropriate or necessary”). Additionally, pursuant to its statutory authority to establish the salaries or wages of CDJFS employees, a board of county commissioners may determine the amount of money included in each such pay increase.¹² *Cf.* 2008 Op. Att’y Gen. No. 2008-012, at 2-137 (“the authority possessed by the various county appointing authorities to fix their employees’ compensation includes the authority, subject to any statutory restrictions, to determine the salary component, and any increases therein, of their employees’ compensation”).

¹² In granting retroactive lump sum pay increases to CDJFS employees, a board of county commissioners must exercise reasonable discretion. If distinctions are drawn among CDJFS employees in granting such pay increases, the distinctions must be reasonable so as to comport with state and federal equal protection requirements. *See* 2006 Op. Att’y Gen. No. 2006-026, at 2-224; 2004 Op. Att’y Gen. No. 2004-004, at 2-34; 1981 Op. Att’y Gen. No. 81-082, at 2-323.

Accordingly, in response to your first question, we conclude that a board of county commissioners may provide CDJFS employees retroactive lump sum pay increases more than once per year and may determine the amount of money included in each such pay increase.

Issuance of a Payroll Certificate under R.C. 9.41

Your second question asks whether new payroll certificates must be issued under R.C. 9.41 to reflect retroactive lump sum pay increases that are granted to CDJFS employees. To answer this question, it is helpful to understand the payroll process for CDJFS employees.

The payroll process for CDJFS employees is initiated when the county auditor issues a warrant on the county treasurer. *See* 1984 Op. Att’y Gen. No. 84-076, at 2-248 to 2-249 (employees of a county department of human services, now a CDJFS, are county employees and are thus paid directly by warrant of the county auditor); *see also* R.C. 321.15 (“[n]o money shall be paid from the county treasury, or transferred to any person for disbursement, except on the warrant of the county auditor”). Pursuant to R.C. 319.16, the county auditor “issue[s] warrants ... on the county treasurer for all moneys payable from the county treasury, *upon presentation of the proper order or voucher and evidentiary matter for the moneys.*” (Emphasis added.) R.C. 9.41, the statute about which you ask, specifies the evidentiary materials that must be present before a county auditor may properly issue a warrant to pay compensation to employees who are in the classified civil service:

The ... [county auditor] ... shall not draw, sign, issue, or authorize the drawing, signing, or issuing of any warrant on ... the [county] treasurer or other disbursing officer of [the] county ... to pay any salary or other compensation to any officer, clerk, employee, or other person in the classified service unless an estimate, payroll, or account for such salary or compensation containing the name of each person to be paid, bears ... the certificate of the appointing authority, that the persons named in the estimate, payroll, or account have been appointed, promoted, reduced, suspended, or laid off, or are being employed in pursuance of [R.C. Chapter 124] and the rules adopted thereunder.

R.C. 9.41. This means that a classified CDJFS employee¹³ may not receive a compensation payment unless and until the county auditor has been provided with an estimate, payroll, or account bearing the certificate described in R.C. 9.41. *See* 2009 Op. Att’y Gen. No. 2009-033, at 2-222 (R.C. 9.41 “prohibits the payment of compensation to persons in the classified service without certification by the appointing authority”).

¹³ As explained earlier, most CDJFS employees are in the classified civil service. However, the county director, administrators appointed under R.C. 329.021, and up to five other administrative positions with a CDJFS are not in the classified civil service. R.C. 329.02-.022.

The employee's appointing authority¹⁴ must furnish the certificate to the county auditor, and it must verify that the employees named in the attached estimate, payroll, or account "have been appointed, promoted, reduced, suspended, or laid off, or are being employed in pursuance of [R.C. Chapter 124] and the rules adopted thereunder." R.C. 9.41; *see also* 1928 Op. Att'y Gen. No. 2803, vol. IV, p. 2485, at 2488 (under G.C. 486-21, now R.C. 9.41, the civil service commission, "when inspecting a payroll to determine whether or not it shall be certified, is required to give consideration only to the things enumerated, viz., whether the persons whose names appear thereon, have been appointed, promoted, reduced, suspended, or laid off, or are being employed in pursuance to the provisions of the civil service law"). Because classified CDJFS employees may not be paid unless and until the county auditor receives the certificate described in R.C. 9.41, the certificate must be provided to the county auditor as often as payrolls are issued. *Cf.* 2A Ohio Admin. Code 123:1-35-01 (analogous certification requirements for classified state employees must be performed by the Director of Administrative Services as often as payrolls are issued). Accordingly, before a county auditor may issue a warrant authorizing payment of retroactive lump sum pay increases to classified CDJFS employees, the county auditor must be provided with an estimate, payroll, or account bearing the certificate described in R.C. 9.41.¹⁵ *Cf.* 1915 Op. Att'y Gen. No. 824, vol. II, p. 1735 (syllabus) ("[t]he auditor of state in issuing warrants for salary and compensation of persons in the classified service of the state should be guided exclusively by the certificate of the state civil service commission attached to the pay roll [*sic*] on which such warrant is demanded. *If such certificate is attached, the auditor of state may lawfully issue the warrant; if it is not attached, he must refuse to issue a warrant*" (emphasis added)).

¹⁴ Because the county director of job and family services and the board of county commissioners are co-appointing authorities of most CDJFS employees, *see* note 5, *supra*, either the county director or the board of county commissioners may provide the county auditor the certificate required by R.C. 9.41.

¹⁵ We recognize that you have asked whether new payroll certificates must be issued under R.C. 9.41 "to reflect" retroactive lump sum pay increases that are given to CDJFS employees. However, the certificate described in R.C. 9.41 is not required to specify the amount of compensation that an employee is to receive. Rather, the certificate is attached to an estimate, payroll, or account that sets forth the name of each employee to be paid and the amount of compensation to be paid to each. The certificate itself merely indicates "that the persons named in the estimate, payroll, or account have been appointed, promoted, reduced, suspended, or laid off, or are being employed in pursuance of [R.C. Chapter 124] and the rules adopted thereunder." R.C. 9.41.

Conclusions

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

1. A board of county commissioners may grant employees of a county department of job and family services retroactive lump sum pay increases more than once per year and may determine the amount of money included in each pay increase.
2. Before a county auditor may issue a warrant authorizing payment of retroactive lump sum pay increases to classified employees of a county department of job and family services, an estimate, payroll, or account that sets forth the amount of money to be paid to each employee must be provided to the county auditor. The certificate described in R.C. 9.41 must be attached to this estimate, payroll, or account.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General